

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 10-8694
)
KARYN CENA,)
)
 Respondent.)

)

RECOMMENDED ORDER

On November 29, 2010, a formal administrative hearing was conducted by video teleconference in Tallahassee and Sarasota, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Martin, Esquire
Manatee County School Board
215 Manatee Avenue, West, Second Floor
Bradenton, Florida 34205

For Respondent: Melissa C. Mihok, Esquire
Kelly & McKee, P.A.
1718 East Seventh Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

STATEMENT OF THE ISSUE

The issue in this case is whether the Manatee County School Board (Petitioner) has just cause to terminate the employment of Teacher Karyn Cena (Respondent).

PRELIMINARY STATEMENT

By an Administrative Complaint dated August 20, 2010, the Petitioner alleged that on May 11, 2010, the Respondent forcibly grabbed a student by the arm in a disciplinary incident that was subsequently determined to be an incident of child abuse.

The Respondent denied the allegations and requested a formal administrative hearing. The Petitioner forwarded the dispute to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of six witnesses and had Exhibits 1 through 9 admitted into evidence. The Respondent testified on her own behalf, presented the testimony of one witness, and had Exhibits 1 through 10 admitted into evidence.

A Transcript of the hearing was filed on January 3, 2011. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a first grade teacher employed by the Petitioner to work at Tillman Elementary School (Tillman) pursuant to a professional services contract.

2. On May 11, 2010, the Tillman first grade students were gathered in an auditorium to rehearse for a musical program to be presented in celebration of Memorial Day.

3. The students had been rehearsing for several days prior to May 11, 2010. As might be expected, some first grade students required occasional redirection. Such redirection was generally communicated by a teacher delivering a "stern look" to the non-complying student. If the correction was not successful, a non-complying student was directed to go to the back of the room and sit on a bench that essentially served as a "time out" area.

4. At one point in the program, the students were standing, singing, and holding up their arms, pretending to waive American flags. The flags had not yet been distributed to the students. During this portion of the rehearsal on May 11, 2010, the Respondent apparently thought that one of the students ("S.M.") was playing and not pretending to wave the non-existent flag appropriately.

5. The Respondent grabbed the student by the arm and quickly walked the student to the back of the room, where the Respondent placed the student forcefully on the time out bench. The student did not resist the Respondent in any manner.

6. There was no credible evidence that the Respondent provided any redirection to the student prior to her physical interaction with the student.

7. There was no evidence that the student was unable to comply with a verbal directive delivered by the Respondent or any other teacher.

8. There was no evidence that the student was acting out or posed any threat whatsoever to himself or any other student, or to the Respondent or any other school employee.

9. There was no evidence that any force or physical contact was necessary whatsoever to correct the student's behavior or to direct the student to the time out area.

10. At the hearing, the Respondent was described by witnesses as appearing "angry" during the incident. Although the Respondent denied that she was angry with the child, the Respondent's interaction with the student was clearly inappropriate under the circumstances, and it is not unreasonable to attribute her behavior to anger.

11. Observers of the incident testified that the student appeared to be embarrassed by the incident, sitting with his head bowed after being placed on the bench. Some teachers testified that they felt personal embarrassment for the student.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).^{1/}

13. The Petitioner has the burden of proving by a preponderance of the evidence the allegations set forth in the Administrative Complaint underlying the proposed termination of the Respondent's employment. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990). In this case, the burden has been met.

14. At all times material to this case, the Respondent was employed as a first grade teacher through a professional services contract with the Petitioner. Manatee County School Board Policy 6.11(12)(c) states as follows:

Any employee of the School Board may be terminated from employment for just cause, including, but not limited to, immorality, misconduct in office, gross insubordination, willful neglect of duty, drunkenness, or conviction of any crime involving moral turpitude, violation of the Policies and Procedures Manual of the School District of Manatee County, violation of any applicable Florida statute, violation of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida. (Emphasis supplied)

15. Florida Administrative Code Rule 6B-4.009 provides the following relevant definitions:

(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 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.

16. The Principles of Professional Conduct for the Education Profession in Florida are set forth at Florida Administrative Code Rule 6B-1.006 and provides, in relevant part, as follows:

6B-1.006 Principles of Professional Conduct for the Education Profession in Florida.

(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.

* * *

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

17. The evidence established that by her physical contact with the student, the Respondent failed to make a reasonable effort to protect the student from conditions harmful to physical health or safety.

18. The evidence establishes that the Respondent intentionally exposed the student to unnecessary embarrassment by her conduct towards the student during the incident.

19. The superintendent of the Manatee County school system credibly testified during the hearing that the Respondent's misconduct was sufficient to impair her effectiveness in the school system because she acted out of anger.

20. The Petitioner asserts that the Respondent violated section 1003.32(1)(j), Florida Statutes, by use of excessive force during the incident. The cited statute provides, in relevant part, as follows:

In accordance with this section and within the framework of the district school board's code of student conduct, teachers and other instructional personnel shall have the authority to undertake any of the following actions in managing student behavior and ensuring the safety of all students in their classes and school and their opportunity to learn in an orderly and disciplined classroom:

* * *

(j) Use reasonable force, according to standards adopted by the State Board of Education, to protect himself or herself or others from injury.

21. There is no evidence that the State Board of Education has adopted standards related to the use of reasonable force in the classroom. However, there was no evidence presented that there was any need for the Respondent to touch the student or to

apply any force whatsoever during the incident. There was no evidence that the student posed any threat to himself or to any other person.

22. The Administrative Complaint alleged that the incident had been investigated by Child Protective Services (CPS) and the Manatee County Sheriff's Office and that the CPS had completed the investigation with "verified findings of child abuse." The allegation was supported only by hearsay evidence that was insufficient to support a finding of fact; accordingly, no such findings have been made.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Manatee County School Board enter a final order, terminating the employment of Karyn Cena.

DONE AND ENTERED this 1st day of March, 2011, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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 1st day of March, 2011.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

COPIES FURNISHED:

Scott A. Martin, Esquire
Manatee County School Board
215 Manatee Avenue, West, Second Floor
Bradenton, Florida 34205

Melissa C. Mihok, Esquire
Kelly & McKee, P.A.
1718 East Seventh Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

Lois Tepper, Acting General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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

Tim McGonegal, Superintendent
Manatee County School Board
215 Manatee Avenue, West
Bradenton, Florida 34205

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.