

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 09-2966
)
RITA M. GREEN,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in this case on January 12-13, 2010, in Viera, Florida, before J. D. Parrish, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph R. Lowicky, Esquire
Glickman, Witters and Marell, P.A.
1601 Forum Place, Suite 1101
West Palm Beach, Florida 33401

For Respondent: Matthew E. Haynes, Esquire
Jeffrey Sirmons, Esquire
Johnson and Haynes, P.A.
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STATEMENT OF THE ISSUE

Whether Rita M. Green (Respondent), committed the violations alleged, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On May 5, 2009, the superintendent of schools on behalf of Brevard County School Board (Petitioner), issued a letter to advise Respondent that she was being recommended for termination from her employment with Petitioner. Prior to that time (on or about February 19, 2009) Petitioner advised Respondent that an investigation would be conducted concerning allegations that Respondent force fed an autistic student assigned to her class. In follow-up to the investigation, Petitioner determined it had "just cause" to terminate the Respondent's employment with the district.

More specifically, Petitioner maintains that Respondent committed violations of the professional standards for teachers in Florida constituting misconduct in office and rising to the level that justifies termination of her employment. Respondent has disputed the allegations of the case and timely requested an administrative hearing. The case was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings on May 29, 2009.

At the hearing, Petitioner presented testimony from 11 witnesses. Petitioner's Exhibits numbered 1-19, 21 and 23-32 were admitted into evidence. Respondent testified on her own behalf and offered testimony from three witnesses. Respondent's Exhibits numbered 1-7, 9-13, 14-20 and 23 were also admitted

into evidence. The two-volume Transcript of the proceedings was filed with DOAH on February 1, 2010. By stipulation the parties agreed to file their proposed recommended orders not later than March 3, 2010. Both timely filed proposals that have been fully considered in the preparation of this Order. Unless otherwise noted, all references are to Florida Statutes (2009).

FINDINGS OF FACT

1. Petitioner is a duly-constituted entity charged with the responsibility and authority to operate, control, and supervise the public schools within the Brevard County Public School District (school district). As such, it has the authority to regulate all personnel matters for the school district.

2. At all times material to the allegations of this case, Respondent was an employee of Petitioner and was subject to the disciplinary rules and regulations pertinent to employees of the school district.

3. Respondent was assigned to teach an exceptional student education class at University Park Elementary School (UPES). Respondent's class at UPES consisted of a group of pre-K handicapped students with varying exceptionalities. Respondent allowed two students from a nearby sixth grade class to "help out" during a portion of the school day. Additionally, a full-time teacher's aide was assigned to Respondent's class who also

assisted Respondent with the students. It is undisputed that Respondent's students were challenging due to their various limitations and exceptionalities.

4. One of the students in Respondent's class was a young, non-verbal autistic child who typically spent only a half day at the school. The child, who was three or four years old, brought food for the lunch period but would primarily eat the finger foods packed by the mother that did not require a utensil. The child's mother packed a special spoon with a certain design and color that the child used for foods like applesauce.

5. Autistic children require consistency and a strict adherence to routine. Deviations from their comfort zone and routine can lead to tantrums or other undesirable reactionary behaviors. The autistic child in Respondent's class was typical in this regard. The student did not adjust well to change and would exhibit adverse responses to the unexpected.

6. Respondent knew the child well enough to understand the need for, and the importance of, consistency and adherence to routine. With regard to the student's individual education plan (IEP), the student was to begin working on feeding skills using a hand-over-hand teaching method. Eventually it was expected that the student would develop the skill to self-feed those foods requiring a utensil. Force feeding was not prescribed by the IEP or expected by the student. In fact, whether or not the

student actually consumed food was not required by the IEP.

7. On February 18, 2009, Respondent's aide began to set up the lunch foods for the students in the class. This was one of the aide's assigned duties and was a routine of the class day. With regard to the autistic student previously described, the aide set out the finger foods packed in the lunchbox as well as jars of other foods requiring a utensil. Unfortunately, the student's mother had forgotten to pack the special utensil that the student was accustomed to using/seeing.

8. The student began to eat the finger foods and did not display any agitation or poor conduct. When Respondent approached the student with a disposable "spork" that she intended to use for the food in jars, the child began to tantrum. It was evident the autistic student did not react well to the spork. Respondent observed the adverse reaction but persisted in her efforts to feed the student. She wrongly presumed that if the student would taste the food, the familiarity of the food would overcome the adverse reaction to the spork. The more Respondent tried to get the student to eat, the more the student resisted and fought.

9. At one point Respondent enlisted the assistance of one of the helper sixth grade students (both of whom were in the classroom at the time). Respondent directed the student to hold the autistic child so that she could put the spork/food into the

student's mouth. Despite continuous opposition from the child, Respondent held the student's face with one hand and used her other hand to shove food toward the student's mouth. This behavior was confirmed by both of the sixth graders as well as the aide who was also present.

10. As a result of the incident described above, the autistic student was left with bruises that depicted a handprint on one side of the face. This bruising remained visible the next day and was photographed by authorities.

11. Respondent maintained that the student had caused the injuries by resisting and pulling away from her. It is common for autistic children to injure themselves during tantrum events. Nevertheless, had Respondent not held the face so tightly, the bruising would not have occurred. The simple solution to avoid the injury would have been for Respondent to release the student when the adverse reaction to the spork began.

12. In fact, the proper response to any stimulus that causes an adverse reaction with an autistic child is to remove the offending trigger. Autistic children will continue to respond adversely so long as the offensive trigger remains. In this case, Respondent merely wore the student out. The thrashing and resistance continued until the student could fight no more.

13. When the student was scheduled to go home (at the usual pick up time), Respondent advised the mother that the student was asleep. She returned later to pick up the child but noticed the student's demeanor and behavior were different. Further, the bruising on the student's face was evident. The mother accepted Respondent's explanation for the discoloration.

14. Troubled by what she had observed Respondent do, the aide reported the incident to school administrators. Administrators spoke with the two sixth-grade students who had been in the class at the time of the incident who corroborated the aide's representation of what had occurred. The witnesses confirmed Respondent restrained the child with her legs, held the student's face tightly with one hand, and attempted to shove food with the spork.

15. As is required by law, the school administrators reported the incident to authorities who initiated an investigation into abuse allegations. Respondent did not then, and did not at hearing, accept responsibility for causing the bruising on the student's face.

16. Nevertheless, it is undisputed that as a direct result of Respondent's behavior the autistic student suffered bruising. No other person grabbed the student's face and held it with the force necessary to leave bruises. Respondent failed to understand that such behavior is unacceptable. Respondent

failed to acknowledge that the proper response to the student's adverse reaction would have been to let the student go.

17. Respondent was not required to feed the autistic student. Respondent was not required to hold the student so tightly that bruises were left. Respondent was not preventing the student from self-injurious behavior.

18. The student in question was not the first autistic child assigned to Respondent's class. Prior to the incident complained, of Respondent had many times dealt with students who were similarly handicapped or limited. Prior to the incident complained of, Respondent had enjoyed a good reputation for dealing with a challenging student population. Respondent offered no credible explanation for why her behavior on the date in question deviated from acceptable teaching standards. Teachers in Florida are not allowed to physically harm students.

19. Subsequent to the investigation of the incident Respondent was suspended from her teaching duties. On May 5, 2009, Richard A. DiPatri, acting as superintendent for the school district, notified Respondent that he intended to recommend termination of her employment as a teacher at the May 12, 2009, meeting of the Brevard County School Board. The notice further explained the basis for the termination and stated, in pertinent part:

The reason for my decision is that an investigation has shown that on or about February 18, 2009, you physically abused a 3 year old special needs student assigned to your Pre-K handicapped class at University Park Elementary School. Specifically, you attempted to force feed the student by shoving a spoon down his throat while holding him by the head and neck. In doing so you used such force that the student was gasping for air and spitting up the food and suffered bruises on his face, neck and back.

20. Respondent timely challenged the proposed termination and the matter was appropriately forwarded to the Division of Administrative Hearings for formal proceedings.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.569 and 120.57(1), Fla. Stat.

22. Petitioner bears the burden of proof in this cause to establish by a preponderance of the evidence that Respondent committed the violations alleged. See McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996).

23. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942). As reviewed in this matter, Petitioner has established by a preponderance of the evidence that Respondent inappropriately held the autistic student in such a manner that the child was bruised and thereby proved that

there is "just cause" for Petitioner's termination from employment.

24. Section 1012.33, Florida Statutes, provides, in pertinent part:

. . . All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: 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.

25. In this case "just cause" includes those items specifically addressed by the statute but also includes other conduct that may be denoted by the "not limited to" language of the statute. See Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2nd DCA 1994). Also, "misconduct in office" in the instant matter must be considered in relation to the injury to the autistic student.

26. "Misconduct in office" is defined by Florida Administrative Code Rule 6B-4.009(3) as:

. . . a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC,, and the Principals 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.

27. Florida Administrative Code Rule 6B-1.001, provides:

(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.

28. Florida Administrative Code Rule 6B-1.006 provides in pertinent part:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(3) Obligation to the student requires that the 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.

29. It is concluded that Respondent caused an injury to the autistic student. Respondent failed to acknowledge that her conduct in grabbing the student, holding the student with a grip that injured the face, and attempting to feed the student under adverse conditions was totally unnecessary and in violation of policies of conduct for teachers. The sixth-grade students who witnessed the encounter as well as the aide who was present all were concerned for the autistic student's well-being. The incident left a lasting and unfavorable impression on all three. If Respondent had merely stopped when the student reacted to the spork, no injury would have occurred.

30. Instead, Respondent stubbornly continued to try to feed the student. It was unnecessary and shows extremely poor judgment on Respondent's part. In this case misconduct may result when the conduct engaged in "speaks for itself," in terms of its seriousness and its adverse impact on the teacher's effectiveness. Proof of the conduct, or, as in this case, the attempt to force feed the student resulting in bruising may be considered proof of impaired effectiveness. See Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000).

31. In this state, educators are held to a high standard

of ethical behavior. It is concluded that Respondent's behavior violated that standard. Respondent failed to reasonably protect the autistic student from conditions harmful to learning and failed to protect his physical health and safety. The hand-print bruising on the student's face was directly related to Respondent's conduct. Therefore, Respondent's misconduct constitutes sufficient grounds for termination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order terminating Respondent's employment with the school district.

DONE AND ENTERED this 28th day of April, 2010 in Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
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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.