

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLADES COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-2593TTS
)
ALICE GARDNER,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on November 14, 2012, in Moore Haven, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Robert C. Shearman, Esquire
Henderson, Franklin, Starnes
and Holt, P.A.
1715 Monroe Street
Ft. Myers, Florida 33901

For Respondent: Mark Herdman, Esquire
Herdman and Sakellarides
Suite 110
29605 U.S. Highway 19, North
Clearwater, Florida 33761

STATEMENT OF THE ISSUE

Whether Petitioner established "just cause" to discipline Respondent as a teacher.

PRELIMINARY STATEMENT

On August 3, 2012, Petitioner, Glades County School Board (School Board), transmitted the request by Respondent, Alice Gardner (Ms. Gardner), to DOAH for an administrative hearing. The undersigned was assigned the case, and set a hearing for September 24, 2012. The School Board filed a motion for continuance which the undersigned granted. The undersigned reset the case for final hearing on November 14, 2012.

At the November 14, 2012, hearing, the School Board presented the testimony of C.H., Wayne Aldrich (Superintendent Aldrich), Debra Davis (Principal Davis), Tina Wills (Ms. Wills), and Ms. Gardner. The parties introduced into evidence joint Exhibits numbered 2, 5 through 9, 12 through 22, and 24. The School Board introduced into evidence Exhibits 1, 3, 4, and 10, over objection. Ms. Gardner did not present any witnesses.

On December 3, 2012, a one-volume Transcript was filed with DOAH. The parties timely submitted proposed recommended orders on December 13, 2012, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Since 2004, Ms. Gardner has been employed by the Glades County School District as a teacher. During the 2009-2010 school year, she taught language arts to middle school students at West Glades School. During the relevant time period, Ms. Gardner

worked under a professional service contract. A teacher's professional service contract automatically renews each year, and the contract can be terminated only by a showing of "just cause" or by performance deficiencies outlined in section 1012.34, Florida Statutes.

2. On April 16, 2010, Ms. Gardner was teaching language arts to seventh grade students. The students were supposed to be working on the language arts assignment. However, as Ms. Gardner walked around the class, she found some students working on their math homework. Frustrated by students doing math homework during her language arts class, Ms. Gardner confiscated the students' math work. In one instance, Ms. Gardner tore a student's math homework in half. One of the students whose math work Ms. Gardner confiscated was C.H. C.H. was generally described as a "good student." Ms. Gardner placed C.H.'s math workbook on a table near Gardner's desk at the front of the room, and redirected C.H. to the language arts assignment.

3. At some point in the class, C.H. walked up to the front of the classroom and removed her math workbook from the table without Ms. Gardner's permission. As C.H. turned to walk back with her book, Ms. Gardner forcefully grabbed C.H.'s arm from behind. C.H. credibly testified that Ms. Gardner "grabbed my arm and turned me around and pushed me, and my books fell." C.H. started crying, and walked out of the classroom. As C.H. was

leaving the classroom, Ms. Gardner told C.H. to return to her desk. C.H. stated that she was crying because she was "shocked."

4. C.H. walked to the School's office, which is in the same hallway as Ms. Gardner's class. When she arrived at the office, C.H. was crying and visibly upset. The school guidance counselor took C.H. to speak with Principal Davis. Principal Davis found C.H. to be "distraught, crying, [and] shaking." Principal Davis spoke with C.H. to determine why the student was upset. C.H. informed Principal Davis that Ms. Gardner had become angry with C.H., and that Ms. Gardner had snatched C.H.'s books, grabbed her arm and pushed her. Based on the seriousness of the allegation, Principal Davis decided to immediately investigate C.H.'s claims by obtaining statements from C.H.'s classmates.

5. After the language arts class, the next class for C.H. and her classmates was math taught by Ms. Wills. Before the math class began, Ms. Gardner came to Ms. Wills' class and gave her C.H.'s workbook and other students' papers. Ms. Gardner informed Ms. Wills that several of the students had been doing math homework when the students should have been doing their language arts work. Ms. Wills credibly testified that Ms. Gardner was "really upset" with students doing their math homework in her class, and appeared agitated.

6. Shortly after Ms. Wills' class began, Principal Davis came to speak with the students. Principal Davis released

Ms. Wills to take an early lunch, and then asked the students to write down anything "bothersome" that has happened in Ms. Gardner's class during the prior period. A majority of the students provided written statements that, in essence, corroborated C.H.'s story.

7. After reviewing the students' statements, Principal Davis decided she needed to investigate further. Principal Davis met with Ms. Gardner and advised her about C.H.'s allegation that Ms. Gardner had inappropriately touched C.H. Because the investigation could result in discipline, Ms. Gardner decided to have a union representative present when she gave her statement. Further, Principal Davis informed Ms. Gardner that Ms. Gardner should go home until the investigation was completed.

8. On April 21, 2010, Ms. Gardner gave her statement to Principal Davis. Ms. Gardner admitted to confiscating C.H.'s math notebook and calculator. Ms. Gardner indicated that later in the class C.H. walked across the room and retrieved her math notebook without permission. Ms. Gardner stated that she merely "touched" C.H.'s arm to redirect the student, and to put the math notebook back on the table. C.H. dropped the math notebook, and left the class. According to Ms. Gardner's interview, she did not forcefully grab C.H.'s arm.

9. Ms. Gardner's testimony that she merely "touched" C.H.'s arm was consistent with the interview given to Principal Davis.

The undersigned finds Ms. Gardner's characterization that she only "touched" C.H.'s arm without force not to be credible. Ms. Gardner's testimony concerning the events was often evasive on key points. For example, when asked if she recalled that C.H. was crying when leaving the classroom, Ms. Gardner indicated that she did not. Yet, in her deposition, taken just a week earlier, she testified that C.H. was crying when she left the classroom. Similarly, Ms. Gardner was evasive concerning questions about whether or not she acted in frustration or her understanding that the change in her contract status was the result of her touching C.H. As a result of Ms. Gardner's evasiveness, the undersigned found her credibility damaged.

10. C.H. did not receive any physical injury from the incident on April 16, 2010.

11. After completing her investigation on April 21, 2010, Principal Davis provided Wayne Aldrich, superintendent for Glades County School Board, with the following recommendation:

As a result of a battery allegation by a student against Ms. Gardner, I have conducted a thorough investigation and found the allegation to be substantial. Ms. Gardner has been suspended with pay since the incident occurred on Friday, April 16. As a result, I have followed protocol required by the Florida Department of Education Office of Professional Practices and I am recommending the following action:

1. Placement of a narrative of my investigation in her personnel file.

2. Change of her contractual status to fourth year annual for 2010-2011 school year.

3. Recommendation of termination if any further substantiated incidents of intentional physical contact with a student occur.

I am requesting that she return to the classroom on Friday, April 23, 2010.

12. Principal Davis testified that she considered the recommended change in Ms. Gardner's contract status from a professional service contract to a "fourth year annual contract" as less severe than termination or suspension. A "fourth year annual contract" would allow Ms. Gardner to return to professional service contract after being on an annual contract for one year. Principal Davis explained that Ms. Gardner had been evaluated as a high-performing teacher in the past, and it was hoped that she would return to that level after this discipline.

13. At the end of the 2009-2010 school year, Principal Davis evaluated Ms. Gardner as "needs improvement." Under the comments section, Principal Davis noted "offer to wait for 2010 FCAT declined." There was no evidence tying this "needs improvement" evaluation to the incident that occurred on April 16, 2010.

14. Superintendent Aldrich reviewed Principal Davis' investigation and recommendation. Based on his review,

Superintendent Aldrich recommended that the School Board follow Principal Davis' recommendation, including the change in Ms. Gardner's contract status. Similar to Principal Davis, Superintendent Aldrich believed that the change in Ms. Gardner's contract status was less severe than a suspension.

15. Superintendent Aldrich testified that a teacher should use physical force only "if the student was out of control and would be in a position to do physical harm to another student or themselves." However, no School Board Policy concerning the use of physical force was offered into evidence.

16. The School Board, without notice to Ms. Gardner concerning her rights to an administrative hearing, adopted Principal Davis' recommendations. Ms. Gardner, subsequently, requested a formal administrative hearing and reconsideration of the School Board's decision. The School Board denied her request, finding that Ms. Gardner had waived her right to a hearing. Ms. Gardner filed an appeal.

17. The Second District Court of Appeal found the following:

It is undisputed that the Board did not give Ms. Gardner written notice of her right to seek administrative review and the time limits for requesting a hearing. Under these circumstances, the Board failed to provide Ms. Gardner with a point of entry into the administrative process before taking adverse action on her contract status. It follows

that Ms. Gardner did not waive her right to request a formal hearing.

Consequently, the appellate court reversed the School Board's decision, and remanded the case for further proceedings. Gardner v. Sch. Bd. of Glades Cnty., 73 So. 3d 314 (Fla. 2d DCA 2011).

18. While Ms. Gardner's appeal was pending before the Second District Court of Appeal, Ms. Gardner worked under the fourth year annual contract for 2010-2011 school year. At the end of the 2010-2011 school year, Ms. Gardner's annual contract was not renewed.

19. On remand, the School Board issued a May 16, 2012, letter, notifying Ms. Gardner of her rights to an administrative hearing. The School Board framed the issue as "to challenge the change in her contract status from a professional service contract for fourth year annual contract." In the Joint Pre-Hearing Stipulation, the parties identified a factual issue for resolution as "[w]hether Gardner's physical contact with the student, C.H., constitutes "just cause" for discipline." Further, the parties' stipulation identified three disputed issues of law: 1) Whether the disciplinary options available to Petitioner included placement of Ms. Gardner on a fourth year annual contract status; 2) whether the placement of Ms. Gardner on fourth-year annual contract status was the appropriate discipline; and 3) whether the School Board's action in denying

Ms. Gardner's request for a formal hearing in July 2010 renders the placement of Gardner on a fourth-year annual contract status for the 2010-2011 school year, and the non-renewal of her annual contract at the end of the 2010-2011 school year void *ab initio*.

20. Before considering the legal issues identified by the parties, it is clear that the factual dispute of whether or not "just cause" exists must be addressed first. If "just cause" does not exist, then the issue of the penalty becomes moot. At the hearing, the parties presented testimony concerning the facts underlying the School Board's action here, and whether or not "just cause" existed to sanction Ms. Gardner.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to a contract with the Glades County School Board. The proceedings are governed by sections 120.57 and 120.569, Florida Statutes (2012).

22. The School Board has the authority to operate, control and supervise the public schools in its district. Art. IX, § 4(b), Fla. Const. This authority includes the power to suspend and dismiss employees and to adopt personnel policies. See §§ 1001.42(5), 1012.22(1)(f), 1012.23(1), and 1012.33, Fla. Stat. (2010).^{1/}

23. Generally, a professional service contract is a continuous contract which renews automatically. A professional

service contract, however, "may be suspended or dismissed at any time during the term of the contract for "just cause" as provided in paragraph (1) (a) [,]"^{2/} or not renewed by a school district based upon uncorrected performance deficiencies, pursuant to section 1012.34, Florida Statutes.^{3/, 4/} The School Board must prove by the preponderance of the evidence that "just cause" exists. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

24. "'Just cause' includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude." § 1012.33(1) (a). This "just cause" list is not exhaustive, and the statute recognizes that other wrong doing may also constitute "just cause," if the act meets the same magnitude or seriousness as the listed offenses.^{5/}

25. Here, the parties tried by consent the issue of whether or not the School Board established by preponderance of the evidence "just cause" by proving that Ms. Gardner is guilty of "misconduct in office."^{6/}

26. As it existed during the relevant time frame, rule 6B-4.009(3) defined "misconduct in office" as "a violation of the Code of Ethics of the Education Profession as adopted in Florida Administrative Code Rule 6B-1.001, and the Principles of

Professional Conduct for the Education Profession in Florida as adopted in Florida Administrative Code Rule 6B-1.006, which is so serious as to impair the individual's effectiveness in the school system."^{7/}

27. The Principles of Professional Conduct for the Education Profession found in rule 6B-1.006 provides, in pertinent part, the following:

(3) Obligation to the student requires that the individual:

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

* * *

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

28. Applying these rules of law to the facts of this case, the School Board has failed to establish "just cause" to discipline Ms. Gardner's employment. Specifically, the School Board failed to bring forward evidence showing that Ms. Gardner's acts on April 16, 2010, impaired her effectiveness in the school system.

29. At the onset, the record here shows by a preponderance of the evidence that Ms. Gardner acted inappropriately in using physical force to compel C.H.'s behavior. The record showed that Ms. Gardner acted in anger, grabbing C.H.'s arm, turning her

around, and pushing her forcefully in order to have C.H. drop the confiscated math workbook. These actions created a condition harmful to learning and demonstrated a lack of self-control by Ms. Gardner. Therefore, the School Board proved that Ms. Gardner violated rule 6B-1.006(3)(a).^{8/}

30. Similarly, the School Board also proved by a preponderance of the evidence that Ms. Gardner violated rule 6B-1.006(3)(e) by intentionally exposing C.H. to unnecessary embarrassment. C.H. credibly testified that she was "shocked" by Ms. Gardner's actions and that she left the classroom crying and became hysterical. C.H.'s response was not typical of her, as she was described by both Principal Davis and Ms. Gardner as a model student. Although Ms. Gardner did not have a specific intent to embarrass or disparage C.H., she did have the intent to use physical force to obtain C.H.'s compliance. The result was C.H. dropping her books and leaving the class crying and emotionally distraught. Under these facts, the undersigned finds that the School Board showed by a preponderance of the evidence that Ms. Gardner intentionally exposed C.H. to embarrassment.

31. The School Board did not, however, bring forward sufficient evidence showing that the incident on April 16, 2010, impaired Ms. Gardner's effectiveness in the school system. The facts concerning this question are a close call. On one hand, the undersigned recognizes that at the moment that Ms. Gardner angrily

grabbed C.H. in an effort to assert classroom control, Ms. Gardner was not acting as an effective teacher. However, there is no evidence outside of this one moment showing that Ms. Gardner was ineffective. The only marginal evidence of Ms. Gardner's effectiveness concerned her teacher performance appraisal for 2009-2010 school year. The teacher performance appraisal shows overall that Ms. Gardner "need[ed] improvement," and contained comments that the evaluator offered to wait to conduct the evaluation until after the 2010 Florida Comprehensive Assessment Test (FCAT) scores were received, but Ms. Gardner declined to wait for the scores. The School Board did not offer any evidence showing how Ms. Gardner's performance appraisal reflected that she was not effective based on the April 16, 2010, incident. Ms. Gardner's performance appraisal does not contain any statement tying her "need[ed] improvement" rating to the actions of inappropriately using physical force on C.H. In fact, a review of Ms. Gardner's performance appraisal shows that she was rated as meeting expectations in certain areas, and needing improvement in other areas. For example, the performance appraisal shows that Ms. Gardner was rated as "meeting expectations" in an area identified as "Intervention/Direct Services." This "Intervention/Direct Services" section rated, among other factors, whether a teacher "[f]oster[s] student responsibility, appropriate social behavior, integrity, valuing of cultural diversity, and

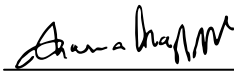
respect for self and others by role modeling and learning activities." In contrast, the performance appraisal also shows Ms. Gardner as needing improvement in an area titled "Administrative Management." "Administrative Management" evaluated, in part, whether Ms. Gardner "maintain[s] a positive, organized, and safe learning environment." Consequently, one may find facts on both sides of the question concerning Ms. Gardner's effectiveness in the school system. Therefore, Ms. Gardner's performance appraisal for 2009-2010 has only marginal value, and does not support a finding that the incident of misconduct impaired her effectiveness as a teacher in the school district.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Glades County School Board enter a final order finding:

- 1) The record contains insufficient evidence of "just cause" in order to discipline Ms. Gardner; and
- 2) Pursuant to section 1012.33(6)(a), Florida Statutes (2010), immediately reinstate Ms. Gardner under her professional service contract and pay her back salary.

DONE AND ENTERED this 11th day of February, 2013, in
Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of February, 2013.

ENDNOTES

^{1/} Unless stated otherwise, all references in the Recommended Order shall be to the 2010 version.

^{2/} § 1012.33(6)(a), Fla. Stat. (2010).

^{3/} § 1012.33(e), Fla. Stat. (2010).

^{4/} The legislature extensively revised section 1012.33(3)(a), Florida Statutes (2010), so that as of July 1, 2011, a district school board can no longer issue professional service contracts. Ch 2011-1, § 13, Laws of Florida. See Orange Cnty Sch. Bd. v. Rachman, 87 So. 3d 48, 48-49 n.1 (Fla. 5th DCA 2012).

^{5/} See Miami-Dade Cnty Sch. Bd. v. Pusey, Case No. 12-0808TTS, 19-34 (Dec. 26, 2012), citing Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217, 218-19 (Fla. 2d DCA 1994) (Blue, J., specially concurring) ("We assume that drunkenness and immorality, which are not included in the non-exclusive list of sins [set forth in section 231.36(1)(a), Florida Statutes (2001), the predecessor of section 1012.33(1)(a)] constituting "just cause", would also be grounds for dismissal In amending section 231.36 and creating a new contract status for teachers (professional service) and by failing to further define "just cause", the legislature gave school boards broad discretion to determine when

a teacher may be dismissed during the contract term. . . . I agree with the majority--that the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause.'").

^{6/} In the submission of the Proposed Recommended Orders, the School Board and Ms. Gardner recognize that the "just cause" issue concerns whether or not the facts show that she is guilty of "misconduct in office." See School Board's Proposed Recommended Order at page 4, and Respondent's Proposed Recommended Order at page 11. Thus, the parties tried this issue by consent.

^{7/} On July 8, 2012, Florida Administrative Code Rule 6B-4.009, was re promulgated and transferred to the current version of Florida Administrative Code Rule 6A-5.056. Rule 6A-5.056 is inapplicable to the instant case because it took effect July 8, 2012, after Ms. Gardner's alleged misconduct on April 16, 2010. See Anglickis v. Dep't of Prof'l Reg., 593 So. 2d 298, 300 (Fla. 2d DCA 1992) ("[T]his rule was not in effect at the time of the audit; therefore, appellants cannot be found to have violated this rule.").

^{8/} The School Board did not allege or attempt to prove that Ms. Gardner's actions rose to the level of "corporal punishment" which is the "moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce a school rule . . ." Although Superintendent Aldrich and Principal Davis both testified that it was a school policy prohibiting a teacher from touching a student to compel compliance in the classroom, the School Board failed to offer into evidence the policy. Consequently, there can be no finding that Ms. Gardner violated this unidentified School Board policy, and to what extent that she violated, if at all.

COPIES FURNISHED:

Mark F. Kelly, Esquire
Kelly and McKee, P.A.
1718 East 7th Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

Robert C. Shearman, Esquire
Henderson, Franklin, Starnes
and Holt, P.A.
1715 Monroe Street
Fort Myers, Florida 33901

Mark S. Herdman, Esquire
Herdman and Sakellarides, P.A.
Suite 110
29605 U.S. Highway 19, North
Clearwater, Florida 33761

Scott Bass, Superintendent
Glades County School Board
400 10th Street
Moore Haven, Florida 33471

Dr. Tony Bennett, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.