

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-2413  
 )  
 ANTHONY L. BURNEY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

As previously scheduled, a final hearing in this case was held before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings, on November 3, 2009, at video teleconference sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Janeen L. Richard, Esquire  
Miami-Dade County School Board  
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For Respondent: Mark Herdman, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether the district school board has just cause to suspend a security monitor for 30 days without pay based upon the allegation that he slapped a student.

PRELIMINARY STATEMENT

At its regular meeting on April 2, 2009, Petitioner Miami-Dade County School Board suspended Respondent Anthony Burney, for 30 workdays, without pay, from his position as a district school security monitor. This action resulted from allegations that on September 9, 2008, Mr. Burney slapped a student named K.H. in the cafeteria at Allapattah Middle School (Allapattah).

In a letter dated April 23, 2009, Mr. Burney requested a formal hearing. On May 8, 2009, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings and the final hearing was scheduled initially for September 18, 2009, as requested by the parties. Based on Petitioner's unopposed motion and the subsequent Joint Status Report, the case was re-scheduled for November 3, 2009.

At the final hearing, Petitioner presented the testimony of the following witnesses: former Allapattah Assistant Principal Jacqueline Lewis; three students who are minors, D.M., D.G. and A.E.; Miami-Dade School Police Officer Montoya Jackson; former Allapattah Principal Adolfo Costa; and Jimmie Brown, Jr., District Director, Office of Professional Standards. Petitioner's Exhibits 1 through 22 were admitted into evidence. Mr. Burney testified on his own behalf and offered no additional exhibits.

The alleged victim, K.H., did not appear at the hearing, although he had been subpoenaed to testify. At the request of counsel for the Petitioner, the deposition testimony of K.H. was taken on November 23, 2009, and filed at DOAH on December 4, 2009.

The final hearing Transcript was filed on November 30, 2009. After an extension of time was granted at the request of Petitioner, each party filed a Proposed Recommended Order before the deadline, December 17, 2009.

#### FINDINGS OF FACT

1. Petitioner, the Miami-Dade County School Board ("Petitioner" or "the School Board"), is the constitutional entity authorized to operate, control, and supervise the Miami-Dade County Public School System.

2. As of the final hearing, Respondent Anthony Burney ("Respondent" or "Burney") had been employed as a school security monitor in the Miami-Dade County Public School System for approximately 21 years. For the last eight or nine years and at all times relevant to this case, Burney was assigned to Allapattah.

3. On September 9, 2008, K.H., an eighth grader, and fellow students, D.M., D.G., and A.E., were sitting on benches in the cafeteria, two on each side of an aisle facing each other

with their backs against the tables and their legs and feet in the aisle.

4. Burney walked through the aisle to the lunchroom serving counter and got a tray of food. When he walked back through the aisle, K.H. wrote in a statement prepared the day of the incident that he (K.H.) was "sitting down and [Burney] was trying to pass by, ok. I let him pass the first time then he came back on purpose just to bother us so I didn't move [my legs and feet from the aisle], and out of now [sic] where he slapped me."

5. The other students at the table gave conflicting written statements and testimony. D.M. said Burney was running towards them with a tray of food, that it was A.E. who did not move her feet, and that Burney slapped K.H. on the right side of his face with his left hand. D.G. did not remember whether or not Burney had a tray, but she did hear him say "excuse me" the first time he passed them but not the second time because they were being loud and playing. D.G. also heard Burney apologize to K.H. after he supposedly hit K.H.. A.E. testified that Burney had the tray in his right hand and hit K.H. with his left hand.

6. A video surveillance DVD is grainy and less than clear, but it does show that Burney was walking not running. Burney was holding a tray in his left hand not his right hand. It also

shows that, as Burney passed A.E. and K.H. who were sitting on the bench to his left, he turned the right side of his body towards K.H., but did not raise his right hand. After that, K.H. jumped up in a confrontational stance in front of Burney and was restrained by others. There were no red or other marks on K.H.'s face.

7. The video surveillance DVD is consistent with Burney's explanation of what happened. Burney walked pass the four students to the counter and got his lunch. When he walked back down the same aisle with his tray, he turned to step over the student's legs and get through the aisle. He inadvertently touched K.H. when he brushed pass him and, as soon as K.H. jumped up to confront him, he apologized to defuse the situation.

8. The cafeteria was emptying near the end of the lunch period and Burney could have and, in retrospect, arguably should have walked down any of the other aisles where there were no students sitting. While that may have demonstrated the best professional judgment for an adult dealing with 14-year-old children, there is no evidence that Burney had any prior conflicts with K.H. or any reason to believe that he needed to avoid him to prevent the confrontation.

9. As a result of the allegations that he slapped K.H., Burney was reassigned to work at a different location. On

November 13, 2008, a conference-for-the-record was held to discuss the findings of the investigation with Burney. He was given notice of his principal's recommendation for discipline on February 23, 2009. At its regular meeting on April 2, 2009, the School Board voted to accept the recommendation to suspend Burney without pay for 30 workdays.

#### Ultimate Factual Determinations

10. Burney's conduct on September 9, 2008, did not entail threats, threatening behavior, or acts of violence. He did not, therefore, violate School Board Rule 6Gx13-4-1.08, which prohibits violence in the workplace.

11. Burney did not violate School Board Rule 6Gx13-4A-1.21, which prohibits unseemly conduct or the use of abusive or profane language.

12. Burney did not violate the Code of Ethics, School Board Rule 6Gx13-4A-1.213, by not respecting the dignity of others, not exercising his best professional judgment, or not conducting himself ethically.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this proceeding pursuant to Sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes (2009).

14. In an administrative proceeding to suspend or dismiss a teacher, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). See McNeill v. Pinellas County School Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter County School Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); MacMillan v. Nassau County School Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

15. Burney's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

16. In its three-count Notice of Specific Charges served on August 19, 2009, the School Board alleged that Burney violated rules on the following: Violence in the Workplace (Count I), Responsibilities and Duties (Count II), and the Code of Ethics (Count III).

17. The School Board is authorized to suspend or dismiss

[a]ny member of the instructional staff . . . at any time during the term of [his teaching] contract for just cause . . . . The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid.

§ 1012.33(6)(a), Fla. Stat.

18. The term "just cause"

includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

§ 1012.33(1)(a), Fla. Stat.

19. Florida Administrative Code Rule 6B-4.009 provides the following relevant definition:

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for 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.

20. Slapping a student has been recognized as a basis for discipline of school personnel. Manatee County School Board v. Chevalier, DOAH Case No. 09-1972 (R.O. 11/17/09), 2009, Fla. Div. Adm. Hear. LEXIS 819.

21. In Count I, the School Board accused Burney of violating School Board Rule 6Gx13-4-1.08, which provides in relevant part:

Threats, threatening behavior, or acts of violence against students, employees, visitors, or other individuals by anyone on DCPS property will not be tolerated.  
Violations of this policy may lead to



disciplinary action which includes dismissal, arrest, and/or prosecution.

Any person who makes substantial threats, exhibits threatening behavior, or engages in violent acts on DCPS property shall be removed from the premises as quickly as safety permits, and shall remain off DCPS premises pending the outcome of an investigation. DCPS will initiate an appropriate response. This response may include, but it is not limited to, suspension and/or termination of any business relationship, reassignment of job duties, suspension or termination of employment, and/or criminal prosecution of the person or persons involved. (Emphasis added.)

22. The evidence does not support a finding that Burney committed an act of violence against K.H. Burney is, therefore, not guilty of violating School Board Rule 6Gx13-4-1.08.

23. Count II is based on Burney's alleged violation of School Board Rule 6Gx13-4A-1.21, which provides as follows:

All persons employed by the School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system. Unseemly conduct or the use of abusive and/or profane language in the workplace is expressly prohibited.

24. This case does not involve allegations of abusive or profane language in the workplace (although it is noted with disfavor that Burney was profane and made a point of wanting it on the record at the hearing). Whether Burney violated School

Board Rule 6Gx13-4A-1.21, as alleged by the School Board, turns upon whether his conduct was "unseemly."

25. The Rule does not define the term "unseemly conduct." The word "unseemly," however, usually suggests inappropriateness manifesting indecency, bad taste, or poor form (e.g. a crude joke in mixed company). There is no evidence to support a finding that Burney's conduct was unseemly. See Miami-Dade County School Board v. Williams, DOAH Case No. 04-2156 (R.O. 12/2/04, F.O. 1/26/05).

26. The Code of Ethics of the Education Profession, adopted in Florida Administrative Code Rule 6B-1.001, provides, in relevant part, as follows:

6B-1.001 Code of Ethics of the Education Profession in Florida.

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

27. The evidence is insufficient to support a finding, as alleged in Count III, that Burney violated the Code of Ethics of the Education Profession.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order rescinding its previous decision to suspend Burney without pay for a period of 30 workdays, and award him back pay or benefits, if any were denied him as a result of that decision.

DONE AND ENTERED this 14th day of January, 2010, in Tallahassee, Leon County, Florida.



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ELEANOR M. HUNTER  
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Filed with the Clerk of the  
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this 14th day of January, 2010.

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.