

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLOTTE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 12-3258TTS
)
 SANDRA TUELL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on December 4, 2012, in Port Charlotte, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Thomas Gonzalez, Esquire
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner established just cause to terminate Respondent's employment as a teacher.

PRELIMINARY STATEMENT

On August 7, 2012, Respondent, Sandra Tuell (Ms. Tuell), requested an administrative hearing challenging the Charlotte County School Board's (School Board) termination of her employment. On September 12, 2012, the School Board informed Ms. Tuell that her name had been submitted for termination at its September 11, 2012, meeting, and that her termination was retroactively effective as of August 14, 2012. On September 26, 2012, Ms. Tuell's request for an administrative hearing was forwarded to DOAH.

The undersigned held the final hearing on December 4, 2012. The School Board presented the following witnesses: Robert Mallon (Mr. Mallon); Kimberly Thomas-Brooks (Ms. Brooks); Steven Cummings (Mr. Cummings); Larry Langston (Deputy Langston), Glenn Blondun (Mr. Blondun); Chuck Breiner (Mr. Breiner); and Barbara Melanson (Ms. Melanson). The School Board introduced into evidence Exhibits 1 through 11. Ms. Tuell testified in her own behalf and presented the testimony of Michael Tuell (Mr. Tuell), her husband. Ms. Tuell did not offer any exhibits into evidence.

A one-volume transcript of the final hearing was filed with DOAH on December 14, 2012. The parties requested an extension of time to file proposed recommended orders, which was granted. The parties filed the proposals on January 11, 2013.

FINDINGS OF FACT

1. The School Board is responsible for the operation, control, and supervision of public schools located in Charlotte County, Florida. Art. IX, § 4(b), Fla. Const. and § 1001.32, Fla. Stat. (2012).^{1/}

2. Ms. Tuell has been employed as a teacher for the Charlotte County School District since 1985. During the 2011-2012 school year, Ms. Tuell taught English at the Academy, a school within the School Board's district.

3. The events at issue here occurred on May 9, 2012. During that school day, after returning from lunch, Ms. Tuell was obviously impaired. Her impairment was recognized by fellow teachers, a student, the school resource officer, and school administrators. Ms. Tuell was observed acting strangely, such as inappropriately singing, clapping, slurred speech, and being loud and boisterous.

4. When confronted by school administrators about her behavior and their suspicions that she might be under the influence of some substance, Ms. Tuell became extremely belligerent, combative, and profane. Ms. Tuell threatened to leave the school campus, but was prevented by school officials and Deputy Langston. Ms. Tuell's misbehavior continued to escalate after school administrators directed her to submit for urinalysis.

5. School administrators explained to Ms. Tuell that the School District's policy recognized that if an employee failed to submit for drug and alcohol testing, when directed by school officials with reasonable suspicion of an impaired employee, the employee could be disciplined, including termination. Ms. Tuell, however, repeatedly refused to submit for the drug and alcohol testing. When provided the telephone number in order to call her union representative, Ms. Tuell, again in a profane manner, told school officials that she did not need to call him. Moreover, Ms. Tuell refused to sign a written acknowledgement of the School Board Policy and her refusal to be tested. However, she did continue to verbally abuse school personnel in a profane manner, and adamantly stated that she was not impaired.

6. At the hearing, Ms. Tuell was asked why she did not submit to the urinalysis test, and she replied:

I was in such - - I did not know what to do.
I had no representation. I had been
inundated and bombarded with six or seven
people who were falsely accusing me of
things, and I didn't feel like there was a
reason for me to.

7. After refusing to submit to the urinalysis, school personnel informed Ms. Tuell that she was being placed on administrative leave with pay pending a pre-determination hearing. She was then asked to provide her classroom keys and school identification. Because her school keys were mixed together with her personal keys, Ms. Tuell had difficulty

separating the keys. Ms. Tuell, then, threw her keys at the face of one of the school personnel, hitting him, and told him to remove the keys, again in a profane manner.

8. All of the school personnel, who knew Ms. Tuell, noted that her behavior was not typical of her. Ultimately, one of Ms. Tuell's co-workers drove Ms. Tuell home because she was too impaired to drive.

9. Not surprisingly, Ms. Tuell has a very vague recollection concerning these certain events, but she has expressed regret.

10. During the 2011-2012 school year, Ms. Tuell suffered from multiple foot injuries. In August 2011, she had a broken right ankle that required her to wear a walking cast for six to eight weeks. In January 2012, Ms. Tuell developed a stress fracture in her left foot that then resulted in her wearing a walking cast again for six to eight weeks. As a result of these injuries, Ms. Tuell was prescribed hydrocodone each time for pain associated with those injuries. She was to take the medication as needed for pain. According to Ms. Tuell, her two hydrocodone prescriptions were respectively for 250 milligrams and 750 milligrams.

11. On May 8, 2012, Ms. Tuell had a hydrocortisone injection in her foot for a neuroma. Ms. Tuell described that

she had a large bruise on her foot that made it extremely painful to walk.

12. On May 9, 2012, Ms. Tuell went to work in the morning. She met with Ms. Thomas-Brooks, a fellow English teacher, without any incident. Following her usual routine, Ms. Tuell went home for lunch to let her dogs out of the house. According to Ms. Tuell, the total amount of time that it took her to leave the campus and return to school was usually 30 minutes. While at home on May 9, 2012, Ms. Tuell testified that she took two hydrocodone pills that had been left over from her injuries in August 2011 and January 2012. Further, Ms. Tuell indicated that she was not concerned about returning to the school after taking the medication because she had done so in the past without any adverse reaction.

13. After returning to the school campus, Ms. Tuell exhibited the bizarre and combative behavior that characterized the events of the day.

14. At the pre-determination hearing, Ms. Tuell did not come forward with the information concerning her self-medicating with the prescription, and denied that she had either an alcohol or drug problem. Consequently, she was not eligible for an Employee Assistance Program to address any alcohol or drug problem.

15. Ms. Tuell was visibly impaired on May 9, 2012, due to her self-medicating and taking hydrocodone during her lunch break period at home. The evidence was contradictory concerning whether or not Ms. Tuell smelled of alcohol. The undersigned finds the testimony of Deputy Langston and Mr. Blondun, that they did not smell alcohol on Ms. Tuell, credible. Both witnesses come from law enforcement background and have familiarity with individuals who are under the influence of alcohol. Further, both witnesses were in close proximity to Ms. Tuell and had ample opportunity to observe her. Therefore, the undersigned finds that the more believable evidence is that Ms. Tuell was not impaired as a result of alcohol usage, but rather from her over medicating with the hydrocodone.

16. School Board Policy 3124 creates a "drug-free workplace." School Board of Charlotte County Administrative Procedure section 3124, Drug Free Workplace.

17. In order to eliminate substance abuse from the workplace, the School Board adopted a drug testing policy, School Board Policy 3162.01, Drug Testing (hereinafter School Board Policy 3162.01 or Policy"). School Board Policy 3162.01 sets out "procedures for the detection and deterrence of alcohol and drug use." School Board Policy 3162.01 warns: "All persons covered by this policy should be aware that violations of these

procedures may result in discipline up to and including termination, or not being hired."

18. In the subsection titled "Employees," School Board Policy 3162.01 provides that "[i]t is the Board's policy that employees shall not be under the influence of or in the possession of alcohol or drugs, . . . at work locations, or while on duty." Further, the School Board Policy addresses several key issues concerning this case. First, under a subsection titled "Prescribed Medications" the Policy provides the following:

The use of prescribed medications is not a violation of this policy; however, any use of prescribed medications that could foreseeably interfere with the safe and effective performance of duties or operation of equipment must be brought to the attention of the employee's immediate supervisor. Failure to notify the employee's supervisor could result in disciplinary action, up to and including termination.

19. School Board Policy 3162.01 also specifically addresses an instance where an employee refuses to submit to drug and alcohol testing. The Policy provides the following:

C. Refusal to be Tested

Refusal to submit immediately to an alcohol or drug analysis when requested by appropriate administrative or law enforcement personnel or refusal to submit to a search of person properties if requested by law enforcement personnel may constitute insubordination and may be grounds for discipline up to and including termination.

20. School Board Policy 3162.01 sets out the employee's responsibilities under its drug testing policy. In pertinent part, the Policy provides the following:

An employee must:

A. Not report to work or be subject to duty while his/her ability to perform job duties is impaired due to on or off duty alcohol or drug use;

B. Not possess or use alcohol or impairing drugs (illegal drugs and prescription drugs without a prescription) during working hours or while subject to duty, on breaks, during meal periods, or any anytime while on Board property;

* * *

D. Submit immediately to an alcohol or drug test when requested by an appropriate Board representative;

E. Notify his/her supervisor, before beginning work, when taking any medications or drugs, prescriptions or non-prescription, which may interfere with the safe and effective performance of duties or operation of Board equipment.

* * *

21. School Board Policy 3162.01 then sets out that school administrators are responsible for implementing the drug testing policy, and provides a definition of "reasonable suspicion" for conducting a drug test.^{2/} Further, the School Board Policy lists the following examples of "reasonable suspicion" to include, in pertinent part, slurred speech, verbal altercation, and unusual behavior. Id. Finally, the School Board Policy directs that a

representative from the School District's Human Resources department shall inform an employee that it has been determined that testing is appropriate, and will ask the employee to sign a consent form. "The employee will also be informed that refusal to sign or to be tested is considered the same as a positive test." School Board Policy 3162.01(D)(2), Administrative Responsibilities and Procedures.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.57(1) and 120.569, Fla. Stat.

23. The School Board has the burden of proof to show by a preponderance of the evidence that just cause exists. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

24. Section 1012.33(1)(a), Florida Statutes, provides, in relevant part, that:

Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, . . . gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

25. Florida Administrative Code Rule 6A-5.056 provides that "[j]ust cause means cause that is legally sufficient[,]" and provides definitions for the charges set out in section 1012.33.

Importantly, for this case, rule 6A-5.056 defines "gross insubordination" as "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."

26. Applying the rules of law to the facts here, the undersigned finds that the School Board met its burden of showing "just cause." The facts clearly established that Ms. Tuell was impaired when she returned back to school from lunch. Consequently, "reasonable suspicion" existed for school administrators to direct that Ms. Tuell submit to drug and alcohol testing. Further, the facts show that despite the administrators' repeated attempts seeking Ms. Tuell to submit to testing, she refused in an often angry and profane manner. The evidence also showed the school administrators warned Ms. Tuell under the School Board Policy, her refusal to submit to testing was considered the same as testing positive. Moreover, Ms. Tuell's own testimony shows that she made a conscious decision not to undergo testing because she thought she did not need to be tested. Ms. Tuell's refusal to submit to drug and alcohol testing after being directed by school administrators was gross subordination. See Orange Cnty. Sch. Bd. v. O'Neill, Case No. 05-4551, 2006 Fla. Div. Admin. Hear. LEXIS 260 (Fla. DOAH June 16, 2006) (finding a teacher guilty of gross insubordination

where the facts show reasonable suspicion that the teacher was impaired existed and the teacher repeatedly refused to comply with a school administrator's request that the teacher undergo a drug and alcohol test pursuant to a school board policy).

27. Ms. Tuell also violated School Board Policy 3162.01 by failing to inform her supervisors that she had taken a prescription medication during the lunch period, when she returned to work.

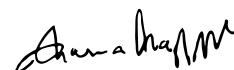
28. The School Board established "just cause" to terminate Ms. Tuell under these facts. The School Board's policy concerning drug testing, however, does not automatically call for termination with a positive result, but appears to contemplate "discipline up to and including termination[.]" The facts here show several mitigating circumstances that the School Board should consider in determining the appropriate discipline. First, the evidence was undisputed by all of the witnesses that Ms. Tuell's behavior was not normal for her and that the events of May 9, 2012, are an isolated incident. In fact, in the 27 years that Ms. Tuell has worked for the School District, she has a minimal prior disciplinary record. It appears that in 2005, Ms. Tuell received a written reprimand for showing an inappropriate movie to her students, but other than that incident she has not been a disciplinary problem. Second, Ms. Tuell took the hydrocodone medication, which she had been prescribed for

prior foot injuries, to address a painful foot injury. Obviously, Ms. Tuell did not act appropriately by returning to school after taking the two hydrocodone pills, and some discipline is warranted. Even though the School Board has proven just cause, it is appropriate to offer Ms. Tuell an opportunity to enter an Employee Assistance Program and probation for two years as a condition of her employment with random drug testing, based on her long service with minimal disciplinary problems.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order that just cause to discipline Ms. Tuell exists; and that Ms. Tuell be placed on a two-year probationary period requiring that she successfully participate in and complete a substance abuse program, such as an Employee Assistance Program, and submit to random drug testing during her probationary period.

DONE AND ENTERED this 25th day of February, 2013, in Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 2013.

ENDNOTES

^{1/} References to Florida Statutes shall be the 2011 version unless otherwise indicated.

^{2/} "'Reasonable suspicion' is a belief based on objective facts sufficient to lead a reasonably prudent administrator to suspect that an employee is under the influence of drugs or alcohol so that the employee's ability to perform the functions of the job is impaired or so that the employee's ability to perform his/her job safely is reduced." School Board Policy 3162.01 (B) (1), Administrative Responsibilities.

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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.