

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-0899TTS
)
ROBERT J. SINGER,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 13, 2012, in Bradenton, Florida, before Administrative Law Judge Linzie F. Bogan, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Erin G. Jackson, Esquire
Thompson, Sizemore, Gonzalez
and Hearing, P.A.
Post Office Box 639
201 North Franklin Street, Suite 1600
Tampa, Florida 33602

For Respondent: Robert J. Singer
14703 1st Avenue East
Bradenton, Florida 34212

STATEMENT OF THE ISSUE

Whether there is just cause for the Manatee County School Board to terminate the employment of Robert J. Singer.

PRELIMINARY STATEMENT

On or about February 8, 2012, Petitioner, Manatee County School Board (Petitioner/School Board), through Timothy McGonegal, as superintendent of schools, served on Respondent, Robert J. Singer (Respondent), an Administrative Complaint recommending Respondent's termination from employment. Respondent timely filed his request for administrative hearing, and on March 9, 2012, the matter was referred to the Division of Administrative Hearings for a disputed fact hearing. By consent of the parties, the disputed fact hearing was held on September 13, 2012.

During the final hearing, Petitioner offered testimony from Respondent, Randall Petrilla, and Anthony Losada. In addition to testifying on his own behalf, Respondent offered the testimony of Debra Horne. Petitioner's Exhibits 1 through 8, 8A through 8M, and 9 through 16 were admitted into evidence. Respondent's Exhibit A was admitted into evidence.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on September 21, 2012. Each party filed a Proposed Recommended Order (PRO). The respective PROs were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board is the duly authorized entity responsible for providing public education in Manatee County, Florida.

2. Respondent has been employed by the School Board as a teacher's aide at Braden River Middle School (BRMS) since September 6, 2007. A person employed as a teacher's aide is considered an "educational support employee" and is subject to section 1012.40, Florida Statutes (2011).^{1/} Respondent's position as a teacher's aide is covered by the Paraprofessional Bargaining Unit, Collective Bargaining Agreement, between the Manatee County District School Board and Manatee Education Association 3821 (Collective Bargaining Agreement). Article XVI of the Collective Bargaining Agreement provides in relevant part that "[n]o regular paraprofessional will be dismissed or deprived of salary or fringe benefits during the term of the school year without just cause." The Collective Bargaining Agreement does not define "just cause."

3. As a teacher's aide, Respondent was responsible for:

- (1) assisting in the supervision of students on campus, as well as in the classroom;
- (2) assisting with supervision of students in the cafeteria;
- (3) assisting and monitoring testing of students;
- (4) participating in workshops and training sessions as required;
- (5) providing a safe and secure workplace;
- (6) keeping supervisors informed of potential problems or unusual events; and
- (7) following School Board policies, rules and regulations.

4. Mr. Randall Petrilla (Petrilla), principal of BRMS, is Respondent's supervisor. While working at BRMS, Petrilla charged

Respondent with the responsibility of running the In-School Suspension Program (ISS). Students are assigned to ISS when they commit minor infractions of school rules. Respondent was the only adult assigned to supervise the ISS classroom, and during any given day, there would be anywhere from 0 to 20 students assigned to Respondent for supervision. By his own admission, Respondent acknowledges that it is "extremely important" to remain awake and to always maintain control of the students in ISS.

5. Throughout Respondent's employment, Petrilla has counseled or disciplined Respondent for improper behavior and for falling asleep during school hours. Specifically, Respondent has been counseled or disciplined as follows:

a. On April 28, 2009, Respondent received an evaluation. In his evaluation, Petrilla stated that Respondent needed to work on maintaining self control. Petrilla also noted that Respondent had fallen asleep during faculty meetings and while supervising students in ISS.

b. On February 10, 2010, several students reported that Singer fell asleep in the ISS classroom while supervising students. Petrilla informed Respondent that "[i]t is expected that there will be no recurrence of this [type] of behavior" and if such an event did recur, then further disciplinary action would result.

c. On June 12, 2010, Respondent received an evaluation and it was noted therein that Respondent "continues to have issues w/ sleeping when he is supervising students."

d. On January 14, 2011, Respondent was issued a written reprimand for his actions "on November 17, 2010; December 8, 2010; and January 11, 2011" when he was observed by Petrilla or other staff members sleeping during required meetings or while he was supervising students. Petrilla informed Respondent that such behavior was totally [un]acceptable" and that such behavior was considered misconduct in office and gross insubordination. Petrilla again reminded Respondent that future instances of sleeping while on duty would subject Respondent to disciplinary action.

6. On February 2, 2011, during a required district in-service meeting, Respondent was observed sleeping by Assistant Principal Anthony Losada (Losada). Based on this allegation, the Office of Professional Standards (OPS) conducted an investigation and confirmed that Respondent was sleeping during work hours. Following the OPS investigation, the superintendent recommended that the School Board suspend Respondent for ten days. Respondent admitted the violation, accepted the suspension, and acknowledged that he understood that additional violations of a similar nature could result in further disciplinary action.

7. Following the OPS investigation, the School Board had concerns about Respondent's ability to supervise students in ISS. Consequently, Respondent was given a temporary assignment where he was responsible for monitoring different areas of the school, such as the hallways, the media center, the bus ramps, the cafeteria, and the Office of Student Services. Petrilla assigned

Respondent these temporary duties despite the fact that the duties were being performed by other personnel. Petrilla believed that by assigning Respondent these temporary duties, which required a higher level of physical activity as compared to Respondent's ISS duties, Respondent would be more alert throughout the workday and would, therefore, not sleep while on the job.

8. Due to Petitioner's concerns about Respondent sleeping while on duty, Rebecca Wells (Wells), director of Human Resources, requested, on February 23, 2011, that Respondent submit to a fitness-for-duty examination at the school district's expense. Following initial testing, it was determined that Respondent needed to see a specialist for evaluation for sleep apnea.

9. On March 4, 2011, while Respondent was performing his temporary assignment, Petrilla observed Respondent sleeping in the administrative office located in student services. When Petrilla saw Respondent sleeping, he went to retrieve a camera, but when he returned, Respondent was awake. Petrilla informed Respondent that he was observed sleeping and that such conduct would not be tolerated during school hours.

10. While temporarily assigned to the media center, Respondent, along with media center specialist Joanne Torlucci (Ms. Torlucci), worked with small groups of students.

Ms. Torlucci informed Respondent that on several occasions his "head [would] drop down" while he was working with students. When interviewed by school personnel, one student said that Respondent had the "dropsies" when describing Respondent's conduct.

11. On or about April 11, 2011, Dr. Brian Angsten (Dr. Angsten) sent the School Board a letter regarding Respondent's "care for hypersomnolence." The letter indicated that Respondent had a polysomnogram, which established that he has severe obstructive sleep apnea. Dr. Angsten prescribed a recommended plan of treatment and stated that "[p]rovided the patient complies with the treatment outlined, he should be able to perform his occupational duties without restriction."

12. On May 4, 2011, Respondent was observed by Petrilla and Losada sleeping during a district-wide meeting held in the media center of BRMS. The next day, Petrilla sent Respondent an email confirming what was observed during the district-wide meeting.

13. On May 17, 2011, Dr. Nicole Bentze (Dr. Bentze), Respondent's primary care physician, sent the School Board a letter regarding Respondent's medical condition. In her letter, Dr. Bentze informed the School Board that Respondent was "fit to return to full duty" and "may resume all of his responsibilities in the classroom at Braden River Middle School."

14. On May 24, 2011, the School Board received documentation from Respondent's fitness-for-duty testing advising that Respondent was "medically acceptable" for his position.

15. On May 31, 2011, OPS conducted an investigation based on an allegation that Respondent was observed sleeping on March 4, 2011, and May 4, 2011. The investigation confirmed that Respondent was sleeping during duty hours as alleged. Based on this finding, the superintendent recommended termination of Respondent's employment.

16. On July 7, 2011, the School Board received a letter from Dr. Angsten regarding Respondent's treatment for obstructive sleep apnea. Dr. Angsten stated that he was advised of the superintendent's recommendation to terminate Respondent's employment for falling asleep in class. Dr. Angsten advised that Respondent "ha[d] not had enough time with proper treatment to appropriately deem this a lost cause as of yet." Dr. Angsten informed the School Board that he had arranged a follow-up with Respondent in one month, and at that time, he "w[ould] review his compliance cards." Upon receiving this letter, the superintendent rescinded his recommendation to terminate Respondent's employment.

17. On August 19, 2011, Respondent was observed sleeping during a faculty meeting at BRMS. The following day, Petrilla informed Respondent of his observations. Petrilla warned

Respondent that any further episodes of sleeping while on duty would be reported to OPS.

18. On November 2, 2011, Respondent was observed sleeping during duty hours by Petrilla, Losada, Assistant Principal Lori Jones, and the school resource officer, Carl McClellan. Petrilla advised OPS of what he had observed, and OPS initiated an investigation.

19. Debra Horne (Horne), who works as an investigator with OPS, interviewed four students that were supervised by Respondent while in ISS. Three of the students reported that while they were in ISS, they observed Respondent sleeping. The fourth student stated that Respondent displayed conduct that suggested he was sleeping in the classroom.

20. As part of the investigation, OPS placed a hidden camera in the ISS classroom at BRMS. The video evidence established that on November 18, 2011, Respondent slept on several different occasions; sometimes for seconds, other times for up to 20 to 30 minutes.

21. On November 21, 2011, OPS met with Respondent and informed him that video evidence documented him sleeping during duty hours on November 18, 2011, while supervising students in the ISS classroom. After reviewing the video, Respondent acknowledged that he did, in fact, fall asleep while supervising students. The School Board presented Respondent with the

opportunity to tender his resignation. Respondent opted not to tender his resignation, but instead requested that he be granted unpaid leave to pursue the option of disability retirement. Respondent did not file for disability retirement once he learned that the amount of his monthly disability income would be insufficient to meet his financial needs.

22. On January 17, 2012, the superintendent offered to transfer Respondent to a bus monitor position. The position would require Respondent to assist bus drivers with student supervision. The environment on a school bus is typically much louder than an ISS room and would provide greater stimuli to Respondent.

23. On or about January 18, 2012, Respondent sent a letter to Horne, wherein he requested additional information about the bus monitor position. In his letter, Respondent advised:

As I have stated before, I now know I have sleep apnea, do not know when or why it going to happen except that it can (even with me following Dr. orders and getting a sound sleep).

24. On January 19, 2012, Respondent declined the bus monitor position because, according to Respondent, there was "no guarantee that he would not fall asleep while on a bus." During the final hearing, Respondent advised that in addition to the above, he also rejected the bus monitor position because working

on a bus would possibly make it more difficult for him to see about his elderly mother during the workday.

25. On January 19, 2012, Respondent was placed on paid administrative leave, and on February 8, 2012, the superintendent notified Respondent of his intent to recommend the termination of Respondent's employment.

26. While on paid administrative leave, Respondent underwent a second sleep study. The study, which was conducted on May 23, 2012, confirmed that Respondent had obstructive sleep apnea with disproportionate hypersomnolence. Respondent was offered several options for treatment including pharmacologic therapy (stimulant medications) and clinical monitoring. Respondent chose clinical monitoring and elected not to pursue pharmacologic therapy due to his fears about the stimulant medications. There was no credible evidence offered regarding any limiting side effects associated with the stimulant medications that Respondent would possibly be prescribed.

27. The treatment that Respondent currently receives is the same treatment that he has received since March 2011. In fact, the clinical monitoring is the same treatment that Respondent was receiving when he fell asleep on several occasions while supervising students.

28. Prior to the final hearing, Respondent was again evaluated by Dr. Angsten. By correspondence dated September 11, 2012, Dr. Angsten advised,

In summary, this patient has complied with all requests from his . . . physicians with regard to his condition. He has made a good faith effort to comply with CPAP therapy, which has been verified by electronic monitoring. Objective testing demonstrates excellent control of his sleep apnea. As such, any further hypersomnolence must be attributed to an underlying medical condition, not behavioral inadequacy on the part of Mr. Singer.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat. (2012).

30. Petitioner seeks to terminate Respondent's employment. Petitioner bears the burden of proving by a preponderance of the evidence that just cause exists for Respondent's termination. 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).

31. Pursuant to section 1012.27(5), the superintendent has the authority to recommend to the School Board that an employee's employment be terminated.

32. Pursuant to sections 1012.22(1)(f) and 1012.40, the School Board has the authority to terminate an employee's employment.

33. Respondent is subject to section 6.11(1) of the Policies and Procedures Manual of the School Board of Manatee County (Policies and Procedures Manual), which provides:

Any employee of the School Board may be temporarily suspended, with or without pay, or permanently terminated from employment, for just cause including, but not limited to, immorality, misconduct in office, incompetence, gross insubordination, willful neglect of duty, drunkenness, or conviction of a 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.

I. Incompetence

34. Paragraph 26 of the Administrative Complaint alleges that "Singer is incompetent as defined in Rule [6A-5.5056]^[2/] in that he failed to perform his duties and lacks the physical ability to perform them." Rule [6A-5.056] provides the definition of "incompetency" as that term is used in section 6.11(1) of the Policies and Procedures Manual. Rule [6A-5.056] provides that incompetency is the "inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity." Rule [6A-5.056(1)(b)] defines incapacity to include

the "lack of adequate physical ability" to discharge one's required duty. As noted by Dr. Angsten, Respondent's hypersomnolence "must be attributed to an underlying medical condition, [and] not behavioral inadequacy on the part of Mr. Singer." Respondent's underlying medical condition, which causes him to sleep uncontrollably while on the job, has rendered Respondent physically unable to perform his employment-related duties. Accordingly, Petitioner has proved by a preponderance of evidence that Respondent is incompetent within the meaning of rule [6A-5.056].^{3/}

II. Misconduct

35. Paragraph 24 of the Administrative Complaint alleges that Respondent "engaged in misconduct as defined in rule [6A-5.056(3)]," According to paragraph 25 of the Administrative Complaint, Respondent engaged in misconduct by violating rule 6B-1.006(3)(a), which requires that Respondent make reasonable effort to protect students from conditions harmful to learning and/or to the students' mental and/or physical health and/or safety.

36. Despite the fact that Respondent knew that he was suffering from a medical condition that caused him to sleep uncontrollably, he, nevertheless, continued to supervise students. Other than pursuing a failed course of clinical monitoring, Respondent took no other steps to ensure that he

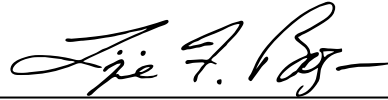
would not doze off while supervising students. The evidence establishes that Respondent's repeated conduct of sleeping during duty hours, while supervising students, impaired his effectiveness as a teacher's aide. See Lee Cnty. Sch. Bd. v. Patricia Slade, Case No. 11-3199TTS (Fla. DOAH Nov. 15, 2011; Lee Cnty. Sch. Bd. Dec. 6, 2011) (a teacher cannot be effective when asleep in the classroom). Respondent's conduct in this instance speaks for itself, and the resulting impairment to his effectiveness can reasonably be inferred. Walker v. Highlands Cnty. Sch. Bd., 752 So. 2d 127 (Fla. 2nd DCA 2000); Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Summers v. Sch. Bd. of Marion Cnty., 666 So. 2d 175 (Fla. 5th DCA 1995).

37. Respondent's violations, individually and collectively, constitute just cause for his termination from employment pursuant to section 6.11 of the Policies and Procedures Manual.

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 Respondent's employment.

DONE AND ENTERED this 26th day of October, 2012, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2012.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2011, unless otherwise indicated.

^{2/} Effective April 5, 1983, Florida Administrative Code Rule 6B-4.009 was transferred to Florida Administrative Code Rule 6A-5.056. The Administrative Complaint correctly references the substance of the rule and corresponding numbered paragraphs, but incorrectly references the chapter number for the rule. Consequently, rule 6A-5.056 will be substituted herein and designated by the utilization of brackets ([]).

^{3/} Respondent suggests that the School Board should place him in a parent liaison position. A parent liaison, which was formerly known as a dean, was assigned to schools to assist with discipline. The position requires an extreme amount of paperwork and calls for the regular supervision of students. As Horne testified, the "job descriptions are different. The salaries are different. A parent liaison is considered a step up in the pay scale from a teacher aide." The parent liaison position is considered a promotion from the teacher's aide position. Respondent is not qualified to work as a parent liaison because of his inability to remain awake while on the job.

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.