

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 08-3986
)
 GWENDOLYN JOHNSON,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This case was heard, pursuant to notice, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, on December 2 and 3, 2008, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sonia E. Hill-Howard, Esquire
Palm Beach County School District
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Post Office Box 19239
West Palm Beach, Florida 33416-9239

For Respondent: Frederick W. Ford, Esquire
2801 PGA Boulevard, Suite 110
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STATEMENT OF THE ISSUE

The issue is whether Respondent should be suspended from employment for twenty days without pay for misconduct and unprofessional conduct in violation of School District Policies

1.013 and 1.014, Florida Administrative Code Rules 6B-1.001(3) and 6B-1.006(4)(b), (5)(a) and (5)(h), and School Board Bulletins #P-12542-CAO/COO-Count Day and Class Size Reduction Review, and #P-12519-CAO/COO-Florida Department of Education Student Enrollment Procedures.

PRELIMINARY STATEMENT

The Palm Beach County Superintendent of Schools received a recommendation, based on an internal administrative review, that Respondent should be terminated from employment. On July 17, 2008, the Superintendent notified Respondent that he was recommending that she be suspended without pay for twenty days. The notice informed Respondent that she could request a formal administrative hearing, and she timely made that request on July 24, 2008. Petitioner filed a petition to have the recommended penalty imposed and forwarded the case to the Division of Administrative Hearings. As requested by the parties, a formal hearing was scheduled by the assigned Administrative Law Judge, June C. McKinney, for December 2 and 3, 2008. The case was subsequently transferred to the undersigned.

Prior to the hearing, a Motion to Quash Subpoenas from both Petitioner and Respondent issued to a person, who also faced pending disciplinary proceedings based on the same facts and circumstances as Respondent, was granted. An alternative motion

to use that person's prior statements that were not subject to cross-examination also was denied. Counsel for Respondent moved to strike the allegation, made for the first time in Petitioner's section of the Pre-hearing Stipulation, that Respondent also violated Section 1003.23, Florida Statutes (2008). The motion was granted.

A formal hearing was held, as scheduled, on December 2 and 3, 2008. Petitioner presented the testimony of Gwendolyn Johnson, Angelette Green, Andrew Binns, Kimberly Desjarlais, David Shore, Angela Jones, Susan Miller, and Arthur C. Johnson. Petitioner's Exhibits 1, 2, 6, 8, 9, 11, 12, 13, 17, 30, 31, 36, 38, 45, 47, 48, 50-53, 57, 61-64, 66-68, 80, 92, and 100 were received into evidence.

Respondent presented, in addition to her own, the testimony of Marcia Andrews, Michelle Ertel, Marisol Ferrer, Jack Thompson, and Clarence Freeman. Respondent's Exhibits 1-11, 14, 16, 17, 18, 20, 24-29, 32, 33, 39, 43, 46, 47, 48, 50, 60, and 61 were received into evidence.

The four-volume transcript was filed on January 7, 2009. On January 27, 2009, Petitioner's Unopposed Motion for Extension of Time for Filing Proposed Recommended Orders (PROs) was granted, and accordingly, Petitioner and Respondent filed their PROs on February 13, 2009.

FINDINGS OF FACT

1. Petitioner, Palm Beach County School Board (the Board or Petitioner), operates, controls, and supervises all public schools within the Palm Beach County School District (the District), as authorized by Subsection 1001.32(2), Florida Statutes (2008).

2. The District School Superintendent, Dr. Arthur C. Johnson (Superintendent Johnson) is responsible for the administration, management, and supervision of instruction in the District, as provided in Subsection 1001.32(3), Florida Statutes (2008).

3. Respondent, Dr. Gwendolyn Johnson (Dr. Johnson or Respondent) was the principal at Independence Middle School (Independence) during the 2007 to 2008 school year. In her thirty-five years with the District, Dr. Johnson was a principal for eight years, an assistant principal for eleven and a half years, a guidance counselor for approximately nine years, and, before that, an elementary and high school occupational specialist.

4. At Independence, Respondent's assistant principals were Kathleen Carden, Martest Sheffield, and Scott Duhy. Although the projected enrollment was 1174, not the minimum number of 1201 required to justify having a third assistant principal, Dr. Johnson requested and, on May 15, 2007, received approval to

keep the third assistant principal, Mr. Duhy, subject to reaching or exceeding the required enrollment by the time the count of students was taken on or about the eleventh day of school in the fall. The increase over the projection was possible because Independence was the 2007 receiving school for students whose parents transferred them from D- or F-rated schools under No Child Left Behind Act. For the 2007-2008 school year, Dr. Johnson assigned primary responsibility for maintaining a count of the student population to another one of the assistant principals, Dr. Carden.

5. In addition to determining the number of assistant principals, the enrollment count is used by the District to determine other staffing, including the number of teachers, and guidance counselors assigned to each school.

6. Attendance at Independence was reported by teachers each school day on bubbled attendance sheets. The sheets were scanned each day and the data stored in a computer program called the Total Education or Resource Management System (TERMS). The sheets were returned to the teachers who used them to record attendance for a two-week period before signing and submitting them, and receiving new computer-generated biweekly attendance scan sheets.

7. On August 23, 2007, the District notified all principals, including Dr. Johnson, by memorandum (Bulletin # P-

12519-CAO/COO/FO/FTE), that any student who had never attended any period since the first day of school must have a withdrawn code entered into the TERMS program by August 27, 2007.

Dr. Johnson e-mailed the Bulletin to her administrative staff and convened a meeting of that group to review it. Her secretary also e-mailed a reminder of the requirements to the staff on August 27, 2007.

8. Teachers reported students who never attended school from the beginning of the year, the so-called "no-shows," by making handwritten notes or by drawing lines through the student's name on the attendance sheets, expecting those names to be removed from their rosters. Students who never showed up were not bubbled absent on the attendance sheets. A student aide in the student services office scanned the sheets, so the school's data processor, Angela Jones, did not see the teacher's notes and make changes in the computer.

9. Once teachers kept getting biweekly attendance sheets with the names of no-shows and transfers on them, they started e-mailing or otherwise notifying Ms. Jones who began to keep a running list of no shows and transfers. Ms. Jones was not allowed to enter the withdrawal code in TERMS until authorized to do so by either Dr. Johnson or Dr. Carden, as shown by their e-mails. Rather than following the instructions in Bulletin # P-12519 to withdraw all no-shows by August 27, 2007, no-shows

were treated like transfers and were not withdrawn until the student's new school requested their records.

10. Dr. Johnson's claim that she was not aware that procedures outlined in the District's Bulletin of August 23, 2007, were not being followed by Ms. Jones and Dr. Carden, is not credible. She was present at the meetings in her office and her conference room, well after the August deadline, during which Ms. Jones continued to receive instructions to wait for approval to make withdrawals.

11. On August 31, 2007, the District notified all principals, including Dr. Johnson, by memorandum (Bulletin # P-12542-CAO/COO) that the District's enrollment count day was September 7, 2007, and that the count would be taken from TERMS. Dr. Johnson sent an e-mail to all teachers to count students, as directed in the Bulletin of August 23, by only including students who had been in attendance at least one period since school began on August 22, thereby excluding no-shows from the count. Prior to 2007, this would have been the enrollment number that the school faxed or e-mailed to the District. For the first time in 2007, the number used by the District was the number taken from TERMS summary enrollment screen that included no-shows at Independence. The District also relied on that data for its Full Time Equivalent (FTE) survey and report to the

State Department of Education (DOE). The FTE count is used to determine per pupil funding by the State.

12. The actual number of students at Independence on September 7, 2007, was 1188 but the number taken from the TERMS database and reported was 1214, a twenty-six student discrepancy that was later, after an audit, reduced to twenty-four. In October 2007, Dr. Johnson falsely verified the accuracy of the FTE survey that was, subsequent to the audit, determined to be an over-count of 23 students.

13. Dr. Johnson testified that she verified the accuracy of the count relying on the work of Dr. Carden, Ms. Jones, Exceptional Student Education Coordinator Carol Lee, and ESOL Coordinator Ann Costillo. She denied attempting to fraudulently inflate the number to gain or maintain resources allocated by the District, but she knew there was a difference in the numbers based on a September report from Dr. Carden. She also knew that, if the teachers followed her instructions regarding how to count students, the "actual" number of 1214 from TERMS, written in by Dr. Carden, had to be incorrect.

14. TERMS data also was uploaded to another program called Grade-Quick. When it was time to give grades at the end of nine weeks, Ms. Jones no longer had the ability to alter the rosters and teachers were required to give a grade to each student on their roster.

15. David Shore was the Grade-Quick technical support person at Independence. At the suggestion of Dr. Johnson, he sought advice from the District's technical support person, Bruce Roland, who told him to have teachers give each no-show student a grade of "F" to avoid an error code. The uploaded grades for students who did not attend Independence, according to Mr. Roland, would be deleted from the District's mainframe.

16. Fearing other consequences of giving "Fs," including the possibility of generating letters to parents whose children did not attend Independence, and doubting Mr. Shore's advice because he was relatively new in his position, some teachers refused to give "Fs" to no-shows.

17. After discussions with Dr. Johnson, Mr. Shore instructed teachers to give a grade of "C" instead and to be sure also to give a conduct grade. One teacher apparently found a way to give a conduct grade, but no letter grade, to students who were not enrolled in her class and to somehow avoid a computer error code.

18. Some time during the fall semester, anonymous complaints concerning the enrollment at Independence were made to the State Auditor General's Office, who referred the matter to an auditor in the District's office.

19. In December 2007, the audit confirmed that the count at Independence was incorrect largely because no-shows and

withdrawals were not withdrawn timely from the computer in TERMS before the District's initial count on August 27, 2007; before the District's eleven-day count on September 7, 2007; nor before Dr. Johnson twice verified the accuracy of the FTE count in October 2007.

20. Dr. Johnson made no effort to make corrections, after she admittedly was aware of the errors in October, November, and December. Dr. Johnson blamed teachers who were unprofessional, racist, and disgruntled over her more strict adherence to the attendance rules for teacher planning and professional development days, and over proposed spending of A-plus money. She testified that they deliberately failed to bubble no-shows as absentees. That assertion contradicts the testimony of her witness that the proper procedure was followed by teachers who drew lines through the names of no-shows rather than bubbling them as absent. It also contradicts the instructions she gave in a memorandum to teachers, on October 5, 2007, telling them to write codes next to students' names on their rosters, NS for no-show, WD for withdrawn - If a student was present at least one day..., T for transfer, and A for add. Her memorandum instructs teachers to give the information to Ms. Jones on October 11, 2007. Ms. Jones said she did look at rosters for FTE reporting and she did make corrections. She too says her count was accurate at the time unless teachers withheld information. The

teachers' rosters were maintained and, from a review of the class rosters, the auditor concluded that the error was made in not correcting TERMS to comply with teachers' reports.

21. Dr. Johnson also blamed her supervisor, Marisol Ferrer, for sending a less experienced manager, Joe Patton, to attend a meeting, on October 11, 2007, with her of the Employee Building Council, a group that included some teachers who were antagonistic towards Dr. Johnson. It is true that only later did Mr. Patton recall that, after the meeting and after Dr. Johnson left, some of teachers told him there were problems with the student count at Independence. At the time, however, Mr. Patton did not tell Ms. Ferrer or Dr. Johnson about the comments. Dr. Johnson testified that, had she been told after that meeting on October 11th about the problems, she could have corrected the numbers before she submitted her verification of accuracy. She did know that Dr. Carden showed her two sets of numbers on September 7, 2007. Although she testified that she believed the fluctuations were normal because students come and go during the day for doctor's appointments or for other reasons, Dr. Johnson took no further steps to determine if that was in fact the cause of the discrepancy.

22. After Dr. Johnson and Dr. Carden instructed Ms. Jones to begin making withdrawals after the October FTE report, some of the withdrawals were backdated showing the no-show students'

withdrawal dates as the first day of school, August 22, 2007. The District submitted corrections to DOE before the deadline for incurring penalties, ultimately reducing the FTE count at Independence by 23 students.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case, pursuant to Sections 120.569 and 120.57, Florida Statutes (2008).

24. Respondent's assertion that Petitioner has stipulated that it has the burden of proof by clear and convincing evidence, based on the Notice of Twenty (20) Day Suspension that states "[t]he recommendation is based on clear and convincing evidence," is rejected as not binding in this proceeding. Respondent also relies on the decision in, among other cases involving the imposition of penalties, McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995), involving the suspension of a school administrator's teaching certificate. The court held that:

The proceeding before the Commission, which involved the potential revocation of McKinney's license, was penal in nature. The Commission was required to prove the charges by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

Id. at 388.

25. Petitioner relies, among others, on the decision in Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 2d DCA 1990), in which the court distinguished between revocation and termination, as follows:

It is settled in Florida jurisprudence that the standard of proof required in teacher license revocation cases is clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Although not as clearly settled in Florida, there is considerable authority elsewhere, as well as implicit state case law authority, that the lesser standard of preponderance of the evidence is applied in teacher dismissal cases. In Ferris v. Austin, 487 So. 2d 1163 (Fla. 5th DCA 1986), the court held that there was competent and substantial evidence to support the findings contained in the hearing officer's recommended order, stating: Nowhere did the hearing officer conclude that the standard of evidence for dismissal of a teacher was anything other than that of preponderance of the evidence. It is apparent from reading the recommended order that the hearing officer concluded that the evidence, pursuant to any standard, supported Ferris and not the School Board. Id. at 1167. It may be inferred from the above language that the hearing officer's findings would have been upheld by the appellate court by a preponderance of the evidence standard.

Id. at 884.

26. Based on the fact that Respondent could have been terminated, as originally recommended, by the lesser standard, but was not at risk of losing her license, it follows that Petitioner has the burden of establishing by the preponderance

of the evidence that Dr. Johnson has violated the policies and rules, as charged in the Petition, and that her actions warrant her suspension without pay for twenty days.

27. Respondent is charged with misconduct and unprofessional conduct for violating School District Policies 1.013 and 1.014, Florida Administrative Code Rules 6B-1.001(3) and 6B-1.006(4)(b), (5)(a), and (5)(h), and School Board Bulletins #P-12542-CAO/COO-Count Day and Class Size Reduction Review, and #P-12519-CAO/COO-Florida Department of Education Student Enrollment Procedures.

28. Section 1012.22(1)(f), Florida Statutes (2008), provides that a school board has the power to suspend and dismiss employees as follows:

Suspension and dismissal and return to annual status.--Suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed or returned to annual contract except as provided in this chapter.

29. It is presumed that, at the times relevant to this proceeding, Respondent was employed under a professional services contract. Subsection 1012.33(4)(c), Florida Statutes (2008), provides in pertinent part:

(c) Any member of the district administrative or supervisory staff and any

member of the instructional staff, including any school principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him or her must be based on immorality, misconduct in office ...

30. Florida Administrative Code Rule 6B-4.009(3) provides the following definition:

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.

31. Respondent was charged with violating Florida Administration Code Rule 6B-1.001(3) of the Code of Ethics of the Education Profession in Florida, by specifically not being

(a)ware 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.

32. The evidence does not support a conclusion that Respondent was not aware of the importance of trying to maintain the respect and confidence of her colleagues. In fact, it appears that she sought support in trying to control and diffuse the behavior of disgruntled teachers.

33. Respondent was charged with violating Florida Administrative Code Rule 6B-1.006(4)(b), (5)(a), and (5)(h), as follows:

(4) Obligation to the public requires that the individual:

* * *

(b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

* * *

(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.

34. By demonstrating that Respondent contradicted or allowed her staff not to comply with directions to enter withdrawal codes as required by Bulletin P-12519-CAO/COO/FO/FTE, the Petitioner demonstrated by a preponderance of the evidence that Respondent violated the Florida Administrative Code Rule 6B-1.006(4)(b).

35. By establishing that Respondent failed to adequately supervise and resolve discrepancies before the count day established in Bulletin #P-12542-CAO/COO, Petitioner proved by a

preponderance of the evidence that Respondent violated Florida Administrative Code Rule 6B-1.006(5)(h).

36. School District Policy 6Gx50-1.013 describes the responsibilities of school district personnel and staff, as follows:

It shall be the responsibility of the personnel employed by the district 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.

37. School Board Policy 6GX50-1.014 describes the responsibilities of principals, as follows:

1. The principals' responsibilities and duties are as stated in the appropriate federal laws and rules, Florida statutes, state board of education rules, and school board policies, and as delegated herein. The principal shall be the administrative and supervisory instructional leaders of the school, and shall be responsible for the policies of the school board as directed by the superintendent.

2. The principal shall assume responsibility for the leadership of the school staff by providing guidance and assistance in the implementation of the district's curriculum. The management of the school plant and of the financial affairs of the school shall be among the prime responsibilities of the principal.

3. The duties of all personnel at a school center shall be prescribed by the principal

4. Pursuant to § 231.085, F.S., the duties of principals may be assigned by the superintendent and shall include, but not limited to:

a. Administrative responsibility, instructional leadership in implementing the Sunshine State Standards and the overall educational program of the school to which the principal is assigned, submission of personnel recommendations to the superintendent, administrative responsibility for records and reports, and administration of student suspension.

5. Principals shall serve on the school's advisory council as provided by § 229.58, F.S.

38. By proving that Respondent violated the some of the Rules and policies, as charged, Petitioner has proved that she committed misconduct in office, as that is defined in Florida Administrative Code Rule 6B-4.009(3).

39. Petitioner also has the burden to prove that her misconduct was "...so severe as to impair [her] effectiveness in the school system." As established in Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000), impaired effectiveness can be inferred when conduct is sufficiently serious, when a teacher failed to follow School Board policy and lost control of the students in his classroom. See also Castor v. Gilbert, DOAH Case No. 93-0346, 1993 Fla. Div. Adm. Hear. LEXIS 5551 (R.O. 11/16/93; F.O. 2/3/94) in which a teaching certificate was suspended for three years, followed by a two-

year period of probation for submitting false attendance records.


40. Respondent's loss of effectiveness is reflected in the teachers' efforts to report her misconduct to the District, their refusal to accept her suggestion that students who were not enrolled at Independence should be given "Fs" for grades, and their efforts, apparently successful in at least one instance, to avoid giving any grade to withdrawn and no-show students. Respondent effectively lost her leadership role in the school system.

41. Considering her long, previously unblemished career as an educator, and her standing in the community, the proposed suspension of Respondent for twenty days without pay is reasonable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is RECOMMENDED that the School Board of Palm Beach County, Florida, enter a final order suspending Respondent for twenty days without pay.

DONE AND ENTERED this 16th day of April, 2009, in
Tallahassee, Leon County, Florida.


ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of April, 2009.

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.