

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAKE COUNTY SCHOOL BOARD,                    )  
  )  
      Petitioner,                                    )  
  )  
vs.    )  
  )     Case No. 07-0797  
PAUL OGLES,                                        )  
  )  
      Respondent.                                 )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

On April 5, 2007, a hearing was held in Leesburg, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Stephen W. Johnson, Esquire  
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For Respondent: Mary F. Aspros, Esquire  
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STATEMENT OF THE ISSUE

Whether Respondent violated Lake County School Board Policy 2.71 as described in letters from the Lake County Superintendent of Schools dated January 2, 2007, and January 7, 2007, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By letters dated January 2, 2007, and January 7, 2007, the Superintendent of the Lake County School District notified Paul Ogles that he was accused of violating School Board Policy 2.71, and as a result he was reprimanded, suspended for five days without pay, and directed to receive cultural sensitivity training. Mr. Ogles disputed the allegations in the complaint letters and requested a hearing pursuant to Section 120.57(1), Florida Statutes. On February 13, 2007, the matter was referred to the Division of Administrative Hearings and on February 15, 2007, the matter was assigned to the undersigned.

A Notice of Hearing was issued scheduling the case to be heard April 5, 2007, and the case proceeded as scheduled. At hearing, Petitioner presented the testimony of five witnesses, including Respondent, and Petitioner's Exhibits numbered 1 through 9 were admitted into evidence. Respondent testified on his own behalf, presented the testimony of two additional witnesses, and Respondent's Exhibits numbered 1 and 2 were admitted into evidence.

A transcript of the proceedings was filed with the Division on April 18, 2007. At the request of Respondent, the parties were given until May 21, 2007, to file their proposed recommended orders. Both submissions were timely filed and have been carefully considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. The School Board of Lake County is the corporate body politic responsible for the administration of schools within the Lake County School District.

2. At all times material to this proceeding, Paul Ogles was employed as an English/speech teacher at the Curtright Center of Eustis High School in the Lake County School District.

Mr. Ogles, a Caucasian male, has been employed as a teacher for the District for nine years.

3. At all times material to this proceeding, Ms. Bernetta McNealy, an African-American woman, was employed as a teacher at the Curtright Center of Eustis High School. Ms. McNealy's classroom is adjacent to Mr. Ogles' classroom.

4. During the 2005-2006 school year, Ms. Tess Rogers was an assistant principal at Eustis High School and one of Mr. Ogles' supervisors. Mr. Michael Elchenko was Principal at Eustis High School during this time, and Ms. Rebecca Nelsen was the Director of Compensation and Employee Relations for Lake County School District.

5. Mr. Ogles' first teaching position was as a teaching assistant with Project Outward Bound at Morris Brown College, a historically black college in Atlanta, where he prepared high school students for college. Mr. Ogles returned to teaching twenty years later after running his own textbook company.

6. Mr. Ogles has received excellent evaluations during his employment by the Lake County School District. Once a teacher receives a rating of twelve (the highest rating possible) for two consecutive years, the educator may choose to participate in a PG-13 Appraisal of Professional Growth/Career Development instead of receiving the normal educator evaluation. Mr. Ogles qualified for this type of evaluation and successfully participated in the PG-13 appraisal process for several years.

7. Mr. Ogles has sponsored or assisted with many school organizations such as the Beta Club; the Chess Club; the Key Club; the High Q Club; and the Speech and Debate Club. He used personal funds to support the students' activities, including paying \$300.00 to rent a bus so students could attend a competition.

8. Mr. Ogles was one of two Team Leaders on campus and in that capacity worked with the assistant principal to try to upgrade the quality of the school and to increase interaction between students and teachers. He also volunteered for bus duty before and after school.

9. While performing bus duty, it was often Mr. Ogles' responsibility to enforce the school's dress code as students arrived on campus. Eustis High School has a policy of prohibiting students from wearing clothing with symbols or messages that may be considered disruptive to the learning environment. Students are not necessarily disciplined for

wearing such clothing, but are requested to remove the offensive clothing, turn it inside out so as to hide the offensive message, put other clothing on over it or call home to have alternate clothing provided.

10. The Confederate flag is one such symbol that is not allowed to be displayed on clothing worn to school. Dixie Outfitters is a line of clothing that sometimes bears the Confederate flag. Mr. Ogles was aware that the school policy forbade the wearing of the Confederate flag and he often was involved in enforcing the policy against students wearing the symbol.

11. On or about May 19, 2006, Mr. Ogles was using his computer to search for project ideas for the following year while his students were taking a test. He was looking at a website called [www.cagle.com](http://www.cagle.com), a political website from which he has gotten cartoons in the past. Several cartoons from this website are posted in his classroom, and there was no evidence presented to indicate that anyone had ever complained about their display.

12. While viewing the website, he saw a cartoon that depicted a Confederate flag. However, instead of the traditional "stars and bars," the cartoon showed black arms crossed, with stars imprinted on them. The hands were extended beyond the flag, with the wrists shackled. The cartoon was originally published in approximately 2000, as a means of protesting the

consideration by several southern states to display the Confederate flag at state buildings.

13. When Mr. Ogles first saw the cartoon, he thought that it was "strong art" depicting the Confederate flag as a symbol of racism.

14. In between classes, he showed the cartoon to Ms. McNealy. He asked her if she was familiar with students wearing Dixie Outfitters clothing. She indicated she was not. He stated that perhaps this cartoon could be placed on a new line of clothing for black students to wear in response to the "heritage" argument white students used to defend the wearing of the Confederate flag.

15. The conversation was very short, as the bell was ringing for the next class to begin. Ms. McNealy did not respond to Mr. Ogles or give him any indication that she was offended or bothered in any way. There is also no evidence that she ever discussed her feelings about the cartoon with Mr. Ogles at any later time. Mr. Ogles testified, and his testimony is credited, that he believed that because the cartoon advocated a position against the display of the Confederate flag, that it would support what he believed to be Ms. McNealy's position on this issue. It is his view that African-Americans have as much ownership of the Confederate flag as anyone else, and should be able to use the image to express their views.

16. While Ms. McNealy did not tell Mr. Ogles that she was offended by the cartoon, she did make her feelings known to Ms. Rogers, the assistant principal and Michael Rivers, a guidance counselor at the Curtwright Center, almost immediately. Ms. Rogers is Caucasian and Mr. Rivers is African-American. Both found the cartoon to be offensive.

17. After speaking with Ms. Rogers and Mr. Rivers, Ms. McNealy left campus for the day. About an hour after he showed Ms. McNealy the cartoon, he was asked to come to the office and was informed by Ms. Rogers and Mr. Jones, another administrator, that Ms. McNealy was upset about the cartoon and had left campus.

18. Mr. Ogles did not realize that Ms. McNealy would be offended by the cartoon and had he realized she would be offended, he would not have shown it to her.

19. On May 22, 2006, Mr. Elchenko, the Principal of Eustis High School received a written complaint from Ms. McNealy about Mr. Ogles' showing her the cartoon.<sup>1/</sup> Mr. Elchenko determined Mr. Ogles' conduct to be unprofessional and issued a Professional/Personal Action Report Relating to Work Experience (Appraisal II form) and Prescription/Assistance Form to Mr. Ogles. Both documents directed him to stop giving materials to co-workers that could be considered offensive. Mr. Ogles has complied with these directives.

20. After Mr. Elchenko completed his investigation, Mr. Elchenko reported the allegations to the School Board's District office because he believed the allegations in Ms. McNealy's complaint rose to the level of racial harassment. Rebecca Nelsen conducted an investigation on behalf of the School District.

21. Mr. Ogles was reassigned from his teaching position at Eustis High School to the County Copy Center by letter dated July 17, 2006, and remains in that placement today.

22. Ms. Nelsen determined that Mr. Ogles' conduct created an intimidating, hostile or offensive work environment on the basis of race, which is prohibited by School Board policy. Ms. Nelsen recommended to the Superintendent that Mr. Ogles' employment be terminated. A separate investigation was conducted for the School Board by a private entity called the Robert Lewis Group. The findings and recommendations of that investigation are not part of this record.

23. By letter from the Superintendent dated January 2, 2007, Mr. Ogles was suspended without pay for the period from January 8, 2007 through January 12, 2007, and was directed to receive cultural sensitivity training for violating School Policy 2.71. There is no evidence submitted to indicate that the Superintendent's decision was approved or ratified by the Lake County School Board.



24. Mr. Ogles served his period of suspension and successfully completed cultural diversity training. Before this incident, Mr. Ogles had never been accused of making any appropriate racial remarks and was not considered to be a racist individual. He had expressed the view that racism should hold no place in education. His principal did not question his competence as an educator.

#### CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

26. The Lake County School Board is the duly constituted governing body of the School District of Lake County. § 4, Art. IX, Fla. Const.; §§ 1001.30 and 1001.33, Fla. Stat. A district school board has the statutory authority to adopt rules governing personnel matters pursuant to Sections 1001.42(5), 1012.22(1) and 1012.23, Florida Statutes (2006).

27. In Florida, the school superintendent has the authority to make recommendations for dismissal of school board employees, and the school board has the authority to suspend school board instructional staff with professional service contracts for "just cause." §§ 1001.42(5); 1012.22(1)(f); and 1012.33(6)(a), Fla. Stat. (2006). A superintendent also has the power to suspend instructional staff and other employees "during emergencies for a

period extending to and including the day of the next regular or special meeting of the district school board and notify the district school board immediately of such suspension."

§ 1012.27(5), Fla. Stat.

28. Just cause is defined to include misconduct in office. § 1012.33(1)(a), Fla. Stat. (2006). Moreover, Florida Administrative Code Rule 6B-4.009 identifies the criteria necessary for suspension or dismissal of instructional personnel. The Rule provides in pertinent part:

(3) 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.

28. Petitioner bears the burden to prove the charges against Respondent by a preponderance of the evidence. Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

29. The letter of January 2, 2007, which outlines the basis for the school district's action against Mr. Ogles, states in pertinent part:

The district has concluded its investigation into a formal racial harassment complaint from one of your co-workers. It has been determined that you violated School Board policy 2.71, Prohibition of Harassment.

\* \* \*

Based on the above finding and in accordance with Florida Statutes 1012.27(6)<sup>2/</sup> and School Board policy 6.38,<sup>3/</sup> I hereby suspend you without pay for five (5) school days beginning January 8, 2007 and extending through January 12, 2007, I further direct you to receive cultural sensitivity training through the district's Employee Assistance Program. (Quotation of Policy omitted).

30. The January 2, 2007, contains no allegations of facts, other than the reference to a complaint from a co-worker. The January 2, 2007, letter was followed by a letter dated January 7, 2007, which stated:

This written reprimand is to put you on notice of your violation of School Board Policy 2.71 on May 19, 2006, when you handed a cartoon depicting black arms shackled at the wrist extending from the Confederate flag to a co-worker. The district conducted an investigation, following the co-worker's filing of a formal complaint alleging racial harassment. The investigation found that your actions had the effect of racially harassing your co-worker.

Your plan of correction is to refrain from any conversation, gestures, distribution of graphic material or any conduct relating to an individual's race, color, religion, sex, gender, age, national or ethnic origin, marital/family status, qualified handicap or disability or social and family background that may be found offensive. In addition, you are to complete a cultural diversity training as provided by the district's Employee Assistance Program.

31. Respondent may only be disciplined for matters alleged in the charging documents provided to him. Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005);

Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996)(reference to the statute without supporting factual allegations not sufficient to place respondent on notice of the charges against him); Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring). Thus in this case, the only conduct that is at issue is the conduct identified in the January 7, 2007 letter to Mr. Ogles: handing the cartoon described in Finding of Fact number 12 to a co-worker, which an investigation found had the effect of racially harassing that co-worker.

32. In order to prevail, Petitioner must demonstrate that Mr. Ogles' conduct violated School Board Policy 2.71. Assuming such a violation, Petitioner must also prove that it had the authority to impose a suspension without pay.

33. School Board Policy 2.71 states in pertinent part:

(2) The School Board prohibits harassment against any employee, applicant for employment, student, or student applicant based upon race, color, religion, sex, age, national or ethnic origin, marital/family status, qualified handicap or disability or social and family background. This policy also applies to non-employee volunteers who work subject to the control of school authorities.

(a) The term "harassment" includes verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, sex, age, national or ethnic original, marital family background or any other characteristic protected by law and that:

- (i) Has the purpose or effect of creating an intimidating, hostile or offensive work or academic environment;
- (ii) Has the purpose or effect of interfering with an individual's work or academic performance; or
- (iii) Otherwise adversely affects an individual's work or academic performance.

(2) The term "harassment" includes, but is not limited to:

- (i) Racial slurs (including but not limited to, "nigger"), jokes, epithets, negative stereotyping, threats, intimidation, hostile acts;
- (ii) Denigrating or hostile written or graphic material posted or circulated in the workplace or schools; or
- (iii) Any other graphic or physical conduct relating to an individual's race, color, religion, sex, gender, age, national or ethnic origin, marital/family status, qualified handicap or disability or social and family background.

34. In order to find that Respondent's actions constituted harassment, it must be determined that showing the cartoon to a co-worker of another race denigrates or shows hostility toward that person because of her race, and that it had the effect of creating an intimidating, hostile or offensive work environment, or had the effect of interfering or otherwise adversely affecting with the individual's work. While the School Board Policy describes the conduct as a two-part inquiry, in reality the elements are intertwined. For example, if the conduct does not show hostility toward another person because of his or her race or other protected characteristic, it cannot by definition have

the purpose or effect of creating an offensive work environment. On the record presented, the undersigned does not find that Petitioner has demonstrated that the conduct showed hostility or aversion toward an individual because of his/her race.

35. Both parties have cited to cases interpreting the Federal Civil Rights Act in determining what constitutes a hostile or offensive work environment and what obligation the School Board has when faced with allegations of harassment. The analogy is appropriate in that School Board Policy 2.71 prohibits conduct that has the purpose or effect of creating an intimidating, hostile or offensive work environment, as does case law interpreting 42 U.S.C. § 1981. That case law indicates that in order to demonstrate a hostile work environment claim, the party making the claim must show that the person harassed belongs to a protected group; that he or she has been subject to unwelcome harassment; that the harassment was based on a protected characteristic of the employee; and that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998); Barrow v. Georgia-Pacific Corp., 2005 U.S. App. 17401 (11th Cir. 2005); Gupta v. Florida Board of Regents, 212 F.3d 571, 583 (11th Cir. 2000).

36. The analogy works only to a point, however, because the School Board cannot be expected to wait until conduct is

pervasive before taking affirmative steps to correct employees and impose discipline for conduct that clearly violates its policies. However, in determining that the conduct itself is inappropriate, the case law requiring Petitioner to meet both a subjective and objective test remains instructive. Petitioner must show that a reasonable person would find the environment hostile or abusive as a result of the conduct and that the target of the conduct -- here, Ms. McNealy -- found the environment or conduct to be offensive. The "mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment." Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

37. Ms. McNealy did not testify. Whether her absence was planned or unforeseen, the fact remains that there is no competent evidence from Ms. McNealy regarding whether she found the cartoon to be offensive and if she did, why she was offended by it. There is testimony from other members of the staff that she was angry, upset and left school for the day. However, that testimony simply does not establish that she was offended by the receipt of the cartoon as opposed to the cartoon being one factor of many that caused to her leave school the day she received it. Most importantly, there is no testimony as to why she might have found the cartoon to be offensive and whether that reason was related to her race. Therefore, the Petitioner has not demonstrated that the conduct at issue, i.e., handing the cartoon

to Ms. McNealy, was considered by Ms. McNealy to be personally offensive because it denigrated or insulted her because of her race.

38. The Petitioner also did not demonstrate that the cartoon was objectively offensive because it denigrates or shows hostility toward African-Americans.

39. The cartoon, without question, presents a disturbing image. To the undersigned, it espouses the view that the Confederate flag and our country's history related to the enslavement of African-Americans are inextricably intertwined. The effects of this shameful period in our country's history remain with us today, and the cartoon makes that point. However, on its face, the cartoon does not seek to promote racism but to condemn it. This interpretation is consistent with both Mr. Ogles' interpretation and the stated view of the cartoon's author.

40. Respondent testified credibly that he felt the cartoon would be consistent with what he perceived Ms. McNealy's position on such issues to be. While his actions presumed a familiarity to discuss such issues with his co-worker that he did not have, the record simply does not support any intention on his part to denigrate or insult her because of her race.

41. While other witnesses, both black and white, testified that they were offended by the cartoon, no witness stated why. The reason for taking offense is crucial to determining that the



action shows hostility or aversion toward the recipient because of her race. In this case, that evidence is absent.

42. Even assuming that Petitioner demonstrated that Respondent's conduct violated School Board Policy 2.71, which it has not, the question would remain whether it was appropriate to suspend Respondent without pay. In order to support such a suspension, Petitioner must demonstrate just cause, which includes misconduct in office. § 1012.33(1)(a), Fla. Stat. Misconduct is defined by rule, see paragraph 28.

43. Petitioner did not charge Respondent with misconduct in office in either the January 2, 2007, or January 7, 2007, letters. Further, the authority to suspend without pay is limited to the school board as opposed to the Superintendent. The Superintendent may only recommend suspension or take such action during emergencies. § 1012.27(5), Fla. Stat. There has been no allegation that this case represented an emergency.

44. Even assuming the appropriate authority existed for the Superintendent to impose a suspension and assuming that Respondent was properly notified that his conduct allegedly violated Florida Administrative Code Rule 6B-1.006, Petitioner has not met its burden to demonstrate a violation of the rule for the same reasons stated above. Not only has the Petitioner failed to demonstrate that the conduct did not constitute harassment under School Board Policy 2.71, or misconduct as defined in Rules 6B-1.006 and 6B-4.009, it has not demonstrated

that the conduct was so serious as to impair Respondent's effectiveness in the classroom.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing the charges against Respondent, and rescinding all discipline previously imposed.

DONE AND ENTERED this 12th day of June, 2007, in Tallahassee, Leon County, Florida.

**S**

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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of June, 2007.

ENDNOTES

<sup>1/</sup> Ms. McNealy did not testify during this proceeding. Her complaint was admitted for the purpose of establishing that she filed a written complaint, and not for the truth of the matters asserted in the document.

<sup>2/</sup> Section 1012.27(6), Florida Statutes, provides that the school district superintendent shall:

[D]irect or arrange for the proper direction and improvement, under rules of the district school board, of the work or all members of the instructional staff and other employees of the district school system, supervise or arrange under rules of the district school board for the supervision of the instruction in the district, and take such steps are necessary to bring about continuous improvement.

<sup>3/</sup> School Board Policy 6.38, which is referenced in both the January 2, 2007, letter and the Petitioner's Proposed Recommended Order, was not submitted as an exhibit in this proceeding and its contents are unknown to the undersigned. Therefore, no reliance has been placed on this policy in this Recommended Order.

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.