

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-0131TTS
)
JERRY ZURZOLO,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on March 7 through 9, 2012, in Fort Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire
School District of Lee County
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For Respondent: Robert J. Coleman, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether just cause exists to terminate Respondent's employment with Petitioner based on alleged incompetence, as defined by Florida Administrative Code

Rule 6B-4.009(1); and whether Respondent failed to correct performance deficiencies pursuant to section 1012.34(3), Florida Statute (2011).^{1/}

PRELIMINARY STATEMENT

On December 12, 2011, Joseph Burke, Ed.D., superintendent, notified Respondent, Jerry Zurzolo, that termination of his employment was being recommended to the Lee County School Board (the "Board"). A Petition for Termination of Employment was filed with the Board by the superintendent on December 14, 2011. Respondent timely requested a formal administrative hearing to contest the decision.

The Board forwarded the Petition to the Division of Administrative Hearings (DOAH) on January 10, 2012, citing Respondent's request for a formal administrative hearing. At the final hearing, the Board called the following witnesses: Debra Lee, third-grade teacher; Donna Cole, exceptional student education ("ESE") teacher; Melissa Taveras, teacher; Georgianna McDaniel, director of Personnel; Christopher Cann, assistant principal; Beth Bolger, assistant director for grants; Sandra Strausser, principal of Colonial Elementary School (the "School"); and Diane Sherman, coordinator for curriculum and staff development. Petitioner's Exhibits 1 through 16 were admitted into evidence. Respondent testified on his own behalf. Respondent offered Exhibits 1 through 18 into evidence, each of

which was accepted. (All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent such hearsay was not corroborated or not used to substantiate other competent evidence, it will not be used as a basis for any finding herein.)

The parties advised the undersigned that a transcript of the final hearing would be ordered. They were given ten days from the date the transcript was filed at DOAH to submit proposed recommended orders. The Transcript was filed at DOAH on April 6, 2012; however, the parties requested and were given additional time to file their proposed recommended orders. Each party timely submitted a Proposed Recommended Order, and both parties' submissions were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Board is responsible for hiring, terminating, and overseeing all employees at the School.

2. At all times relevant hereto, Respondent was an art teacher in the Lee County school system. During the 2009-2010 school year, Respondent taught the first semester (August through December) at Portorff Elementary and the second semester (January through May) at the School. He was assigned full time to the School at some point during the 2010-2011 school year.

Respondent has been a teacher in the Lee County school system

since 2002. Prior to that, he taught two years in New York and two years in North Carolina.

3. In each of his first nine years teaching in Lee County, Respondent received satisfactory performance evaluations. He rarely received higher than satisfactory performance scores and only two less-than-satisfactory scores. In his latest evaluation (for the 2010-2011 school year), Respondent received "needs improvement" scores in the areas of professional behavior and supervision. He rated satisfactory in planning and preparation, punctuality, and logical thinking and decisions, but those areas were noted as "focus areas," meaning he needed to improve on them. The 2009-2010 evaluation had contained all satisfactory scores, but again noted some focus areas.

4. At the end of the 2010-2011 school year, Respondent received a generally satisfactory evaluation. He was given no formal indication by his principal that his work was not acceptable, but he had been told that he needed to improve in some areas. His principal did not grade Respondent unsatisfactory because she said if she gave him "needs improvement" and provided him with assistance, he could correct his shortcomings. On August 4, 2011, right at the beginning of the new school year, Respondent received a letter via hand-delivery from the superintendent of schools. The letter advised Respondent that he was being placed in the Intensive Assistance

Program ("IAP"). At that point, Respondent's principal had not furnished him any informal assistance to correct his deficiencies.

5. IAP is a program established to help teachers who are struggling in any area of their work performance. IAP is also generically referred to as performance probation. The minutes of the first IAP meeting indicated the stated purpose of the program was to "provide resources and feedback for improvement in the areas indicated as 'Needs Improvement' and 'Unsatisfactory' on the Final Performance Assessment."^{2/} The IAP process is supposed to last 90 days and consists of a total of eight meetings. During the IAP process, unannounced observations of Respondent's classroom would be made by IAP team members. The observations were to last for a minimum of 30 minutes each and would be scheduled so that two observations would not occur on the same day.

6. There is some question as to whether the IAP process actually lasted 90 days. A letter from the superintendent dated December 8, 2011, says the process started on August 18, 2011, i.e., on the date of the first of the eight scheduled meetings. The process was completed on November 30, 2011, the date of the eighth meeting. At the initial meeting, the IAP team discussed how the process would work, but there was no substantive assistance or feedback given. The first observation of

Respondent's classroom by a team member was done on August 22, 2011. Feedback and discussion of that observation (i.e., the "assistance" part of IAP) did not occur until the second meeting held on September 15, 2011. Ninety days from August 18, 2011, would be November 16, 2011; 90 days from September 15, 2011, would be December 14, 2011. However, due to the ultimate findings made herein, an exact determination of the 90-day period is not necessary.

7. According to the IAP process, three different observers were to take turns sitting in on Respondent's classroom at random times. The observers were: Strausser, the principal; Cann, the assistant principal; and Sherman, the staff development director. Respondent was teaching art, one of the "special" areas within the School. He did not have a single class of students for the entire school day; rather, he taught a different group of children every class period. He would teach students ranging from kindergarten to fifth grade throughout each day. In all, he would see over 700 students during the rotation of classrooms into his art class.

8. Respondent's classroom was observed on August 22, 2011, for 36 minutes by Cann. On September 9, 2011, Strausser observed for an unspecified amount of time. On September 12, 2011, Sherman observed for an hour and 15 minutes. Their observations were discussed at the September 15, 2011, meeting (the second

meeting in the IAP process). Among the observations made were the following: that Respondent wheeled his chair from place to place in the classroom rather than walking; that his cell phone alarm went off, signaling time for clean-up rather than using the alarm on his classroom smart board; that he "yelled" at a student; that he allowed students to draw on the smart board one at a time rather than involving the entire class in an activity; that he did not give students enough time to answer questions; and that he misspelled words on the smart board.

9. Respondent explained that his smart board was malfunctioning and needed to be repaired; that he never intentionally "yelled" at anyone, but may have talked louder than necessary; and that he rewarded students by allowing them to draw on the smart board. He also said he didn't know about the alarm on the smart board, but that he would use it in lieu of his cell phone (which was not even a functioning telephone; he used it only as an alarm). He also agreed to allow more time for students to answer questions after they were posed.

10. There were observations on September 19, 2011 (35 minutes, Sherman); September 22, 2011 (35 minutes, Cann); and September 23, 2011 (Strausser, length of time not provided). The observations were discussed at the third IAP meeting on September 26, 2011. The findings included: the classroom was not neat and orderly; he should not try to hurry students in a

negative fashion; he should ask questions that require more thought and reasoning by his students; he should stick to his academic plan; he should use correct and appropriate words, i.e., octopi, rather than octopuses; and octopus arms, instead of octopus legs; and, the class should start on time. As for classroom management, it was suggested he could direct students to use one door for entering and the other for exiting his classroom.

11. At the IAP meeting to discuss the observations, the minutes reflect pages of observations and concerns, but only a few minor areas to follow up. Based on the observations, Respondent took steps to organize and clean his classroom, he accepted the advice concerning use of two doors, and he agreed to make every effort to start class instruction timely.

12. Cann observed the room on October 4, 2011, for 35 minutes. Sherman observed the classroom on the next day for 35 minutes during a fifth-grade class with 19 students. Sherman somehow was able to observe how many students were "off task" every five minutes while making observations about Respondent's teaching style. Strausser apparently did not conduct an observation prior to the next IAP meeting held on October 6, 2011. At that meeting, the identified areas for Respondent to focus on were using the latest Sunshine State Standards for his lesson plans, waiting a moment after asking a question, cleaning

and organizing his room, and using a level tone of voice with students.

13. Because the IAP meetings had started to last longer than the prescribed time, beginning with this meeting, Respondent asked if he could comment on the observations in writing at the next meeting. That arrangement seemed to put Respondent at a disadvantage as compared to others at the meeting, but the IAP team agreed to the process.

14. Cann observed the classroom again on October 17, 2011, for 35 minutes; and on October 20, 2011, for 35 minutes. Sherman observed on October 18, 2011, for 35 minutes, during a third-grade class with 18 students. Strausser observed on the same day (in contravention of the IAP guidelines) for one hour. Their findings, discussed at the October 18, 2011, meeting included: Respondent making sarcastic comments to students; he did not correctly discipline a child who was whistling; and his lesson did not appear to have substance (at least according to Cann). Sherman again made note of the number of children off-task at several different times during her visit. She also measured the depth of the questions he asked of students, finding them to be less challenging than she deemed appropriate for their grade level.

15. At the meeting to "discuss" the findings, which lasted 43 minutes, Respondent again agreed to submit his responses in

writing. He specifically asked for some feedback concerning his efforts to improve, but Strausser said there had not been any improvements. In his written response, Respondent explained the situation concerning the whistling boy; he was sight-impaired and whistled all the time. He also provided rational responses to each of the IAP members' concerns.

16. Sherman next observed on October 21, 2011, for 35 minutes during a kindergarten class. She took exception to Respondent's giving students a directive, its not being followed, and Respondent's moving forward anyway. Strausser visited on October 25, 2011, for one full hour. She found that students were working on a project not set forth in the lesson plan, that it took Respondent rather long to seat new students, and that Respondent gave too detailed instructions, not allowing creativity.

17. At the meeting held on November 1, 2011, to discuss those findings, there was little in the way of assistance or instruction provided to Respondent. He submitted responses to the observations in writing. He explained, by way of example, that because he had so many different classes of children, from kindergarten through fifth grade, he was not as familiar with his 700 students as a regular teacher might be with their smaller number of students. Thus, he might need to verify students' attendance by calling a name, rather than recognizing a face.

18. On November 3, 2011, Sherman observed the classroom for 35 minutes during a fourth-grade class of 20 students. She found that students were engaged in horseplay around the sink, that Respondent asked low-level questions, and that some students were working without waiting for instruction. Strausser observed on November 8, 2011, for an undisclosed amount of time. She questioned whether classroom instructions started promptly and whether the substance of the lesson was appropriate for the grade level. Cann's observation was on November 9, 2011, for 35 minutes. He noted the classroom was dark, some students did not follow directions, and the lesson was too easy.

19. Those observations were discussed at the November 15, 2011, meeting, the seventh of eight planned meetings. In the follow-up portion of the minutes for that meeting, everyone was simply reminded that the next meeting would be the last one. A recommendation would be made at the conclusion of the last meeting. Respondent again submitted written comments and responses to the findings made by the observers. His responses, even if self-serving, provided rational reasons for most of the shortcomings identified by the observers. For example, he explained that natural light (i.e., no electric light) was sometimes the most conducive to the art being created by his students. He also gave examples of how he had reorganized materials in his classroom per the observers' suggestions.

20. The last observation by Strausser was on November 16, 2011, at 10:55 a.m., for an indiscernible length of time. She took exception to the level of challenge for projects being created by the fifth-grade class. Cann observed on November 21, 2011, for 35 minutes. He, too, questioned the age appropriateness of the lesson for the day. He also found fault with the way Respondent handled a child who cried the entire class period. The last observation by Sherman was on November 21, 2011, for 35 minutes. She observed two students using scissors inappropriately, found the class not to be totally responsive to directions, and thought the lesson was not challenging to the students.

21. Those observations were discussed at the last IAP meeting held on November 30, 2011. The meeting lasted one hour. Respondent gave his responses orally at that meeting, rather than submit them later in writing. At the conclusion of the meeting, Respondent and his union representative were asked to leave the room. The IAP team then discussed the matter and decided to recommend termination of Respondent's employment at the School.

22. Besides the IAP process, the School had other concerns about Respondent. According to a fellow teacher, Ms. Lee, her students were messy at times upon returning from art, and they seemed to like art more under a different teacher. Ms. Cole, a teacher, said she provided Respondent with help so that he could

deal with ESE students in a more positive fashion. Ms. Taveras, another teacher, found Respondent's lessons to be below the students' abilities. She provided him with optional ideas, but did not think he implemented the ideas well.

23. Respondent is an art teacher and may not be held to the higher standard of other classroom teachers. However, he has a formal education and has taught school for over ten years. It is the opinion and observation of the undersigned that Respondent has significant shortcomings in the area of written and verbal communications. His grammar needs improvement and some remedial training would be beneficial. However, he appears to know how to teach art and does an adequate, though not superior, job. His evaluations are probably correct; he is "satisfactory," but not high-performing.

24. Strausser does not appear to want Respondent at her school and feels like she had no choice when Respondent was assigned there. She does not view him favorably, as evidenced by her comments and observations. It does not seem appropriate that she was part of a team which is supposed to furnish assistance to the teachers in order to retain them at the School. To avoid the appearance of impropriety, a different observer would have been preferable.

25. Much of the criticism of Respondent was fairly devoid of significant substance. For example, he was negatively

critiqued when he attempted to assist kindergarten students by suggesting they use the letter "A" for the fish's mouth. Cann opined that the letter "V" would be more appropriate because that letter did not have a cross mark like the letter "A." Respondent explained that younger students are more familiar with "A" than "V," so he opted for the more familiar letter. It is difficult to ascertain how such a concern would be an element of determining whether to terminate Respondent's employment. Respondent is criticized by one observer for not being in close proximity to all of his students, i.e., moving around the classroom; another observer chastised him for not staying at the front of the class so all students could see him. He was told to be more creative, yet criticized for allowing students to draw blue pizza.

26. The most serious concerns expressed by the IAP team had to do with the level of work given to students and the depth of questions posed to students. However, the IAP meeting notes do not reflect much assistance being provided to Respondent in those areas.

27. There was little, if any, testimony by the IAP team members as to how they assisted Respondent during the process. Instead of assistance, there was a heavy concentration of criticisms, some of them so petty as to be suspect. If the team

was supposed to be helping Respondent improve, as opposed to highlighting his faults, then the team failed.

28. Respondent is not an excellent teacher, but his shortcomings were not properly addressed. The IAP team did not "provide resources and feedback for improvement in the areas indicated" to correct his deficiencies.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract with the Lee County School Board. The proceedings are governed by sections 120.57 and 120.569, Florida Statutes.

30. The superintendent of schools for Lee County, Florida, has the authority to recommend to the School Board that an employee be suspended or dismissed from employment. §§ 1012.22(1)(f) & 1012.33(6), Fla. Stat.

31. The burden of proof in this proceeding is on Petitioner to prove by a preponderance of the evidence that just cause exists to suspend or terminate the employment of Respondent. McNeil 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).

32. Petitioner has discretion to set standards which subject an employee to discipline. See Dietz v. Lee Cnty. Sch.

Bd., 647 So. 2d 217 (Fla. 2d DCA 1994). Nonetheless, 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. State ex. rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948); In re: Grievance of Towle, 665 A. 2d 55 (Vt. 1995).

33. The School Board has construed just cause for purposes of discipline pursuant to the TALC Agreement in the same manner as that phrase is used in section 1012.33, viz:

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 and found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

34. Specifically, the Board is alleging that Respondent is incompetent and, therefore, just cause exists for termination of his employment. Despite the fact Respondent is not the best teacher and has several shortcomings, there is insufficient evidence that he is incompetent. The IAP process did not establish just cause for termination of his employment.

35. It should also be noted that the IAP process, which was for the purported purpose of providing Respondent with assistance so that his deficiencies could be addressed and corrected,

focused almost entirely on identifying every possible problem, no matter how minute, in Respondent's classes. There was no credible testimony or evidence that Respondent was given helpful instructions and assistance to correct those deficiencies.

36. Under the "performance probation" (a/k/a IAP) process, it is the duty of school administration to "provide assistance in helping correct deficiencies within a prescribed period of time." § 1012.34(4)(b). The School Board failed in that regard.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by Petitioner, Lee County School Board, rescinding its termination of the employment of Respondent, Jerry Zurzolo.

DONE AND ENTERED this 9th day of May, 2012, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of May, 2012.

ENDNOTES

1/ Unless stated otherwise herein, all references to Florida Statutes will be to the 2011 version.

2/ The director of personnel advised the principal that the IAP was not appropriate for a teacher that did not have unsatisfactory scores on their evaluation. However, after some deliberation, the School opted to go forward with the IAP process.

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.