

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 09-0387
)
 RAYBURN WHITE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted on August 19, 2009, in West Palm Beach, Florida, and on October 21, 2009, by video teleconference between West Palm Beach and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Corey M. Smith, Esquire
School District of Palm Beach County
3318 Forest Hill Boulevard
Suite C-302
West Palm Beach, Florida 33406

For Respondent: Mark Wilensky, Esquire
Dubiner & Wilensky, P.A.
515 North Flagler Drive, Suite 325
West Palm Beach, Florida 33401-4349

STATEMENT OF THE ISSUES

Whether Petitioner, Palm Beach County School Board (Petitioner or School Board), has just cause to terminate or otherwise discipline Respondent, Rayburn White's, employment based on the conduct alleged in the "Petition" dated January 15, 2009, and filed with DOAH January 20, 2009. Also at issue is the discipline, if any, to be imposed.

PRELIMINARY STATEMENT

Respondent is an art teacher employed by the School Board. On July 21, 2008, Palm Beach County Deputy Sheriff Van Garner arrested Respondent on charges of "Exposing Sexual Organs," "Resisting Arrest without Violence," and "Loitering or Prowling in a Public Restroom." Thereafter, Respondent timely self-reported his arrest.

By letters dated November 20, and December 4, 2008, Superintendent, Arthur C. Johnson, Ph.D., notified Respondent that he intended to recommend to the School Board that Respondent's employment be suspended without pay and that termination proceedings be instituted. Both letters contained the following grounds (which are also the grounds for termination set forth in the Petition filed by the School Board):

Based upon information presented to me, I hereby inform you that there is sufficient

evidence to warrant your termination from your position as teacher. . . .

On or about July 24, 2008, you became the subject of an Employee Relations investigation based upon the allegation(s) of ethical misconduct, failure to exercise best professional judgment in violation of 6B-1.001(3), Florida Administrative Code, The Code of Ethics of the Education Profession in Florida. Furthermore, the allegations included a violation of School Policy(ies) 1.013(1), Responsibilities of the School District Personnel and Staff. At the conclusion of the investigation, the allegation(s) and violation of District policy(ies) were substantiated.

Sufficient just cause exists for you to be disciplined pursuant to Sections 1012.22(1)(f) and 1012.27(5), Florida Statutes; Palm Beach County School District Policies 1.013 and 3.27, as well as Administrative Directive 3.27; and Article II, Section M(6) of the Collective Bargaining Agreement between the Palm Beach County Classroom Teachers Association and the School Board of Palm Beach County, for violations of the foregoing.

This action is taken in accordance with Sections 1012.22 and 1012.27, Florida Statutes. . . .

The School Board voted to accept Dr. Johnson's recommendation of termination. Respondent thereafter timely requested a formal administrative hearing to challenge the proposed action, the matter was referred to DOAH, and this proceeding followed.

At the final hearing, Petitioner presented the testimony of the following School Board employees with his or her title in parenthesis: Respondent (teacher), Dr. Johnson (School

Superintendent), James Campbell (principal of Acreage Pines Elementary School), and Angelette Green (Director of Employee Relations). Petitioner also presented the testimony of detectives Van Garner and Peter Lazar of the Palm Beach County Sheriff's Office. Petitioner offered the following pre-marked exhibits, each of which was admitted into evidence: 1, 2, 4, 5, 6, 8, 15, 18, 20, 24, 25, 26, 27, 28, 29, and 30. At the request of the Petitioner, official recognition was taken of the School Board's policy 6Gx50-1.013 and of Florida Administrative Code Rule 6B-1.006.

Respondent testified on his own behalf and presented the testimony of Rodney Caito, who had taken certain photographs that were admitted into evidence. Respondent offered the following pre-marked exhibits, each of which was admitted into evidence: 1, 2, 3, 4, 6, 7, 8, and 9.

Unless otherwise noted, all statutory references are to Florida Statutes (2008). References to rules are to the rules in effect as of the entry of this Recommended Order. The relevant statutes and rules have not changed since July 21, 2008, the date the conduct at issue occurred.

A Transcript of the proceedings, consisting of three volumes, was filed on December 7, 2009. At the request of the parties, the deadline for the filing of Proposed Recommended Orders was established as being 45 days following the filing of

the transcripts. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Petitioner was the constitutional entity authorized to operate, control, and supervise the public schools in Palm Beach County, Florida

2. Petitioner has entered into individual contracts with its employees. At all times relevant to this proceeding, Petitioner employed Respondent as an art teacher. The record is silent as to whether he has a continuing contract or a professional services contract. Prior to his reassignment after his arrest in 2008, Respondent's assigned school was Acreage Pines Elementary School (Acreage Pines).

3. Respondent has been employed by Petitioner since October 17, 1987. Respondent's job performance has been satisfactory or above during his tenure with Petitioner.

4. Petitioner and the teacher's union have entered into a collective bargaining agreement (CBA). Petitioner has adopted rules and policies that control the activities of its teaching professionals. Respondent is subject to the provisions of the CBA, rules adopted by Petitioner, rules of the State Board of Education, and duly-enacted statutes.

5. Article II, Section M(6) of the CBA pertains to progressive discipline and provides as follows:

(6) Where just cause warrants such disciplinary action(s) and in keeping with the provisions of this Section, an employee may be reprimanded verbally, reprimanded in writing, suspended without pay or dismissed upon the recommendation of the immediate supervisor to the Superintendent. Other disciplinary action(s) may be taken with the mutual agreement of the parties.

6. Section 1012.22(1)(f), Florida Statutes, provides that a district school board has the following powers:

(f) *Suspension, dismissal, and return to annual contract status.*--The district school board shall 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.

7. Section 1012.27(5), Florida Statutes, provides that a school superintendent has the following powers:

(5) *SUSPENSION AND DISMISSAL.*--Suspend members of the instructional staff and other school employees during emergencies for a period extending to and including the day of the next regular or special meeting of the district school board and notify the district school board immediately of such suspension. When authorized to do so, serve notice on the suspended member of the instructional staff of charges made against him or her and of the date of hearing. Recommend employees for dismissal under the terms prescribed herein.

8. Florida Administrative Code Rule 6B-1.001 sets forth the Code of Ethics of the Education Profession in Florida. Subsections (2) and (3) thereof provide as follows:

(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.

9. School Board Policy 6Gx50-1.013(1) requires School Board employees 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."

THE 1994 INCIDENT

10. On or about June 27, 1994, Respondent entered a plea of guilty to the following charges brought in the United States District Court for the Northern District of Mississippi: Interference with Government Employee, Disorderly Conduct, and Reckless Driving. A U.S. Magistrate adjudicated Respondent guilty of all three charges, imposed court costs, and placed him on probation for one year with the following special condition

of probation: "Defendant shall not visit any area of the Tennessee Tombigbee Waterway while on probation supervision."

11. On March 21, 1995, the Florida Education Practices Commission (EPC) filed an Administrative Complaint against Respondent that included the following factual allegations in paragraphs 3, 4, and 5:

3. On or about June 18, 1994, Respondent was observed masturbating in his car. When approached by an undercover federal office, Respondent fled the scene and was later apprehended.

4. Respondent was arrested in the U.S. Northern District of Mississippi and charged with Interference with Government Employees, Disorderly Conduct and Reckless Driving.

5. On or about June 27, 1994, Respondent plead guilty to all three charges and the Court adjudicated him to be guilty as charged. Respondent was sentenced to serve one year probation, not return to the Tennessee Tombigbee Waterway and pay a \$400 fine and court costs.

12. Thereafter Respondent and the EPC entered into a Settlement Agreement which included the following in paragraphs 3 and 4:

3. The Respondent elects not to contest the allegations set forth in the Petitioner's Administrative Complaint, which are incorporated herein by reference.

4. The Respondent agrees to accept a letter of reprimand for the conduct described in the Administrative Complaint, a copy of which shall be placed in his certification file with the Department of Education, and a copy of which shall be placed in his personnel file with the Palm Beach County School Board.

13. The Settlement Agreement also includes the following in paragraphs 6 and 7:

5. The Respondent agrees that within thirty [30] days of entry of the Final Order herein he shall provide the Education Practices Commission [EPC] written verification from a professional approved by the Recovery Network Program that he poses no threat to the safety or well-being of students and that he is able to perform the responsibilities of an educator. All expenses incurred in connection with providing this verification shall be borne by the Respondent.

6. The Respondent agrees that he shall be placed on probation for a period of two [2] years . . .

14. The Settlement Agreement was approved by Final Order issued by the EPC on September 22, 1995.

15. Respondent served his period of probation.

16. Respondent did not admit the alleged facts that underpin the EPC's Administrative Complaint.¹

THE 2008 INCIDENT

17. Okeeheelee Park (the park) is located in suburban Palm Beach County. The park's various recreational amenities include walking trails. The park also has restroom facilities at multiple locations.

18. Detective Van Garner of the Palm Beach County Sheriff's Office and his partner, Detective Peter Lazar, were assigned to conduct undercover operations in the park on

July 21, 2008. Their assignment included the apprehension of people engaging in illegal sexual acts in the park. This assignment was in response to citizen complaints about such activity in the park. Both officers were in civilian dress. Detective Garner wore a tee shirt and short pants.

19. On July 21, 2008, Respondent was exercising in the park by walking to lose weight. Because of medical problems, Respondent needed to lose weight. To work up a good sweat, Respondent wore a one-piece wet suit that covered his torso, but not his arms or his legs. The wet suit had a front zipper, which zipped in a downward, diagonal motion from his neck area to his left thigh area. Respondent wore a shirt and a pair of walking shorts over the wet suit. During that summer, Respondent typically walked from noon to 4:00 p.m.

20. Respondent attracted the attention of Detective Garner on the afternoon of July 21, 2008, because he saw him go into more bathrooms in the park than "normal."²

21. At approximately 3:00 p.m. on July 21, 2008, Respondent had been walking for three hours. He went to the area of a bathroom at the top of a hill near a pavilion where there was a cool breeze.

22. Detective Garner pulled up in a truck, got out, and went inside the bathroom from the door on the opposite side of the building from where Respondent was standing.³

23. Almost immediately thereafter, while Detective Garner was standing at a urinal, Respondent entered the bathroom, walked past Detective Garner, and went to a handicapped stall. Respondent left the door to the handicapped stall ajar.

24. Detective Garner and Respondent were the only two people in the restroom. Detective Garner testified that sometimes a man who is in a restroom for sexual activity will do things to attract the attention of other patrons of the facility. Respondent did not make any hand signal, say anything, or do anything to attract the attention of Detective Garner other than leaving the door to the stall ajar. Respondent did nothing in the restroom that would have attracted Detective Garner's attention had Detective Garner not been a law enforcement officer.

25. Respondent stood in the handicapped stall in the proper stance to urinate. His feet faced the toilet and his body was turned so that one looking into the stall from the door would have seen his back and side, but not his front. Detective Garner became suspicious because he did not hear a stream of urine coming from the stall.

26. There was a conflict in the evidence as to what Respondent was doing in the stall. Respondent testified that he had unzipped the wet suit so he could urinate. Respondent testified that with one hand he was holding up his shorts and

with the other he was trying to prevent the wet suit from becoming completely unzipped. Respondent testified that it is very difficult to get the wet suit zipper started once it becomes completely unzipped. According to Respondent, when Detective Garner approached the stall, Respondent was removing his penis from the wet suit in order to urinate.

27. Detective Garner testified that when he approached the stall, he saw Respondent move his hands back and forth below the level of his waist in an activity Detective Garner believed could only have been masturbation. Detective Garner could not see Respondent's genital area until Respondent turned toward Detective Garner after Respondent sensed Detective Garner's presence. Detective Garner testified that he saw Respondent's erect penis when Respondent turned.

28. In resolving the conflicting evidence, the undersigned finds that Petitioner failed to establish by a preponderance of the evidence that Respondent masturbated in the handicapped stall of the park's bathroom on July 21, 2008.⁴

29. Petitioner also failed to establish by a preponderance of the evidence that Respondent was attempting to solicit Detective Garner or anyone else for sex.

30. When Respondent turned towards him, Detective Garner pulled out his badge and identified himself as a deputy sheriff. Respondent immediately began to put his penis back in the wet

suit and his short pants. Within 20-to-30 seconds of that identification, Respondent had accomplished that purpose and started to exit the stall. In leaving the stall, Respondent pushed Detective Garner aside. Detective Garner pushed back. Before Respondent left the bathroom, there was a brief scuffle between Detective Garner and the Respondent consisting of Detective Garner trying to restrain Respondent and Respondent attempting to exit the bathroom. No blows were thrown during the scuffle.

31. When he left the restroom, Respondent walked down a hill away from the restroom and Detective Garner. Detective Garner walked in the opposite direction to retrieve his firearm from his vehicle. While walking to his vehicle, Detective Garner called Detective Lazar on a cell phone and requested that Detective Lazar come to the scene to assist him.

32. As Detective Lazar was heading to the scene, he asked a uniformed officer to follow him to the scene. Shortly thereafter, Detective Lazar and the uniformed officer arrived on the scene. Respondent promptly complied with their orders.

33. Respondent was charged with Exposing Sexual Organs in violation of Section 800.03, Florida Statutes; Resisting Arrest Without Violence in violation of Section 843.02, Florida Statutes; and Loitering in Public Restroom in violation of a county ordinance.

34. Respondent entered into a Deferred Prosecution Agreement in resolution of the criminal charges. Respondent successfully completed the Deferred Prosecution Agreement, which included undergoing supervision, paying the costs associated with the supervision, completion of the Prostitution Impact Prevention Education School, undergoing HIV/STD test, provision of a DNA sample, and no contact with adult establishments.

35. Respondent timely self-reported his arrest as required by School Board policy.

36. The School Board's Department of Employee Relations conducted an investigation into Respondent's employment history, his background, and the events that culminated in his arrest on July 21, 2008.

37. The results of the investigation were presented to the School Board's Employee Investigative Committee (EIC), which makes non-binding recommendations to the Superintendent of Schools. The EIC voted to substantiate the charges against Respondent and recommended to the School Superintendent that Respondent's employment be suspended for 20 days and that Respondent be transferred to another school.

38. Dr. Johnson made the decision that Respondent's employment should be terminated. When he made that recommendation, Dr. Johnson thought that Respondent had been caught masturbating for the second time.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the subject matter parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

40. Because Petitioner seeks to terminate Respondent's employment and does not involve the loss of a license or certification, Petitioner has the burden of proving the allegations in its Administrative Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

41. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

42. Petitioner failed to prove by a preponderance of the

evidence that Respondent masturbated or unlawfully exposed his genitals in the park bathroom on July 21, 2008.

43. Petitioner failed to prove that Respondent loitered in the park bathroom on July 21, 2008.

44. Petitioner proved that Respondent failed to comply with Detective Garner's lawful orders on July 21, 2008.

45. A teacher's employment can be terminated for just cause pursuant to the provisions of Section 1012.33, Florida Statutes. If Respondent is on a contract other than a continuing contract, just cause is as provided in Section 1012.33(1)(a), which provides, in relevant part, as follows:

(1)(a) . . . Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

46. If Respondent is on a continuing contract, just cause is as provided in Section 1012.33(4)(c), Florida Statutes, which provides, in relevant part, as follows:

(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, incompetency, gross

insubordination, willful neglect of duty, drunkenness, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. . . .

47. The charges against Respondent are that he engaged in ethical misconduct, that he violated the Code of Ethics of the Education Profession in Florida (Fla. Admin. Code R. 6B-1.001(3)) by failing to exercise best professional judgment, and that he violated School Policy 1.013(1), setting forth Responsibilities of the School District Personnel and Staff. Petitioner failed to prove those alleged violations. The Petition filed by Petitioner, which is the charging document for this proceeding, does not allege what provisions of Section 1012.33, Florida Statutes, Respondent violated.

48. Respondent's failure to comply with Detective Garner's orders was completely unrelated to his duties and responsibilities as a teacher. Petitioner failed to establish grounds to terminate Respondent's employment or to otherwise discipline that employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Palm Beach County enter a final order dismissing the charges against Respondent and reinstating his employment with full back pay.

DONE AND ENTERED this 10th day of February, 2010, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of February, 2010.

ENDNOTES

1/ Petitioner presented no competent evidence upon which a finding can be made that Respondent was charged with disorderly conduct because he was caught masturbating.

2/ Both Detective Garner and Detective Lazar thought they had seen Respondent in the park on occasions when Respondent would have been teaching school. Respondent established that at least on some of those other occasions, Detective Garner and Detective Lazar had mistaken another park user for Respondent.

3/ Detective Garner initially testified that he entered the bathroom after Respondent. This mistake is attributable to the fact that Detective Garner did not have the opportunity to review his arrest report in any detail prior to testifying.

4/ It is clear that Detective Garner believed before he entered the bathroom that Respondent was cruising the park bathrooms to solicit homosexual activity. This belief was very likely strengthened because he had mistaken Respondent for another individual. The undersigned concludes that Detective Garner likely misunderstood Respondent's hand motions in the bathroom stall because that is what he expected to see. While he would have been able to see Respondent's penis when Respondent sensed

his presence and turned towards him, Detective Garner's testimony that he saw Respondent's erect penis is no more (and no less) credible than Respondent's testimony as to what he was doing in the park bathroom and his denial that he was masturbating. In reaching these conclusions, the undersigned has considered that Respondent was in the park for a legitimate purpose, he had been walking in the hot part of the day for three hours, he was hot and wet from sweat, he was wearing a confining wet suit, and he was about to begin a 45-minute-walk from the park to his home. The undersigned has further considered that Detective Garner has made many arrests under similar situations and that he had difficulty recalling some details of this arrest.

COPIES FURNISHED:

Sonia Elizabeth Hill-Howard, Esquire
Palm Beach County School District
3318 Forest Hill Boulevard, C-302
Post Office Box 19239
West Palm Beach, Florida 33416-9239

Mark Wilensky, Esquire
Dubiner & Wilensky, P.A.
515 North Flagler Drive, Suite 325
West Palm Beach, Florida 33401-4349

Corey M. Smith, Esquire
School District of Palm Beach County
3318 Forest Hill Boulevard, Suite C-302
West Palm Beach, Florida 33406

Dr. Arthur C. Johnson, Superintendent
Palm Beach County School Board
3318 Forest Hill Boulevard, Suite C-316
West Palm Beach, Florida 33406

Dr. Eric J. Smith
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.