

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MONROE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-1067TTS
)
JANET FABER,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference between Key West and Tallahassee, Florida, on May 31, 2012, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Theron Coleman Simmons, Esquire
Vernis and Bowling of the
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Islamorada, Florida 33036

For Respondent: Mark Herdman, Esquire
Herdman and Sakellarides, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent committed the acts alleged in the Administrative Complaint filed with DOAH on March 21, 2012, and, if so, the discipline that should be imposed against Respondent's employment.

PRELIMINARY STATEMENT

By letter dated February 21, 2012, the Monroe County School District Superintendent of Schools (Superintendent) informed Respondent that he was going to recommend that the Monroe County School Board (School Board) terminate Respondent's employment as a teacher in its Exceptional Student Education (ESE) Program. Respondent, through her union representative, requested a hearing. The Administrative Complaint was dated February 21, 2012. On February 28, 2012, the School Board voted to suspend Respondent's employment without pay pending resolution of this proceeding before DOAH.^{1/} The matter was thereafter referred to DOAH, and this proceeding followed.

The Administrative Complaint alleged that Respondent struck a 5-year-old special needs student (the Student) while teaching on December 7, 2011, and that she was seen "handling [the Student] roughly" between November 30 and December 7, 2011. Based on those allegations, Petitioner alleges that Respondent violated its policy against corporal punishment and its standards of ethical conduct. The Administrative Complaint does

not allege that the violations constituted misconduct in office or any other grounds for discipline enumerated in section 1012.33(1), Florida Statutes (2012). Unless otherwise noted, each reference to a statute is to Florida Statutes (2012), and each reference to a rule is to the rule as published in Florida Administrative Code as of the date of this Recommended Order.

At the final hearing, Petitioner presented the testimony of Cheryl Allen (Petitioner's Human Resources Director), Harry Russell (school principal), Linda Diaz (assistant school principal), and Charity King (classroom teacher). Petitioner's pre-marked Exhibits 1-7, 9, 10, 13, 14, 15 (first four pages only), and 17-22 were admitted into evidence. Among Petitioner's Exhibits were depositions of the following: Mr. Russell, Ms. Diaz, Theresa Axford (Petitioner's Executive Director of Operations), the Student's mother, the Student's father, and Respondent.

Respondent testified on her own behalf and presented the additional testimony of Rececca Rollason (a paraprofessional). Respondent presented one composite Exhibit, which was admitted into evidence.

A Transcript of the proceedings, consisting of one-volume, was filed on June 18, 2012. On the unopposed motion of the School Board, the deadline for the filing of proposed recommended orders was extended to July 9, 2012. Each party

filed a Proposed Recommended Order, and both have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

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

2. At all times relevant to this proceeding, Respondent has been an ESE teacher employed by Petitioner pursuant to a professional services contract. Prior to the incidents that are the subject of this proceeding, Respondent has not received any disciplinary action.

3. Respondent has been an ESE teacher employed by Petitioner since 2005. The 2011-12 school year was her first year working with kindergarten through second grade students. Respondent worked with ESE students both in the regular classroom setting, where she works one-on-one with a student, and in situations where she removes students from the regular classroom and works with one or more students in a separate classroom.

4. Charity King (Ms. King) is a kindergarten teacher in one of Petitioner's elementary schools (the subject school). Respondent was assigned to the subject school for the 2011-12 school year, which was her second year as a teacher.

5. Ms. King's class consists of 16 kindergarten students, one of whom is the Student.

6. The Student is a five-year-old female with special needs. The Student has been diagnosed with a form of autism known as Pervasive Developmental Disability Disorder, Not Otherwise Specified. The Student is high functioning intellectually, but she has trouble verbalizing and is easily distracted. She sometimes screams, pushes others (including her teacher), and becomes defiant. Periodically, she has tantrums.

7. The Student's father is a school psychologist employed by Petitioner. The Student's mother is an ESE staffing specialist in the subject school. Both the father and the mother are very involved with their daughter's education.

8. Respondent testified, credibly, that she communicated daily with the Student's parents and that she had developed a good rapport with the Student.

9. Respondent also testified, credibly, that she is philosophically opposed to becoming physical with any student. Ms. Rollason has worked with Respondent on a daily basis since August of 2006. During that time, Ms. Rollason has never seen Respondent be physically inappropriate with a child, Respondent lose her temper with a child, or do anything inappropriate with a child.^{2/}

10. On December 7, 2012, Respondent provided one-on-one services to the Student in Ms. King's classroom. Ms. King taught her other students during that day.

11. On December 16, Ms. King reported to Ms. Diaz, the assistant principal at the subject school, that on December 7 she had witnessed Respondent spank the Student on one occasion, at which time she administered two blows.^{3/}

12. Ms. King testified that on a scale ranging from a low of 1 to a high of 10, each of the two blows administered to the Student would have been a 7.

13. Ms. King testified at the formal hearing that she first discussed the spanking incident with Respondent on December 15. Ms. King testified that during that conversation, Respondent tacitly admitted spanking the Student by nodding her head and making a spanking motion. Respondent testified that she met with Ms. King to discuss target groups, which included a general discussion about the Student. Respondent denied that the subject of spanking was discussed, and she denied making any spanking motion

14. Ms. King testified that other than the conversation she had with Respondent, she did not discuss the alleged spanking incident with anyone at the school, including the Student's mother, until December 16, when she talked to Ms. Diaz.

15. Ms. King did not confront Respondent on the day of the alleged incident. Ms. King does not know the approximate time of day the alleged spanking occurred, does not know what she was doing when the alleged spanking occurred, does not know where she was in the classroom, does not know where in the classroom Respondent and the Student were, and does not recall whether the Student cried or had any other reaction to the alleged spanking. Ms. King did not talk to the Student about the alleged spanking, and she did not check to see if the Student was hurt.

16. Ms. King also testified that prior to December 7, she had seen Respondent mishandle the Student. Ms. King did not identify the time, date, or place of this alleged mishandling. Ms. King did not describe the acts that constituted the mishandling. Respondent testified, credibly, that she never mishandled the Student and did not know what Ms. King was referencing.

17. On either December 17 or 18, Respondent was first notified of the allegation that she had spanked the Student. Respondent was totally surprised by the allegation. She had no idea what Ms. King was talking about. Over the course of the following days and weeks, Respondent tried to reconstruct the events of December 7. She could not recall any incident, and nothing in her notes from that day referenced any issue.

18. Mr. Russell interviewed the other students in Ms. King's class on December 22. None of those students reported witnessing anything inappropriate on December 7.

19. The Student's parents were not informed of the alleged incident until January, after the holiday break. Consequently, they were unable to discuss the incident with their daughter right after the alleged incident occurred.

20. Since the first time she was confronted with the allegations, Respondent has maintained she did not hit, spank, or strike the Student on December 7. Respondent has also maintained that she never handled the Student in a rough manner. There is no basis in this case to credit Ms. King's testimony over that of the Respondent. While the undersigned finds Ms. King to be a sincere witness, her vague, uncorroborated testimony is insufficient to support a finding of guilt in this proceeding.

21. Mr. Russell recommended that Respondent's employment be terminated. When he made that recommendation, he was unaware of Petitioner's progressive discipline policy. There was no other evidence that Respondent's effectiveness in the school system had been impaired by the alleged incidents.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter of and

the parties to this case pursuant to sections 120.569 and 120.57(1).

23. Because Petitioner seeks to terminate Respondent's employment, which 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).

24. 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)).

25. Petitioner has failed to meet its burden of proof in this matter.

26. Section 1012.33(1)(a), Florida Statutes, sets forth "just cause" for terminating Respondent's employment. The following are included among the grounds justifying termination

of employment: "immorality," and "misconduct in office" as those terms are defined by rule of the State Board of Education.

27. The following definitions are set forth in Florida Administrative Code Rule 6B-4.009(2), (3), and (4):

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

28. Subsections (1) and (2) of the Code of Ethics of the Education Profession in Florida (Florida Administrative Code Rule 6B-1.001) provide as follows:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, students, parents, and other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

29. The Principles of Professional Conduct for the Education Profession in Florida are set forth in Florida Administrative Code Rule 6B-1.006. Subsection (2) of the rule provides as follows:

(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.

30. Florida Administrative Code Rule 6B-1.006(3) sets forth the obligations a teacher has to a student, and includes the following:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's physical health and/or safety.

* * *

(e) Shall not intentionally expose a student unnecessary embarrassment or disparagement.

(f) Shall not violate or deny a student's legal rights.

31. Because the School Board did not meet its burden of proof in this matter, it is not necessary to determine whether, as asserted by Respondent, the Administrative Complaint is deficient.^{4/}

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the School Board of Monroe 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 find Janet Faber not guilty of the violations alleged in the Administrative Complaint and reinstate her employment with back pay and appropriate benefits.

DONE AND ENTERED this 25th day of July, 2012, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2012.

ENDNOTES

^{1/} The agenda item submitted to the School Board did not explicitly state that the recommendation was to terminate Respondent's employment. (The agenda item is Petitioner's

exhibit 1.) Respondent has asserted that termination should not be a recommended penalty because the School Board did not consider terminating her employment. That argument is rejected for two reasons. First, the Administrative Complaint, which pre-dated the School Board's action, clearly seeks to terminate Respondent's employment. Moreover, the letter to the Superintendent from Respondent's union representative requesting a formal hearing was to "challenge your recommendation to terminate" Respondent's employment. Respondent has known from the outset of this proceeding that termination of her employment is at issue in this proceeding. Second, in a teacher discipline proceeding where one or more alleged violations are established, the ALJ submits a recommended order that contains a recommended penalty. The school board, not the ALJ, makes the final decision as to the penalty to be imposed. The School Board will enter the final order in this proceeding, and will determine the penalty, if any, to be imposed.

^{2/} Ms. Rollason regularly observed Respondent with the Student during the 2011-12 school year and never observed Respondent act inappropriately with the Student. Ms. Rollason was not present in Ms. King's classroom on December 7, 2012, when the alleged spanking occurred. Because of Ms. King's vague testimony, it is unknown whether Ms. Rollason was present when Ms. King considered Respondent to have handled the Student roughly.

^{3/} There was some confusion between Ms. King's testimony at the hearing and her deposition testimony. That confusion is resolved by finding that Ms. King testified that there was one incident of spanking that involved two blows.

^{4/} Had such a ruling been necessary, the undersigned would have concluded that the Administrative Complaint adequately notified Respondent that the Petitioner sought to terminate her employment, and that it notified her of the School Board policies she had allegedly violated. The Administrative Complaint was deficient in that it failed to allege that the alleged violation of School Board policies constituted misconduct in office, immorality, or any of the other grounds for discipline set forth in section 1212.33(1)(a). Florida Administrative Code Rule 28-106.2015 sets forth the pleading requirements for an administrative complaint. Whether the deficiency would have precluded the prosecution of this matter will not be addressed because Respondent did not timely file a motion to dismiss the Administrative Complaint as required by Florida Administrative Code Rule 28-106.204(2). Because of that

failure, the School Board has not had the opportunity to address the issue.

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.