

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-1034TTS

AARON ALTHEIM,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Jessica E. Varn, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH). The hearing was held on October 2, 2013, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Heather L. Ward, Esquire
Cristina Rivera, Esquire
Miami-Dade County Public Schools
1450 Northeast Second Avenue
Miami, Florida 33132

For Respondent: Mark S. Herdman, Esquire
Herdman and Sakellarides, P.A.
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STATEMENT OF THE ISSUE

Whether there is just cause to terminate Mr. Altheim's employment.

PRELIMINARY STATEMENT

On March 13, 2013, the Miami-Dade County School Board (School Board) voted at its regularly scheduled meeting to terminate Mr. Aaron Altheim's employment as a teacher with the School Board. The School Board notified Mr. Altheim of its decision by letter dated March 14, 2013. Mr. Altheim timely requested an administrative hearing and the School Board referred the matter to DOAH on March 19, 2013. The matter was assigned to Administrative Law Judge Jessica E. Varn.

On March 27, 2013, the final hearing was scheduled for May 9, 2013, in Miami, Florida. On April 12, 2013, the undersigned entered an Amended Notice of Hearing, re-scheduling the hearing for May 10, 2013. Respondent requested two continuances, which were granted. The hearing was first rescheduled for August 30, 2013, and then rescheduled again for September 11, 2013.

On July 10, 2013, the School Board filed its Notice of Specific Charges. The notice charged Mr. Altheim with violations of School Board Policies 3210, 3210.01, and 3213; Florida Administrative Code Rule 6A-5.056(2), alleging that Mr. Altheim's actions constitute misconduct in office; and rule 6A-5.056 (4),

alleging that Mr. Alheim's actions constitute gross insubordination.

On September 9, 2013, Respondent filed an emergency motion to continue and reschedule hearing. The motion was granted and the final hearing was rescheduled for October 2, 2013.

At hearing, Petitioner presented the testimony of Karen Robinson, Howard Weiner, and Helen Pina. Mr. Alheim testified on his own behalf. Petitioner's Exhibits 1-4, and 6 were admitted into evidence. Respondent's Exhibits 14-18 were admitted into evidence; Respondent also offered 13 deposition transcripts, labeled Exhibits 1-13, which were admitted into the record by stipulation of the parties in lieu of live testimony.

The one-volume Transcript was filed with DOAH on October 17, 2013. Both parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2012).

FINDINGS OF FACT

1. The School Board is the entity authorized to operate, control, and supervise the public schools in Miami-Dade County, Florida.

2. Mr. Alheim has been employed with the Miami-Dade County Public Schools for 15 years.

3. During the 1999-2000 school year, Mr. Altheim was a teacher at North Miami Middle School. He was involved in a conference-for-the-record; he was directed to follow all School Board rules and to conduct himself within the community in a proper manner.

4. During the 2002-2003 school year, Mr. Altheim was still working at North Miami Middle School. He was involved in a conference-for-the-record, where he was again directed to adhere to all Miami-Dade County School Board rules and regulations. He was also directed to cease and desist from inappropriate contact with the students, and to conduct himself in a manner that would reflect credit upon himself and the Miami-Dade County Public Schools.

5. Ten years later, during the 2012-2013 school year, Mr. Altheim was employed as a civics teacher for John F. Kennedy Middle School. Karen Robinson was the Principal during this school year.

6. On a school day in December 2012, Mr. Altheim took his class to the cafeteria for lunch. While in the cafeteria, he noticed three girls who were out of place; because he knew which students should be in the cafeteria during that time period, he concluded that the three girls should be elsewhere.

7. Mr. Altheim took one student to Mr. Sanon's class, and informed Mr. Sanon that the student was attempting to skip his

class. The other two he took to see the Assistant Principal, who was on the phone when the group arrived at his office.

8. Mr. Altheim left the students in the Assistant Principal's office, shortly thereafter returning to check on the matter. The students were still waiting, and the Assistant Principal was still on the phone. Mr. Altheim told the Assistant Principal that the girls were "skipping" and started to walk away. He overheard one of the girls, N.S., tell the other girl that Mr. Altheim was a rapist, and that he touched people. Mr. Altheim told Ms. Robinson that N.S. had called him a rapist, and Ms. Robinson directed Mr. Altheim to write a referral for N.S., for using inappropriate language with a teacher.

9. N.S. was described as a challenging student by both Ms. Robinson and Mr. Altheim. Prior to this incident, Mr. Altheim had written referrals for N.S. numerous times for behavioral problems.

10. Ms. Robinson met with N.S., and asked her why she used the term "rapist" to refer to Mr. Altheim. N.S. accused Mr. Altheim of rubbing girls' necks and shoulders, including hers, and gave Ms. Robinson the names of three other girls who could corroborate her story.

11. Ms. Robinson spoke to approximately five students, including the three girls that had been identified by N.S. Some of the girls accused Mr. Altheim of massaging their necks and

shoulders, and one accused him of brushing her bangs away. According to Ms. Robinson, all of them reported feeling uncomfortable with the physical contact. None of these students' written statements or oral statements were entered into evidence.

12. Instead, 13 other students testified by deposition. Twelve of them never saw Mr. Altheim touch any student inappropriately. Most of them saw Mr. Altheim pat students on the back or on the shoulder, or shake a student's hand, when congratulating a student for a job well done. They consistently testified that he did so in a congratulatory manner, but never in an inappropriate manner.

13. One student, D.P., claimed that he had seen Mr. Altheim wrap his arm around a girl's waist, but added that no one else saw this occur, and admitted to being friends with N.S. and the other accusers. D.P.'s testimony was not corroborated by any other student's testimony, and is not found credible.

14. Notably absent from the record is any alleged victim statement; not a single student testified that he or she had been inappropriately touched by Mr. Altheim.

15. Mr. Altheim credibly testified that he never inappropriately touched any student, and that he never massaged student's necks or shoulders. He may have patted students on the shoulder or back, or shaken students' hands when congratulating

them, but there was nothing inappropriate about the physical contact.

16. The greater weight of the evidence establishes that Mr. Altheim is not guilty of misconduct in office, gross insubordination, or of a violation of any School Board policy.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

18. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983) (Jorgenson, J., concurring).

19. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg.,

625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

20. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995). The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000); see also Williams v. Eau Claire Pub. Sch., 397 F.3d 441, 446 (6th Cir. 2005) (holding trial court properly defined the preponderance of the evidence standard as "such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . [a] belief that what is sought to be proved is more likely true than not true").

21. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

22. Pursuant to section 1012.33(6)(a), Florida Statutes, Petitioner is authorized to suspend or dismiss a member of its instructional staff for "just cause," which is defined, in relevant part, as follows:

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, two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34. . . gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea to, regardless of adjudication of guilt, any crime involving moral turpitude.

§ 1012.33(1)(a), Fla. Stat. (emphasis added).

23. In the Administrative Complaint, the School Board asserts that Mr. Alheim is guilty of gross insubordination and/or misconduct in office, and of violating three different School Board Policies.

24. Gross insubordination, as defined in rule 6A-5.056, is the intentional refusal to obey an order, reasonable in nature, and given by and with proper authority. The School Board failed to prove that Mr. Alheim is guilty of gross insubordination.

25. Misconduct in office, as defined in rule 6A-5.056, 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 colleague's ability to effectively perform duties.

26. The School Board failed to prove that Mr. Altheim was guilty of misconduct in office.

27. School Board Policy 3210, which is titled "Standards of Ethical Conduct," provides in relevant part:

All employees are representatives of the District and shall conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

This policy, in relevant part, further provides that an instructional staff member shall:

* * *

3. Make a 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;

* * *

7. Not intentionally expose a student to unnecessary embarrassment or disparagement;

8. Not intentionally violate or deny a student's rights;

9. Not harass or discriminate against any student on any basis prohibited by law or the Board and shall make reasonable efforts to assure that each student is protected from harassment or discrimination;

* * *

21. Not use abusive and/or profane language or display unseemly conduct in the workplace.

28. The School Board failed to prove that Mr. Altheim's conduct violated any of the provisions of School Board Policy 3210.

29. Mr. Altheim is also accused of violating School Board Policy 3210.01, titled "Code of Ethics", which states as follows:

Each employee agrees and pledges:

A. To abide by this Code of Ethics, making the well-being of the students and the honest performance of professional duties core guiding principles.

B. To obey local, State, and national laws, codes and regulations.

C. To support the principles of due process to protect the civil and human rights of all individuals.

D. To treat all persons with respect and strive to be fair in all matters.

E. To take responsibility and be accountable for his/her actions.

F. To avoid conflicts of interest or any appearance of impropriety.

G. To cooperate with others to protect and advance the District and its students.

H. To be efficient and effective in the performance of job duties.

The policy, in relevant part, states that in regard to students, each employee shall:

A. 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. Not intentionally expose a student to unnecessary embarrassment or disparagement;

F. Not intentionally violate or deny a student's legal rights;

G. Not harass or discriminate against any student on any basis prohibited by the Board and shall make reasonable effort to assure that each student is protected from harassment and discrimination.

30. The School Board failed to prove that Mr. Altheim's conduct violated School Board Policy 3210.01.

31. School Board Policy 3213, titled "Student Supervision and Welfare," states in relevant part:

Protecting the physical and emotional well-being of students is of paramount importance. Each instructional staff member shall maintain the highest professional, moral, and ethical standards in dealing with the supervision, control, and protection of students on or off school property.

* * *

E. Staff members shall not inappropriately associate with students at any time in a manner which may give the appearance of

impropriety, including, but not limited to, the creation or participation in any situation or activity which could be considered abusive or sexually suggestive or involve illegal substances such as drugs, alcohol, or tobacco.

F. Staff members shall not engage in unacceptable relationships and/or communications with students. Unacceptable relationships and/or communications with students include, but are not limited to the following: dating, any form of sexual touching or behavior; making sexual, indecent or illegal proposals, gestures or comments; and/or exploiting an employee-student relationship for any reason. Any sexual or other inappropriate conduct with a student by any staff member will subject the offender to potential criminal liability and discipline up to and including termination of employment.


32. The School Board failed to prove that Mr. Altheim's conduct violated any portion of School Board Policy 3213.

33. The greater weight of the evidence established that Mr. Altheim is not guilty of any of the allegations made in the Notice of Specific Charges.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade School Board enter a final order dismissing the charges against Mr. Altheim and reinstating him with full back pay and benefits.

DONE AND ENTERED this 22nd day of November, 2013, in
Tallahassee, Leon County, Florida.



JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
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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.