

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DESOTO COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-2333TTS
)
JOHN B. SCULLEY,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 29, 2012, in Arcadia, Florida, before R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Shaina Thorpe, Esquire
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists to terminate the employment of Respondent, John B. Sculley ("Sculley"). Petitioner, DeSoto County School Board (the "Board"), alleges that Sculley violated Florida Administrative

Code Rule 6A-5.056(2), i.e., that he was incompetent in the performance of his duties as a school psychologist.

PRELIMINARY STATEMENT

On June 26, 2012, the Board voted unanimously to terminate Sculley's employment, finding that just cause existed based upon facts it had reviewed. Respondent timely filed a request for a formal administrative hearing before the Division of Administrative Hearings (DOAH) to contest the Board's decision.

At the final hearing held in this matter, the Board called the following witnesses: Anthony Bobo, psychologist; Adrian Cline, superintendent of DeSoto County schools; Debra Giacolone, director of Exceptional Student Education ("ESE"); Kathy Haugan, psychologist; Robert Hrstka, director of facilities; and Raymond Klejmont, assistant director of human resources. The Board's Exhibits 1 through 14 were accepted into evidence. Respondent called one witness: Dr. Roosevelt Johnson, retired former director of ESE. Respondent offered Exhibits 1 through 4 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 was not used to supplement 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. The parties requested and

were granted thirty days from the date the transcript was filed at DOAH to submit proposed recommended orders (PROs). The Transcript was filed at DOAH on November 28, 2012. The PROs were due on or before December 28, 2012; Petitioner's PRO was filed on December 20, and Respondent's PRO was filed December 27. Both parties' PROs were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the oral testimony and documentary evidence presented at final hearing, the following findings of fact are made:

1. The Board is responsible for hiring, firing, and overseeing all employees within the DeSoto County school system. At all times relevant hereto, Sculley was employed by the Board as a school psychologist.

2. Sculley has apparently served for 30 years as a licensed psychologist. He worked as a school psychologist for about ten years in DeSoto County. (Sculley did not testify or appear at the final hearing. Information concerning his experience and background can only be derivatively ascertained through the testimony and evidence presented by other witnesses.) By all accounts, Sculley did excellent work for the Board for the majority of his tenure.

3. Much of Sculley's job duties centered on students in the ESE program within the school district. Sculley performed psychological evaluations for students which were then used by the ESE department to assign the students to appropriate programs and classes, apply for state-funded services, and promote sufficient educational opportunities for the students.

4. In December 2011, the ESE director for DeSoto County schools suffered a stroke and was forced to retire. At about the same time, the assistant ESE director also chose to retire. Robert Hrstka was selected to act as the interim ESE director pending the hiring of a new ESE director. Hrstka had some experience with ESE students and was familiar with ESE programs. Hrstka became the interim director on December 8, 2011. Terry Cassels became his interim assistant ESE director.

5. When Hrstka took over his duties as interim director, he soon learned that his assistant, Cassels, harbored some concerns about Sculley's work performance. According to reports Cassels made to Hrstka, Sculley was providing incorrect reports to ESE, he was not administering required tests to students, and his scoring of tests was deficient. Cassels did not testify at final hearing, so her stated concerns were not corroborated by competent, non-hearsay evidence. However, as a result of Cassel's stated concerns, Hrstka began to pay attention to Sculley's work product. Hrstka also received additional

information from Cissy Quave about the poor quality of Sculley's work. To address the concerns that had been raised by others, Hrstka talked with the superintendent of schools about bringing in a trained psychologist to audit the work of Sculley and Quave - the only two members of the school's psychological team. Quave worked half-time as a school psychologist and the other half-time as a staffing specialist or staffing coordinator.

6. Before the audit of Sculley and Quave's work began, Hrstka met with Sculley and discussed some of his concerns and some of the concerns that had been raised by Cassels. Following a meeting with Sculley on or about December 13, 2011 - just a week after assuming his duties as interim ESE director - Hrstka issued a letter of reprimand to Sculley. The bases for the reprimand were that Sculley:

- Had asked teachers what tests he should give students;
- Was not giving students the proper tests;
- Had submitted reports that were incomplete; and
- Had inquired of teachers as to the meaning of a test ceiling.

7. These fundamental shortcomings by Sculley caused Hrstka to be concerned about whether Sculley could properly and competently perform his required duties without further assistance. Initially, Hrstka was not looking to terminate

Sculley's employment; rather, he was concerned with making sure the psychological assessments and other important tasks were being completed correctly. Hrstka intended to wait for the results of the independent, outside expert's evaluations before taking any further action concerning Sculley's employment status.

8. To help alleviate the perceived problems with Sculley's work, Hrstka first initiated a plan (set forth in the letter of reprimand) that would essentially require Sculley to have his work reviewed by Sculley's subordinate, Quave. Quave was a certified school psychologist, but she only worked half-time in that position for the Board and Sculley had supervised Quave during her internship. Sculley initially approved of the monitoring plan and it was put into place for a short time. As will be discussed below, Sculley ultimately filed a discrimination complaint against the Board, primarily based upon alleged comments made by Quave during the time she was "overseeing" Sculley's work.

9. Meanwhile, on January 21, 2012, Debra Giacolone was hired as the permanent ESE director, relieving Hrstka of his interim duties. Giacolone was an experienced administrator, having served as assistant principal and dean of students at local schools. She had not previously served as an ESE director, but was qualified to do so. When Giacolone took over

as ESE director, the decision to audit Sculley's work had already been made. Giacolone was made aware of Hrstka's concerns about Sculley, so she investigated the situation independently.

10. Giacolone reviewed psychological reports that had been signed and certified by Sculley, finding a number of errors, including: Sculley had not timely completed psychological evaluations of several students. Sculley had been assigned the task of developing a plan for conducting functional behavior assessments; he did not complete the plan timely. Sculley's comprehensive assessments of students were fairly short and often did not include background information or the reason for the student's referral. It was reported to Giacolone that Sculley failed to include all pertinent information provided by parents in his assessments, but even though Giacolone verified that certain information was not included in the assessment, as no competent testimony was presented at final hearing to prove that the information had been provided by the parents.

11. Thereafter, the aforementioned audit was performed. The person hired to conduct the audit of Sculley and Quave's work was Kathy Haugan, a licensed school psychologist who was working for the Manatee County school system at that time. Haugan had previously met Sculley and Quave at meetings or conventions for professional associations, but she did not know

them well. Hrstka, pursuant to Haugan's directions, pulled a number of randomly selected files from Sculley and Quave's pending case files. Haugan reviewed the selected files using a File Review Checklist which outlined the various protocols utilized in performing student psychological assessments. Reviews of the test protocols are a good means of measuring whether the person performing the assessments is performing in accordance with professional standards. The audit of Sculley's files was completed in accordance with generally accepted standards for such a review.

12. The review of each file addressed the following criteria:

- Whether items were scored correctly on subtests;
- Whether scores were added correctly;
- Whether the scores were transferred correctly to the front page of the record form;
- Whether the scores were transferred to scaled scores;
- Whether the scaled scores were added correctly;
- Whether composite, percentile, and confidence interval items were recorded accurately;
- Whether scores and information was interpreted accurately;
- Whether the recommendation was in sync with the interpretation;

- Whether, based on previous data, the evaluation was valid; and
- Whether the report considered data required by state and federal guidelines.

13. Haugan determined from her review of the test protocols that Sculley had only a 27 percent accuracy rate in his testing results, compared to a 94 percent accuracy rate for Quave. While many of the errors made by Sculley were mathematical, i.e., he simply added up scores on his scoring sheets incorrectly, Haugan found other errors to be more substantive in nature. The errors made Sculley's work "at best suspect and at worst invalid" according to Haugan. The work product was bad enough that Haugan recommended that students who had been evaluated by Sculley should be reevaluated to determine if they were properly placed and/or receiving appropriate services. Haugan's substantive testimony was credible and did not seem biased or unfair towards Sculley.

14. Haugan's report recommended that Sculley should pay much closer attention to the protocols used in the evaluation process. It is important that school psychologist in general - and Sculley in particular - be provided with professional development opportunities and consultation to help them maintain accuracy and proficiency. Haugan offered her services for developing and providing supervision of Sculley in order to

provide such consultation and assistance. The Board did not further utilize her services, however. (Sculley did not ultimately receive any consultation or professional help, because he was terminated from employment.)

15. When Giacolone reviewed Haugan's report, she became very concerned about Sculley's competency. Giacolone met with Sculley on a number of occasions to discuss some of her perceived shortcomings with his work, which included: not finishing work timely; not responding appropriately to parents; omitting or misstating parents' input in evaluation forms; and dating tests incorrectly. During the meetings, Sculley appeared to act "aloof" toward Giacolone. Sculley also seemed unable to provide credible reasons or explanations for the mistakes in his work. Giacolone and Sculley met to discuss these matters on February 2, 6, and 14, 2012. There were also other brief conversations between the two on a regular basis during that month.

16. When Giacolone began looking into Sculley's work issues, she was not aware that Sculley and Quave were having a dispute. Quave had written a long email to Hrstka and Cassels outlining her concerns about Sculley. The email was forwarded to Giacolone on February 1, 2012, i.e., after she was already conducting meetings with Sculley about his work. The Quave

email was not the impetus for Giacolone's investigation into Sculley's performance.

17. Giacolone found Sculley to be distracted or confused when discussing his work. In addition to the areas of deficiency discussed above, Giacolone also said Sculley seemed cognitively impaired during their conversations. Giacolone was concerned about Sculley, but was not predisposed toward terminating his employment. In order to help Sculley retain his position with the Board, Giacolone offered him the opportunity to take some on-line training courses. Sculley said he could not navigate the computer sufficiently well to do on-line courses, so Giacolone provided assistance in that regard as well. Ultimately, Sculley did not access the on-line training because, allegedly, he felt it would not be beneficial to him. According to Giacolone, Sculley apparently did not believe his performance was subpar.

18. After their meeting on February 14, Giacolone was so concerned that she decided to restrict Sculley from doing any further student evaluations until such time as she could become comfortable that he was not doing harm to the students. On March 22, 2012, Giacolone directed Sculley to return all student files in his possession to her office until further notice. Sometime later, on or about March 27, 2012, Giacolone discovered that Sculley had retained at least one file. A student's file

was missing, so an office employee began searching for it. The file was found on Sculley's desk. Sculley allegedly told Giacolone he did not remember the directive to return all of the student files. Sculley did not testify to explain the discrepancy of delivering all his files to Giacolone but not remembering the directive as it applied to one file.

19. Even though he was restricted from doing so, Sculley continued working on an evaluation for at least one student. Again, when confronted about this, Sculley reportedly feigned no knowledge of the prohibition against continuing to do evaluations. Absent testimony from Sculley, it is impossible to determine whether he had a legitimate reason for his actions.

20. Meanwhile, Raymond Klejmont determined that because Quave had initially suggested using Haughan to review Sculley's files, it would be best to have the files reviewed by someone else as well. Anthony Bobo (Bobo) - who later became a school psychologist for the Board via contract - was chosen to do the review. Bobo also found errors and "items of concern" regarding Sculley's work. Bobo found the errors to be substantial.

21. Ultimately, Giacolone submitted a written recommendation to Superintendent Cline that Sculley's employment should be terminated. Klejmont, as human resources director, concurred with the recommendation. Cline, who had met with Sculley and found him to be less than cogent during their

meeting, accepted the recommendation for termination of employment. By letter dated June 4, 2012, Cline advised Sculley that he would be recommending termination of Sculley's employment at the upcoming Board meeting. On June 26, 2012, the Board -- in accordance to Cline's recommendation -- terminated Sculley's employment.

22. Sculley did not testify at the final hearing to contradict or rebut the allegations about his abilities. Dr. Robinson's testimony on Sculley's behalf, while credible, fell short of addressing the specific concerns raised by Hrstka, Cline, and Giacolone. Dr. Robinson was unaware of the reasons for Sculley's employment termination; he had not read the Haugan or Bobo reports, because he had retired by the time they were issued; he only gave Sculley a satisfactory performance approval for an unspecified period of time. Dr. Robinson established only that Sculley had been a good employee in previous years.

The Discrimination Claim

23. Sculley raised, as a defense to the allegations of incompetence against him, that he was being discriminated against by co-workers, especially Quave. There was no testimony by Sculley to explain how the purported discrimination affected a review of his competency, the stated reason for termination of his employment. No competent, substantial evidence exists which suggests that there is a correlation between the alleged

discrimination claimed by Sculley and the allegations of incompetency.

24. None of the alleged discriminatory acts was substantiated by competent testimony. So, even if it might arguably be shown to relate to Sculley's work issues, no facts can be made on the record, except the fact that Sculley complained of discrimination.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract with the DeSoto County School Board. The proceedings are governed by sections 120.57 and 120.569, Florida Statutes (2012).^{1/}

26. The Superintendent of Schools for DeSoto County, Florida, has the authority to recommend to the School Board that an employee be suspended or dismissed from employment. § 1012.27, Fla. Stat.

27. The School Board has the authority to terminate the employment of or to suspend non-instructional personnel without pay and benefits. See §§ 1012.22(1)(f) and 1012.40(2)(c), Fla. Stat.

28. The burden of proof in this proceeding is on the Board to prove, by a preponderance of the evidence, just cause exists to suspend or terminate the employment of Sculley. This case does not involve the loss of a license or certification, so the

more stringent standard of clear and convincing evidence does not apply even though it is somewhat penal in nature. 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, 884 (Fla. 3d DCA 1990).

29. "Just cause" is the standard of discipline applied to actions against support personnel. In the absence of a rule or written policy defining just cause, school boards have historically had discretion to set standards which subject an employee to discipline, including termination from employment. See Dietz v. Lee Cnty Sch. Bd., 647 So. 2d 217 (Fla. 2nd 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).

30. Historically, section 231.36, Florida Statutes, governed public education in this state. In 1999, the Florida Legislature amended that statute to remove the absolute discretion held by school boards when disciplining its employees. The Legislature gave the State Board of Education authority to create rules to define just cause. In 2002, the

Legislature created the Florida K-12 Education Code (the "Code"), transferring all provisions of the former section 231.36 to the new Code, codified in chapter 1012.

31. The rule promulgated by the State Board of Education to define just cause was initially found at Florida Administrative Code Rule 6B-4 and is now codified in rule 6A-5. Rule 6A-5.56 states, in pertinent part:

Just cause" means cause that is legally sufficient. Each of the charges upon which just cause for a dismissal action against specified school personnel may be pursued are set forth in Sections 1012.33 and 1012.335, F.S. In fulfillment of these laws, the basis for each such charge is hereby defined:

* * *

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;
2. Failure to communicate appropriately with and relate to students;
3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;
4. Disorganization of his or her classroom to such an extent that the health, safety or welfare of the students is diminished; or
5. Excessive absences or tardiness.

(b) "Incapacity" means one or more of the following:

1. Lack of emotional stability;
2. Lack of adequate physical ability;
3. Lack of general educational background;
or
4. Lack of adequate command of his or her area of specialization.

* * *

32. In this case, Sculley's inability to properly and proficiently perform student psychological assessments constitutes incompetency under the rule. Incompetency is one of the grounds for termination of employment under section 1012.33, Florida Statutes. The description of Sculley's demeanor and confusion, uncontroverted by rebuttal evidence, also proves incapacity and therefore incompetency.

33. The Board has met its burden of proof in this matter.

34. The Employee Code of Conduct relevant to Board employees such as Sculley sets forth the means of establishing just cause. It also sets forth the manner in which disciplinary action may be imposed. Although the Code of Conduct allows for counseling and an opportunity to comply with rules before disciplinary action is taken, the counseling requirement is not absolute. Further, when given the opportunity for assistance, Sculley chose not to accept the assistance which was offered.^{2/}

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by Petitioner, Desoto County School Board, upholding the termination of the employment of Respondent, John B. Sculley's, for the reasons set forth above.

DONE AND ENTERED this 7th day of January, 2013, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 2013.

ENDNOTES

^{1/} Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2012 version.

^{2/} The Employee Code of Conduct is not dispositive in this case. It is discussed only because it was brought up in Respondent's PRO.

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.