

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ORANGE COUNTY SCHOOL BOARD,            )  
  )  
          Petitioner,                            )  
  )  
vs.    )     Case No. 05-4551  
  )  
MICHELE O'NEILL,                            )  
  )  
          Respondent.                         )  
\_\_\_\_\_                                        )

RECOMMENDED ORDER

On April 6 and 7, 2006, an administrative hearing in this case was held in Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian F. Moes, Esquire  
Orange County School Board  
445 West Amelia Street  
Post Office Box 271  
Orlando, Florida 32802-0271

For Respondent: Elizabeth F. Swanson, Esquire  
Egan, Lev and Siwica, P.A.  
Post Office Box 2231  
Orlando, Florida 32802-2231

STATEMENT OF THE ISSUE

The issue in the case is whether the Orange County School Board (Petitioner) had just cause for termination of the employment of Michele O'Neill (Respondent).

PRELIMINARY STATEMENT

By Administrative Complaint dated October 7, 2005, the Petitioner notified the Respondent that the Petitioner intended to terminate the Respondent's employment as a classroom teacher. The Respondent filed a request for hearing that was forwarded to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of five witnesses and had Exhibits numbered 1 through 7 admitted into evidence. The Respondent testified on her own behalf, presented the testimony of seven witnesses, and had Exhibits numbered 1 through 6 admitted into evidence.

A Transcript of the hearing was filed on May 5, 2005. The testimony of Petitioner's witness Melissa Caliguiri was taken on May 11, 2006, and the Transcript was filed on May 15, 2006. Both parties filed Proposed Recommended Orders.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was employed under a professional services contract by the Petitioner as a classroom teacher at Lakemont Elementary School, a unit of the Orange County Public School System.

2. At all times material to this case, Dr. Susan Stephens was the principal of Lakemont Elementary School.

3. The Petitioner has adopted a "Drug-Free Workplace" policy (the Policy) that in relevant part provides as follows:

No employee shall use, possess, manufacture, distribute, or be under the influence of controlled substances or alcohol while on duty or on school board property, except when he/she is using a controlled substance in conformance with the instructions of a physician.

4. The Policy provides for "Reasonable Suspicion testing" and provides that such tests may be performed "based on a belief that an employee is using or has used alcohol or drugs" in violation of the Policy, and further provides as follows:

Reasonable suspicion testing must be based on specific, contemporaneous documented objective and articulable observations and circumstances which are consistent with the long and short term effects of alcohol or substance abuse; including, but not limited to, physical signs and symptoms, appearance, behavior, speech and/or odor on the person.

Supervisors who have Reasonable Suspicion that an employee may be under the influence while on duty are required to immediately direct the employee to submit to testing as provided for by the board. Reasonable Suspicion shall be in accordance with training provided to managers, and will require confirmation by two trained managers. One of the two managers may include the supervisor, if trained. A refusal to submit to testing will result in a recommendation to terminate the employee.

5. The Policy includes an "observation checklist" of characteristics indicative of potential alcohol or controlled substance use, which "includes, but is not limited to" slurred

speech, confusion/disorientation, odor of alcohol on breath or person, rapid/continuous eye movement or an inability to focus, and improper job performance and/or violation of authority.

6. Dr. Stephens has received training in "Reasonable Suspicion" observations.

7. During the 2002-2003 school year, the Respondent was seriously injured in an automobile crash that required an extended absence from the classroom. She eventually returned to teaching about a year later, but continued to suffer the after-effects of the injuries, including an altered and uneven manner of walking.

8. For the vast majority of the Respondent's employment with the Petitioner, her performance has been evaluated as "effective," and she was regarded as a good teacher.

9. There is some evidence that, after the Respondent's post-accident return to teaching, there were concerns related to the Respondent's job performance. A letter from Dr. Stephens to the Respondent dated February 25, 2005, specifically addressed a number of issues, including collaboration with co-workers, anger management, and focusing on academic instruction during classroom time.

10. Also subsequent to the Respondent's return to the classroom, a small number of parents whose children were being taught by the Respondent expressed various concerns about the

education the students were receiving. For various reasons, some parents asked that their children be transferred to the classrooms of other teachers.

11. Late in the school day on Friday, September 30, 2005, a parent contacted Dr. Stephens and reported that during a classroom meeting with the Respondent, the parent detected the odor of alcohol on the Respondent. The parent asked that the child be transferred to another teacher's classroom. Dr. Stephens attempted to locate the Respondent at that time, but the school day was finished and the Respondent had apparently left the campus.

12. On Monday, October 3, 2005, Dr. Stephens came to the Respondent's classroom to discuss the requested transfer, and during the meeting, Dr. Stephens detected the odor of alcohol emanating from the Respondent.

13. Dr. Stephens returned to her office and asked the school's assistant principal, Randall Hart, to go to the Respondent's classroom and talk to her. He did so and then returned to Dr. Stephens' office where he reported to her that the Respondent smelled of alcohol.

14. Dr. Stephens contacted the Petitioner's Employee Relations department to inquire as to how to proceed, and was provided the names of several school board personnel who had received training in "Reasonable Suspicion" observations. From

the names provided to Dr. Stephens, she contacted Dr. Suzanne Ackley, principal of Brookshire Elementary School in Winter Park, and asked her to come to Lakemont Elementary School and observe a teacher for indications of being under the influence.

15. Dr. Ackley arrived shortly after being contacted by Dr. Stephens. Dr. Stephens and Dr. Ackley went to the Respondent's classroom and met with the Respondent. No students were present in the room at the time. Dr. Stephens identified Dr. Ackley as the principal of Brookshire Elementary. Dr. Ackley engaged the Respondent in a conversation about curriculum issues.

16. During the meeting, Dr. Ackley detected the odor of alcohol emanating from the Respondent, and believed that the Respondent's speech sounded "slurred."

17. After meeting the Respondent, Dr. Ackley and Dr. Stephens returned to the school office. Dr. Ackley told Dr. Stephens that she had detected the odor of alcohol while talking to the Respondent. Dr. Ackley then left the Lakemont campus.

18. Shortly after Dr. Ackley departed, and in accordance with the Policy, Dr. Stephens informed the Respondent that there was concern related to possible alcohol use. Dr. Stephens ordered the Respondent to accompany her to a facility used by the school board for alcohol and controlled substance testing.

19. Although the Respondent initially agreed to accompany Dr. Stephens to the facility and to submit to the test, within a few minutes, the Respondent changed her mind and refused to travel with the principal to the testing facility.

20. The Respondent stated that she wanted to go home prior to going to the testing facility, ostensibly to retrieve some prescription medications that she wanted to take to the facility.

21. The Respondent testified that she had not been using alcohol on October 3, 2005. She offered vague testimony about an immaterial personal matter, the import of which was that the Respondent went to an emergency room on October 1, 2005, where she received prescriptions for medications including Flexeril, a muscle relaxant. She asserted that she did not refuse to submit to the test, but that she merely wanted to drive herself home to retrieve the prescription medications prior to continuing on to the drug testing facility, to establish that the behaviors exhibited were related to the use of the medications prescribed at the hospital. The Respondent's testimony is not credible and is rejected.

22. The Respondent offered the expert testimony of Dr. Rahn Shaw, who opined that the prescribed medications could have accounted for some of the Respondent's physical presentation on October 3, 2005; however, there is no evidence

that use of the referenced medications could create an odor of alcohol on or about a person taking the medications.

23. Dr. Stephens declined to permit the Respondent to go home before submitting to the test, and continued in attempting to convince the Respondent to accompany her to the testing facility.

24. Dr. Stephens specifically and repeatedly advised the Respondent that failure to comply with the request would jeopardize the Respondent's employment status, but the Respondent refused to comply.

25. The Respondent decided to leave the school grounds. She went to her car and began to drive the vehicle from the campus, but did not get far from her parking space. The Respondent was prevented from doing so by the school's D.A.R.E. officer, who arrived after being contacted by school personnel concerned about the Respondent's ability to operate the vehicle. The D.A.R.E. officer is also a uniformed police officer.

26. The officer testified that she eventually persuaded the Respondent to exit the vehicle and escorted her to an office in the school where students, who were passing in the vicinity, would not see the Respondent. The officer further testified that Respondent smelled of alcohol at the time the officer intervened in the situation.



27. The Respondent insisted that she was not under the influence of alcohol, and in response, the officer performed a gaze nystagmus test and a "finger-to-nose" test, after which the officer concluded that the Respondent was not capable of driving herself home.

28. Several of the Petitioner's witnesses testified that they were concerned about the Respondent's ability to transport herself home in her personal vehicle. The refusal to permit the Respondent to transport herself to her home or to the testing facility was clearly reasonable based on the observations of the Respondent's behavior.

29. It should also be noted that Dr. Shaw testified that persons using Flexeril "shouldn't be driving or operating machinery because it makes everybody I know drowsy and lethargic" and that "you could qualify for a DUI in this state by taking that medicine and driving most of the time."

30. A cab was called, and the Respondent was taken home in the cab on October 3, 2005. Prior to leaving the campus, Dr. Stephens again attempted to convince the Respondent to submit to the testing and advised that the Respondent's employment was in jeopardy, but to no avail.

31. Dr. Stephens had been in communication with the Employee Relations department during the incident, and had been told to direct the Respondent to contact the Employee Relations

department on Tuesday, October 4th, if she chose not to comply with the testing directive.

32. After determining that the Respondent would not comply with the directive and prior to the Petitioner's departure from the school grounds on October 3rd, Dr. Stephens instructed the Respondent to contact the Employee Relations department on the next day.

33. The Respondent later returned to the school grounds and retrieved her vehicle.

34. The Respondent failed to contact the Employee Relations department on October 4, 2005. At the close of that day, and after the Respondent had failed to make contact, Shonda Von Schrittz, senior manager for the Petitioner's Employee Relations department, sent two letters by express mail to the Respondent. The first letter gave notice of a meeting scheduled for October 10, 2005, to discuss the incident. The second letter advised that the Respondent would be placed on "Relief of Duty" with pay, and that the Respondent was required to remain available to school personnel during school hours while on the paid relief period. Attempts to deliver the letters apparently failed for reasons that are unclear.

35. In any event, there was no communication between the Respondent and the Petitioner until October 13, 2005. On that date, a predetermination conference, which was arranged based on

an October 12, 2005, request from a teacher's union representative, was held. During the meeting, at which Ms. Von Schriltz was present, the Respondent denied that she had used alcohol on October 3, 2005, or that she had been requested to submit to testing. She had no recollection of having been told anything by Dr. Stephens, and was unable to offer a rationale for leaving campus early on October 3rd.

36. During the October 13th meeting, the Respondent was directed to maintain contact with the Employee Relations department, but after the meeting ended, there was no contact until November 8, 2005, when the Respondent answered one of several telephone calls that had been placed to her number by Ms. Von Schriltz. During the November 8th conversation, the Respondent had no recollection of Ms. Von Schriltz or of the October 13th meeting, and instructed Ms. Von Schriltz to contact the Respondent's legal counsel.

#### CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.569, Fla. Stat. (2005).

38. In relevant part, Section 1012.33, Florida Statutes (2005), provides as follows:

1012.33 Contracts with instructional staff,  
supervisors, and school principals.--

(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. (emphasis added)

39. The Petitioner has the burden of establishing the facts of the case by a preponderance of the evidence sufficient to warrant termination of the Respondent's employment. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990). In this case, the burden has been met as set forth herein.

40. The Administrative Complaint filed in this case alleges that the Respondent's actions are "in violation of School Board Policies, insubordination, conduct unbecoming a public employee, and a violation of the Code of Ethics and the Principals of Professional Conduct of the Education Profession in Florida."

41. Pursuant to Article XII, Section A.2. of the operative Contract between the Respondent and the Orange County Classroom Teachers Association, a teacher "may be suspended or dismissed at any time during the year, provided that the charges against him/her are based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude, where applicable, and in accordance with Florida Statutes."

42. "Gross insubordination" is defined at Florida Administrative Code Rule 6B-4.009(4), to be "a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority."

43. The evidence establishes that the school's principal followed applicable procedure in determining that there was reasonable suspicion that the Respondent was using or had used alcohol on October 3, 2005. Two trained personnel observed the Respondent, and both detected the odor of alcohol emanating from the Respondent. The odor of alcohol is specifically identified in the Policy as "grounds for reasonable suspicion."

44. Additionally, Dr. Stephens' letter of February 25, 2005, indicates that she had concerns about the Respondent's job performance. Dr. Ackley believed that the Respondent's speech was slurred on October 3, 2005. Both issues are referenced in the Policy's observation checklist.

45. Having reasonable suspicion to believe that the Respondent was using alcohol, Dr. Stephens directed that the Respondent accompany the principal to the testing facility. The Respondent initially consented and then almost immediately changed her position. The Petitioner's Policy clearly states that such refusal will result in recommendation of termination of employment.

46. Despite numerous attempts to convince the Respondent to comply with the Policy, the Respondent refused to submit to the testing. The principal reiterated to the Respondent that such refusal jeopardized the Respondent's employment, but the Respondent still refused to comply.

47. The Respondent's "constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority" clearly constitutes gross insubordination as defined at Florida Administrative Code Rule 6B-4.009(4).

48. The Respondent correctly asserts that the evidence fails to establish that the Respondent was under the influence of alcohol on October 3, 2005; however, whether or not the Respondent was under the influence of alcohol or any other substance is not at issue in this proceeding.

49. The factual allegations underlying the proposed termination of employment do not address whether or not the

Respondent was under the influence of alcohol on October 3, 2005, but essentially focus on the Respondent's refusal to comply with the school principal's directive on October 3, 2005, that the Respondent should accompany the school principal to the testing facility.

50. The Administrative Complaint further charges that the Respondent was insubordinate through her failure to contact the Employee Relations department on October 4, 2005, and to maintain contact with the department between October 13 and November 8, 2005. While the evidence supports the allegations of the complaint, the insubordination of October 3, 2005, alone clearly warrants termination of employment.

51. As to the charged violations of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida, Florida Administrative Code Rule 6B-4.009(3) provides as follows:

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

52. The Code of Ethics of the Education Profession is set forth at Florida Administrative Code Rule 6B-1.001, and provides as follows:

6B-1.001 Code of Ethics of the Education Profession in Florida.

(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.

53. While Florida Administrative Code Rule 6B-1.001(2) addresses the exercise of judgment, the rule clearly relates to the exercise of judgment in matters affecting the development of students. The evidence fails to establish that the Respondent's poor judgment as set forth herein negatively affected her students. Florida Administrative Code Rule 6B-1.001(3) requires an educator to strive for "the highest degree of ethical conduct." There is no evidence that the Respondent's actions constitute unethical behavior.



54. The Principles of Professional Conduct for the Education Profession are set forth at Florida Administrative Code Rule 6B-1.006. Review of the cited rule fails to establish that the Respondent's actions were specifically contrary to the Principles of Professional Conduct.

55. The Administrative Complaint further alleges that the Respondent exhibited conduct unbecoming a public employee. The Administrative Complaint references no definition of "conduct unbecoming a public employee." The Petitioner asserts in its Proposed Recommended Order that "conduct unbecoming a public employee" is that "which falls below a reasonable standard of conduct prescribed by the employer" citing Seminole County Board of County Commissioners v. Long, 422 So. 2d 938 (Fla. 5th DCA 1982).

56. In this case, the standard of conduct is set forth in the Policy, which also identifies the appropriate penalty in this case. The Respondent's conduct, including the refusal to submit to testing or to maintain contact with her employer after leaving the school campus on October 3, 2005, can essentially be described as a series of insubordinate acts, which have been addressed as set forth herein.

RECOMMENDATION

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

RECOMMENDED that the Petitioner enter a final order terminating the employment of Michele O'Neill.

DONE AND ENTERED this 16th day of June, 2006, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

---

WILLIAM F. QUATTLEBAUM  
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 16th day of June, 2006.

COPIES FURNISHED:

Joseph Egan, Jr., Esquire  
Egan, Lev & Siwica, P.A.  
Post Office Box 2231  
Orlando, Florida 32802-2231

Elizabeth F. Swanson, Esquire  
Egan, Lev and Siwica, P.A.  
Post Office Box 2231  
Orlando, Florida 32802-2231

Brian F. Moes, Esquire  
Orange County School Board  
445 West Amelia Street  
Post Office Box 271  
Orlando, Florida 32802-0271

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

Honorable John Winn  
Commissioner of Education  
Department of Education  
Turlington Building, Suite 1514  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Ronald Blocker, Superintendent  
Orange County School Board  
Post Office Box 271  
Orlando, Florida 32802-0271

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.