

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ORANGE COUNTY SCHOOL BOARD,            )  
  )  
          Petitioner,                            )  
  )  
vs.    )     Case No. 07-2698  
  )  
BARBARA ABOUSHAHBA,                    )  
  )  
          Respondent.                        )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on January 11, 2008, in Orlando, Florida.

APPEARANCES

For Petitioner: Brian F. Moes, Esquire  
Orange County School Board  
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Orlando, Florida 32802-0271

For Respondent: Lindsey N. Oyewale, Esquire  
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## STATEMENT OF THE ISSUES

Whether Respondent, Barbara Aboushahba, committed the violations as alleged in the Administrative Complaint, and, if so, what disciplinary action should be imposed.

## PRELIMINARY STATEMENT

On May 14, 2007, Petitioner, Orange County School Board, filed an Administrative Complaint seeking the severance of Respondent, Barbara Aboushahba, who had a professional service contract with Petitioner pursuant to Section 1012.33, Florida Statutes (2006), for acts alleged in the Administrative Complaint, which are, individually and collectively, in violation of school board policies, constituting misconduct in office, and are a violation of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida. On May 30, 2007, Respondent requested an administrative hearing on Petitioner's decision to terminate her employment. The case, forwarded by Petitioner, was received by the Division of Administrative Hearings on June 15, 2007. On June 18, 2007, an Initial Order was sent to both parties requesting mutually convenient dates for a final hearing. Based on the parties' response to the Initial Order, on June 27, 2007, the case was scheduled for final hearing on October 11, 2007.

On September 28, 2007, Petitioner sought an amendment to the Administrative Complaint to include the allegation that

several alleged acts of Respondent constituted "gross insubordination." On October 10, 2007, an Order Allowing Motion to Amend was entered. On October 2, 2007, the parties jointly moved to continue the final hearing. The final hearing was rescheduled for January 11, 2008, in Orlando, Florida.

At the January 11, 2008, hearing, Petitioner presented the testimony of Danny Axtell, Carol Russ (who also testified as a rebuttal witness), Jeff Bauer, Maggie Reynolds, and two ten-year-old students, E.B. and E.M. Petitioner offered eight exhibits, which were received into evidence and marked Petitioner's Exhibits numbered 1 through 8.

Respondent testified on her own behalf and offered the testimony of Kelly Ann Daugherty and Gabrielle Achlach. Respondent offered eight exhibits, which were received into evidence and marked Respondent's Exhibits numbered 1 through 8.

The two-volume Transcript of the hearing was filed with the Clerk of the Division of Administrative Hearings on January 25, 2008. Proposed recommended orders were to be filed by February 13, 2008. Both parties timely filed Proposed Recommended Orders, which were thoughtfully considered.

All references are to 2006 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. Petitioner, Orange County School Board, is the governmental entity responsible for the operation, supervision, and control of public schools in Orange County, Florida, including the employment of personnel associated with the educational process.
2. Respondent was employed by Petitioner as a kindergarten teacher pursuant to the terms of a professional services contract with Petitioner.
3. Respondent is a member of the bargaining unit covered by the Collective Bargaining Agreement between the School Board of Orange County and Orange County Classroom Teachers Association.
4. On June 25, 2003, Respondent received a written directive "to provide clarification or guidance" from the principal of the school where she taught that she "must avoid touching students except as is absolutely necessary to effect a reasonable and lawful purpose," and "to avoid even the appearance of verbal intimidation of students."
5. On May 18, 2005, Respondent received a letter of reprimand for misconduct from her principal, because she "grabbed a student to get his attention." In the letter she was

warned that "should there be another incident of a similar nature, discipline, up to and including dismissal, may be recommended."

6. On May 31, 2005, Respondent received a letter of reprimand for violating "prior directives and [that you] again placed your hands on a student in a manner that could be interpreted as punitive." In addition, on that date Respondent received a directive that she avoid "touching a student in a manner that serves no educational or lawful purpose" and that she "must exercise care and professional judgment to avoid the appearance of the inappropriate use of physical intimidation." She was urged to "carefully consider when and how to respond to student behaviors."

7. On May 26, 2006, Respondent was suspended without pay for five days as a result of "allegations that you used inappropriate force against a student" and that she "violated two previous directives regarding placing your hands on a student."

8. On March 26, 2007, Respondent executed a Settlement Agreement to resolve an Administrative Complaint that had been filed by the Education Practices Commission in John L. Winn v. Barbara Aboushahba, Case No. 056-0009-V. The Settlement Agreement included a letter of reprimand and a \$400.00 fine.

9. On April 22, 2007, E.B., a ten-year-old student in Respondent's computer lab, had not completed his assignment. Respondent grasped E.B.'s hand and placed his hand on the computer keyboard and/or mouse, with her hand superimposed on his hand. This apparently upset E.B., who then pulled his shirt up and over his head. Respondent then pulled E.B.'s shirt down from his face and told him to "stop crying like a baby." E.B. was crying as a result of being upset by Respondent's actions.

10. Respondent's touching of E.B. was minimal, but unnecessary and inappropriate. Her comment to him was callous and insensitive. Given the fact that this incident occurred less than one month after the above-referenced settlement with the Education Practices Commission, it is apparent that Respondent has not responded appropriately to the directives, reprimands, and guidance directed to similar inappropriate conduct.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of these proceedings. § 120.57, Fla. Stat. (2007); Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

12. Petitioner is the constitutional entity charged with the operation, control, and supervision of public schools in Orange County, Florida. Art. IX, § 4, Fla. Const.

13. A district school board is considered the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or other legitimate reasons." § 447.209, Fla. Stat. Any instructional staff member may be suspended or dismissed at any time during the school year for just cause, which includes misconduct in office and/or gross insubordination, as those terms are defined by the State Board of Education. § 1012.33(1)(a), Fla. Stat.

14. The appropriate standard of proof in a school board dismissal proceeding, such as the instant case, is preponderance of evidence. Sublett v. Sumter County School Board, 664 So. 2d 1178 (Fla. 5th DCA 1995).

15. Respondent is employed by the terms of a professional services contract with Petitioner. Termination of employment is governed by Subsection 1012.33(1), Florida Statutes, which provides, in pertinent part, as follows:

(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), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a).

16. When a school board seeks to terminate an employee's contract for just cause, it must establish each and every element of the charge. MacMillan v. Nassau County School Board, 629 So. 2d 226 (Fla. 1st DCA 1993).

17. Any disciplinary action taken against the employee may be based only upon the conduct specifically alleged in the written notice of specific charges. Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238 (Fla. 2d DCA



1993); and Delk v. Department of Professional Regulation,  
595 So. 2d 966, 967 (Fla. 5th DCA 1992).

18. Petitioner's Amended Administrative Complaint, which is the "charging document," alleges, in pertinent part:

1. The Respondent, at all times material to this Complaint, was employed as a classroom teacher by the Petitioner, the School Board of Orange County, Florida. The Respondent was hired on October 1, 2001, and is currently a reading teacher at Frangus Elementary School.

2. The Respondent holds a professional service contract of employment with the School Board of Orange County, Florida.

3. That on or about June 25, 2003, the Respondent received written directives for pushing a student out of the way.

4. That on or about May 20, 2005, the Respondent received a written reprimand for grabbing a student with such force that the child fell to the ground.

5. That on or about May 31, 2005, the Respondent received a written reprimand for violating prior directives and placing her hands on a student.

6. That on or about May 26, 2006, the Respondent received a five-day suspension without pay for grabbing and pushing students.

7. That on or about November 22, 2006, the Commissioner of Education, John Winn, found probable cause to justify sanctions against the Respondent's certificate.

8. That on or about April 26, 2007, the Respondent attended a predetermination meeting regarding new allegations of touching a student by grabbing his hand and pulling his shirt down. Respondent admitted to touching the student and told him to "stop acting like a baby . . . go ahead and pout . . . I don't care."

9. Such actions, individually and collectively, by the Respondent are in violation of School Board Policies, misconduct in office, gross insubordination and a violation of the Code of Ethics and the Principals of Professional Conduct of the Education Profession in Florida.

10. Said violations, individually and collectively, are sufficient grounds to sever the professional service contract status of Respondent,

Barbara Aboushahba, and to terminate her employment with the School Board of Orange County, Florida.

19. The term "misconduct in office" is not defined in Subsection 1012.33(1)(a), Florida Statutes; the term is defined in Florida Administrative Code Rule 6B-4.009, as follows:

(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.

20. The term "gross insubordination" is not defined in Subsection 1012.33(1)(a), Florida Statutes; the term is defined in Florida Administrative Code Rule 6B-4.009, as follows:

(4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

21. The "Code of Ethics of the Education Profession," Florida Administrative Code Rule 6B-1.001 reads, as follows:

(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.

22. The "Principles of Professional Conduct for the Education Profession in Florida," Florida Administrative Code Rule 6B-1.006, reads, in pertinent part, as follows:

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

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort 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.

(f) Shall not intentionally violate or deny a student's legal rights. . . .

23. Petitioner has not met the burden of proof as it relates to its allegation that Respondent violated the Code of Ethics and Principles of Conduct of the Education Profession in Florida. Fla. Admin. Code R. 6B-1.001 and 1.006. While Respondent's touching of E.B. and her comments were inappropriate and do not reflect a level of self-control expected of an educational professional, her actions were not so egregious as to raise to the level that would be harmful to E.B.'s opportunity to learn or effect his mental or physical health or safety. While he was admittedly upset, he did not suffer unnecessary embarrassment or disparagement or a serious diminution of his legal rights.

24. Petitioner has failed to prove "misconduct in office" as defined in Florida Administrative Code Rule 6B-4.009(3). There is no factual evidence that suggests that Respondent's treatment of E.B. was "so serious as to impair her effectiveness in the school system." Nor has any student, parent, or educator so opined. Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000); McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1993).

25. Petitioner has proved "gross insubordination" as defined in Florida Administrative Code Rule 6B-4.009(4). Respondent's lengthy history of directives, reprimands, and the Settlement Agreement with the Education Practices Commission,

all related to inappropriate touching and verbal intimidation of students, including her April 22, 2007, interaction with E.B., evidences an intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Respondent, Barbara Aboushahba's, "gross insubordination" constitutes "just cause" under Section 1012.33, Florida Statutes, to dismiss her from her employment as a teacher with Petitioner, Orange County School Board.

DONE AND ENTERED this 7th day of March, 2008, in Tallahassee, Leon County, Florida.

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JEFF B. CLARK  
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Filed with the Clerk of the  
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this 7th day of March, 2008.

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.