

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 10-10168
)
DONNA LICHI,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted on May 3 and 4, 2011, by webcast teleconference between Tallahassee and Fort Lauderdale, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Mark A. Emanuele, Esquire
Panza, Maurer and Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, Florida 33308

For Respondent: Jeffrey Scott Sirmons, Esquire
Johnson and Sirmons, LLP
510 Vonderburg Drive, Suite 309
Brandon, Florida 33511

STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate Respondent's employment based on determinations by two licensed psychologists

that Respondent was not fit to perform her duties as a classroom teacher.

PRELIMINARY STATEMENT

Donna Lichi (Respondent) is a classroom teacher employed by the School Board of Broward County, Florida (School Board) pursuant to a professional service contract. For the 2009-10 school year, Respondent was assigned to Everglades Elementary School (Everglades) as a second grade teacher.

For reasons that will be discussed below, the principal of Everglades submitted to the School Board's Professional Standards and Special Investigative Unit (SIU), a request that Respondent be subjected to a "fit for duty" evaluation pursuant to the School Board's Policy 4004 and attached certain information to substantiate the request. On October 16, 2009, the Acting Executive Director of SIU advised Respondent in writing that she would be required to submit to a fit for duty evaluation, a process that will be discussed below. At the conclusion of that process two licensed psychologists determined that Respondent was not fit for duty.

Based on that determination, the School Board accepted the Superintendent of School's recommendation that Respondent's employment be suspended and thereafter terminated, subject to her due process rights. Respondent timely requested a formal

hearing to challenge the proposed actions, the matter was referred to DOAH, and this proceeding followed.

At the final hearing, Petitioner presented the testimony of the father of one of Respondent's students, Martha Machado (grade chair for second grade at Everglades), Eliot Tillinger (principal of Everglades), Melissa Renedo (teacher at Everglades), Richard Mijon (Personnel Administrator V with SIU), Maria Antonia Uribe (a paraprofessional at Everglades), Jennifer Kanefsky (a teacher at Everglades), Dr. Rick Harris (psychologist), and Dr. Grace Sidberry (psychologist). School Board's pre-marked Exhibits 1-10, 13, 14, 17, 18, 20-22, and 24-26 were admitted into evidence. The remaining pre-marked exhibits were not offered into evidence. The following School Board exhibits contain sensitive information as to Respondent's health and have, on joint motion, been sealed: 4, 6, 9, 13, 20, 21, and 26.

Respondent testified on her own behalf, but offered no other testimony. Respondent offered one exhibit, which was admitted into evidence under seal due to the sensitive health information contained therein. Respondent offered no other exhibits.

A Transcript of the proceedings, consisting of three volumes, was filed on June 6, 2011. In addition, the testimonies of Drs. Harris and Sidberry were filed under seal on

July 6, 2011. On joint motion, the deadline for the filing of proposed recommended orders (PROs) was set for 30 days following the filing of the transcript. Both parties timely filed a Proposed Recommended Order, and each has been duly-considered by the undersigned in the preparation of this Recommended Order.

The undersigned has made findings of fact as to Respondent's fitness for duty in general terms to protect her privacy.

FINDINGS OF FACT

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

2. A superintendent of schools has the statutory responsibility and obligation to recommend the placement of school personnel and to require compliance and observance by all personnel of all laws, policies, and directives of the school board, the State of Florida, and the federal government. In this proceeding, the Superintendent of Schools for the Broward County School District has recommended to the School Board that Respondent's employment be terminated because she is not fit to perform her duties as a classroom teacher.

3. Respondent is a classroom teacher with approximately ten years of teaching experience. For the 2008-09 school year,

Respondent taught at Seminole Middle School. Respondent received a satisfactory evaluation for that school year.

4. Respondent was assigned to teach a second grade class at Everglades for the 2009-10 school year pursuant to a professional service contract.

5. The School Board has adopted Policy 4004, which provides for mandatory physical and/or psychological examinations for employees, as follows:

AT ANY TIME DURING THE COURSE OF EMPLOYMENT WHEN IT SHALL BE DEEMED ADVISABLE BY THE SUPERINTENDENT/DESIGNEE, AN EMPLOYEE MAY BE REQUIRED TO TAKE A PHYSICAL OR PSYCHOLOGICAL EXAMINATION.

RULES

1. The Board authorizes the Superintendent to establish procedures to carry out the intent of this policy.

2. The affected employee shall select the name of a medical doctor, psychologist or psychiatrist from a list maintained by the Division of Personnel, Policies, Government and Community Relations.

3. Where the employee is found to be unable to function satisfactorily, the Division of Personnel, Policies, Government and Community Relations shall take appropriate action.

6. On October 14, 2009, Eliot Tillinger, principal of Everglades, sent the following memo to Craig Kowalski, who was serving as the Acting Executive Director of SIU:

As per the above the above referenced policy [Policy 4004], a "fit for duty" evaluation is being requested for Donna Lichi. Attached please find her job description as well as supporting documentation. Multiple concerns regarding the safety and welfare of the students have arisen from staff and parents in the school community.

7. As reflected in the memo, Mr. Tillinger attached documentation supporting his request. This documentation was prepared by Mr. Tillinger (or by his staff at his direction), and documented his personal observations plus complaints he had received from parents and school staff. Mr. Tillinger did not formally observe Respondent, nor did he conduct a formal evaluation of her performance. His observations were from his customary "walk-throughs," which entailed unscheduled visits to classrooms and observations of approximately five minutes a visit.

8. Of particular concern to Mr. Tillinger were reports that on at least two occasions, Respondent left children who were supposed to be under her supervision without supervision. One child was observed urinating on a bush while on the playground. Instead of supervising her class, Respondent talked on her cell phone.

9. On another occasion, Respondent permitted two children to walk unsupervised through an area that parents were driving through to pick up their children after school. The children

were returning from a park adjacent to the school. The children had gone to the park to retrieve an object one of them had left during recess. Respondent exposed those two children to danger by allowing them to go to the park unsupervised. No formal disciplinary action was taken against Respondent following either incident.

10. Mr. Tillinger received a report from parents of children in Respondent's class that Respondent's interaction with them was unusual. One parent told Mr. Tillinger that Respondent was self-absorbed at the "meet your teacher" conducted just before school started and at the "open house" conducted shortly after school started. On these occasions, Respondent bragged about what good a teacher she was and boasted of her personal achievements and accolades. That parent opined to Mr. Tillinger (and testified at the formal hearing) that he did not think Respondent was aware of what was happening in her classroom because at a parent-teacher conference she did not know that his daughter could not log onto the classroom computer for several days. That parent also complained to Mr. Tillinger that Respondent required her students to wear shirts of a certain color on different days of the week, a practice that was not sanctioned by the school administration. The parent also reported that Respondent refused to complete a questionnaire

a psychologist had asked Respondent (as the child's teacher) to complete as part of an evaluation of the student.

11. Another parent reported to Mr. Tillinger that Respondent's behavior during a parent-teacher conference was bizarre. This parent reported that Respondent had "almost a catatonic stare" during the conference. The parent also reported that in a subsequent telephone conference, Respondent abruptly hung up on the parent during the middle of the conversation.

12. Mr. Tillinger characterized the number of complaints and the nature of the complaints as being "unusual."

13. Martha Machado was the grade chair for the second grade at Everglades. Ms. Machado met with the other second grade teachers on a weekly basis to discuss any concerns or issues. Although she attended these meetings, Respondent was never engaged in these meetings by asking questions or contributing comments.

14. Ms. Machado met with Respondent prior to the beginning of school to help her settle into her classroom. During that first meeting, Respondent removed from her classroom all chairs that were not colored blue and replaced them with blue chairs taken from other second grade classrooms. Respondent thereafter decorated the walls of her room completely in blue. Ms. Machado considered this behavior to be unusual.

15. Ms. Machado gave Respondent detailed lesson plans at the beginning of school and provided Respondent with copies of lesson plans Ms. Machado used for her own class. Ms. Machado offered to assist Respondent and was available to answer any questions. Until October, Respondent did not ask any questions as to the lesson plans. The lesson plans were provided to assist Respondent. Ms. Machado told Respondent to use them, modify them, or do whatever else she wanted with them. In October, Respondent admitted to Ms. Machado that she did not understand her lesson plans. Respondent also stated that she had not received copies of the lesson plans.¹ Respondent had no explanation for why she did not tell Ms. Machado sooner that she did not understand the lesson plans.

16. When a student was transferred from one classroom to another classroom, the student was to take his or her books and workbook to the new classroom. After a student was transferred from Respondent's classroom to another second grade classroom, the new teacher sent the student to Respondent's classroom to get the student's books and workbook. After the student retrieved the books and the workbook, the student returned to the new classroom. Soon thereafter, Respondent entered the new classroom, took the workbook from the student, and returned to her classroom. When informed of the incident, Ms. Machado told Respondent to return the workbook to the student.

17. Ms. Machado observed that Respondent was overly complimentary to her, copied her hairstyle, and purchased a purse identical to Ms. Machado's purse. Ms. Machado found this behavior to be strange.

18. Ms. Machado discussed her concerns about Respondent with Mr. Tillinger. Mr. Tillinger also received reports that on more than one occasion, Respondent dismissed her class 15 minutes prior to the end of the school day and had her class wait in the stairwell, singing songs and playing games until the final bell rang.

19. In response to his observations, the reports he heard as to Respondent's behavior, and his concerns as to student safety, Mr. Tillinger assigned Melissa Renedo, an intern teacher, to Respondent's classroom. Ms. Renedo was instructed to assist Respondent, and to let Ms. Machado know if anything in Respondent's class made her uncomfortable with respect to the students' safety, welfare, or academics.

20. Respondent's classroom was disorganized. She had no reading groups, she had no lesson plans (other than those given to her by Ms. Machado), and she would interrupt lessons to permit students to go to the "treasure box" to get a trinket as a reward for wearing a certain colored shirt.

21. Ms. Renedo witnessed Respondent pick up a student in the middle of a lesson, comment on how he smelled, and asked him

about his cologne. During a reading lesson, Respondent called the parent of the student with the cologne to see if she could go to the parent's house for dinner.

22. Ms. Renedo observed that Respondent frequently stopped during a lesson to wipe down door handles, computers, and desks with Lysol.

23. One morning two students who said they were fifth grade students came to Respondent's classroom at her request to assist her with setting up a bulletin board. When it was time for lunch, Respondent took her class to lunch, leaving the two fifth grade students unsupervised in the classroom. When Ms. Renedo questioned Respondent about leaving the students unsupervised, Respondent replied that it would be okay and that they were there to help out.

24. Ms. Renedo's observations and concerns were conveyed to both Ms. Machado and Mr. Tillinger.

25. Mr. Tillinger had sufficient justification for requesting the fit for duty evaluation on Respondent dated October 14, 2009.² The documentation submitted with the request was sufficient justification for SIU to deem it "advisable" to require Respondent to submit to a psychological evaluation.

26. At all times relevant to this proceeding, the Superintendent of Schools had in effect the following Policy 4004 procedures relating to fitness for duty determinations:

Fit for Duty Determination Procedures

1. The Executive Director of Professional Standards & Special Investigative Unit (SIU) receives request from a Principal/Administrator (includes District Administrators) or Superintendent/Designee.

2. SIU notifies employee via certified mail that he/she must undergo a physical and/or psychological examination. A reassignment letter is prepared directing employee to remain at home or at an alternate site with pay, depending on circumstances (i.e. active case file/investigation).

3. The affected employee shall select the name of a medical doctor psychologist or psychiatrist from a list maintained by the Executive Director of Professional Standards & Special Investigative Unit, within 24 hours.

4. SIU Administrator schedules within ten working days a medical appointment and follows-up in writing to the doctor's office and to the employee of appointment confirmation.

5. Letter is sent to the doctor explaining billing instructions, and 'Fit for Duty Evaluation' report of findings.

6. The doctor as delineated in the policy will conduct Pre [sic] evaluation at District expense. **Note: a 2nd Opinion will be at the employee's expense if requested, with the employee selecting from the School Board approved list as delineated in the policy.**

7. **A third evaluation will be mandated if previous two (Pre & 2nd Opinion) are contradicting and will be at District expense and will be binding by [sic] all parties.**

8. Doctor determines if employee is 'Fit for Duty' or [is] not [fit] for duty.

9. Where the employee is found 'unfit for duty' the Executive Director of Professional Standards & Special Investigative Unit shall take appropriate action per the recommendation of the doctor, subjecting employee to a Post-evaluation by the same doctor making the initial evaluation. The Post-evaluation ought to occur within 90 days of the initial evaluation.

10. If a doctor determines that the employee is 'Unfit for Duty', an administrative reassignment letter is prepared changing the employee's pay status to 'at home without pay (PLV)'. The employee is given information to call the Leave Department to apply for any paid leave accrued, and/or any other leave types per SBBC Policies that they are eligible for. Also, a Formal Referral to EAP is prepared for follow-up.

11. Based on the progress and/or compliance with EAP's recommendations, a Post Evaluation is scheduled within the 90-day reassessment period.

12. If employee is unfit to return to work in the Post Evaluation, then the employee is recommended for termination (School Board Agenda is prepared for the next Board Meeting). **Note: 2nd Opinions on the Post evaluation will be at the employee's expense, if requested. Third evaluation, if required will be at District expense and will be binding by [sic] all parties.**

13. Employee and school/work site are notified of doctor's fit for duty status via certified mail. (Note: Confidential Doctor's report will only be distributed to the employee). The immediate supervisor is notified as well. However if the doctor has

follow-up recommendations, then a Formal Referral to Employee Assistant Program (EAP) is prepared by SIU (i.e. mental health follow-up or other referrals as appropriate.

14. If employee is found Fit for Duty, a certified letter is sent to the employee with instructions to return to work. The immediate supervisor is notified as well.

27. Richard Mijon delivered a letter to Respondent on October 16, 2009, informing her that she would be required to submit to a fit-for-duty evaluation.

28. Respondent chose Dr. Rick Harris to conduct the initial evaluation. Dr. Harris found Respondent not to be fit for duty. Because of that finding, Dr. Harris also performed a re-evaluation.

29. Prior to the evaluations, Mr. Mijon provided Dr. Harris with the documentation attached to Mr. Tillinger's request and the results of other investigations by SIU of Respondent's behavior that occurred before she was transferred to Everglades.

30. As part of the initial evaluation, Dr. Harris examined Respondent on November 2 and December 15, 2009, and on January 6, 2010. His report, dated January 22, 2010, is part of School Board's Exhibit 4. After discussing the results of the tests he administered and his clinical interview, Dr. Harris' report summarized his findings and explained his reasons for

those findings. His testimony at the formal hearing was consistent with his report. Dr. Harris found that Respondent was not fit for duty.

31. On June 7, 2010, Dr. Harris conducted his re-evaluation of Respondent. His report, dated August 12, 2010, is also part of School Board's Exhibit 4. After discussing the results of the tests he administered during the re-evaluation, and his clinical interview, Dr. Harris' report summarized his findings and explained his reasons for those findings. His testimony at the formal hearing was consistent with his report. Dr. Harris found that Respondent continued to be unfit for duty.

32. The undersigned finds Dr. Harris' testimony to be clear, professional, and persuasive. Petitioner proved that Respondent was not fit for duty on the initial evaluation and re-evaluation by Dr. Harris.

33. Pursuant to the School Board's Policy 4004, Respondent was entitled to seek a second opinion by being evaluated by a separate School Board approved psychologist of her choosing, but at Respondent's expense. Respondent chose Dr. Grace Sidberry, a licensed psychologist.

34. Dr. Sidberry evaluated Respondent on September 8 and 14, 2010. Her report dated September 14, 2010, is contained in School Board's Exhibit 9. After discussing the results of the tests she administered during the re-evaluation, and her

clinical interview, Dr. Sidberry's report summarized her findings and explained her reasons for those findings. Her testimony at the formal hearing was consistent with her report. Dr. Sidberry found that Respondent was unfit for duty.

35. The undersigned finds Dr. Sidberry's testimony to be clear, professional, and persuasive. Petitioner established by a preponderance of the evidence that Respondent was not fit for duty as a classroom teacher as of September 14, 2010.

36. Drs. Harris and Sidberry opined that Respondent's fitness for duty may be restored following appropriate treatment for the conditions that render her unfit for duty. Respondent would not benefit from a performance development plan before her fitness for duty is restored.

37. The School Board followed its applicable rules in processing the "fit for duty" request submitted by Mr. Tillinger.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2010).

39. Because Petitioner seeks to terminate Respondent's employment and this case 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. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

40. 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)).

41. Policy 4004 and the applicable procedures specifically state, "If employee is unfit to return to work in the Post Evaluation, then the employee is recommended for termination." Petitioner followed the procedures required by Policy 4004, and the evidence established that Respondent was not fit for duty following the re-evaluation by Dr. Harris or the evaluation by Dr. Sidberry.

42. Pursuant to section 1012.33(6)(a), Florida Statutes (2010), a teacher on a professional service contract may be suspended during the term of the contract for "just cause" as defined by section 1012.33(1)(a), which provides that just cause

includes incompetency. Petitioner proved by the requisite evidentiary standard that Respondent is incapable of performing her duties as a classroom teacher due to her mental and emotional status.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the School Board of Broward County, Florida, enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order terminate Respondent's employment.

DONE AND ENTERED this 20th day of July, 2011, 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 20th day of July, 2011.

ENDNOTES

^{1/} After Respondent was removed from the classroom, the lesson plans Respondent claimed not to have received were found in file folders in her classroom storage area.

^{2/} In making that finding, the undersigned considered Respondent's argument that Policy 4004 is constitutionally infirm because there are no guidelines as to the circumstances under which a principal can request a "fit for duty" evaluation. An ALJ does not have the authority to determine constitutional challenges to adopted policies of a school board. See Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages and Tobacco v. Ruff, 592 So. 2d 668 (Fla. 1991). The undersigned has also considered the argument that Policy 4004 can be used to get rid of a teacher without providing the teacher assistance in the form of a performance development plan. While there may be times that Policy 4004 may be abused, the policy has not been abused in this case. The principal in this case had adequate reason to request the evaluation. The decision to require the evaluation was made by SIU, not the principal. SIU had sufficient reason to require the evaluation.

COPIES FURNISHED:

Donnie Carter, Interim Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

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

Gerald Robinson, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Mark A. Emanuele, Esquire
Panza, Maurer and Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, Florida 33308

Jeffrey Scott Sirmons, Esquire
Johnson and Sirmons, LLP
510 Vonderburg Drive, Suite 309
Brandon, Florida 33511

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.