

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 06-1033
)
SYLVESTER JONES,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings on May 8 and 9, 2006, in Melbourne, Florida.

APPEARANCES

For Petitioner: Benjamin B. Garagozlo, Esquire
3585 Murrell Road
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For Respondent: Elizabeth F. Swanson, Esquire
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STATEMENT OF THE ISSUES

A. Whether Respondent made inappropriate comments towards his students while in class on February 22, 2006, and further engaged in a crude and vulgar exchange with a student in regard to those comments.

B. If proven, do the above-described acts violate the Code of Ethics of the Education Profession and/or Principles of Professional Conduct for the Education Profession in Florida. Fla. Admin. Code Chapter 6B-1.

C. If proven, do the above-described acts constitute misconduct in office and constitute conduct unbecoming a public employee sufficient to warrant suspension and/or termination of Respondent's annual contract.

PRELIMINARY STATEMENT

On March 14, 2006, the superintendent of the Brevard County School District (hereinafter referred to as the "superintendent") recommended to the Brevard County School Board (hereinafter referred to as "Petitioner" or "School Board") that Respondent's annual contract as a member of the instructional staff of the Brevard County School District be terminated. The School Board supported the recommendation and voted to terminate Respondent's annual contract. Respondent requested a formal administrative hearing. Pursuant to Respondent's request, the School Board filed a request with the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct a formal de novo hearing. Discovery ensued, and the hearing was then scheduled to commence on May 8, 2006.

At the hearing Petitioner called the following witnesses: Respondent, as an adverse witness; Wendy Barton; Jacob Bashaw; Kathrine Christian; Angela Dizzini; Shorman Flanders; Clevaun Fluellen; Tara Frazier; Kara Lewis; Erica Mays; Renee McAloney; Jonathan McCrary; Thomas Skelley; Willie Van Hooser; Zaneta Scott; M.C.; John Tuttle; Robin Howard; and Dr. Richard DiPatri. A.C. was called by Petitioner, but was excused and did not testify, as a sanction.

At the hearing, Respondent called the following witnesses: Dr. Sharail Smith, Renee Jones, Kimbra Benson, Bernice Henry, and Janet Eastman, and Respondent testified in his own behalf.

Petitioner offered three exhibits, which were received in evidence. Respondent offered six exhibits, which were received in evidence. The three-volume Transcript was filed on June 5, 2006. Petitioner filed its Proposed Recommended Order on June 1, 2006. Respondent filed his proposals on June 12, 2006. Each of the parties' proposals has been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the formal hearing, the following Findings of Fact are made:

1. At the time of his suspension in February of 2006, Respondent, Sylvester Jones, had been employed as a math teacher with the Brevard County School District for approximately seven

months and was under an annual contract for the 2005-2006 school year.

2. As a first year employee and teacher, Respondent had been assigned to Bayside High School, where John Tuttle was principal.

3. Respondent was also assigned a mentor teacher, Ms. Robin Howard, in order to assist him with any issues pertaining to teaching. Respondent was also furnished a document outlining the "teacher's code of conduct," which included inter alia the Code of Ethics of the Education Profession and Principles of Professional Conduct for the Education Profession of Florida.

4. The Brevard County School District had further provided Respondent with training as to the proper method to be utilized in a classroom in the event a student makes disparaging remarks to a teacher.

5. During the school year 2005-2006, Respondent taught math as a "roamer," moving physically from one classroom to another during the course of the school day. The complainant, A.C., was a student at Bayside High School, and was a student in Respondent's fourth period math class. The class was made up of a high-spirited group of challenging students, 40 percent of whom required special services or special accommodations. This made the class difficult to teach.

6. While Respondent was teaching at the front of the class, on February 22, 2006, a note was being passed between some of Respondent's students and the students from the adjoining classroom that was being taught by a teacher by the name of Scott Teter. The note was found by Teter, and he brought it to the attention of Respondent by coming into Respondent's classroom during the class period.

7. Throughout the proceeding at hand, Respondent has given differing versions as to whether Teter had read the note to Respondent's class or whether the note was merely handed to Respondent by Teter during the class. Initially Respondent alleged that Teter had read the note out loud to the class. Later in his testimony, Respondent provided a demonstration during the hearing, whereby he claimed that Teter had displayed the note to the class.

8. It is undisputed that the note referred to Respondent as being "a fag," and it appears that said note was handled by and partly generated by A.C.

9. Upon reading the note, Respondent felt that he had been insulted and that his manhood was being attacked; Respondent testified that the note was an "assassination" of his character. In response to the note, the persuasive evidence is that Respondent made the following statement in front of his class:

"Whoever thinks that I am a fag, ask your mother to bend over, and I will prove if I am a fag or not."

10. One of Respondent's students, namely A.C., then began to vocalize his concern about Respondent's statement and questioned Respondent as to whether Respondent's comment meant that he wanted to have sexual activity with the student's mother.

11. During his fourth period class, Respondent denied A.C.'s challenge, but then repeated his comment, as reflected above, to the entire class.

12. The student, A.C., later decided to notify his mother regarding Respondent's statements, but due to his mother's work schedule, did not do so until the evening of February 23, 2006. The student's mother felt Respondent's comments were vulgar and "disgusting."

13. Upon learning of the comments, M.C. escorted her son to school the next day, February 24, 2006, and met with the school's principal, Tuttle. They related A.C.'s recollection of the incident on February 22, 2006, to him. This is the first time that any school official had been notified of the allegations.

14. Based on the complaint from the parent/student, Tuttle instructed his staff to obtain statements from each of the students in Respondent's fourth period class. Tuttle sought to determine the veracity of the assertions being leveled against a teacher by a parent.

15. Upon obtaining written statements from students in regard to Respondent in the classroom, the principal set up a meeting with Respondent.

16. During this meeting, Respondent claimed that his remarks to his class on February 22, 2006, were as follows: "if anyone thinks that I am a fag to have their mother bend and bow before him."

17. Respondent claimed he was trying to teach them respect, using the "Japanese ritual" of bowing. Respondent became very agitated during the meeting and asked for time to write a statement. He was given until February 27, 2006, to provide his version of the events to the principal.

18. On February 27, 2006, Respondent submitted his written response to the principal as to his version of events. His statements claim that the note was presented to him by Teter and the note had said, "Dr. Jones is a fag, don't bend over." Respondent then remarked to the class that, "if any one thought he was a fag to ask his mother." Respondent stated that he had hoped this statement would have caused the students to discuss

the matter with a parent, and maybe he would have a teacher-parent conference. Although Respondent had advised the principal of having the note in his possession, he never produced the note to the principal or any school official, nor was it presented in this proceeding to confirm his claim as to the contents of the letter. Further, Respondent never set up a parent-teacher conference in this regard with any students, nor did he refer the student, A.C., to the principal's office for discipline.

19. Respondent's versions with regard to his actual comments made to his students are in direct conflict with the version given by many of his students at the hearing. The credible testimony is that Respondent had at least twice repeated the statement in front of the class, "If anyone thinks I am a fag, ask your mother to bend over and I will prove if I am a fag or not."

20. Unlike the students' testimonies regarding the comments, Respondent has changed his version of events on several occasions. Subsequent to the February 27, 2006, statement, he has modified it as attested to by Robin Howard. In early March 2006, Respondent told her that he had said, "if anyone thinks that I am a fag to bow." Respondent claimed that this was a teaching technique, but did not recall the name of the technique. During his meeting with the superintendent, he

claimed that this is a technique called "metaphoric contrast." At the hearing, Respondent did not produce any authority which described this technique. Instead, Respondent presented the testimony of Dr. Sharail Jones, who is an assistant pharmacist and a student in Respondent's bible class at the Greater Blessed Assurance Church, of which Respondent is pastor, who claimed that Respondent uses this technique as part of his way of teaching.

21. Respondent's assertion that he was using the technique of "metaphoric contrast" during the incident on February 22, 2006, a term that is unknown to an experienced teacher such as Ms. Howard, is not credible.

22. The teacher's code of conduct specifically states that a teacher shall be honest in all his professional dealings. See Fla. Admin. Code R. 6B-1.006. This teacher's conduct throughout this cause has been a direct violation of this rule. At first, he denied the assertion and claimed it was a fabrication. Thereafter, he has modified his version of his remarks and then at the hearing asserted that he does not have a present recollection as to whether he made the remarks or not. Then, during cross-examination, Respondent claimed that he may have said the comments as attested to by his students; however, he does not view such a remark as inappropriate, even though his

own witnesses concede that the remarks as attested to by the students would be inappropriate.

23. The comments were viewed by some students as having a sexual connotation, seen as embarrassing, and were alarming enough to cause one of Respondent's students, A.C., to get into a confrontation with Respondent as to whether the teacher wanted to have sex with the student's mother. His concern was great enough to cause the student to notify his mother.

24. As the superintendent testified, a teacher is a role model and is expected to adhere to the teacher's code of conduct. A teacher is in a position of authority. This type of comment displays a lack of respect for the students and their families.

25. Respondent's usage of vulgar and sexual comments directed to a student's mother in the classroom setting created an atmosphere that was not conducive to learning and allowed his students to respond back to him with unacceptable language and with impunity.

26. The evidence in this proceeding has proven that Respondent engaged in conduct that unnecessarily embarrassed several students and created an atmosphere detrimental to learning in his fourth period class on February 22, 2006.

Teaching Effectiveness

27. Respondent was formally evaluated on two occasions during the 2005-2006 school year. Respondent's first evaluation, dated October 26, 2005, resulted in a rating of "Effective" in five categories and "Needs Improvement" in five categories. No "Unsatisfactory" score was assigned to Respondent. "Effective" is the highest performance rating that a teacher can achieve. Respondent's annual evaluation, dated February 14, 2006, resulted in a rating of "Effective" in eight categories and "Needs Improvement" in two categories.

28. Compared to his performance ratings in October 2005, Respondent's annual evaluation demonstrated a significant improvement in teaching performance during the course of his first year with the Brevard County School District.

29. The evidence indicated that prior to the date of the incident, Respondent worked hard at improving his teaching skills and providing his students with a positive learning environment.

30. Respondent had not been formally disciplined or issued directives prior to being relieved of duty on February 24, 2006.

31. There was no evidence which indicated that Respondent had ever used inappropriate language with his students prior to the statements made on February 22, 2006.

Reputation as a Member of the Community

32. Church members testified that Respondent, as minister of the Greater Blessed Assurance Church, tutored children at his church, maintained a transitional facility for people who need temporary homes, and is a role model to the community.

Collective Bargaining Agreement

33. Petitioner entered into a collective bargaining agreement, called the "Agreement between the School Board of Brevard County and the Brevard Federation of Teachers, Local 2098 [BFT], Florida Education Association, AFL-CIO, Inc., American Federation of Teachers, National Education Association, 2005-2006" (Agreement)

34. On Petitioner's annual contract with Respondent is a statement which indicates that Petitioner is bound by the terms of the Agreement with the BFT.

35. Article II, Teacher Protection, Section (G) of the Agreement states:

Any disciplinary action taken against a teacher based on a complaint by a parent or student shall be limited to informal action unless the matter is first reported to the teacher in writing. Formal disciplinary action resulting from such complaint shall be limited to those matters which have been reported to the teacher in writing.

Dismissal Process

36. The first notice that Respondent received of any misconduct on his part occurred on February 24, 2006, when the principal held a meeting with Respondent and handed him a letter stating that he would be removed from the classroom immediately and placed on administrative leave with pay due to allegations of misconduct. The action which resulted in Respondent's being placed on administrative leave due to allegations of misconduct was initiated by the actions or statements of a parent and/or student(s).

37. BFT representative, Janet Eastman's uncontroversial testimony was that the removal of a teacher from teaching duties and placement of a teacher on administrative leave constitutes disciplinary action for purposes of interpreting the Agreement.

38. Respondent received no written notice of the incident in question prior to the disciplinary action taken on February 24, 2006.

39. Petitioner and Respondent both set forth the following undisputed sequence of events:

A. On Friday, February 24, 2006, the principal met with Respondent and notified him of the nature of the allegations in writing and immediately placed Respondent on administrative leave with pay.

B. On Monday, February 27, 2006, Respondent presented his version of events, in writing, to the principal.

C. On March 8, 2006, Respondent received a letter from the Superintendent notifying Respondent of the charges and a recommendation to the School Board that he be terminated.

D. On March 8, 2006, John Russo of the BFT made a written request for the investigative files pertaining to Respondent.

E. On March 9, 2006, Russo, on behalf of Respondent, requested a meeting with the Superintendent.

F. On March 14, 2006, the meeting between Respondent and Superintendent took place, with Russo present.

G. That night, on March 14, 2006, the School Board met and voted to terminate the Respondent's annual teaching contract.

H. On March 15, 2006, Respondent requested a formal hearing to contest Petitioner's tentative action. The request was granted and this matter was referred to DOAH on March 22, 2006 for a de novo formal hearing.

CONCLUSIONS OF LAW

40. DOAH has jurisdiction in this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 1012.33(6)(a)2., Florida Statutes (2004).

41. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent committed the acts alleged in the (proposed) letter of termination of the superintendent and the reasonableness of the proposed disciplinary action. Ferris v. Austin, 487 So. 2d 1163 (Fla. 5th DCA 1986).

42. The standard for termination of a member of the instructional staff subject to an annual contract is just cause, including, but not limited to, misconduct in office.

§ 1012.33(1)(a), Fla. Stat. (2005). Just cause for discipline, up to and including termination, is not limited to the list of offensive conduct set forth in Section 1012.33, Florida Statutes (2005). Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2d DCA 1994) (applying Section 231.36, Florida Statutes, since renumbered as Section 1012.33, Florida Statutes (2005)).

43. Courts have found just cause to support discharge where the employee violates a universal standard of behavior that an employer has a right to expect from its employees. See Autoliv ASP, Inc. v. Department of Workforce Services, 29 P. 3d 7 (Utah Ct. App. 2001) (finding just cause to terminate an employee and deny benefits under the employment Security Act for e-mail transmissions containing sexually explicit content).

44. Misconduct in office "is defined as a violation of the Code of Ethics of the Education Profession as adopted in Florida Administrative Code Rule 6B-1.001(3), and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Florida Administrative Code Rule 6B-1.006." See Fla. Admin. Code R. 6B-4.009(3).

45. Under Florida Administrative Code Rule 6B-1.006(3), it states, in part, that a teacher:

(a) shall make reasonable efforts to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety;

* * *

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

46. Petitioner must prove by a preponderance of the evidence, the allegations of alleged misconduct in order to demonstrate just cause for termination of a teacher. See Sublett v. Sumter County School Board, 664 So. 2d 1178 (Fla. 5th DCA 1995).

47. Additionally, the need to demonstrate "impaired effectiveness" is not necessary in instances where the misconduct by a teacher speaks for itself, or it can be inferred from the conduct in question. See Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2nd DCA 2000); see also Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000).

48. The comments made by Respondent were vulgar with a sexual connotation. Even if not intended by him to be used in a derogatory manner, they were a "serious and flagrant contravention of proper moral standards." As such, it violated the Code of Ethics of the Education Profession in Florida. See

Department of Education, Education Practices Commission v. Ferrell, 10 FALR 4279 (1988).

49. As to Respondent's conduct and comments as alleged herein, the evidence has proven, by a preponderance of evidence, a violation of the Principles of Professional Conduct for the Education Profession in Florida. His conduct and comments to his fourth period class, in response to a note written by a student, unduly and unnecessarily exposed all of his students to embarrassment and/or disparagement. It further created an atmosphere that was harmful to learning and placed in jeopardy his student's mental health and safety. See Fla. Admin. Code R. 6B-1.006.

50. Based on Respondent's comments to his class and to the student, A.C., this teacher's effectiveness within the School District is substantially impaired.

51. Respondent's contention that the proper procedural due process was not followed herein is without merit. See § 1012.33(6)(a), Fla. Stat. (2005). See also Pilla v. School Board of Dade County, 655 So. 2d 1312 (Fla. 3d DCA 1995); Edgar v. School Board of Calhoun County, 549 So. 2d 726 (Fla. 1st DCA 1989); and Reddick v. Leon County School Board, 405 So. 2d 757 (Fla. 1st DCA, 1981).

52. Respondent's next assertion that the protocol set forth in the collective bargaining agreement was not honored herein is also lacking merit. Assuming the issue of the contractual obligation between the BFT and the School Board is relevant during this proceeding, Petitioner has complied with the provisions of said agreement. See Article VI, Section (A) of the Amendment.

53. Respondent also seeks to have the superintendent mandated to allow Respondent to sign a new annual contract for the school year 2006-2007. This request is contrary to law. See Cox v. School Board of Osceola County, 669 So. 2d 353 (Fla. 5th DCA 1996). The decision to nominate a teacher for an annual contract solely rests with the superintendent of a school district.

54. Although Respondent demonstrated that he had no prior disciplinary actions filed against him and that he sincerely sought to be a good and effective teacher, his actions February 22, 2006, and thereafter, are so egregious that termination is the appropriate sanction.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that Respondent's annual contract with the School Board be terminated, effective March 14, 2006.

DONE AND ENTERED this 30th day of June, 2006, in
Tallahassee, Leon County, Florida.



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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.