

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,                    )  
  )  
          Petitioner,                            )  
  )  
vs.    )     Case No. 12-3903TTS  
  )  
MARIA BURNS,                                 )  
  )  
          Respondent.                         )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

On February 28, 2013, an administrative disputed fact hearing was held in this case in Fort Myers, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire  
School District of Lee County  
2855 Colonial Boulevard  
Fort Myers, Florida 33966

For Respondent: Robert J. Coleman, Esquire  
Coleman and Coleman  
Post Office Box 2089  
2080 McGregor Boulevard, Suite 202  
Fort Myers, Florida 33902

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Lee County School Board (School Board or Petitioner), has just cause to

dismiss Respondent, Maria Burns, from her employment as a school teacher for immorality and misconduct in office.

PRELIMINARY STATEMENT

On May 30, 2012, the School Board suspended Respondent with pay after she was arrested and charged with possession and cultivation of marijuana and possession of drug paraphernalia. On October 8, 2012, she was suspended without pay, effective the following day. When the School Board dismissed Respondent from her employment, she requested a hearing, and the matter was referred to DOAH.

At the hearing, the School Board called three witnesses: Ranice Monroe, director of the Lee County School District's Department of Professional Standards and Equity; Charlotte County Sheriff's Detective Kevin Connolly; and Charlotte County Sheriff's Crime Scene Technician Kary Mohlmaster. Petitioner's Exhibits 1 through 13 were admitted in evidence, along with Respondent's Exhibits 1 through 5, 10, 12, 13, 15, and 19. A Transcript of the hearing was filed on March 19, 2013, and the parties filed proposed recommended orders that have been considered.

FINDINGS OF FACT

1. Respondent holds a Florida Educator Certificate and has been a teacher at Pine Island Elementary School in Lee County since August 27, 1990. Prior to that, she taught for four years

in DeSoto County. The evidence was that she has been a good and effective teacher.

2. On May 21, 2012, Respondent resided with a female housemate in a home Respondent owned in Charlotte County. The two women had a disagreement or altercation, and the housemate threatened Respondent, who left the premises to get help from the housemate's mother. When her mother arrived, the housemate became more violent and threatening. The Charlotte County Sheriff's Office (Sheriff's Office) was called and responded to the home. The housemate barricaded herself in the house, fired shots, and stood off law enforcement for several hours.

3. When the stand-off ended, and before Respondent returned to the house, the Sheriff's Office arrested the housemate and executed a warrant to search the premises. During the search, law enforcement found 25 to 30 small suspected marijuana plants in five flower pots in open view on chairs on the second floor balcony of the house. The plants tested positive for cannabis. It appeared to law enforcement that the plants were being tended by someone and that leaves were being harvested from the plants. A cigar-type box was found on a kitchen counter amid debris from the stand-off, during which tear gas canisters were shot through the windows of the home. The box had a hinged lid and contained suspected marijuana residue and seeds and a glass smoking pipe (drug paraphernalia).

4. Because Respondent was the owner and a resident in the house, she was arrested and charged with marijuana possession, marijuana cultivation, and possession of drug paraphernalia. Respondent entered into a pre-trial diversion agreement, which she completed by the time of the hearing in this case. On February 25, 2013, the charges against her were dropped by nolle prosequi.

5. No other evidence was presented from which it could be inferred that Respondent knew the marijuana plants were in her house. When found, the plants were in an open and obvious location, but there was no evidence how long they had been there prior to their discovery by law enforcement. The cushions of the chairs they were on were not designed to be left outside in the elements. There was no evidence as to where the plants were kept when not on the chairs on the balcony. Even if the plants were seen by Respondent, there was no evidence that she knew they were marijuana plants.

6. There was no evidence that Respondent tended to the plants, harvested leaves from them, or used the leaves in any way. There also was no evidence that the drug paraphernalia belonged to Respondent, or that she knew the drug paraphernalia was in the house. No inferences are drawn simply from Respondent's decisions, made on advice of counsel based on Fifth Amendment privilege, not to appear at the final hearing and not

to address certain aspects or give her explanation of the incident during the pre-determination hearing.

7. The local media reported Respondent's arrest. The reports gave Respondent's name, age, and Charlotte County address, and included a photograph, but did not identify her as a teacher. Pine Island is a small community, and everyone at Respondent's school and in the community probably knows about her arrest and prosecution. There was no other evidence as to any adverse effect that knowledge might have on Respondent's service to the community or effectiveness as a teacher.

8. Lee County School Board Policy 5.02 requires the School Board to "establish high standards and expectations for its professional faculty and staff, including: (1) Compliance with applicable federal and State laws, rules, codes, regulations and policies concerning professional credentials and employment; (2) Dedication to high ethical standards; [and] (3) Establishment of high standards in educational practice." It also requires employees to meet the standards and expectations established by the School Board.

9. Lee County School Board Policy 5.04 requires criminal background checks to determine suitability for employment and provides that failure to be truthful on an employment application about prior criminal history will be grounds for ineligibility or dismissal from employment. Id. § (1)(a). It also provides that

the School Board will not hire a teacher: who is "on probation or has a pending case"; with "[o]ther offenses listed in §§ 435.04 and 1012.315, Florida Statutes" (which includes, under section 435.04(2)(rr), Florida Statutes, a chapter 893 felony drug prevention and control offense, such as cultivation of marijuana); or with a misdemeanor drug and/or drug paraphernalia offense less than five years old. Id. § (7)(a)-(c).

10. Lee County School Board Policy 5.29(1) provides that "[a]ll employees are expected to exemplify conduct that is lawful and professional . . . ."

11. Lee County School Board Policy 5.37(2)(a) "prohibits the use, distribution, manufacture, possession, sale, cultivation, or attempt to sell illegal controlled substances at any time whether on or off duty . . . ." Violation of the prohibition subjects an employee to "disciplinary action up to and including termination." This policy is set out in the School Board's Employee Handbook.

12. There is a Collective Bargaining Agreement between the School Board and the Teachers Association of Lee County. It prohibits possession, consumption, or being under the influence of illegal drugs on the job or in the workplace. It does not negate Lee County School Board Policy 5.37(2)(a).

## CONCLUSIONS OF LAW

13. School boards have the authority to suspend or dismiss instructional employees under sections 1012.22(1)(f) and 1012.33(6)(a), Florida Statutes. Suspension or dismissal must be for just cause. § 1012.33(1)(a) & (6)(a), Fla. Stat. In a proceeding under those statutes, the School Board has the burden to prove just cause by a preponderance of the evidence. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. Dade Cnty. Sch. Bd., 569 So. 2d 883 (Fla. 3d DCA 1990).

14. Just cause is defined to include (among other things not pertinent to this case) immorality and misconduct in office, as defined by rule of the State Board of Education, and being convicted or found guilty of, or entering a plea of guilty to, a crime involving moral turpitude, regardless of adjudication of guilt. § 1012.33(1)(a), Fla. Stat. A pre-trial diversion agreement is not a plea of guilty, leaving the charges of immorality and misconduct in office.

15. In May 2012, immorality and misconduct in office were defined by Florida Administrative Code Rule 6B-4.009. Immorality was defined as:

conduct that is inconsistent with 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.

Misconduct in office was defined as a violation of the Code of Ethics of the Education Profession in Florida as adopted in rule 6B-1.001<sup>1/</sup> and the Principles of Professional Conduct for the Education Profession in Florida as adopted in rule 6B-1.006,<sup>2/</sup> which is so serious as to impair the individual's effectiveness in the school system.

16. The School Board did not prove possession of marijuana, cultivation of marijuana, or possession of drug paraphernalia by Respondent. Constructive possession of illegal drugs or contraband requires knowledge and the ability to exercise dominion and control. Duncan v. State, 986 So. 2d 653, 655 (Fla. 4th DCA 2008). In this case, Respondent owned the home and would have had the ability to exercise dominion and control, but it was not proven that she knew the marijuana plants and drug paraphernalia were on the premises. Contrast Brown v. State, 428 So. 2d 250, 251 (Fla. 1983) (the owner was present when the drugs were found in plain view); see also Duncan v. State, supra; Harris v. State, 954 So. 2d 1260 (Fla. 5th DCA 2007); Forehand v. Sch. Bd. of Washington Cnty., 481 So. 2d 953 (Fla. 1st DCA 1986) (not proven that teacher either knew of the existence of the marijuana plants or had the ability to exercise dominion or control). For these reasons, the School Board did not prove either immorality or misconduct in office. Cf. Lee Cnty. Sch. Bd. v. Williams, Case 11-2037 (DOAH Jul. 1, 2011; Lee Cnty. Sch.



Bd. Sept. 13, 2011) (an arrest and criminal charges do not themselves prove the underlying offense).

17. As to the immorality charge, the School Board also did not prove 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.

18. As to the misconduct in office charge, the School Board did not prove rule 6B-1.001 and rule 6B-1.006 violations, or any violations so serious as to impair the individual's effectiveness in the school system.

19. Effective July 8, 2012, rule 6B-4.009 was replaced by Florida Administrative Code Rule 6A-5.056, which defines immorality and misconduct in office differently. Section (1) of the new rule deletes the "sufficiently notorious" language and defines immorality as:

conduct that is inconsistent with the standards of public conscience and good morals. It is conduct that brings the individual concerned or the education profession into public disgrace or disrespect and impairs the individual's service in the community.

Section (2) of the new rule defines misconduct in office as 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.

20. Analogizing rules to statutes, the new rules should not apply to the alleged conduct in this case. Cf. Fla. Ins. Guar. Ass'n v. Devon Neighborhood Ass'n, 67 So. 3d 187 (Fla. 2011); Menendez v. Progressive Express Ins. Co., 35 So. 3d 873 (Fla. 2010); Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, 986 So. 2d 1279 (Fla. 2008); Metro. Dade Cnty. v. Chase Fed. Housing Corp., 737 So. 2d 494 (Fla. 1999). These decisions make clear that statutes affecting substantive rights and privileges do not apply retroactively without express legislative intent; by analogy, the new rules in this case should not be applied retroactively without express intent that they do so.

21. If the new rules applied, the School Board also would not have proven immorality or misconduct in office since it did not prove possession of marijuana, cultivation of marijuana, or possession of drug paraphernalia by Respondent. If the School Board had proven such conduct, it would have proven misconduct in

office under the new rules; it still would not have proven immorality since it did not prove conduct that impaired Respondent's service in the community.

22. Respondent's arrest for marijuana cultivation disqualified her from employment as a teacher. § 435.04(2)(rr), Fla. Stat. See also Lee Cnty. Sch. Bd. R. 5.04. As a result, the School Board was required to remove her from her teaching position until the arrest was resolved in a way that made her eligible for employment. § 435.06(2)(b), Fla. Stat. This occurred when the criminal charges were dropped on February 25, 2013. For this reason, back pay is warranted from that date forward. See Lee Cnty. Sch. Bd. v. Williams, supra.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the School Board enter a final order: finding no just cause for dismissal on charges of immorality or misconduct in office; and reinstating Respondent with back pay from February 26, 2013, forward.

DONE AND ENTERED this 19th day of April, 2013, in  
Tallahassee, Leon County, Florida.



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J. LAWRENCE JOHNSTON  
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 19th day of April, 2013.

ENDNOTES

- 1/ This rule has been renumbered 6A-10.080.  
2/ This rule has been renumbered 6A-10.081.

COPIES FURNISHED:

Robert J. Coleman, Esquire  
Coleman and Coleman  
Post Office Box 2089  
2080 McGregor Boulevard, Suite 202  
Fort Myers, Florida 33902

Robert Dodig, Jr., Esquire  
School District of Lee County  
2855 Colonial Boulevard  
Fort Myers, Florida 33966

Matthew Carson, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

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

Joseph Burke, Ed.D., Superintendent  
Lee County School Board  
2855 Colonial Boulevard  
Fort Myers, Florida 33966-1012

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.