

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-5125  
 )  
DANIEL PRESMY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on May 13, 2008, in West Palm Beach, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes.<sup>1</sup>

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Daniel Presmy, committed the violations alleged in the Recommendation for Suspension and Termination for Employment, and if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

By letter dated October 4, 2007, Respondent was notified that the Superintendent of Schools for Palm Beach County was recommending termination of his employment. At its scheduled meeting of October 24, 2007, the School Board took action to suspend Respondent without pay from his teaching position and initiate dismissal proceedings against him from all employment with Palm Beach County Public Schools.

Respondent elected to dispute the reasons for his dismissal stemming from the student incident that occurred at Roosevelt Elementary School (Roosevelt) on December 11, 2006. Because he requested a formal proceeding, the matter was referred to the Division of Administrative Hearings.

The charges filed against Respondent surrounding the December 11, 2006, incident charged Respondent with inappropriate physical contact with a student in violation of School Board Policies 0.01, 1.013 and 3.12, and State Board of Education Rules 6B-1.001 and 6B-1.006.

At hearing, Petitioner presented the testimony of Kenyetta Haywood, Director of Employee Relations; Renita Price, Officer with the School Board; Daniel Presmy; Robert Walton, Detective with the School Board; and Patricia Seabrook, School Treasurer and Back-up Nurse. Petitioner's Exhibits numbered 1 through 15,

17 through 24, and 26 were admitted into evidence. Respondent testified on his own behalf. Respondent admitted no exhibits into evidence. The Collective Bargaining Agreement between the School Board of Palm Beach County, Florida and the Palm Beach County Classroom Teachers Association was admitted into evidence as the parties' Joint Exhibit.

The proceedings were transcribed and the parties availed themselves of the right to submit proposed recommended orders after the filing of the transcript. The Transcript of the final hearing was filed with the Division of Administrative Hearings on June 23, 2008. Both Petitioner and Respondent filed timely Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Daniel Presmy (hereinafter "Presmy" or "Respondent") has been a teacher for six years with Palm Beach County School Board (hereinafter "School Board"). He has always taught elementary students.

2. Presmy has had no prior disciplinary action taken against him by the Superintendent of Palm Beach County School Board or the School Board.

3. Presmy was a certified teacher in the School Board of Palm Beach County.

4. On December 11, 2006, while in his classroom Presmy was teaching his third-grade class, and three students who were not students in his classroom showed up and disrupted the class. Presmy requested that the students leave his room. The students

did not leave upon the initial request. One student informed Presmy that a student in the class had his eraser. Presmy then asked his class who had the eraser. Subsequently, an eraser flew to the front of the classroom and fell on the floor. Presmy picked up the eraser and handed the eraser to the student who had requested it.

5. Presmy turned back to his class and was hit on the temple with the eraser. Presmy turned back around toward the student who he had given the eraser to and the student raised his hand. Again, Presmy told the student to leave. The student continued to stand in the middle of the doorway to Presmy's classroom and would not leave.

6. While Presmy remained in his classroom, he used his fingertips to push the student's head and told the student (hereinafter "student victim") to "leave and don't come back here." Presmy "didn't think that [he] was doing anything wrong by telling him to leave with a gesture to leave."

7. Presmy's reaction of touching the student was inappropriate. However, no evidence was demonstrated that the student was hurt during the incident.

8. Presmy did not press the buzzer or contact and ask for any assistance regarding the incident because he didn't think it was necessary.

9. On December 11, 2006, Officer Price was paged regarding the incident and she returned the call. She was informed that a student reported that he had been hit by a teacher at Roosevelt.

10. Price interviewed the student victim and witnesses regarding the incident with Presmy.

11. The School Board initiated an investigation into the incident. During the investigation, Respondent met with Detective Walton. Presmy told the investigator that he pushed the student victim in the head and told him to leave.<sup>2</sup>

12. The investigator concluded his investigation and presented the case to the State Attorney's Office for review. As a result, Daniel Presmy was criminally charged with Battery as a violation of Florida Statutes.

13. On August 2, 2007, Presmy pled guilty to the battery charge as a negotiated plea agreement so as not to put himself and his family through a lengthy trial and under the advice of his lawyer. His sentence was 45 hours community service, 12 weeks of anger management, 12 months of probation with early termination after six months and a \$595 court fee.

14. Petitioner alleges Respondent, by his conduct, violated School Board Policies 0.01, 1.013 and 3.12, and State Board of Education Rules 6B-1.001 and 6B-1.006.

15. Subsequently, the School Board of West Palm Beach County at a meeting on October 24, 2007, voted to suspend Presmy without pay effective October 25, 2007, and initiated dismissal proceedings.

#### CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the

parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

17. Petitioner has the burden of proving that it has just cause to terminate the Respondent's employment as a classroom teacher.

18. Pursuant to Section 1012.33(6)(a), Florida Statutes, the School Board is authorized to suspend or dismiss

[a]ny member of the instructional staff . . . at any time during the term of [his teaching] contract for just cause . . . . The Board 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. (Emphasis supplied.)

19. In this matter, The Collective Bargaining Agreement mandates that Petitioner's burden to prove the charges against Respondent must be made by clear and convincing evidence rather than by the preponderance of the evidence, which is usually the burden in such cases.

20. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth Board, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to

the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Id.

21. In its Recommendation for Suspension and Termination from Employment, the School Board advanced the following allegations for dismissing Presmy: violation of School Board Policies 0.01, 1.013, and 3.12, and State Board of Education Rules 6B-1.001 and 6B-1.006. The School Board bases the termination of employment by alleging Presmy had inappropriate physical contact with a student.

22. As to Presmy's conduct, the School Board failed to point out in its Proposed Recommended Order which specific provisions of policies and rules Presmy's conduct violated. Therefore, those policies and rules that might have application in the instant case as listed in the Recommendation for Suspension and Termination from Employment are discussed.

23. Policy 0.01(2)(c) Commitment to the Student, Principle 1 provides in pertinent part:

(2)(c) Shall make reasonable effort to protect the student from conditions harmful to learning or to health and safety.

24. The evidence is insufficient to persuade the undersigned that Presmy's conduct, pushing the disruptive student victim's head out of the classroom with his fingertips, was intended, or reasonably would be expected to cause harm. No evidence of injury was presented.<sup>3</sup> Therefore, the greater weight

of the evidence fails to establish Presmy violated the Commitment to the Student policy.

25. Policy 1.013 Responsibilities of School Board Personnel and Staff provides in pertinent part:

1. It shall be the responsibility of the personnel employed by the Board school board to carry out their assigned duties in accordance with federal laws, rules, state statutes, state board of education rules, school board policy, superintendent's administrative directives and local school and area rules.

\* \* \*

4. Teachers. It shall be the duty of the teacher to provide instruction, leadership, classroom management and guidance to pupils through democratic experiences that promote growth and development both as individuals and as members of society. Pursuant to § 231.09, F.S., teachers shall perform duties prescribed by school board policies relating, but not limited, to helping students master challenging standards and meet all state and local requirements for achievement; teaching efficiently and faithfully; using prescribed materials and methods, including technology-based instruction; recordkeeping; and fulfilling the terms of any contract, unless released from the contract by the school board.

26. The evidence establishes that Presmy made every effort to carry out his teaching duties and manage his classroom so that he could continue with instruction even with the student victim continuously disrupting the class. Therefore, the School Board failed to establish that Presmy violated the offense of Responsibilities of the School Board Personnel and Staff.



27. Policy 3.12 Criminal Background Checks provides in pertinent part:

**Definitions:** For the purposes of this policy:

\* \* \*

b. "Conviction" means a determination of guilt that is the result of a plea or a trial regardless of whether adjudication is withheld.

\* \* \*

3. A prospective or current employee **may** be disqualified or may be terminated from continued employment if the prospective or current employee has been convicted of a crime classified as a felony or first degree misdemeanor directly related to the position of employment sought or convicted of a crime involving moral turpitude or any of the offenses enumerated in Chapter 435, Florida Statutes.

28. Presmy's battery conviction clearly falls within the definition of the policy. However, Florida law recognizes that a criminal conviction based on a plea of guilty is not legally sufficient to prove the facts on which the offense was based. Williams v. Castor, 613 So. 2d 97 (Fla 1st DCA 1993); State v. Dubose, 152 Fla. 304, 11 So. 2d 477 (1943). Therefore, the battery conviction in and of itself is not sufficient to justify termination of Presmy's employment.

29. And, although Presmy inappropriately touched a student who was disrupting his class, Policy 3.12 does not mandate that a current employee be terminated if the current employee has been convicted of a first degree misdemeanor. The policy provides discretion for the punishment with the word "may."

30. Florida Administrative Code Rule 6B-1.001 is entitled Code of Ethics of the Education Profession in Florida and provides in pertinent part:

(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.

\* \* \*

31. Florida Administrative Code Rule 6B-1.006 is entitled Principles of Professional Conduct for the Education Profession in Florida and 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.

(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.

32. There is no evidence that Presmy's physical contact with the student in any way impaired his effectiveness in the school system. Further, no evidence was provided that Presmy embarrassed or disparaged the student. Therefore, the greater weight of the evidence fails to establish Presmy violated either the Code of Ethics or Principle of Professional Conduct.

33. The School Board failed to establish the essential elements of the School Board's rules. The evidence adduced in support of the School Board's allegations fails to meet the exacting "clear and convincing" standard. Thus, Petitioner has failed to sustain all the aforementioned charges except Policy 3.12 as grounds for termination against Respondent in this case. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law regarding such offenses.

34. Presmy's act of inappropriate student touching, which lead to his conviction has to be looked at under The Collective Bargaining Agreement. It mandates that "Except in cases which clearly constitute a real and immediate danger to the Board or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations, progressive discipline shall be administered. . . ."

35. Applying such a standard in the instant case, Presmy has no prior disciplinary action in his six-year tenure with the

School Board. The undersigned has no doubt, Presmy should not have touched the student. However, his act was neither violent nor threatening. Thus, the record is void of evidence to demonstrate that Respondent posed a real or immediate danger to the Board.

36. Additionally, Presmy's reaction of pushing the child victim out of his doorway with his fingertips to stop the classroom disruption does not rise to the level of flagrant and purposeful. As a result, the discipline of termination is inappropriate under the progressive disciplinary policy of the Collective Bargaining Agreement. And, as noted earlier Policy 3.12 allows discretion regarding discipline for Presmy's conviction within the parameters of progressive discipline under The Collective Bargaining Agreement.

RECOMMENDATION

Upon consideration of the Findings of Fact and the Conclusions of Law reached, it is

RECOMMENDED that Palm Beach County School Board find Presmy had inappropriate physical contact with a student but apply the progressive disciplinary policy to determine his punishment.

DONE AND ENTERED this 11th day of August, 2008, in Tallahassee, Leon County, Florida.



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JUNE C. MCKINNEY  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of August, 2008.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, citations to the Florida Statutes refer to the 2007 Florida Statutes.

<sup>2/</sup> Presmy was the only witness with personal knowledge of the incident who testified at hearing. In lieu of firsthand evidence, the School Board offered mostly hearsay evidence, including the uncertified transcript from Detective Walton. Thus, Presmy's testimony is deemed to be more credible to the fact-finder.

<sup>3/</sup> The testimony of the back-up nurse that she provided ice to the student victim is rejected as competent evidence of injury. The School Board failed to make a time connection between the incident and the nurse providing ice. Moreover, no other evidence was provided to demonstrate such a proposition.

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.

