

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ORANGE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 08-1596
)
JAMES DESHAY,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on August 27 and 28, 2008, in Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian F. Moes, Esquire
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For Respondent: Tobe M. Lev, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated misconduct rules relating to educators and, if so, whether

discipline, up to and including dismissal, should be imposed by Petitioner.

PRELIMINARY STATEMENT

Respondent is a professional service contract teacher with the Orange County Public Schools ("OCPS"). On or about March 25, 2008, Petitioner filed an Administrative Complaint against Respondent alleging violations of an express work rule of OCPS and other enumerated offenses, including misconduct in office, willful neglect of duty, conduct unbecoming a public employee, and breach of employment agreement. Respondent denied the allegations and requested a formal administrative hearing before the Division of Administrative Hearings.

At the final hearing held on the dates specified above, Petitioner called seven witnesses: Eric Close, technology coordinator at Winter Park High School ("WPHS"); Susan Gluckman, technology representative at WPHS; Andrew Huffman, Systems Engineer III; Michael Byrne, assistant principal at WPHS; Demiki Joiner, assistant principal at WPHS; Gina Dole, senior manager of OCPS Employee Relations; and William Gordon, principal at WPHS. Petitioner offered the following exhibits which were received into evidence: 1, 3 through 5, 6a, 6b, 6c, 8a, 8b, 8c, 10 through 12, 17, and 19 through 22, and 24. Respondent presented the testimony of two witnesses: Betty Crawford, retired OCPS teacher; and Mary Woolridge, retired OCPS employee.

Respondent also offered the following exhibits which were received into evidence: 3, 4, 6 through 11, 15, 16, and 20. A single joint exhibit was also accepted into evidence.

At the close of the evidentiary portion of the final hearing, the parties requested and were allowed 20 days from the filing of the hearing transcript within which to file their respective proposed recommended orders. A three-volume hearing Transcript was filed on November 3, 2008. The parties then requested and were given until December 1, 2008, to file their post-hearing submissions. Both parties filed Proposed Recommended Orders containing proposed findings of fact and conclusions of law. The parties' proposals have been carefully considered during the preparation of this Recommended Order.

At the time its Proposed Recommended Order was filed, Respondent requested leave to file color graphs in conjunction with its written submission. Petitioner opposed the motion. Upon review of the motion, the response and the graphs, the undersigned determined that the motion would be granted to the extent the graphs are merely demonstrative of statements from the final hearing. To the extent the graphs indicate data outside the testimony and exhibits accepted at final hearing, they will be ignored and will not serve as a basis for any finding of fact herein.

FINDINGS OF FACT

1. Petitioner, Orange County School Board, is responsible for the operation of all public schools within the Orange County Public School system. Petitioner is responsible for hiring and monitoring qualified individuals who teach students within the OCPS system. Teachers may be either Professional Service Contract employees or employed under an annual contract. Professional service contract employees are entitled to all rights, privileges, and responsibilities set forth in the Contract Between [Petitioner] and The Orange County Classroom Teachers Association.

2. Respondent received his teaching certificate in the State of Florida in 1985 and has taught school in Orange County since that time. At all times material hereto, Respondent was employed as a Professional Service Contract employee with OCPS. Respondent transferred to WPHS at the beginning of the 2003-2004 school year. Prior to that time, Respondent had been a teacher at Jones High School, also within the OCPS system.

3. Jones High School is a predominantly African-American school which had received two consecutive "F" grades from the Department of Education due to student achievement (or lack thereof) on the Florida Comprehensive Assessment Test (FCAT). WPHS, on the other hand, was a predominantly white school which had not received "F" grades relating to the FCAT.¹

4. Respondent was transferred to WPHS to teach Algebra I, primarily to students who were struggling with Algebra. His students were, by and large, tenth graders who were taking Algebra I, which normally is a ninth grade class. Some of the students had previously failed Algebra; others were taking the class for the first time.

5. When Respondent was assessed by an assistant principal for school year 2004-2005, he received an "ER" grade in planning and delivering instruction. "ER" meant effective, but with recommendations. A comment to his assessment stated, "Mr. DeShay needs to work on motivating his students so they will want to perform to higher standards within his class."

6. The following year (2005-2006), Respondent received another "ER" grade in planning and delivering instructions. This time, the comment stated, "Mr. DeShay needs to plan his instructional time so that students are constantly engaged during the period. This will also assist in classroom management problems."

7. Because Respondent received two consecutive "ER" grades, he was placed on a Professional Improvement Plan (PIP) for the 2006-2007 school year. The PIP targeted three areas of competencies: classroom management and discipline; planning and delivery of instruction; and professional responsibility. The

PIP commenced on October 26, 2006, and was to run for a period of 90 school days, i.e., until April 19, 2007.

8. At the end of the PIP period, Respondent had not made improvements in the areas of "planning and delivery of instruction" and "classroom management and discipline." As a result, Respondent received a grade of "NI" on his final assessment. "NI" means the instructor needs improvement in order to meet expected standards. The PIP was then extended another 30 school days, commencing at the start of the 2007-2008 school year.

9. Respondent had never received an "NI" grade on an evaluation before the final assessment in April 2007. Respondent had never been disciplined during the course of his employment with the OCPS system prior to coming to WPHS. He had a reputation as an effective and respected teacher while at Jones High School and previously.

10. During the 2007-2008 school year, while Respondent was still under the extended PIP, Eric Close, a technology coordinator at WPHS, had occasion to log on to Respondent's school computer. Close was, at the request of another teacher, seeking to retrieve a copy of math software believed to exist on Respondent's H drive, located on the school network. While Close was retrieving the software, he noticed a Word document entitled, "Your Neighbor is Watching You." Upon a quick scan of

the Word document, Close ascertained that it contained potentially inappropriate material. Close reported his finding to his superior and to administration.

11. When administration reviewed the "Neighbor" story, it was determined to be objectionable and inappropriate due to its content. The story was about a somewhat benign voyeuristic encounter between neighbors, but was certainly not appropriate for high school students. It did, in fact, violate administration's interpretation of OCPS Management Directive A-9.

12. Management Directive A-9 is a work rule prohibiting employees from using school computers for certain specified activities or purposes. Pertinent portions of Management Directive A-9 state:

3. Employee Access to Network

* * *

d. District employee shall not conduct a private enterprise, defined as offering or providing goods or services for personal use on school time. District equipment or supplies, including technology, computers and other equipment . . . may not be used for private business . . . unless expressly authorized by the Superintendent . . .

e. The District authorizes employees to use District computer technology resources and data bases for assigned responsibilities. These resources shall be used by employees to enhance job productivity as it relates to District

business. These resources shall be used for District-related purposes and not for personal use or gain or for the benefit of private, "for profit" or "not for profit" organizations.

4. Network Security and Acceptable Use

a. Employees shall not use the Web or FTP to search or download obscene or inappropriate material from the Internet. Employees using District computers who discover they have connected with a web site that contains sexually explicit, racist, violent or other potentially offensive material must immediately disconnect from that site. The ability to connect with a specific web site does not in itself imply that permission is granted to visit that site.

* * *

6. Due Process

a. Any employee failing to comply with this Management Directive may be subject to disciplinary action as well as civil liability or criminal charges.

7. Searches and Seizures

a. Employees have limited privacy expectation in the contents of their personal files on the District Network. . . . At any time and without prior notice, the District reserves the right to examine electronic mail messages, files on personal computers, web browser cache files, web browser bookmarks, and other information stored on or passing through District computers.

b. Routine maintenance and monitoring of the Network may lead to discovery that a user has violated this Management Directive or the law. An individual search in

collaboration with the employee's supervisor or Employee Relations will be conducted if there is a reasonable suspicion that a user has violated the law or this Management Directive.

13. All employees are expected to be aware of and adhere to Management Directive A-9. Each time a user logs on to a District computer, a "pop-up" appears that includes a warning against improper use. The pop-up says in pertinent part:

NOTICE TO USERS

This is an Orange County Public Schools owned computer. It is for authorized use only. You are responsible for all access that occurs using your logon and password. . . Unauthorized or improper use of this system may result in disciplinary action as specified in Management Directive A-9 . . . as well as civil and/or criminal penalties. [Site to Management Directive A-9 is provided.]

14. The log-on pop-up appeared on Respondent's screen each time he logged on at school. Respondent was aware of Management Directive A-9, but doesn't know if he ever read the entire five-page directive in its entirety. He does, however, acknowledge that he is bound by the terms of that directive.

15. After Close found the seemingly incriminating document on Respondent's computer, Administration conducted a full review of Respondent's H drive and computer in its entirety. Numerous personal files were found which, in the view of school administration, violated Management Directive A-9. A partial list of the questioned files and documents follows:

- Stories entitled, "Your Neighbor is Watching You" and "Life Changes Quickly" (about a male business executive's sexual interest in his newly hired secretary), and "Luvystory."
- Security reports for a job where Respondent had worked part time.
- On-line business (money-making) opportunities.
- Information about an on-line business (www.Getestore.com).
- Shopping from internet retailers, including www.Amazon.com, www.Perfume.com, www.Walmart.com and others.
- Digital pictures of scantily clad women related to a proposed business venture by Respondent.
- A social networking site called www.blackmembervoices.com with Respondent's profile, photo and contact information.

- Numerous non-educational sites relating to funny videos, court TV, vacation sites, golf sites, etc.
- Personal correspondence written by Respondent.

16. It is clear Respondent used his school computer on many occasions to at least visit suspect web sites, engage in business and/or work on non-school-related documents. What is less clear is the extent to which those sites or documents were accessed during classroom periods.

17. Petitioner's technology personnel were able to identify all of the sites and documents existing on Respondent's computer. An exhaustive list of each site, including when each had been accessed, was provided at final hearing. The list clearly shows that Respondent accessed sites or opened questionable files during classroom periods, during Respondent's planning period, and before and after school. The technology people could not, however, ascertain how long each site or document remained on Respondent's screen once it was opened.

18. Respondent maintains that he only worked on documents for brief periods of time and perhaps only accessed them to transfer from a pen drive or diskette to his H drive without working on them at all. He says that he did not open any inappropriate documents in the presence of students. No

students, as far as he knows, ever accessed Respondent's computer.

19. It is clear that Respondent's school computer contained documents and materials that violated Management Directive A-9. It is clear those documents, materials and questionable web sites were accessed numerous times. It is not clear how much time Respondent spent on the documents, viewing the sites, or engaging in personal business on the computer.

20. "Willful neglect of duty" has been defined as a constant and continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority. See Fla. Admin. Code R. 6B-4.009(4). Respondent's continued use of his school computer for personal reasons, however brief each use might have been, constitutes willful neglect of duty under this definition.

21. By having objectionable and potentially harmful information and documents on his computer, Respondent breached his employment agreement. Respondent was not protecting students from conditions harmful to their learning. Although no students were known to actually see the material, its mere existence was in violation of Respondent's obligations. Further, by taking time out of his work day to engage in personal business and other interests, Respondent has subordinated his professional obligation to his students.

22. Respondent's explanations about his use of the computer bear some discussion. The explanations do not deny the existence of the materials or access to web sites, but seek to minimize the significance of the use (or misuse).

23. As for the short stories on the computer, Respondent says he was taking an on-line literature class and the stories were part of his assignments. He would submit stories and they would be evaluated by instructors. Respondent's intent was to receive some sort of certification of completion from the class and submit that to his employer (OCPS) as evidence that he was attempting to enhance his education. Respondent never finished the on-line course.²

24. As for use of the school computer, Respondent says (at page 444 of the hearing Transcript), "So anytime I'd use those things, I would--if I had some spare time, I'd pop it in and work on it, and I'd save it on my H drive." This testimony somewhat contradicts Respondent's claim that the documents were only accessed when he was downloading them from a pen drive.

25. The pictures of scantily clad women were explained by Respondent as merely advertisements that had been part of a web sites (Men's Health magazine) he had accessed during school hours. He did not download the pictures to his H drive.

26. Also appearing on the computer were some pictures described as "modeling photos." Respondent says those were

pictures he accessed from a modeling site with the intent of creating a DVD or PowerPoint presentation for use by the models in marketing themselves. Respondent says he did not know any of the models and that this proposed business never came to full fruition. Respondent says he worked on that project using his school computer, but during after-school hours.

27. Respondent says that although he had documents and information about his personal businesses on the school computer, he never used the computer to order supplies for his business. He admits ordering some Beanie Babies, but says those were ordered as gifts for people, not as replacement goods for his vending company business. Respondent did draft contracts on his school computer, but says he never used them in conjunction with his business.

28. The security logs on Respondent's computer were done for a friend. Respondent had worked as a part-time security guard at an apartment complex. When he could no longer do so because of the requirements of his teaching job, Respondent was able to turn the job over to a friend. That friend could not write well, so Respondent would do the friend's weekly logs for him on the computer.

29. In total, it is clear that Respondent did utilize his school computer for personal matters and that some of the personal matters were not appropriate for high school students

in his charge. The fact that no students saw the inappropriate material--as far as anyone knows--does not minimize the seriousness of Respondent's actions.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the parties and subject matter of this case pursuant to Sections 120.569 and 120.57, Florida Statutes (2008).

31. Petitioner has the burden of establishing the facts of the case by a preponderance of the evidence sufficient to warrant discipline against Respondent, up to and including dismissal. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

32. Section 1012.33, Florida Statutes (2007), which allows District School Boards to dismiss professional service contract teachers for just cause, provides 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.

33. Florida Administrative Code Rule 6B-4.009 addresses the various criteria for suspending or dismissing a teacher:

6B-4.009 Criteria for Suspension and Dismissal.

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for each of such charges is hereby defined:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

(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.

(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.

34. It is clear that Respondent used his school computer to view materials that were not intended to further the education of students. Further, Respondent's computer contained documents which had no relation whatsoever to Respondent's teaching duties and responsibilities. Some of the information stored on Respondent's school computer was inappropriate, whether or not such information was disseminated to students or other individuals.

35. Petitioner has met its burden of proof by establishing, by a preponderance of the evidence, that Respondent is guilty of misconduct in office. Further, that misconduct is in direct violation of an OCPS policy. However, the extent of that misconduct and its impact on Respondent's effectiveness as a teacher has not been sufficiently established to warrant dismissal.

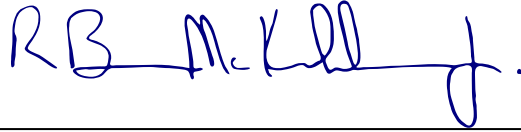
36. Nonetheless, Respondent's conduct does warrant sanctions and remedial education.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Orange County School Board finding Respondent guilty of misconduct in office and imposing the following sanctions: Uphold Respondent's suspension to date; reinstate Respondent's professional services contract commencing as soon as practicable; and require Respondent to complete remedial training concerning professionalism and use of school property.

DONE AND ENTERED this 19th day of December, 2008, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of December, 2008.

ENDNOTES

^{1/} Although both parties brought out the racial makeup of the schools in testimony, there was no plausible explanation as to why that fact was relevant to the instant case.

^{2/} The "Neighbor" story is replete with grammatical errors, misspellings, fractured sentences and disjointed paragraphs. It was, in essence, not indicative of writing done by a professional with Respondent's educational background. However, Respondent maintains that it was his work, and there is nothing to refute that testimony.

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.