

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 11-1772PL
)
DEANA BROWN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On June 17, 2011, a formal administrative hearing was conducted by video teleconference in Lakeland and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bruce P. Taylor, Esquire
204 37th Avenue, Suite 190
St. Petersburg, Florida 33704

For Respondent: Mark Herdman, Esquire
Herdman and Sakellarides, P.A.
29605 U.S. Highway 19, North, Suite 110
Clearwater, Florida 33761

STATEMENT OF THE ISSUES

The issues in this case are whether the allegations set forth in the Administrative Complaint filed by the Petitioner, Dr. Eric J. Smith, as Commissioner of Education, against the

Respondent, Deana Brown, are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated April 2, 2010, the Petitioner alleged that the Respondent "engaged in a pattern of failing to supervise her students during the 2006-2007 and 2007-2008 school years." The Respondent denied the allegation 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 one witness and had Exhibits 1 through 20 and 23 admitted into evidence. The Respondent testified on her own behalf, presented the testimony of one witness, and had Exhibits 2 through 6 admitted into evidence.

A Transcript of the hearing was filed on July 29, 2011. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order. A Pre-hearing Stipulation filed by the parties contained stipulations of fact that have been incorporated herein as necessary.

FINDINGS OF FACT

1. At all times material to this case, the Respondent held a Florida Educator's Certificate No. 801038, covering the areas of elementary education, English for speakers of other languages

(ESOL), and varying exceptionalities, valid through June 30, 2013.

2. The Respondent was first employed by the Polk County School District (District) as an exceptional student education (ESE) teacher in 1998. She transferred to Spook Hill Elementary School (SHES), a unit of the District, at the beginning of the 2003-2004 school year.

3. At the beginning of the 2005-2006 school year, the Respondent was assigned by SHES Principal Matthew Burkett (Mr. Burkett) to teach in the pre-kindergarten (Pre-K) ESE class. Students in the classroom were three to five years of age and exhibited disabilities ranging from autism to being educable mentally handicapped. This was the Respondent's first experience teaching in the Pre-K ESE classroom.

4. The Respondent's classroom was a portable structure, surrounded by a fence, with a ramp leading from the classroom door into a playground area. There was a restroom in the portable classroom building. The classroom was staffed by the Respondent and a paraprofessional.

5. Mr. Burkett testified that he became concerned with the Respondent's classroom performance based on contacts with parents of students in the classroom. Mr. Burkett identified the concerns as "sleeping, being on the cell phone, those types of things." Mr. Burkett apparently made an effort to observe

the Respondent based on such concerns, and his observations resulted in disciplinary actions.

6. On January 19, 2007, Mr. Burkett issued a verbal warning to the Respondent regarding the issue of sleeping in the classroom and confirmed the verbal warning by letter dated January 22, 2007. The letter noted that the Respondent explained that she had been modeling behavior for the children during naptime. The letter advised that the Respondent's sleeping at naptime was not appropriate, that she should not lie down on the floor with her students, and that any issue "that jeopardizes the health and safety of the students will result in further disciplinary action."

7. At 12:45 p.m. on February 2, 2007, Mr. Burkett returned to the Respondent's classroom to talk to the Respondent. He found the classroom dark and quiet, with the students, some of whom were asleep, lying on the floor. The Respondent was not asleep but was lying on the floor. Mr. Burkett reminded the Respondent that she had been directed to refrain from lying on the floor with students, and, on February 8, 2007, he issued a written reprimand to the Respondent for disregarding the directive.

8. On February 9, 2007, Mr. Burkett issued a "letter of concern," wherein he referenced issues discussed during conferences with the Respondent on February 2, 5, and 8, 2007.

9. The letter noted the presence in the classroom of the Respondent's niece, an unapproved volunteer, and stated that the girl was prohibited from being in the classroom until the niece applied for and receive approval to be a volunteer.

10. The letter noted the presence of an adult male in the classroom, an air-conditioning technician employed by the county, with whom the Respondent was planning a class reunion. The letter directed the Respondent to refrain from conducting personal business in the classroom.

11. The letter noted the Respondent's frequent use of a telephone earpiece and her cell phone on personal business during school hours.

12. The letter indicated the Respondent had explained that the calls were to the parents of her students and were school related, that the Respondent had been instructed not to wear the earpiece, and that the Respondent had subsequently been observed using her cell phone and earpiece. The letter directed the Respondent to discontinue having her cell phone "on your person during the school day from 7:30 am to 3:15 pm."

13. The letter noted concern that the Respondent was not "engaged" with her students and that the Respondent had claimed to have been "busy" at times a parent had observed the classroom. The letter directed the Respondent to assign "busy"

tasks to her paraprofessional so that the Respondent could remain engaged with her students.

14. The letter noted another discussion regarding napping and advised the Respondent that students were to nap for only one hour, rather than from 12:45 p.m. to 2:00 p.m.

15. The letter noted the Respondent had not been supervising her students during playground time and had stayed inside to clean the classroom. The letter stated that the custodian was responsible for cleaning the room and would do so.

16. The letter noted that various educational items hanging from the classroom ceiling were a violation of the fire code and needed to be removed.

17. The letter noted that the Respondent had chosen to allow parents to drop students off at school prior to 7:15 a.m. The Respondent testified that she did so to accommodate parents whose schedules were difficult. The letter advised the Respondent that students were not to be dropped off at school prior to 7:15 a.m. and that the principal would intervene with parents if necessary.

18. Also on February 9, 2007, Mr. Burkett issued a verbal warning to the Respondent for leaving the school campus during working hours on February 7, 2007, without obtaining prior approval from the school administration. He documented the verbal warning by separate letter dated September 9, 2007,

wherein he noted that the SHES assistant principal had been required "to assist with the safety and supervision of your students" during the unapproved absence. The letter noted that the Respondent had explained she left school to take her niece to work. The letter advised that further incidence of leaving the school grounds during working hours without approval would result in further disciplinary action.

19. On March 1, 2007, Mr. Burkett observed the paraprofessional in the playground, sitting on a swing set, holding a child, and yelling at other students who were running on the ramp. Both the portable door and the fence gate were "wide open." Mr. Burkett returned the students to the classroom where he observed other students playing in the teacher's chair while the Respondent talked on her personal cell phone, unaware that Mr. Burkett had entered the room.

20. On March 6, 2007, Mr. Burkett issued a written reprimand for the Respondent's continued use of her personal cell phone during school hours. The Respondent asserted that she was talking to the parent of a student who had called a few seconds prior to Mr. Burkett's entrance into the classroom (despite his directive of February 9, 2007, prohibiting her possession of her personal cell phone on campus during school hours).

21. By letter dated March 14, 2007, the District superintendant issued a letter suspending the Respondent without pay for one day (March 22, 2007) based on the events of March 1, 2007.

22. On March 19, 2007, the Respondent became engaged in an altercation with her niece, who was again on the SHES campus during school hours. During the altercation, the Respondent argued with her niece and slapped her niece on the face. When the niece left the campus, the Respondent got into her personal vehicle and followed her niece. The Respondent failed to follow SHES procedure when she left the campus during school hours.

23. By letter dated April 18, 2007, the District superintendant issued a letter suspending the Respondent without pay for one day (April 25, 2007) based on the events of March 19, 2007.

24. By letter dated May 8, 2007, Mr. Burkett referenced the creation on March 8, 2007, of a Professional Development Plan (PDP) to "address the learning environment" in the Respondent's classroom. Among the performance deficiencies identified in the PDP and noted in the letter was the failure to circulate around the classroom during activities, engaging and interacting with students, rather than sitting at the teacher's desk. Additional deficiencies included a failure to comply with

the students' Individual Education Plans (IEPs), posting a daily classroom schedule, and classroom safety issues.

25. On August 31, 2007, the Respondent strapped a misbehaving student into a 24-inch tall high chair and then left the classroom to use a laminating machine and a non-classroom restroom. The paraprofessional remained in the room with the students. The student's IEP did not allow for use of a high chair as a restraining or "time-out" device. Mr. Burkett entered the classroom approximately ten minutes after the Respondent left and observed that both the high chair and the student had fallen over. The student was not injured. The Respondent returned to the classroom about five minutes after Mr. Burkett entered the room and explained where she had been.

26. By letter dated September 10, 2007, the District superintendant issued a letter suspending the Respondent without pay for five days (September 17 through 21, 2007) based on the Respondent's disciplinary history and the events of August 31, 2007. Prior to the suspension period, the dates of suspension were amended to September 20, 21, and 14 through 16, 2007.

27. On January 17, 2008, the Respondent again left the SHES campus prior to the conclusion of her working hours without obtaining approval from school officials. At approximately 2:30 p.m., on that date, a Pre-K student failed to appear at the designated time and location for bus transportation from the

school to home. Mr. Burkett attempted to locate the Respondent to resolve concerns about the student's location and determined that the Respondent was not present on campus. After the Respondent was eventually located, she told school officials that she placed the student on a different bus on that date and then left the campus. She had not advised anyone at the school of the alternative transportation arrangements prior to her unapproved departure from campus. After confirming that the child was indeed on the other bus, his regular bus departed late from the school campus.

28. By letter dated January 30, 2008, the District superintendant issued a letter suspending the Respondent without pay for five days (February 6 through 12, 2008) based on the Respondent's disciplinary history and the events of January 17, 2008.

29. On February 21, 2008, an assistant principal at SHES went into the Respondent's classroom for an informal observation. The Respondent was seated at her computer when the assistant principal entered the room. After looking around the room, the assistant principal believed that not all of the Respondent's students were present in the room. The assistant principal took a head count, determined that one child was missing from the classroom, and inquired of the Respondent as to the location of the missing student. The child was subsequently

found, unharmed, in the portable classroom bathroom. The Respondent had been unaware of the missing child prior to the assistant principal's observation that the child was not present and had no idea of the child's location.

30. By letter dated March 3, 2008, the District superintendant issued a letter immediately suspending the Respondent with pay and stating that the superintendant would recommend to the Polk County School Board that the Respondent's employment be terminated. The grounds for the proposed termination included the Respondent's "continuing pattern of violating school and district policies" and a "pattern of failing to properly supervise students under your care."

31. The Respondent's employment with the District ended after an unsuccessful administrative challenge to the proposed termination.

CONCLUSIONS OF LAW

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

33. In this case, the Petitioner is seeking to revoke the Respondent's teaching certification. License revocations are penal in nature. The Petitioner must demonstrate the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v.

Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In order to be "clear and convincing," the evidence must be "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." See Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, the burden has been met.

34. Section 1012.795(1), Florida Statutes, provides in relevant part as follows:

The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any

other penalty provided by law, if the person:

* * *

(g) Upon investigation, has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board.

* * *

(j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

35. The evidence established that the Respondent's failure to comply with directives from the principal regarding use of her personal cell phone and lying on the floor during naptime reduced her effectiveness as an employee of the District. The Respondent's physical altercation with her niece while on school campus and during employment hours reduced her effectiveness as an employee of the District. Restraining a student in a high chair and then leaving the classroom for upwards of 15 minutes, during which time the child and the chair fell over, reduced her effectiveness as an employee of the District. Leaving the campus without permission during employment hours reduced her effectiveness as an employee of the District. Placing a child on a school bus different from the child's usual bus without notifying anyone at SHES and then, yet again, leaving campus early without permission reduced her effectiveness as an

employee of the District. Failing to supervise students or to be aware of their location reduced her effectiveness as an employee of the District. Accordingly, the Respondent has violated section 1012.795(1)(g).

36. The Petitioner has charged that the Respondent violated the Principles of Professional Conduct for the Education Profession as prescribed by State Board of Education rules. Such principles are set forth at Florida Administrative Code Rule 6B-1.006, which provides, in relevant part, as follows:

(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.

37. The evidence established that the Respondent restrained a student in a high chair and left the classroom for approximately 15 minutes, during which time the child and the chair fell over. The evidence also established that the

Respondent failed to supervise her students or to be aware of their locations. In so doing, the Respondent failed to make a reasonable effort to protect students from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety. The Respondent has violated rule 6B-1.006(3)(a) and, accordingly, has violated section 1012.795(1)(j).

38. Florida Administrative Code Rule 6B-11.007 sets forth the disciplinary guidelines applicable to this proceeding. The Petitioner's Proposed Recommended Order included a proposed penalty in compliance with the guidelines, which is reasonable under the facts of this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order imposing a two-year suspension of the Respondent's teaching certificate followed by a three-year probationary period, including such terms and conditions, including appropriate additional educational requirements, as the Education Practices Commission may choose to impose.

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

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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this 14th day of September, 2011.

ENDNOTE

^{1/} References to Florida Statutes are to the 2010 version,
unless otherwise stated.

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.