

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 08-4819
)
MICHAEL ALTEE,)
)
 Respondent.)

)

RECOMMENDED ORDER

On February 10-11, 2009, a duly-noticed hearing was held in Jacksonville, Florida, before Lisa Shearer Nelson, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David J. D'Agata, Esquire
Office of the General Counsel
City Hall, St. James Building
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

For Respondent: Thomas A. Delegal, III, Esquire
Wendy E. Byndloss, Esquire
424 East Monroe Street
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue to be determined is whether grounds exist for terminating Respondent's employment as a teacher in the Duval County School System.

PRELIMINARY STATEMENT

This case originated when on May 17, 2007, the Duval County Superintendent of Schools provided to Respondent a Notice of Termination of Employment Contract and Immediate Suspension Without Pay. The Notice alleged that the Duval County School Board's (School Board's) Professional Practices Commission, Office of Professional Standards, had on five occasions investigated Respondent's conduct and had, as a result of the most recent allegations against him, imposed Step IV of Progressive Discipline, i.e., termination. Respondent timely requested a hearing pursuant to Section 120.57(1), Florida Statutes, and the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge. On June 20, 2007, the case was docketed as DOAH Case No. 07-2758 and assigned to the undersigned. A Notice of Hearing issued, scheduling a hearing August 22-23, 2007.

On August 10, 2007, the School Board filed an Unopposed Motion for Leave to File an Amended Notice of Termination of Employment Contract and Immediate Suspension, which was granted by Order dated August 15, 2007. The Amended Notice of Termination of Employment Contract and Immediate Suspension Without Pay added an allegation for teaching out-of-field without providing documentation of completion of teaching out-of-field credit. At the request of both parties, the matter was

continued and rescheduled for September 19-20, 2007. However, on September 18, 2007, the School Board filed a Notice of Voluntary Dismissal Without Prejudice and that same day an Order Closing File issued.

On September 18, 2007, another Notice of Termination of Employment Contract and Immediate Suspension Without Pay was issued by the School Board, and Respondent timely filed a request for hearing. The School Board referred the case to DOAH, where it was docketed as Case No. 07-4754 and assigned to Administrative Law Judge Don Davis.

The case was noticed for hearing December 5-6, 2007. On November 15, 2007, the School Board moved for Final Summary Judgment, and Respondent timely responded in opposition. On November 27, 2007, Judge Davis issued an Order Closing File which addressed the Motion for Final Summary Judgment. In that Order, Judge Davis held, in pertinent part, that Mr. Altee was not a qualified instructional person for whom relief could be afforded in this proceeding.

Ultimately, Respondent filed a Petition for Review of Non-Final Agency Action in the First District Court of Appeal, and the matter was docketed as DCA Case No. 1D07-6534. On August 12, 2008, the First District issued an opinion in which it held that the Order Closing File departed from the essential requirements of law in three respects: 1) if treated as a

Motion to Dismiss, as stated by the administrative law judge, the Motion giving rise to the Order was not timely filed as it was filed more than 20 days after service of the petition; 2) if treated as a Motion to Dismiss, the administrative law judge erred in looking beyond the four corners of the petition; and 3) the Board's Motion raised a disputed factual issue as to the appropriate penalty or remedy for a tenured teacher who failed to obtain educational credit to teach out-of-field. The Court stated, "At the very least, due process requires the ALJ to hold a hearing to afford the parties an opportunity to present evidence on these disputed material facts." The Court granted the petition for review, quashed the Order Closing File and remanded with instructions that the parties be afforded an opportunity to present evidence on the disputed material facts. The Court's mandate issued October 8, 2008.

On September 17, 2008, the School Board issued another Notice of Termination of Employment Contract and Immediate Suspension Without Pay. This Notice alleged the progressive discipline alleged in prior versions of the Notice, with substantially more factual information. It omitted the charge discussed by the First District Court of Appeal. The School Board forwarded the case to the Division on September 26, 2008, indicating that Respondent again requested a hearing and that

the School Board intended to proceed on the original violations and not pursue the out-of-field teaching certification issue.

Due to the retirement of Judge Davis in the interim, the case was assigned to the undersigned and noticed for hearing December 18-19, 2009. A separate proceeding involving the same factual basis was filed with the Division by the Education Practices Commission (Case No. 08-4969), and the cases were consolidated for hearing by Order dated October 24, 2008.

At this point in the proceedings, Respondent invoked his Fifth Amendment right against self-incrimination, and sought a protective order to avoid having his deposition taken. Respondent's Motion for Protective Order was denied by Order dated November 26, 2008. A Second Motion for Protective Order and Motion to Quash Subpoena was filed, which was considered at a telephonic motion hearing December 8, 2008, along with motions to hold the hearing in person, as opposed to by means of teleconferencing, and for a continuance.

As a result of the motion hearing, several things transpired. The motion to have the hearing conducted in person was granted, as was the request for continuance. The hearing was rescheduled for February 10-11, 2009. The request for protective order was denied. The parties were directed that each petitioner could ask questions of Respondent at his deposition, and as long as there was the threat of licensure

proceedings or a reasonable basis to believe that Respondent's answers could subject him to criminal liability, he could invoke the Fifth Amendment on a question-by question basis. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1974); Patchett v. Commission on Ethics, 626 So. 2d 319 (Fla. 1st DCA 1993).

On December 18, 2008, the Fifth Amendment issue was considered for the third time. The parties were assembled to take the previously noticed deposition of Respondent. At that time, counsel for the Commissioner of Education indicated that he intended to file a Notice of Voluntary Dismissal with respect to Case No. 08-4969. Given that event, parties sought clarification as to the applicability of the Fifth Amendment Privilege should there be no threat of licensure action based upon the same facts. The undersigned repeated her view of the scope of the Fifth Amendment protection in this arena, i.e., that the privilege may be invoked as long as there is the threat of action against Respondent's license or threat of criminal prosecution. At the hearing and by Order dated December 19, 2008, Respondent's Motion for Continuance of the Deposition, or alternatively a third Motion for Protective Order, was denied; Petitioner's request to extend the time for completion of the deposition beyond the date previously noticed was denied; and

the parties were reminded that the case remained scheduled for hearing February 10-11, 2009.

The Commissioner of Education did in fact file a Notice of Voluntary Dismissal with Prejudice on December 18, 2008, and on that same day an Order issued severing Case No. 08-4949 from Case No. 08-4819 and closing the file of the Division with respect to Case No. 08-4969.

Prior to hearing, the parties submitted a Prehearing Stipulation that included factual stipulations that, where relevant, have been incorporated into the Findings of Fact. At hearing, Respondent stipulated that the discipline alleged in the September 17, 2008, Notice of Termination as "Prior Misconduct and Disciplinary Actions" had been imposed and that Respondent was not challenging the basis for the prior discipline.

At hearing, Petitioner presented the testimony of eight witnesses and Petitioner's Exhibits 1-9, 18, 26, 32-34, 38, 41-42 were admitted into evidence. Respondent offered the testimony of two witnesses and Respondent's Exhibits 1-9, and 14-17 were admitted. Respondent's Exhibit 12, the deposition of John Holochek, was marked for identification, but ruling on its admissibility was deferred. The deposition is now admitted.

The proceedings were recorded and the Transcript was filed with the Division on February 25, 2009. The parties timely

filed Proposed Recommended Orders which have been carefully considered in the preparation of this Recommended Order.

Petitioner also filed, and the Respondent filed a response to, a Motion for Assessment of Costs. The Motion is denied.

FINDINGS OF FACT

Stipulated Facts

1. Respondent, Michael Altee, is a teacher covered under the Duval County Teacher Tenure Act, Laws of Florida, Chapter 21147 (1941), as amended (Tenure Act), and the Collective Bargaining Agreement between Duval Teachers United and the Duval County School Board for 2006-2009.

2. Mr. Altee is a tenured or experienced contract teacher who can only be terminated for "cause" as defined in the Tenure Act and the collective bargaining agreement.

3. During the spring semester, 2007, Respondent taught history and intensive reading at Frank H. Peterson Academies of Technology (Peterson Academy).

4. On April 11, 2007, the Peterson Academy was placed on "lockdown" status based on an incident whereby someone brought a gun to school. On that day, Michael Altee was absent from school.

5. During his teaching career with the Duval County School system, Mr. Altee received satisfactory evaluations.

6. Respondent did not dispute that he had been the subject of disciplinary action by the School Board in the past and did not challenge the basis for the past disciplinary actions alleged in the September 17, 2008, Notice of Termination. (Transcript at 58-60). Accordingly, the allegations in the Notice regarding past conduct are accepted as fact:

A. Inappropriate Language, Comments to Students, Sandalwood High School, SY 2000-2001

During the 2000-2001 school year, an investigation by DCSB's Affirmative Action Office confirmed that you routinely made crude and inappropriate comments which were offensive to students under your care. For instance, you commented that a female student "could not afford to let her (buttocks) get any bigger," and asked her "why don't you bend me over and spank me." You also stated that the brother of a certain female student "had the brains" and she "had the beauty," and you announced to your class that they were all "losers" and that you were "sick and tired" of them. While you initially denied the comment on a female student's buttocks, you later rescinded the denial and admitted to saying things in class that your students "may misconstrue." The foregoing misconduct result in an April 9, 2001 Reprimand Letter from DCSB's Professional Standards Office, which you signed.

Further, the Commissioner of Education for the State of Florida filed an Administrative Complaint against you on May 7, 2003, before the Education Practices Commission ("EPC") based on the foregoing misconduct. That proceeding concluded with a February 4, 2004, Final Order by EPC adopting the terms

and conditions of an October 7, 2003 Settlement Agreement which included:

1. placing you on probation (i.e., your license to teach in Florida) from February 4, 2004 through February 4, 2006:
2. your agreement to (i) "violate no law and fully comply with all district school board regulations, school rules, and State Board of Education Rule 6B-1.006;" and (ii) satisfactorily perform (your) assigned duties in a competent, professional manner";
3. your agreement to "satisfactorily perform (your) assigned duties in a competent, professional manner"; and
4. the issuance of a January 23, 2004, Letter of Reprimand by the EPC.

B. R-rated Movie (Fahrenheit 911), Sandalwood High School, SY 2004-2005

During the 2004-2005 school year, you played an R-rated movie to your students without written parental permission in violation of DCSB policies, despite your receipt of such policies just days earlier. This violation of DCSB policies resulted in an October 18, 2004, Reprimand Letter from Principal Bill Gesdorf, which you signed and accepted the disciplinary action.

C. Threats to Students, Staff, Sandalwood High School, SY 2004-2005

During the 2004-2005 school year, you acted in an unreasonable and aggressive manner toward students. For instance, as a disruptive student was escorted out of your class and led down a hallway by a school

guard whom you summoned, you came within close physical proximity to and circled the student in a taunting and provocative manner while calling the student names such as "punk," and telling the student that you were "his worst nightmare." On a separate occasion, you behaved in a similarly aggressive and hostile manner toward a school security guard in the presence of students and staff. You provoked and shouted at the security guard and appeared to invite a physical altercation with him. Your conduct toward students and school personnel resulted in a June 5, 2005, Letter of Reprimand from DCSB's Professional Standards Office (which you signed and accepted) and a suspension of your employment without pay for ten working days.

Additional Findings of Fact

7. The School Board is charged with the responsibility to operate, control and supervise all free public schools within the School District of Duval County, Florida, pursuant to Section 1001.31, Florida Statutes.

8. Respondent is a tenured teacher with the School District. Pursuant to his teaching contract with the School Board, and consistent with his teaching certificate issued by the State of Florida Department of Education, Respondent is subject to the School Board's rules and regulations, as well as all applicable Florida laws and rules regulating teaching in public schools.

9. Teachers employed by the School Board are bound by a progressive discipline policy, which requires that discipline

generally be imposed with increasingly severe penalties: first, a verbal reprimand; second, a written reprimand; third, a suspension without pay; and fourth, termination of employment. The policy may be disregarded only for severe acts of misconduct.

10. The allegations against Respondent concerning the 2006-2007 school year allege actions taken by Respondent with respect to his first-period intensive reading class at Peterson Academy in the second semester of the year. At the time these events occurred, step three discipline, i.e., an unpaid suspension, had been imposed against Respondent for previous conduct at a different school.

11. During the 2006-2007 school year, Respondent was certified to teach history, but was also assigned to teach intensive reading to freshmen at Peterson Academy. By his own description, this assignment was "against his will."

12. Intensive reading is a class designed for those students who have not achieved an acceptable grade on the reading portion of the Florida Comprehensive Assessment Test, generally referred to as the FCAT.

13. Although Respondent generally teaches history, he was assigned to teach intensive reading for this particular school year.

14. Several of the students in Mr. Altee's class had other teachers in the fall semester, and were transferred to Mr. Altee's class in the spring. The format of the intensive reading classes was generally the same. Each student was expected to read for approximately 15 minutes at the beginning of the class period. The teacher would then read aloud to the students for approximately the same length of time, and then the students would work out of resource books (or workbooks). Generally, the written assignments would be related to whatever was read in class.

15. There is no accepted "list" of approved reading material for teachers to use in the intensive reading class. Materials were provided, but not required to be used. Teachers are expected to use good judgment and select reading material that is age and content appropriate for the students in the class being taught. In the intensive reading classes students took prior to Mr. Altee's class, teachers generally read poems or fictional short stories.

16. Mr. Altee, however, felt that the materials provided were boring and elected to read different materials to the students in his class. He admitted not knowing what reading material would really be appropriate for a freshman intensive reading class. Included in the materials that he read were "true crime" stories, including a story read over at least two

days about the serial killer, Ted Bundy. In conjunction with his reading, he passed around pictures for the students to observe.

17. The students testified that pictures shown in class included post-execution pictures of Ted Bundy, autopsy pictures of unidentified people, and pictures of Seung Hui Cho (Cho), the person responsible for the Virginia Tech University killings. Mr. Altee, on the other hand, testified that he only showed Bundy's mug shot, a picture of him approaching the courthouse and a picture of Bundy defending himself.

18. The readings and pictures had no discussion or written work associated with them. No teaching point was made in connection with these stories or pictures.

19. On or about April 20, 2007, student J.H. and his mother complained to John Holocek, the Peterson Academy principal, that Mr. Altee was showing inappropriate pictures in the freshman intensive reading class, and that Mr. Altee had made a statement about bringing a gun to school.

20. J.H. was in Mr. Altee's class for the second semester of the school year. J.H. and Mr. Altee did not always see eye-to-eye, and J.H. received several referrals for bad behavior from Mr. Altee. While there was significant testimony from several students that the referrals were not always warranted, at least some portion of the referrals were legitimately issued.

21. Mr. Holocek contacted the Office of Professional Standards regarding the complaint. John Williams, the Director of the Office of Professional Standards, and Leroy Starling, the Office's investigator, went to the Peterson Academy and interviewed J.H. and his mother. The School Board's Office of Professional Standards initiated an investigation, which began on or about April 20, 2007. The investigation was handled primarily by Leroy Starling, an investigator with sixteen years experience with the School Board and 25 years of experience as a homicide investigator. John Williams was also present during the interviews taken in the investigation.

22. According to the report prepared for the investigation, J.H. reported that Respondent began his intensive reading class with photos and stories focusing on crime and violence, and showed pictures of Ted Bundy both before his execution and post mortem, as well as pictures of President John F. Kennedy when he was assassinated and at the time of his autopsy.

23. J.H. also reported that Respondent had made a comment about bringing a gun to school.

24. The investigation occurred at a time immediately following two significant incidents. On April 11, 2007, as referenced in finding of fact four, Peterson Academy was on "lock-down" because a student brought a gun to school.

On April 16, 2007, Virginia Tech University was the subject of what has been described as the deadliest shooting rampage in American history, where approximately 33 students and faculty were killed and several more injured by a lone gunman, Seung-Hui Cho, who then took his own life. These two events were five days apart.

25. After speaking with J.H. and his mother, Respondent was interviewed. Present at his interview were Holocek, Starling, Williams, and Richard Miller, a teachers' union representative. Respondent first denied making any statement about guns on campus. He ultimately retreated from that position, stating instead that he made a sarcastic comment in response to a comment by a student, and that his words were "twisted" by the student.

26. Respondent told investigators that J.H. was lashing out because he wrote J.H. a disciplinary referral the day before and the rest of the students were lying.

27. After speaking with Respondent, Principal Holocek chose several students from the intensive reading class to interview. At Respondent's request, student K.H. was also interviewed. Respondent's union representative, as well as Starling and Williams, were present for the student interviews.

28. At the first interview of the students, they were asked two questions: 1) whether they had been shown photographs

by Mr. Altee; and 2) did they ever hear any statements made by Mr. Altee concerning a gun. Based upon the students' answers, Mr. Starling recovered the computer from Mr. Altee's classroom and turned it over to James Culbert, the School Board's forensic computer analyst, to view the computer and determine whether any images like those described by the students had been downloaded on the computer. Mr. Altee's District-issued laptop computer was also retrieved.

29. Mr. Culbert searched for images using the search terms "JFK" and "autopsy" in the computer hard drive's temporary internet files that had been accessed using Respondent's log-in. Mr. Culbert was able to identify the last time a particular picture or website was accessed, but could not identify the first time photos were viewed.

30. The investigators printed a twenty-one page internet activity report entitled "Pictures Accessed by Alteem" (Respondent's computer user name) which showed approximately forty thumbnail images retrieved from Respondent's computer hard drive. The students previously interviewed were then recalled individually to look at the pictures and identify which, if any, were shown to them by Mr. Altee. This packet was introduced at hearing as Petitioner's Exhibit 6.

31. The students were asked by the investigator to write their names next to the pictures they remembered seeing. Those

students interviewed later in the process could see the signatures of the students who had come before them. However, the more credible evidence is that the students were generally not affected by the signatures of students who signed before them. They only signed those pictures they remembered seeing in class.

32. The pictures shown to the students included several pictures of John F. Kennedy as well as others on an autopsy table, with some pictures including open cranial wounds; pictures of Cho; some movie ads; other physical wounds; someone "shooting up" with a needle; and pictures from the JFK assassination. Some were difficult to make out and many appeared to be similar views of JFK during his autopsy. Some pictures were identified by several students; some by a few; and some not at all.

33. N.M. identified pictures 1, 6, 10, and 29. Three of these pictures were of Cho, one was of John F. Kennedy post-mortem. At hearing, she recalled discussions of Bundy, autopsies, and Cho and Respondent's comment about of a gun. She recalled that the gun comment was in connection with the Cho shootings, although her identification of the timing of the comment was not possible.

34. J.T. identified pictures 2, 10, 29 and 36. Two were of Cho, and two were of JFK post-mortem. J.T. did not testify.

35. A.J. identified pictures 2, 6, 10 and 29. A.J. testified that she recalled Mr. Altee reading about Bundy, and talking about Cho and autopsies or executions, but did not recall whether Mr. Altee read any stories about JFK. She did not look at all of the pictures passed out in class, and did not believe she was influenced by the signatures of other students. She also recalled a comment by Mr. Altee about bringing a gun to school, which she believed was in conjunction with the Virginia Tech incident.

36. J.H. identified pictures 2, 6, 10 and 29 in the initial investigation. At hearing, nearly two years later, he also identified pictures 1, 3, 9, 12, 13, 15-20, 25, 30-32, 34-36 and 38. Pictures 2, 3, 16, 18, 19, and 36 all appear to be pictures of JFK post mortem that are similar views from different angles.

37. G.H. identified pictures 2, 6, 24, 29 and 36. At hearing, he recalled discussions of Ted Bundy, JFK, pictures of autopsies or executions and of Cho. He also recalled a comment by Altee about bringing guns to school in connection to the Virginia Tech incident. G.H. was not influenced by the signatures of other students, but was very disturbed by the pictures.^{1/}

38. A.K. identified a great deal more pictures than any other student. Although in some respects his testimony matched

that of his classmates, it also went so far beyond what his classmates stated as to make him not credible. His testimony is not relied on in these proceedings.

39. K.D. did not identify any of the pictures in the packet. She did confirm that Respondent read true-crime stories, including stories of Ted Bundy, and showed pictures of Bundy, including a mug shot, and one post-execution picture. She did not recall the gun statement or any discussion of JFK.

40. During the initial investigation and at hearing, students indicated that there were other pictures observed by the students that were not in Petitioner's Exhibit 6. Also, several times students identified pictures of JFK as being pictures of Bundy.^{2/}

41. From the evidence presented, it is more probable than not that the students were shown pictures of Bundy, JFK and Cho. Some, but not all, of the students were disturbed by the photos, and all of the students remembered the story related to Bundy. Respondent claims that he could not have shown the images to the students because the file stamp assigned to each image shows that the image was created at some time on April 19, 2007, after the students left his class. April 19 was the last day Respondent taught this class. He also contends that it was not possible for him to have shown the Cho pictures because they

were not released in the media until April 18, 2007, after school hours.

42. Respondent's claim is without merit. First, the file created stamp only shows the last time a website is visited, not the first time it is seen. Moreover, there was competent evidence that Respondent viewed a website containing the JFK images on his laptop as early as April 10, 2007. With respect to the Cho pictures, Respondent admits that they were available April 18, and that he taught intensive reading April 19. Given the consistent testimony of the students, it is more probable than not that Respondent showed these pictures on April 19 in conjunction with discussion of the Virginia Tech massacre.

43. Respondent did not explain why he would be viewing JFK autopsy photos, Bundy photos or the Cho photos at any time on his school-issued computer if he did not intend to use them in conjunction with a lesson other than to say, "I am a historian, a history teacher." He did not indicate that he was using this material for any of his history classes. In short, the viewing and distribution of these photos had no educational component and was not related to the goals or objectives of the class being taught.

44. Respondent insists that the photos were properly shown because images of violence are often portrayed in the classroom, pointing to other sources, such as an eleventh grade history

book and Newsweek article lesson plans dealing with violence or, for example, the charges against the Duke lacrosse team. The difference, however, is that in Mr. Altee's classroom, the showing of the photos had no identified educational value. They were not educational aids to assist in reaching any educational objective. They were not related to any work that was geared to improving the students' reading.

45. In addition to showing the pictures discussed above, the School Board has charged that Respondent made statements in the classroom about bringing a gun to school. The preponderance of the evidence supports the allegation that Respondent made a comment about bringing a gun to school, although the timing of the statement and the actual statement made is unclear.

46. Respondent claims that a day or so after the school "lockdown," students in his class were talking about the incident and there was some discussion about who brought the gun to school. During the discussion, a student said, "Altee brought the gun." Altee responded by saying, "Yeah, Altee brought the gun." Respondent insists that the statement was a sarcastic response that no one could take seriously. It is undisputed that Respondent was not present at school the day of the lockdown.

47. Four students testified that the statement was made in connection with the Virginia Tech shootings. Specifically, A.J.

testified that Altee said if he was put in the same predicament as Cho, he probably would have brought a gun to school as well. Others who testified that the gun statement was made in conjunction with the Virginia Tech shootings stated that Respondent said he would bring a gun to school and show how it worked.

48. The timing attributed to these statements was less clear. Hearing in this case took place nearly two years after the events in question. A.J. placed the conversation at approximately two weeks before Mr. Altee was removed from the classroom. J.H. testified the comments were made the day after the lockdown, which would have been April 12, 2007. Given the totality of the evidence, it is more probable than not that Altee made the statement that he could understand someone who had been bullied bringing a gun to school and made this statement in conjunction with the Virginia Tech killings.

49. Respondent's reaction to the charges against him is that the students are lying and are motivated by his disciplinary actions against them. He claimed that he read a variety of crime stories to the students, including stories about John Dillinger and Al Capone, and that he read these types of stories to avoid boredom. Respondent also points to the fact that before being questioned in connection with this

investigation, none of the students had complained to those in authority about the pictures or the comment about the gun.

50. Respondent's position is simply not credible. While he claims the students are lying, the only students he identified that would have the motivation to lie are J.H. and A.K. A.K.'s testimony has been discarded as generally not credible. While J.H. admitted to having a history of referrals from Respondent, there is no credible reason on the record for the remainder of the students to lie about what they saw and heard in Mr. Altee's classroom. Not one student indicated that they remembered stories about Al Capone or John Dillinger, but all remembered stories about Ted Bundy. Moreover, Respondent's reliance on the lack of prior complaints to authorities is misplaced. These are teenagers, not adults. The testimony presented indicates that in at least a couple of instances, students had complained about Altee's behavior, either to parents or to other school officials (but not the principal), and were advised to "take the high road" and just try to get along. With respect to the gun comment, the greater weight of the evidence indicates that the comment was made in the days immediately preceding the investigation. No earlier complaint would have been feasible.

CONCLUSIONS OF LAW

51. 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.

52. Petitioner has the burden of proving cause to terminate Respondent's employment by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 883 (Fla. 3d DCA 1990); § 120.57(1)(j), Fla. Stat. A preponderance of the evidence means that Petitioner must prove something that is "more probable than not." Holland v. Department of Management Services, DOAH Case No. 02-0986 (F.O. Oct. 1, 2002).

53. Section 4 of the Duval County Teacher Tenure Act, Laws of Florida, Chapter 21197 (1941), as amended, provides the basis for demotions or discharge for teachers in Duval County. It provides in pertinent part:

Causes for the discharge or the demotion of a teacher shall be:

(a) Immoral character or conduct, insubordination or physical or mental incapacity to perform the duties of the employment.

(b) Persistent violation of or a willful refusal to obey the laws of the State of Florida or regulations adopted by the authority of law, relating to public schools or the public school system.

(c) Excessive or unreasonable absence from the performance of duties imposed by the employment, or refusal or inexcusable failure to discharge the duties of such employment.

(d) Dishonesty while employed, chronic illness, or conviction of a felony, crime or any ordinance involving moral turpitude.

(e) Professional incompetency as a teacher;
. . . .

54. The September 17, 2008, Notice of Termination of Employment Contract and Immediate Suspension Without Pay states in pertinent part:

Your employment contract with the Board is hereby terminated based upon the conduct specified in the following charge which amounts to cause:

CHARGE I: Violation of regulations relating to the public school system, those violations being:

6B1.006(3) Obligations to the student requires that an 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.

* * *

(c) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

6B1.001(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.

55. These allegations constitute cause pursuant to Section 4(b) of the Duval County Teacher Tenure Act.

56. Petitioner has demonstrated by the preponderance of the evidence that Respondent has violated the provisions of Florida Administrative Code Rules 6B-1.006(3)(a) and (c) and 6B-1.001(2) and (3), and that those violations are persistent and willful.

57. Florida Administrative Code Rule 6B-1.006(3)(a) requires a teacher to make a reasonable effort to protect students from conditions harmful to learning and/or to the student's mental or physical health or safety. In the 2006-2007 school year, Respondent read stories and showed pictures that had no relationship to the skills he was charged with improving and that were disturbing to some of the students in his classroom. While he claimed that he read true-crime stories to keep the students interested, he had no lesson integrating these stories into the curriculum and taught nothing through them.

It appears that the stories were read and pictures shown for his entertainment as opposed to advancing the learning of the students under his tutelage.

58. Rule 6B-1.006(3)(c) prohibits the intentional exposure of a child to unnecessary embarrassment or disparagement. While there was testimony in the record regarding disparaging comments and treatment accorded some of the students in Mr. Altee's intensive reading class, he was not charged with such conduct with respect to the 2006-2007 school year, and therefore this conduct cannot form the basis for terminating his employment. Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999). The prior discipline alleged, which Respondent did not challenge, clearly indicates such intentional exposure, both by his boorish comments to students during the 2000-2001 school year and aggressive and threatening behavior toward students during the 2004-2005 school year.

59. Rule 6B-1.001(2) requires a teacher's primary professional concern to be for the student and the development of the student's potential, and directs a teacher to strive for professional growth and to exercise the best professional judgment and integrity. By reading true-crime stories and showing related pictures that had no learning objective with respect to intensive reading, Respondent deprived his students

of the opportunity to gain the most out of their educational experience. Respondent admitted to not knowing what reading material was appropriate for a ninth grade class, and apparently made no effort to find out. He simply read stories and showed pictures that would have shock or entertainment value. Rather than educate, the pictures disturbed the students.

60. Likewise, comments about bringing a gun to school, whether said in earnest or in jest, show a total lack of judgment. This lack of judgment is especially troubling where, as here, the students had been subjected to a lockdown at their school, and the news of the Virginia Tech killings, within five days of each other. While the students did not believe Respondent actually brought a gun to school, his comments were troubling at best.

61. Similarly, Respondent's actions demonstrate a lack of ethical conduct in violation of Rule 6B-1.001(3). Respondent's actions during the 2006-2007 school year are especially troubling when viewed in light of the prior discipline for conduct in the 2000-2001 and 2004-2005 school years. Petitioner asserted that Respondent's reaction to disciplinary charges in each instance should be considered in determining the appropriate resolution in this case. To do so is unnecessary. However, it is appropriate to look at what actions Respondent took in the face of his prior discipline. Although on probation

with the Education Practices Commission, he continued to act in a way inconsistent with the laws and rules governing his profession, by showing an R-rated movie in violation of district policy and being suspended for aggressive behavior toward both students and staff. Clearly, Respondent was on notice that any further violation of the laws and rules governing the teaching profession would cost him his job. Yet in the face of this notice, Respondent made the conscious choice to use materials of questionable educational value that were geared not toward advancing the reading level of his students, but instead providing an outlet for his personal interests. His lack of judgment is further evidenced by the cavalier statement about a gun at a time when both students and parents would be especially sensitive about images or references to violence, Petitioner has demonstrated cause for termination.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered finding that the Respondent violated Florida Administrative Code Rules 6B-1.006(3)(a) and (c), and 6B-1.001(2) and (3), thereby demonstrating cause for termination of his teaching contract pursuant to Section 4(b) of the Duval County Teacher Tenure Act.

DONE AND ENTERED this 1st day of April, 2009, in
Tallahassee, Leon County, Florida.



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 1st day of April, 2009.

ENDNOTES

^{1/} G.H. was visibly upset by the pictures, especially those regarding Virginia Tech, at hearing, well after the event. He was clearly nervous about testifying even before the photos were displayed. However, his testimony was clear and consistent. Respondent attempted to discredit his reaction by referring to G.H.'s playing Mortal Kombat video games, which are rated "mature," and are graphic in nature. However, as G.H. stated, Mortal Kombat is a video game. The massacre at Virginia Tech was very real. Moreover, Respondent's self-serving and uncorroborated testimony that G.H. was emotionally unbalanced and therefore not believable is specifically rejected.

^{2/} While JFK was assassinated in 1963 and Bundy committed his crimes in the late 1970's, these children were born in the early 1990's. For them, both men would be historic figures not generally seen in daily life.

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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.