

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

POLK COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 11-0873
)
JULIE HARTER,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge Thomas P. Crapps, held a formal hearing in the above-styled case on May 2, 2011, in Bartow, Florida.

APPEARANCES

For Petitioner: Donald H. Wilson, Jr., Esquire
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For Respondent: Ellis R. Faught, Jr., Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner established "just cause" to terminate Respondent from her teaching job.

PRELIMINARY STATEMENT

On January 10, 2011, Petitioner, Polk County School Board (School Board), informed Respondent, Julie Harter (Ms. Harter) that the superintendent of Polk County School District (School District), Dr. Sherrie B. Nickell, had suspended Ms. Harter as a School Board employee and would recommend her termination. The letter informed Ms. Harter that she would be terminated based on her having an adjudication withheld for violating section 316.027, Florida Statutes (2010)^{1/}, leaving the scene of an accident with injuries; and violating section 843.02, Florida Statutes, resisting or obstructing an officer without violence.

On January 18, 2011, Ms. Harter timely requested a hearing concerning the intent to terminate her employment.

On February 15, 2011, the School Board requested the Division of Administrative Hearings (DOAH) appoint an Administrative Law Judge to conduct the hearing.

On February 18, 2011, Administrative Law Judge Thomas P. Crapps was assigned the case, and an Initial Order was issued. The hearing was initially set for March 24, 2011. The parties filed a Joint Stipulation for Motion to Continue that was granted, and the hearing was rescheduled for May 2, 2011.

At the May 2, 2011, hearing, the School Board presented the testimony of Joe Farinas (Mr. Farinas) and moved into evidence Exhibits 1, 2, and 3 without objection. Ms. Harter presented

the testimony of herself, Thomas Darby (Mr. Darby), Andrea Whiteley (Ms. Whiteley), and Sharon Keener (Ms. Keener).

A one-volume Transcript of the proceedings was filed with DOAH on May 25, 2011. On May 26, 2011, the School Board filed a motion requesting an extension of time to file its proposed recommended order. The undersigned granted the extension. On June 13, 2011, the School Board filed its Proposed Recommended Order, and Ms. Harter filed her Proposed Recommended Order on June 17, 2011. Both proposed orders have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Ms. Harter is a special education teacher in the School District. She is a long-time Polk County, Florida, resident and has worked for the School District since 1985.

2. The School Board is responsible for the operation, control, and supervision of free public schools in Polk County, Florida.

3. On December 10, 2010, Ms. Harter entered a guilty plea for leaving the scene of an accident, which is a third-degree felony, and resisting or obstructing an officer without violence, which is a first-degree misdemeanor. The circuit court withheld adjudication and sentenced Ms. Harter to 36 months' probation on the felony charge, a short period of incarceration in the county jail, community service, fines, and

restitution. As of the hearing date, Ms. Harter had successfully completed her community service hours and was successfully completing the remainder of her probation.

4. Polk County School Board Policy 6Gx53-3.001 (School Board Policy 3.001) sets out the Employment Procedures followed by the School Board. In pertinent part, School Board Policy 3.001(V)(C)(4)(a), provides that:

"criminal offenses listed below will render applicants and employees ineligible for employment with Polk County Public Schools.
a) WILL NOT HIRE OR EMPLOY -- Felony convictions including, but not limited to the following: . . ."

The School Board Policy then lists 49 enumerated crimes that specifically make a person ineligible for employment.

5. School Board Policy 3.001(V)(C)(4)(d)4, also provides that a person may be considered for employment with the School District on a "case-by-case basis" when a person is "on probation [for] (Crimes not listed above)."

6. Mr. Farinas, the School District director of employee relations, credibly testified that, it is the School Board's practice to automatically terminate employees who plead guilty to a felony charge, no exception. The School Board does not employ anyone who has a felony conviction. Further, the School Board, in considering whether or not to grant a "case-by-case" analysis for employing a person who has been convicted of an

offense not listed in the School Board Policy, has limited its consideration to misdemeanors. The record, however, shows that the School Board has not been presented the question of whether or not to consider a person for continued employment, who has a felony conviction for a crime not listed in the School Board Policy and is serving a probationary sentence.

7. Ms. Harter has worked for the School District in many different capacities since 1985. It was undisputed that Ms. Harter was an exemplary special education teacher, who is respected by her peers and students. Ms. Harter has a long, successful record of working with emotionally-handicapped students. As Mr. Darby, an assistant principal who supervised Ms. Harter stated, "without Julie's influence, a lot of those students would have never made it through high school." It was undisputed that Ms. Harter is a "very dedicated and responsible teacher." For example, Ms. Whiteley credibly testified that Ms. Harter "knew all of her students, knew everything about her students, and worked very hard to get them to be successful, and also job placements." The record clearly shows that Ms. Harter is a dedicated special education teacher who loved her students and did an excellent job.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat.

9. Ms. Harter presents two arguments in this case. First, she argues that School Board Policy 3.001(V)(C)(4)(a) impermissibly allows for a teacher's termination for felonies not listed in chapter 435, Florida Statutes.^{2/} Ms. Harter reasons that, because she was not adjudicated guilty for one of the enumerated felony offenses, the School Board cannot automatically terminate her employment. Second, Ms. Harter argues that, because she is serving a probationary sentence that the School Board Policy 3.001(V)(C)(4)(d)4 directs, that the School Board make a "case-by-case" determination about whether or not to terminate her employment.

10. The School Board counters that it has the authority to go "beyond the statutory list of offences to specify that a conviction, guilty plea, or plea of nolo contendere to any felony charge will render an individual ineligible to be employed by the Polk County School Board." Petitioner's Proposed Findings of Facts and Conclusions of Law at para. 15.

11. The School Board bears the burden of proving by a preponderance of the evidence "just cause" to terminate Ms. Harter as an employee. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990). The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely

than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

12. The School Board is responsible for the operation, control and supervision of the free public schools in Polk County. Art. IX, section 4(b), Fla. Const.; and § 1001.32(2), Fla. Stat. ("district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law"). The School Board's authority extends to personnel matters including the power to suspend and dismiss an employee. §§ 1001.42(5) & 1012.22(1)(f), Fla. Stat. Further, the law permits the School Board to adopt policies "establishing standards of ethical conduct for instructional personnel and school administrators. § 1001.42(6), Fla. Stat. This authority extends to the enactment of "policies and procedures necessary for the management of all personnel of the school system." §§ 1001.43(11) & 1012.23(1), Fla. Stat.

13. The law requires that an instructional employee, such as teacher, be provided with a written contract that contains "provisions for dismissal during the term of the contract only for just cause." § 1012.33(1)(a), Fla. Stat.^{3/}

Section 1012.33(1)(a) provides that:

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, two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under s. 1012.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34, 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.^[4/]

14. The statutory language of section 1012.33, setting out that "just cause includes, but is not limited to . . ." shows that the Legislature did not intend the list to be an exclusive listing of the factors that constitute "just cause." Consequently, other wrong-doing may also constitute "just cause" for dismissal. See Dietz v. Lee Cnty Sch. Bd., 647 So. 2d 217, 218-19 (Fla. 2d DCA 1994)(Blue, J., specially concurring)("We assume that drunkenness and immorality, which are not included in the non-exclusive list of sins [set forth in section 231.36(1)(a), Florida Statutes (2001), the predecessor of section 1012.33(1)(a)] constituting just cause, would also be grounds for dismissal . . . In amending section 231.36, and creating a new contract status for teachers (professional service), and by failing to further define just cause, the

legislature gave school boards broad discretion to determine when a teacher may be dismissed during the contract term . . . I agree with the majority, that the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause.'")(footnote omitted); Pinellas Cnty. Sch. Bd. v. Cole, Case No. 11-0250 (Fla. DOAH June 17, 2011), pending agency review ("In the absence of a rule or written policy defining just cause, the Board has discretion to set standards which subject an employee to discipline."); Notter, as Superintendent of Schools v. Gentile, Case No. 10-3399 (Fla. DOAH May 23, 2011), pending agency review ("By including in the definition of the term 'just cause' the phrase 'includes, but is not limited to,' the Legislature made clear that the items listed in the definition were not intended to be exhaustive and that other wrongdoing may also constitute 'just cause' for suspension or dismissal.").

15. Recently, Judge McKibben reasoned in Pinellas Cnty Sch. Bd. v. Cole, that even though a school board has discretion to set standards for employee discipline, absent a definition of "just cause," the "just cause for discipline must rationally and logically relate to an employee's conduct in the performance of the employee's job duties and which is concerned with inefficiency, delinquency, poor leadership, lack of role

modeling, or misconduct." Id. at para. 35, citing State ex. Rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948); and In Re: Grievance of Towle, 665 A. 2d 55 (Vt. 1995).

16. In State ex. Rel. Hathaway v. Smith, the Florida Supreme Court provided a definition for terminations for cause when it stated, "[r]emoval for cause or terminations for cause is employed frequently in statutes and constitutions relating to the removal of officers and employees and has a well settled connotation. It imputes removal or termination for misconduct, some violation of the law or delict of duty on the part of the officer or employee affected." Id. at 651; See also Comprehensive Care Corp. v. Katzman, 2010 U.S. Dist. LEXIS 77121 (M.D. Fla. July 30, 2010)(citing State ex. Rel. Hathaway v. Smith and finding that "misconduct" or "termination for cause" refers to illegal activity, ethical breaches, or utter abandonment or dereliction of a job).

17. Turning to the facts in the instant case, it is not disputed that Ms. Harter pled guilty to a third-degree felony and is currently serving a probationary sentence. School Board Policy 3.001(V)(C)(4)(a) specifically recognizes certain criminal offenses render a person ineligible for employment with the Polk County schools. Furthermore, the language that the School Board "WILL NOT HIRE OR EMPLOY -- Felony convictions including, but not limited to the following: . . ." shows an

intent that the list of felonies that make a person ineligible for employment is not exclusive. Under School Board Policy 3.001 and section 1012.33, the School Board has broad discretion to determine whether or not a felony conviction, not listed in the enumerated offenses, is a disqualifying offense for employment.

18. Further, applying the rule of law in State ex. Rel. Hathaway and Cole to the facts here demonstrates support for finding of "just cause" based on Ms. Harter's criminal violation. In the instant case, the School Board has supplied a definition of "just cause" to preclude a person for employment who has any felony conviction, regardless of adjudication. As shown earlier, School Board Policy 3.001 and section 1012.33 provide the School Board with broad discretion to determine that a person with a felony conviction may be precluded from employment. Although School Board Policy 3.001, on its face, does not contain the bright-line rule that any felony conviction results in an automatic termination, the record showed that the School Board, in practice, follows an automatic termination for employees who plead guilty to a felony regardless of adjudication. Therefore, the School Board has supplied a definition of "just cause" based on its authority and discretion that a felony makes a person ineligible for employment. The holding in State ex. Rel. Hathaway recognizes that "commitment

of a crime" is a basis for termination for cause. The undersigned's conclusion that the School Board has met its burden of proof is based on the fact that Ms. Harter pled guilty to a third-degree felony and the language in State ex. Rel. Hathaway that termination for cause could be based on "some violation of law." One difficulty in this case is that the School Board did not bring forward any evidence showing how Ms. Harter's pleading guilty to leaving the scene of an accident with injuries is logically and rationally related to her job duties or effectiveness as a teacher. For example, the School Board asked Ms. Whiteley hypothetically whether or not some parents would be unhappy if their child was being taught by a person who pled guilty to a felony. Ms. Whiteley "guessed" that some might be unhappy, but that it would depend on the facts of each case. In conclusion, the School Board established "just cause" for termination by showing that it had defined "just cause" to include any felony conviction, regardless of adjudication, and the fact that Ms. Harter pled guilty to a third-degree felony.

19. The School Board acknowledged that no one has previously raised the issue brought forward by Ms. Harter concerning whether or not a person serving a probationary

sentence for a felony, not enumerated by the School Board Policy, could be considered on a "case-by-case" basis for employment.

20. A reading of the School Board Policy indicates, that the School Board may exercise its broad discretion to consider Ms. Harter's termination on a "case-by-case" basis as set out in School Board Policy 3.001(V)(C)(4)(d)4; because she is "[o]n probation [for] (Crimes not listed above)." As shown earlier, Ms. Harter is serving a probationary sentence for a felony that was not listed by the School Board Policy. Although there is no prohibition against the School Board exercising its broad powers to consider Ms. Harter's felony conviction as "just cause" for termination, the language of the School Board Policy also contemplates that for persons serving a probationary sentence based on a sentence for crimes not listed by the policy that the School Board may make a "case-by-case" analysis. Here, Ms. Harter is serving a probationary sentence for a crime not listed by the policy. Therefore, it is appropriate that the School Board consider Ms. Harter's employment on a "case-by-case" basis.

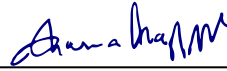
21. In considering a recommendation, the undersigned weighed the seriousness of Ms. Harter's pleading guilty to a third-degree felony, and the fact that teachers are role models. These factors carry great weight. At the same time, there is

compelling and undisputed facts concerning Ms. Harter. It was undisputed that Ms. Harter is a well-respected special education teacher. The record also showed that it was undisputed that in over 25 years of working with the School District that Ms. Harter was an exemplary employee. Moreover, based on the record brought forward, it appears that the events that occurred on March 3, 2010, the date that Ms. Harter committed her crimes, are an isolated instance and not a full reflection of her character. When weighed in the balance, the greater weight of the evidence supports the finding that the School Board established by the preponderance of evidence "just cause" to terminate Ms. Harter as an employee.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that the School Board established "just cause" to terminate Ms. Harter and that Ms. Harter's employment be terminated.

DONE AND ENTERED this 14th day of July, 2011, in
Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 2011.

ENDNOTES

^{1/} All references to the Florida Statutes shall be the 2010 version, unless otherwise stated in the Recommended Order.

^{2/} Section 435.04 concerns the Level 2 background screening standards conducted as condition for employment. Ms. Harter's citation to section 435.04 is based on the School Board Policy's statement that any person who

"has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to any offense outlined in section 435.04, Florida Statutes (or any similar statute of another jurisdiction) or described below, they shall be released from their probationary service/recommended for termination or their contract for services shall be cancelled." School Board Policy 3.001(V)(C)(3)(d).

^{3/} Section 1012.33(1)(a) exempts employees with "continuing contracts," as set out in subsection 4 of the statute, from the requirement of a written contract containing the "just cause" provision. Because the facts in the instant case do not show

that Ms. Harter had a "continuing contract," that provision of the statute is not relevant for this Recommended Order.

^{4/} Florida Administrative Code Rule 6B-4009, defines several of the "just cause" factors set out in the section 1012.33(1)(a), for purposes of dismissing an instructional personnel. Rule 6B-4009 provides the definitions for incompetence, inefficiency, incapacity, immorality, misconduct in office, gross insubordination, drunkenness and moral turpitude.

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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.