

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 12-1557TTS
)	
YVONNE B. EISENBERG,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, this case was heard in Bradenton, Florida, on October 11, 2012, before J. D. Parrish, an Administrative Law with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Erin G. Jackson, Esquire
Thompson, Sizemore, Gonzalez
and Hearing, P.A.
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Tampa, Florida 33602

For Respondent: Melissa C. Mihok, Esquire
Kelly and McKee, P.A.
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STATEMENT OF THE ISSUES

Whether Respondent, Yvonne B. Eisenberg (Respondent), committed the violations alleged in the Amended Administrative

Complaint filed on September 27, 2012, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

This administrative action is a disciplinary case against an employee of Petitioner, Manatee County School Board (Board or Petitioner). The Board's Superintendent of Schools recommended that Respondent be suspended without pay for three days based upon alleged conduct that occurred at Southeast High School. Respondent timely challenged the proposed action and the matter was forwarded to DOAH for formal proceedings on April 27, 2012.

At the hearing, Petitioner presented the testimony of Shane Hall (Mr. Hall), Jane Toole (Ms. Toole), and Debra Horne. Petitioner's Exhibits 2A, 2E, and 2F were admitted into evidence. Respondent testified in her own behalf and presented the deposition testimony of Frederick Leonard Johnson. Petitioner's objection as to the relevance of Mr. Johnson's testimony is overruled.

The Transcript of the proceedings was filed with DOAH on October 30, 2012. An unopposed request to extend the time to file proposed orders was granted, and the parties were given leave until December 17, 2012, to file their proposals. Both parties timely filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a duly-constituted entity charged with the responsibility and authority to operate, control, and supervise the public schools within the Manatee County Public School District (School District). As such, it has the authority to regulate all personnel matters for the School District. See § 1001.32, Fla. Stat. (2012).

2. Dr. Timothy McGonegal is the superintendent of the public schools for the School District. Dr. McGonegal has the authority to recommend suspension and/or termination of employees for alleged misconduct.

3. At all times material to the allegations of this case, Yvonne B. Eisenberg was an employee of the School District assigned to teach profoundly mentally handicapped (PMH) students at Southeast High School.

4. At all times material to the allegations of this case, Mr. Hall was an assistant principal at Southeast High School. Mr. Hall's responsibilities included overseeing the exceptional student education (ESE) program at Southeast High School. Respondent's PMH class fell within the purview of the ESE program. Ms. Toole, an ESE specialist at Southeast High School who is the ESE department chairperson, directly supervised Respondent's class.

5. PMH students require constant supervision and care. Respondent was assigned a full-time aide to assist her with the class. At times Respondent was assigned a second aide to help with students. Students in Respondent's class were limited intellectually and physically. All required assistance with feeding, diaper changes, and mobility.

6. It is undisputed that the challenges of managing Respondent's classroom were daunting. No one disputes that Respondent's daily work required physical and emotional strength. Cooperation between Respondent and others assigned to work in her classroom was important in order for the school day to run smoothly.

7. Students in Respondent's PMH class ranged in age and size. The eldest student could be 22 years old. It is undisputed that a 22-year-old might prove to be a physical burden for mobility and diaper changes.

8. Respondent has received satisfactory performance evaluations in the past. Respondent is effective as an ESE teacher. Nevertheless, on November 12, 2010, Mr. Hall conducted a conference with Respondent to present, in writing, specific expectations for Respondent's future job performance. Mr. Hall advised Respondent to follow the Code of Ethics and to speak civilly and professionally to staff and co-workers.

9. On June 10, 2011, Mr. Hall gave Respondent a written reprimand for her actions during the 2010-2011 school year. More specifically, Mr. Hall cited Respondent's failure to correct her unprofessional conduct toward staff and co-workers, and her willful neglect of duties. Among other items not pertinent here, Respondent was directed to complete sensitivity training and to promote a positive atmosphere in her classroom. Respondent denied the underlying facts that gave rise to the reprimand, but admitted to "yelling" at her aide. Speaking disrespectfully and loudly toward others was a chief component of Mr. Hall's concern regarding Respondent's behavior.

10. On September 20, 2011, Respondent approached Mr. Hall at approximately 8:00 a.m. and asked to talk to him. Mr. Hall had a busy morning agenda but told Respondent he would talk to her later in the day. Respondent accepted the deferment of the talk and did not suggest an emergency situation that required more immediate attention.

11. Later in the day, at approximately 10:30 a.m., Respondent returned to Mr. Hall's office and asked for a meeting. In the interim between the first request for a talk and the second request, Respondent had sent Mr. Hall e-mails outlining a need for supplies, a request for input regarding an aide's condition (whether the aide had been cleared to help lift students), and a need for gloves.

12. Mr. Hall advised Respondent that she was not responsible for buying gloves and soap, and that those types of supplies for her students would be provided by the School District.

13. Respondent claimed that a second aide was not needed in her classroom because she felt the two aides assigned to the PMH class were "against her."

14. Finally, Respondent asked about the status of any physical restrictions for a specifically named aide, Ms. Mitchell. Mr. Hall assured Respondent that the aide could lift as required by the job and had no restrictions.

15. The meeting ended with Mr. Hall presuming he had addressed Respondent's concerns. Mr. Hall also mentioned that Mr. Johnson, a substitute teacher at Southeast High School, could be made available to help lift Respondent's students when needed.

16. At approximately 1:15 p.m. the same day (September 20, 2011), Respondent approached Mr. Hall's office with her fists clenched, her face red with anger, and yelled, "Am I going to get any help in here today?" Mr. Hall was surprised by the loud yelling and was taken aback for a moment. Since he did not understand her request he asked Respondent for a clarification.

17. After a brief exchange, it became apparent to Mr. Hall that Respondent was upset because her students had not been

changed all day and were sitting in dirty diapers. Mr. Hall maintained that Respondent had not clearly asked for assistance in changing the students during the two exchanges they had had during the school day. At that point, Respondent exited Mr. Hall's office and slammed the door.

18. Mr. Hall then telephoned an ESE classroom near Respondent's room and directed Mr. Hubbard to report to Respondent's classroom to assist her with changing the students.

19. As Mr. Hall was completing that call, Respondent reappeared at his office and Mr. Hall asked her to step inside. At that time, Mr. Hall told Respondent she could not communicate with him as she had, that she must remain respectful and professional. Respondent then advised Mr. Hall that she was "pissed off."

20. Mr. Hall directed Respondent to return to his office at the end of the school day, and that Mr. Hubbard was in her classroom waiting to assist her with the diaper changes.

21. Subsequently, Respondent told Ms. Toole that she yelled at Mr. Hall. Respondent maintains that the frustrations of her job and the events of the day supported her behavior. Moreover, Respondent asserts that her passion for the care of her students led to the emotional outburst. Respondent did not return to Mr. Hall's office at the end of the school day.

22. Mr. Hall reported the matter to his principal and to the District's Office of Professional Standards. The Superintendent of schools recommended that Respondent receive a three-day suspension without pay for her conduct toward Mr. Hall and her failure to correct behaviors that had previously been identified. The requirement that Respondent show respect toward co-workers was not a new theme. Had Respondent exhibited patience and a professional demeanor, clearly articulated her need for assistance in lifting her students for diaper changes, and sought help in a timely manner (during any portion of the school day prior to 1:15 p.m.), she could have easily avoided disciplinary action. As soon as Mr. Hall was made aware of her need for lifting assistance, he directed additional help to Respondent's classroom. Curiously, Respondent did not ask Ms. Toole, her ESE supervisor, for help.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

24. Petitioner bears the burden of proof in this cause to establish, by a preponderance of the evidence, that Respondent committed the violations alleged. See McNeil v. Pinellas Cnty Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

25. Section 1012.33, Florida Statutes, authorizes school districts to take disciplinary action against its employees based upon "just cause."

26. In this case, Petitioner's procedures governing employment with the School District, Policy 6.11(1), provides:

(1) Suspension or Termination of Employees:

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 any crime involving moral turpitude, violation of 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.

27. Petitioner's Amended Administrative Complaint alleged Respondent's actions constituted three violations (see Amended Administrative Complaint, paragraphs 15, 16, and 17): misconduct in office, gross insubordination, and failure to maintain the respect and confidence of one's colleagues, of students, of parents, and of other members of the community by failing to sustain the highest degree of ethical conduct.

28. The first alleged violation, misconduct in office, is defined by Florida Administrative Code Rule 6A-5.056(2), as follows:

(2) "Misconduct in Office" means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties. [Emphasis Added.]

28. The Code of Ethics of the Education Profession in Florida provides:

6A-10.080 Code of Ethics of the Education Profession in Florida.

(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, of students, of parents, and of 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 provides, in pertinent part:

6A-10.081 Principles of Professional Conduct for the Education Profession in Florida.

(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.

* * *

(5) Obligation to the profession of education requires that the individual:

* * *

(d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

30. Florida Administrative Code Rule 6A-5.056(4) defines "gross insubordination" as:

(4) "Gross insubordination" means the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties.

31. With regard to the charge of misconduct in office, it is determined that Respondent's behavior on September 20, 2011, constitutes a violation of the law. Respondent yelled angrily at her supervisor and thereby created a harassing and hostile environment. Respondent had previously been directed to refrain from loud, menacing tones with co-workers. Mr. Hall's memorandum of November 12, 2010, specifically identified and prohibited yelling or using profanity. Respondent was specifically told not to use profanity. Respondent's assertion that she was "pissed off" in a loud, inappropriate tone does not meet the professional standards contemplated by the governing rules. Respondent's slamming Mr. Hall's door demonstrates disrespect and a gross indifference to the work environment.

32. With regard to the charge of gross insubordination, it is determined that Respondent's behavior on September 20, 2011, constitutes a violation of the law. Mr. Hall's directive to Respondent regarding her treatment of co-workers was reasonable in nature, and given by and with proper authority. Yelling at one's superior after being told not to yell and use profanity is

unacceptable. Had Respondent presented her request for help in a professional manner, the students' needs would have been easily addressed. Misplaced passion or outrage because the students had not been changed does not excuse unprofessional conduct.

33. With regard to the charge of failure to sustain the highest degree of ethical conduct, it is determined that Petitioner failed to meet its burden in this regard. Any technical violation regarding the standard of educators' conduct has previously been identified and fully addressed as misconduct in office.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent be suspended for three days without pay.

DONE AND ENTERED this 29th day of January, 2013, in Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2013.

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.