

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 03-2497
)
 RAY ANO,)
)
 Respondent.)
 _____)

AMENDED RECOMMENDED ORDER

The parties presented this case in legal briefs submitted in lieu of an evidentiary hearing pursuant to the Agreed Motion to Request Submission of Briefs in Lieu of Hearing filed April 30, 2004, which was granted in an Order entered by Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on May 4, 2004.

STATEMENT OF THE ISSUES

(1) Whether the employment screening standards in Chapter 435, Florida Statutes, can, without more, serve as the basis for the Petitioner's terminating the Respondent's employment as a teacher.

(2) If so, whether Respondent's actions were sufficient to warrant termination of his employment.

PRELIMINARY STATEMENT

In the Administrative Charges section of a Petition for Suspension Without Pay and Dismissal From Employment dated July 1, 2004, the Palm Beach County School Board ("School Board") asserted that just cause existed to suspend and terminate Ray Ano from his employment as a teacher. Mr. Ano timely requested a formal hearing, and the School Board forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. A Notice of Hearing was issued on July 31, 2003, scheduling the final hearing for October 20, 2003.

On August 6, 2003, the School Board filed an Amended Petition for Suspension Without Pay and Dismissal From Employment, in which it alleged that Ray Ano failed to report to the School Board his arrest for defrauding an innkeeper, obstructing justice, and resisting an officer with violence; that Mr. Ano failed to report to the School Board his plea of guilty to these three charges; and that the charge of resisting an officer with violence is a violation of Sections 435.03(2); 435.04(2)(gg) and 435.06(2), Florida Statutes (2002).¹ The School Board asserted that Mr. Ano should be suspended without pay for 15 days and terminated "pursuant to Sections 1012.33, 1012.27(5) and 435.06(2), 435.03(2), 435.04(2)(gg), Florida Statutes; Florida Administrative Code Rules 6B-1.006, 6B-4.009;

Palm Beach County School Board Policies 1.013, 3.13 and 3.27 and Article 2, Section M of the Collective Bargaining Agreement between the Classroom Teachers Association and The School Board of Palm Beach County." Mr. Ano filed Respondent's Motion for More Definite Statement with Incorporated Memorandum of Law on November 17, 2003; the School Board responded that it had no objection to providing a more definite statement, stating that the School Board relied on Florida Administrative Code Rule 6B-4.009(2) and (6) when drafting its Amended Petition.

On October 10, 2003, the parties filed a Joint Motion for Continuance, which was granted in an Order entered October 14, 2003. The final hearing was re-scheduled for December 5, 2003, but this hearing was also continued in an Order entered December 2, 2003, granting the Respondent's Agreed Motion to Cancel Hearing and Stay Proceedings. The case was placed in abeyance by Order entered January 5, 2004, to allow the parties the opportunity to pursue settlement negotiations. On February 19, 2004, Mr. Ano advised that the parties were unable to reach a settlement agreement, and the final hearing was re-scheduled for May 7, 2004.

On April 30, 2004, the parties filed their Agreed Motion to Request Submission of Briefs in Lieu of Hearing. The motion included stipulations of facts and law by the parties, and the parties also specified:

n. The sole question remaining for determination by the court is as follows:

1. Whether or not F.S. §435 is applicable to teachers, and - if so - whether the actions of Respondent herein are sufficient to warrant termination of his employment.^[2]

The motion was granted in an Order entered May 4, 2004, the hearing scheduled for May 7, 2004, was cancelled, and the parties were directed to file their legal briefs on or before May 21, 2004.

The parties timely filed their legal briefs, and the arguments presented therein have been considered in preparing the Recommended Order. Those portions of the stipulations included in the Agreed Motion to Request Submission of Briefs in Lieu of Hearing setting forth the facts underlying this case have been included herein as findings of fact, with some modifications that do not change the substance of the stipulated facts. Those portions of the stipulations setting forth the statutes and rules underlying this case have been included herein in the Conclusions of Law.

FINDINGS OF FACT

Based on the stipulations of the parties and on the contents of Exhibits 1 through 4 attached to the Agreed Motion to Request Submission of Briefs in Lieu of Hearing, the following findings of fact are made:

1. At all times material to these proceedings, Mr. Ano was employed by the School Board as a teacher, a position that he has held for approximately 21 years.

2. The facts and events stated in the Palm Beach County Sheriff's Office Offense Report prepared April 5, 2002,³ led to the arrest of Raymond Ano and his wife, Toby Ano, late on the evening of March 28, 2002, and the early morning hours of March 29, 2002.

3. An Amended Information was filed on September 18, 2002, with the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, charging Raymond T. Ano with battery on a police officer, resisting an officer with violence, and defrauding an innkeeper.

4. On October 31, 2002, Mr. Ano pled guilty to the offenses of battery (lesser), resisting an officer with violence, and defrauding an innkeeper. In an Order entered November 5, 2002, the court withheld adjudication of guilt and sentenced Mr. Ano to probation for 18 months for defrauding an innkeeper and for resisting an officer with violence and for 12 months for battery, with the sentences to run concurrently.

5. Mr. Ano did not report his arrest and guilty plea to the School Board; however, this violation of School Board policy is not, of itself, sufficient to justify termination of his employment.⁴

6. On July 16, 2004, the School Board voted to suspend Mr. Ano without pay and to terminate his employment, based on Mr. Ano's plea of guilty to the charge of resisting an officer with violence.

7. The School Board followed its procedural rules in investigating this matter and in voting to terminate Mr. Ano's employment.

8. An Amended Petition for Suspension without Pay and Dismissal from Employment was issued July 30, 2003, in which the School Board alleged that there was just cause for Mr. Ano's suspension and termination based on his failure to report his arrest and his plea of guilty to an offense enumerated under Chapter 435, Florida Statutes, specifically, resisting arrest with violence, in violation of Section 843.01, Florida Statutes.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

10. The parties stipulated to the relevant facts and jointly requested that the following issue be decided in this case: Whether Chapter 435, Florida Statutes, is applicable to teachers. It would not be appropriate, however, for the undersigned to address such a broad issue, and, accordingly, the

issue is rephrased to correspond with the factual circumstances of this case: Whether the School Board may terminate Mr. Ano's employment solely on the basis of his having pled guilty to the crime of resisting an officer with violence, a violation of Section 843.01, Florida Statutes, which would provide the basis for terminating an employee pursuant to Sections 435.04(2)(gg) and 435.06(2), Florida Statutes.

11. Section 435.01, Florida Statutes, defines the applicability of the employment screening provisions of Chapter 435, Florida Statutes, as follows: "Whenever a background screening for employment or a background security check is required by law for employment, unless otherwise provided by law, the provisions of this chapter shall apply."

12. The legislature has enacted several statutes as part of the Florida K-20 Education Code, Chapters 1000-1013, Florida Statutes, dealing specifically with the manner in which teachers may be terminated from their employment. Section 1001.42(5), Florida Statutes, confers on district school boards the power and responsibility to "designate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees, subject to the requirements of chapter 1012." (Emphasis added.)

13. It is not clear from the parties' stipulation whether, at the times relevant to this proceeding, Mr. Ano was employed under a professional services contract or under a continuing contract. Section 1012.33, Florida Statutes, covers persons employed by district school boards under both types of contracts and provides in pertinent part:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

* * *

(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. 231.26, 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.

* * *

(6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee

shall be immediately reinstated, and his or her back salary shall be paid. If the employee wishes to contest the charges, the employee must, within 15 days after receipt of the written notice, submit a written request for a hearing. . . .

(Emphasis added.)

14. "It is a well-known principle of statutory construction that 'a specific statute covering a particular subject area controls over a statute covering the same and other subjects in more general terms.'" Engineering Contractors Ass'n of S. Florida, Inc. v. Broward County, 789 So. 2d 445, 451 (Fla. 4th DCA 2001); see also G.E.L. Corp. v. Department of Environmental Protection, 29 Fla. L. Weekly D1352 (Fla. 5th DCA June 4, 2004), and cases cited therein. In McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994), the court stated:

We begin our analysis . . . by applying accepted rules of statutory construction to the statutes in question. First, a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959); State v. Billie, 497 So. 2d 889, 894 (Fla. 2d DCA 1986), review denied, 506 So. 2d 1040 (Fla. 1987). The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. 2d DCA 1986), review denied, 504 So. 2d 767 (Fla. 1987).

15. The legislature has included in Section 1012.33(1)(a), (4)(c), and 6(a), Florida Statutes, the exclusive bases for

terminating teachers' employment during the term of their contracts, and the provisions of that statute govern the suspension and termination of Mr. Ano and not Chapter 435, Florida Statutes, a general statute dealing with "all persons required by law to be screened pursuant to the provisions of this chapter." § 435.01, Fla. Stat.⁵ Mr. Ano may not, therefore, be terminated from his employment with the School Board solely because he pled guilty to resisting an officer with violence.⁶

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Palm Beach County, Florida, enter a final order:

(1) Finding that Mr. Ano's plea of guilty to a violation of Section 843.01(2)(gg), Florida Statutes, does not provide a legally-sufficient basis for terminating Mr. Ano's employment with the School Board of Palm Beach County, Florida;

(2) Reinstating Mr. Ano's employment with the School Board of Palm Beach County, Florida; and

(3) Paying Mr. Ano his back salary from the date of his suspension without pay.

DONE AND ENTERED this 1st day of July, 2004, in
Tallahassee, Leon County, Florida.

Patricia H. Malono

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of July, 2004.

ENDNOTES

^{1/} All references to the Florida Statutes herein are to the 2002 edition unless otherwise specified.

^{2/} These issues have been re-stated in both the Statement of the Issues and in the Conclusions of Law below.

^{3/} This report is included as Exhibit 1 to the parties Agreed Motion to Request Submission of Briefs in Lieu of Hearing.

^{4/} School Board Policy 6Gx50-3.13 requires employees to

self-report in writing with the appropriate documentation any arrests and/or criminal charges, including criminal traffic violations, to the employee's immediate supervisor/designee within forty-eight (48) hours of said arrest and/or criminal charges. In addition, all district employees shall self-report in writing any conviction, finding of guilt, withholding of

adjudication, commitment to a pretrial diversion program, or entering a plea of guilty, guilty in your best interest, or Nolo Contendere for any criminal offense other than a minor traffic violation within forty-eight (48) hours after the final judgment has been entered.

^{5/} Although not included herein as a conclusion of law, it is noted that teachers may not be "persons required by law to be screened pursuant to the provisions of" Chapter 435, Florida Statutes. A keyword search on Westlaw produced several lists containing numerous statutes specifically requiring that prospective and current employees undergo either Level 1 or Level 2 employment screening pursuant to Chapter 435, Florida Statutes. See e.g., Sections 394.4572 (mental health personnel); 394.875 (licensure of crisis stabilization units); 395.0055 (licensure of hospitals, ambulatory surgical centers, or mobile surgical centers); 397.403 (licensure of substance abuse service providers); 400.071 (licensure of nursing homes); 400.215 (employees of nursing homes); 402.305 (licensure of child care facilities); 744.1085 (registration of professional guardians); and 985.407 (personnel in juvenile delinquency facilities, services, and programs), Florida Statutes.

The only statute requiring teachers to undergo employment screening pursuant to Chapter 435, Florida Statutes, is Section 1002.36 Florida Statutes, which deals with employees of the Florida School for the Deaf and Blind and provides in pertinent part as follows:

(7) PERSONNEL SCREENING.--

(a) The Board of Trustees of the Florida School for the Deaf and the Blind shall, because of the special trust or responsibility of employees of the school, require all employees and applicants for employment to undergo personnel screening and security background investigations as provided in chapter 435, using the level 2 standards for screening set forth in that chapter, as a condition of employment and

continued employment. The cost of a personnel screening and security background investigation for an employee of the school shall be paid by the school. The cost of such a screening and investigation for an applicant for employment may be paid by the school.

(b) As a prerequisite for initial and continuing employment at the Florida School for the Deaf and the Blind:

1. The applicant or employee shall submit to the Florida School for the Deaf and the Blind a complete set of fingerprints taken by an authorized law enforcement agency or an employee of the Florida School for the Deaf and the Blind who is trained to take fingerprints. The Florida School for the Deaf and the Blind shall submit the fingerprints to the Department of Law Enforcement for state processing and the Federal Bureau of Investigation for federal processing.

2.a. The applicant or employee shall attest to the minimum standards for good moral character as contained in chapter 435, using the level 2 standards set forth in that chapter under penalty of perjury.

b. New personnel shall be on a probationary status pending a determination of compliance with such minimum standards for good moral character. This paragraph is in addition to any probationary status provided for by Florida law or Florida School for the Deaf and the Blind rules or collective bargaining contracts.

3. The Florida School for the Deaf and the Blind shall review the record of the applicant or employee with respect to the crimes contained in s. 435.04 and shall notify the applicant or employee of its findings. When disposition information is

missing on a criminal record, it shall be the responsibility of the applicant or employee, upon request of the Florida School for the Deaf and the Blind, to obtain and supply within 30 days the missing disposition information to the Florida School for the Deaf and the Blind. Failure to supply missing information within 30 days or to show reasonable efforts to obtain such information shall result in automatic disqualification of an applicant and automatic termination of an employee.

4. After an initial personnel screening and security background investigation, written notification shall be given to the affected employee within a reasonable time prior to any subsequent screening and investigation.

(c) The Florida School for the Deaf and the Blind may grant exemptions from disqualification as provided in s. 435.07.

(d) The Florida School for the Deaf and the Blind may not use the criminal records, private investigator findings, or information reference checks obtained by the school pursuant to this section for any purpose other than determining if a person meets the minimum standards for good moral character for personnel employed by the school. The criminal records, private investigator findings, and information from reference checks obtained by the Florida School for the Deaf and the Blind for determining the moral character of employees of the school are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

The legislature could have, but did not, include in Section 1012.32(2), Florida Statutes, a similar comprehensive scheme for the employment screening of teachers in the public school system.

^{6/} It is noted that, in its Amended Administrative Complaint, the School Board alleged that it had just cause to terminate

Mr. Ano's employment. This issue has not been addressed herein due to the stipulation of the parties as to the issues remaining for resolution in this case. In addition, it is noted that, although School Board Policy 3.12 was not included as a basis for Mr. Ano's termination in the School Board's Amended Petition of Suspension without Pay and Dismissal from Employment, the parties cited the policy in the Agreed Motion to Request Submission of Briefs in Lieu of Hearing. School Board Policy 3.12 provides in pertinent part:

3. A prospective or current employee may be disqualified or may be terminated from continued employment if the prospective or current employee has been convicted of a crime classified as a felony or first degree misdemeanor directly related to the position of employment sought or convicted of a crime involving moral turpitude or any of the offenses enumerated in Chapter 435, Florida Statutes.

The parties included in their motion a footnote to the citation to this policy, in which they stated that "School Board Policy 3.12 is not a substantive policy and did not form a basis for discipline in the circumstances presently before the court." Accordingly, because the issue of whether Mr. Ano could be terminated pursuant to School Board Policy 3.12 has not been presented in this case, it is not addressed herein.

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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.