

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 06-1072
)
 NESTOR VARONA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 19, 2006, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Jean Marie Middleton, Esquire
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For Respondent: Mark F. Kelly, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Notice of Specific Charges served April 19, 2006, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In a letter dated March 16, 2006, the Miami-Dade County School Board ("School Board") notified Nestor Varona, a teacher employed by the School Board, that it had suspended him and initiated dismissal proceedings against him for just cause. The letter stated as grounds for the School Board action against Mr. Varona misconduct in office, immorality, lack of good moral character, violation of School Board Rules 6Gx13-4A-1.21 and 6Gx13-4A-1.213, and violation of Florida Administrative Code Rules 6B-1.001(3) and 6B-1.006(5). The School Board noted in its letter that it was exercising the authority granted in Sections 1012.32 and 1012.33, Florida Statutes (2004)¹. In a four-count Notice of Specific Charges served April 19, 2006, the School Board included the factual basis for its decision, alleging as follows: "Mr. Varona admitted that he paid for and received an envelope with transcripts for college credit from Eastern Oklahoma State College and submitted those transcripts to the District when he knew that he had not attended any classes or completed any coursework to earn the college credits." Mr. Varona timely requested a formal administrative

hearing, and the School Board transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice and after several continuances, the final hearing was held on October 19, 2006.

At the hearing, the School Board presented the testimony of Mr. Varona and of Lucy Iturrey; Petitioner's Exhibits 1 through 21 were offered and received into evidence. Mr. Varona testified in his own behalf, and Respondent's Exhibit 1 was offered and received into evidence.

The transcript of the proceedings was filed with the Division of Administrative Hearings on March 20, 1007, and the parties timely submitted proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

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

1. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise all free public schools within the School District of Miami-Dade County, Florida. Article IX, Florida Constitution; § 1001.32, Fla. Stat. (2004).

2. Mr. Varona was employed as a school security monitor in October 1990. In October 1996, the School Board hired Mr. Varona as a fine arts teacher, and he continued as a full-time teacher until his full-time status was terminated in June 2003, when his second non-renewable temporary teaching certificate expired. Mr. Varona was re-hired by the School Board as a temporary instructor in August 2004, and continued working for the School Board as a classroom instructor until he was suspended in March 2006.

3. At the times material to this proceeding, Mr. Varona was a member of the United Teachers of Dade, which had entered into a Collective Bargaining Agreement ("Agreement") with the School Board, effective July 1, 2003, through June 30, 2006. Article V, Section 1 of the Agreement provides that the School Board can dismiss employees only for just cause. Article XXI, Section 1.a. of the Agreement provides that the School Board can suspend or dismiss instructional employees during the school year if the charges against him or her are based on Florida Statutes. Finally, Article XXI, Section 2 of the Agreement provides that dismissals are to be effectuated in accordance with the Florida Statutes, including Chapter 120, Florida Statutes.

4. Prior to the expiration of his temporary teaching certificate, Mr. Varona began his efforts to qualify for a

permanent Florida Educator's Certificate.² He decided to take coursework through an entity named Moving on Toward Education and Training ("MOTET"), which was operated by Dr. William McCoggle, a teacher and coach at Palmetto Senior High School in Miami, Florida. Mr. Varona learned through colleagues who had participated in the program that Dr. McCoggle and MOTET offered courses for which teachers could obtain college credit that could be used to satisfy the requirements for certification.

5. Mr. Varona telephoned Palmetto Senior High School and inquired about certification courses. He was directed to Dr. McCoggle, who told Mr. Varona where and at what time he needed to appear to register for courses.

6. Mr. Varona arrived at Palmetto Senior High School at the appointed time and met with Dr. McCoggle. There were several other teachers present at the time. Mr. Varona obtained information on the classes and was told by Dr. McCoggle to come the next week and bring a document showing the courses that he needed to take, since Mr. Varona had already taken coursework at Florida International University and Miami-Dade Community College.

7. Mr. Varona returned the following week and brought the information Dr. McCoggle had requested. He registered for three or four classes and paid Dr. McCoggle and MOTET \$2,000.00 as tuition.

8. When Mr. Varona went to Palmetto Senior High School for the third time, Dr. McCoggle gave him a sealed, white envelope and told him to take the envelope and turn it in, unopened, at the School Board's Certification Office.

9. Mr. Varona gave the unopened envelope to Ruby Howard at the School Board's Certification Office. The envelope contained a transcript showing credit for college courses from Eastern Oklahoma State College.

10. Mr. Varona did not attend any classes, complete any assignments, take any tests, or engage in any academic effort whatsoever to obtain the college credits reflected on the transcript from Eastern Oklahoma State College.

11. At the times material to this proceeding, Mr. Varona had substantial family responsibilities and was in poor health, and he decided at some point that he was going to leave the teaching profession and would not pursue a permanent Florida Educator's Certificate. He was, however, at the times material to this proceeding, a classroom teacher employed by the School Board.

12. Although he was later notified that the college credits he had submitted to the Certification Office were no good and that he would be entitled to a small refund of the money he paid for the classes, he did not pursue the matter

further because of his decision to leave teaching and not pursue permanent certification.

13. The activities of Dr. McCoggle and MOTET and the Miami-Dade County school teachers who obtained credit without attending classes or making any academic effort were the subject of a grand jury investigation and report, filed July 18, 2005, that was submitted to the Superintendent of the Miami-Dade County school system. Mr. Varona's name was included in the list of 106 teachers who had submitted transcripts showing college credit for classes they had not attended, and the School Board initiated investigations of each of these teachers.

14. The matter was widely reported in the local newspapers.

15. The evidence presented by the School Board is sufficient to establish that Mr. Varona committed misconduct in office and an act of immorality. Although Mr. Varona denied having knowingly submitted false college credits to the School Board's Certification Office for purposes of accumulating credits toward his professional certification, his denials are not persuasive. Under the circumstances, he should have known that the envelope contained a transcript showing college course credit and he knew he had made absolutely no academic effort to obtain those credits. Mr. Varona's testimony that he asked Dr. McCoggle on numerous occasions when the classes would be

held is, likewise, unpersuasive; after a time he must have realized that there would be no classes held, and his failure to withdraw the Eastern Oklahoma State College transcript from the Certification Office supports the reasonable inference that he intended these credits to be applied toward professional certification.

CONCLUSIONS OF LAW

16. 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 (2006).

17. Because this case is a proceeding to terminate Mr. Varona's employment with the School Board and does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in the Notice of Specific Charges by a preponderance of the evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

18. The School Board charged Mr. Varona in Count I of the Notice of Specific Charges with violation of School Board Rules 6Gx13-4A-1.21; in Count II with lack of good moral character in violation of Section 1012.32(1), Florida Statutes,;

in Count III with a violation of 6Gx13-4A-1.213 and of Florida Administrative Code Rules 6B-1.001 and 6B-1.006; and in Count IV with misconduct in office.

19. Section 1012.33, Florida Statutes, sets out the grounds on which instructional personnel on professional service contracts may be suspended and dismissed 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.

* * *

6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4) [employees under continuing contracts], 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.

20. The definitions of the categories of "just cause" identified in Section 1012.33(1)(a), Florida Statutes, are defined in Florida Administrative Code Rule 6B-4.009 and provide "[t]he basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes [now codified in Section 1012.33, Florida Statutes]." Before addressing the violations alleged against Mr. Varona, however, it is necessary to conform the charges set out in the Notice of Specific Charges to the categories of "just cause" identified in Section 1012.33(1)(a), Florida Statutes.

21. Violations of School Board rules do not, of themselves, constitute just cause to suspend or dismiss an employee pursuant to Section 1012.33(1)(a) and (6)(a), Florida Statutes. Section 1012.53(2), Florida Statutes, provides in pertinent part: "Members of the instructional staff of the public schools shall perform all duties prescribed by rules of the district school board. . . ." There is nothing in the Florida Statutes that indicates that School Board employees are subject to suspension or dismissal for failing to adhere to this statutory directive unless the violation of School Board rules

falls within one of the categories of "just cause" set forth in Section 1012.33(1)(a) and (6)(a), Florida Statutes. In this case, the School Board rules that Mr. Varona allegedly violated fall within the definition of "misconduct in office" found in Florida Administrative Code Rule 6B-4.009(3), and the charges against him will be treated as a charge of misconduct in office.

Misconduct in office

22. "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." Fla. Admin. Code R. 6B-4.009(3).

23. Florida Administrative Code Rule 6B-1.001, the Code of Ethics of the Education Profession in Florida, provides in pertinent part:

(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.

24. Florida Administrative Code Rule 6B-1.006, the Principles of Professional Conduct for the Education Profession in Florida, provides in pertinent part:

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

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

* * *

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

(a) Shall maintain honesty in all professional dealings.

* * *

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

25. School Board Rule 6Gx13-4A-1.21, which defines the responsibilities and duties of permanent School Board personnel, provides in pertinent part:

I. Employee Conduct

All persons employed by The School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves both in their

employment and in the community in a manner that will reflect credit upon themselves and the school system.

26. School Board Rule 6Gx13-4A-1.213, which is the School Board's Code of Ethics, incorporates by reference and makes applicable to all of the School Board's employees the Code of Ethics of the Education Profession in Florida.

27. Based on the findings of fact herein, the School Board has proven by a preponderance of the evidence that, by submitting to the School Board's Certification Office a transcript that he should have know contained college course credit for which he expended no academic effort, Mr. Varona did not exercise the best professional judgment and integrity, did not maintain honesty in all professional dealings, and submitted fraudulent information on to the Certification Office. The School Board has, therefore, proven by a preponderance of the evidence that Mr. Varona violated Florida Administrative Code Rule 6B-1.001(2) and (3); School Board Rule 6Gx13-6A-1.213, and Florida Administrative Code Rule 6B-1.006(5)(a) and (h).

28. Based on the findings of fact herein, the School Board has also proven by a preponderance of the evidence that Mr. Varona did not sustain the highest degree of ethical behavior. The term "ethical" means, according to *Webster's Third New International Dictionary, Unabridged* (2002), "being in accord with approved standards of behavior or a socially or

professionally accepted code[;] conforming to professionally endorsed principles and practices." Mr. Varona's behavior violated the generally-accepted standards for the education profession in Florida.

29. Although the School Board has met its burden of establishing that Mr. Varona violated Florida Administrative Code Rules 6B-1.001(2) and (3), School Board Rule 6Gx13-4A.213, and 6B-1.006 (5)(a) and (h), it must also establish that Mr. Varona's conduct was "so serious as to impair the [his] effectiveness in the school system" in order to establish that Mr. Varona committed misconduct in office. Based on the findings of fact herein, the School Board has proven by a preponderance of the evidence that Mr. Varona's effectiveness in the school system was impaired. The general scheme of providing Miami-Dade County school system teachers with college course credit without their having to expend any academic effort was widely known in the community, and Mr. Varona's name was included in a list of those teachers participating in the scheme appended to the Grand Jury Report issued July 18, 2005. Mr. Varona's honesty, integrity, and trustworthiness were, therefore, called into question and he could not longer reflect credit on himself or the school system. The court in Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000), concluded that some conduct is so serious that, even

without a public scandal or evidence of impaired effectiveness, it can appropriately be inferred that a teacher's effectiveness in the school system has been impaired. In Purvis, the teacher lied under oath and resisted arrest, and the court found that, because the offense undermined the teacher's trustworthiness, his impaired effectiveness in the school system could be inferred. See id.; Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000)(impaired effectiveness can be inferred when conduct is sufficiently serious; court distinguished situation where conduct took place at school from one in which conduct was private). In this case, Mr. Varona's behavior was such that it is appropriate to infer that his effectiveness in the school system was impaired.

Lack of good moral character

30. The School Board has also cites lack of good moral character as a basis for dismissing Mr. Varona from his employment as a teacher. Section 1012.32(1), Florida Statutes, provides in pertinent part: "To be eligible for appointment in any position in any district school system, a person shall be of good moral character; shall have attained the age of 18 years, if he or she is to be employed in an instructional capacity; and shall, when required by law, hold a certificate or license issued under rules of the State Board of Education or the Department of Children and Family Services," Neither

Section 1012.32(1) nor Section 1012.33(1)(a), Florida Statutes, identifies "good moral character" as a basis for the suspension or dismissal of a teacher employed under a professional service contract. Finally, and significantly, "immorality" as a basis for suspension or dismissal applies only to School Board personnel employed under a continuing contract, which does not apply to Mr. Varona. Cf. § 1012.33(4)(a) and § 1012.33(1)(a), Fla. Stat. "Lack of good moral character" cannot, therefore, be a basis for dismissing Mr. Varona.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order finding that Nestor Varona violated Section 1012.33(1)(a) and (6)(a), Florida Statutes, by committing misconduct in office and dismissing Mr. Varona from his employment.

DONE AND ENTERED this 15th day of June, 2007, in
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 2007.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2004 edition unless otherwise noted.

^{2/} It is noted that the record is virtually silent as to the dates material to this proceeding.

COPIES FURNISHED:

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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.