

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-1515TTS

DONNA JAMES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on July 1-2, 2013, in Jacksonville, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Craig D. Feiser, Esquire
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For Respondent: Harold S. Lippes, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists to terminate Respondent, Donna James' ("Mrs. James") employment contract with Petitioner, Duval County School Board (the "School

Board"), based on the fact that Mrs. James failed to adequately supervise her students.

PRELIMINARY STATEMENT

By letter dated March 25, 2013, Nikolai P. Vitti, Superintendent of Schools, notified Donna James that the School Board had approved termination of Mrs. James' employment contract effective immediately. Mrs. James requested a formal administrative hearing to contest the School Board's action.

At the final hearing, the School Board called the following witnesses: Dr. Deirdra McDowell-Sutton ("Dr. Sutton"), former principal of Southside Estates Elementary School (the "School"); Zayna Harb, instructional coach at the School; Beverly Walker; Sonita Young, human resources officer; and T.S., a student. The School Board's Exhibits 1-10 and 14-16 were admitted into evidence without objection. Mrs. James testified on her own behalf and called three other witnesses: John James, her husband; Brenda Gillrup, former teacher; and Carolyn Solomon, teacher at the School. Mrs. James' Exhibit 1 was admitted into evidence. (All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent such hearsay was not corroborated, 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. They were given ten days

from the date the transcript was filed at DOAH to submit proposed recommended orders. The parties were also given the right to submit written closing statements. The transcript was filed on July 15, 2013. The School Board filed a Closing Argument and a Proposed Recommended Order on July 17, 2013. Mrs. James filed a Closing Memorandum on July 18, 2013. Each party's submission was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board is responsible for hiring, firing and overseeing all employees at the School, which is an elementary school within the Duval County Public School system.

2. At all times relevant hereto, Mrs. James was a teacher at the School. At the time of her termination of employment by the School Board, Mrs. James was teaching kindergarten at the School. She had been teaching at the School for approximately 17 years, primarily teaching in first and second grades. Mrs. James was certified in grades one through five.

3. Each year she taught at the School, Mrs. James received satisfactory annual evaluations concerning her performance as a teacher. There were some comments on her evaluation forms in the category of classroom management that indicate some minor problems in that area, but none of the comments suggest Mrs. James was less than satisfactory. For example, "classroom

management skills are improving" (2011); "needs to be more consistent with consequences" (2001). Other than those comments, all the evaluations had either no comments or had more positive comments.

4. There was, surprisingly, no evaluation form in Mrs. James' employee file for the 2011-2012 school year, the year just prior to the year Mrs. James' employment contract was terminated.

5. Dr. Sutton became principal of the School in 2009. Her initial assessment of Mrs. James was that she was a competent teacher. Dr. Sutton later came to believe that Mrs. James had some "issues" with classroom management. Dr. Sutton's opinion of Mrs. James appears to be the impetus for the School Board's action seeking termination of Mrs. James' employment contract. (When asked upon being sworn in at final hearing what her "occupation" was, Dr. Sutton replied "Principal of [the School]." However, during cross-examination Dr. Sutton said she was not retained as principal at the School for the upcoming school year. The rationale given to her for non-retention was "data trends and other issues." Dr. Sutton's credibility was negatively affected by her initial failure to be forthright about her employment status.)

6. According to Dr. Sutton's sworn testimony, she visited Mrs. James' classroom regularly, including formal visits at

least every two months and informal visits "frequently."

Mrs. James remembers only two formal visits and almost no informal walk-through visits. Mrs. Gillrup, a retired teacher who came to assist Mrs. James two days a week for the entire school year, never remembers seeing Dr. Sutton visit the room. Dr. Sutton, by her own admission, did not have an assistant principal and was thus spread thin concerning her administrative duties. In light of contradictory testimony, and the fact Dr. Sutton did not have an assistant principal to give her more time, Dr. Sutton's testimony lacks credibility in that regard.

7. There are four separate incidents which form the basis of Dr. Sutton's decision to pursue termination of Mrs. James' employment contract. Each will be addressed below.

The Stabbing Incident¹

8. On or about December 13, 2010, Mrs. James was teaching a first grade class. On that day, one student stabbed another student with a pencil, resulting in injuries to the second student. The School Board provided no direct evidence as to what transpired in the classroom other than the final result, i.e., one student stabbed another. According to Mrs. James, the event occurred as follows: Two boys were engaged in a fight in her classroom. The aggressor was an Exceptional Student Education (ESE) student with "special needs." Mrs. James separated the boys, then took one of the students directly to

the office in order to keep the boys from fighting. While she was gone -- for approximately five minutes -- the ESE student attacked another student with his pencil, stabbing him in the neck and head.

9. A Department of Children and Families' investigation was conducted in that case. The case was closed with a "verified for inadequate supervision" designation. No evidence from the original investigation was provided in the instant matter. There is no evidence that Mrs. James was disciplined because of that incident.

The Playground Incident

10. On March 3, 2012, Mrs. James received a verbal reprimand for failing to supervise two students on the playground. No evidence concerning the specific facts of the situation was presented by the School Board. There is no evidence as to how Dr. Sutton even found out about the alleged incident. Rather, the School Board simply alleges that Mrs. James failed to supervise two students properly, resulting in the reprimand.

11. Mrs. James explained the event as follows: On the day in question, her class was on the playground along with students and teachers from several other classes. When it was time for her class to go, Mrs. James blew her whistle twice, summoning the students to line up. When the students gathered, Mrs. James

went outside the playground area to line up and conduct her student check. At that time, she found that one student (not two, as alleged) was missing. She was still in visual contact with the playground where other teachers and their classes were still located, so she sent two of her more responsible students back to find the missing student. She then proceeded further along the sidewalk in the direction of her classroom, never losing visual sight of the playground. When the two scouts returned with their wayward fellow student, Mrs. James took them and the rest of the class back to the classroom.

12. At no time was the "lost" student ever without adult supervision. Other teachers were in the playground area with their classes. Mrs. James could see the playground at all times. There was no failure to supervise her students.

13. Mrs. James' explanation of the incident was considered by Dr. Sutton to be placing blame on the students rather than accepting her own culpability. Mrs. James said there was no "blame"; rather, a child simply did not hear the whistle and had to be retrieved from the playground.

The Extended Day Student Incident

14. On November 14, 2012, one of Mrs. James' kindergarten students ended up on board a school bus after school even though the student was not a bus rider. Again, the School Board provided no evidence as to how this mistake happened, only the

final result, i.e., the child was improperly on the bus. When the bus driver realized the fact, he returned the child to school. Dr. Sutton then went to speak with the child's parent, who was naturally concerned about the incident.

15. Mrs. James explained the situation as follows: The boy was the only child in her classroom who was on "extended day," meaning that once all the other students left school, he would remain with a group of students for further instruction and supervision. Mrs. James' routine at the end of the day was to line her students up at her classroom door. The extended day student would be released from the classroom first. He would go into a general purpose area right outside the classroom. The child was directed to a carpeted area where he would sit with other kindergarten or first grade extended day students. These students were under the supervision of one or two other teachers. Once that child was safely seated on a carpet, Mrs. James would tend to her other students. Her bus rider students were sent down to Ms. Solomon's room, which was separated from Mrs. James' room by an unused classroom. Ms. Solomon would, in turn, send her car rider students down to Mrs. James' room. It was Mrs. James' duty to then get the car rider students to the appropriate area for pick-up. Mrs. James' extended day student and bus rider students thus went under the supervision of someone else.

16. On the day in question, Mrs. James sent her extended day student out to the common area as per usual. Once he was seated on the carpet, she sent her bus riders down to Ms. Solomon's class and gathered Ms. Solomon's car riders. Mrs. James took the car rider students to the student pick-up area. Upon arrival in that area, her students were turned over to other teachers assigned to assist them. Likewise, there were teachers assisting the bus riders, making sure the right students got on the right bus. Teachers assigned to each area were generally familiar with the students and would likely know if a student was not in the appropriate area.

17. Despite the various safeguards in place, on November 12, 2012, the extended day student from Mrs. James' classroom ended up getting on a bus. How he was able to slip away from the extended day area, avoid detection by the various teachers stationed at the bus area, and get on a bus is not clear. Ms. Solomon said the dismissal time was quite confusing and somewhat chaotic, so if a child did get to the wrong place, it was somewhat understandable. That is why there are other safeguards in place.

18. Dr. Sutton assumed that since the extended day student was from Mrs. James' classroom, she must be responsible for him getting on the bus. Dr. Sutton issued a written reprimand to Mrs. James for her failure to properly supervise the extended

day student. Mrs. James does not agree that she breached her duty in any fashion. Rather, the child somehow managed to evade each and every safeguard in place, ending up on a bus he was not supposed to be riding.

19. The School Board alleged in its letter of termination that another of Mrs. James' students had improperly gotten on a bus earlier in the school year. Dr. Sutton testified that she spoke to Mrs. James about the incident, giving her a verbal reprimand. Mrs. James has no recollection of ever being advised of such a situation. Based upon Mrs. James' demeanor and the fact there is no written memorialization of such an event ever occurring, Mrs. James' version of the story is more credible. It is possible Dr. Sutton was mistaken or confused the event with another teacher's student. It is also possible that, as Mrs. James believes, Dr. Sutton fabricated the first incident. There is no evidence to either support or disprove that contention.

20. Mrs. James was never interviewed or asked about the extended day student bus incident before the reprimand was issued. She was not asked to explain or provide her perspective of what had happened. Nonetheless, the School issued a written reprimand to Mrs. James as a result of the incident. At that time, Mrs. James did not realize she had the right to submit a written response to the allegation, so she did not do so.²

21. When Mrs. James was summoned to the School to receive her written reprimand, her husband accompanied her for moral support. Mr. James is also an educator, working at another school within the Duval County school system.³ As they sat in an outer office waiting to be called in to receive the reprimand, Mrs. Walker, a school district employee, called Mr. James (only) into the office. At that time, he was given what he described as a "No Trespass Affidavit" which said that he could not be present on the School campus. He had no idea why he would be prohibited from being on the campus where his wife taught school. He knew of no offense he had committed to warrant such a prohibition. This procedure reeks of impropriety, especially when considering the School's failure to even ask Mrs. James her perspective of what had transpired in the incident for which the reprimand was being issued.

The Sexual Contact Incident

22. On March 1, 2013, the last and arguably most serious alleged situation involving Mrs. James occurred. On that date, it was reported that two students in Mrs. James' class were engaged in a sexual act or in sexual touching of some kind.

23. At about 10:20 a.m., on that day, Mrs. James was approached by one or more of her students reporting that two of the boys in the class, T.S. and M.M., were doing naughty things under the table where they were sitting. According to the

report, M.M. approached T.S. and asked him if M.M. could put his mouth on T.S.'s penis like he had seen someone do on television. T.S. initially rejected the offer, but M.M. persisted. Then T.S. zipped down his pants as M.M. climbed under the table. M.M. then either touched T.S.'s penis or put his mouth on it.

24. When Mrs. James was advised of this, she called M.M. and T.S. to her desk and admonished them for their behavior. Neither boy admitted to any sexual act, only saying that T.S. showed M.M. his penis upon request and M.M. touched it. She then had the boys taken to the front office by Ms. Cox, a paraprofessional who generally worked with another teacher. (There was no evidence provided as to why Ms. Cox was in Mrs. James' room at that time, how long she had been there, or what she saw vis-à-vis the incident.) Mrs. James asked Ms. Cox to bring back two Referral Forms so she could write up the incident. Later, Ms. Harb, an instructional coach at the School who sometimes acted as de facto assistant principal, brought the forms to Mrs. James.

25. Ms. Harb seemed fairly agitated when she arrived with the forms and tried to ascertain what had actually happened. She watched Mrs. James complete the forms, even suggesting Mrs. James add the statement, "according to another student" at the end of her statement. As it turns out, Ms. Harb had talked to the two boys involved in the incident while they were in the

office. She also spoke to some other students and obtained general statements from them about what had occurred.

26. Due to the nature of the incident, DCF was again called in to investigate the matter. They purportedly concluded that there was evidence to support a "verified for inadequate supervision" designation for the investigation. (This was the same conclusion reached by DCF in the stabbing incident from 2010 which had not resulted in any disciplinary action against Mrs. James.)

27. The School alleges that another sexual touching incident, probably involving the same students, happened the prior week, on February 26, 2013. However, Mrs. James was not at the School on that day, having attended a math workshop she had been going to every Tuesday for some time. There was no evidence at final hearing as to what action was taken against the substitute teacher relating to that alleged incident.

28. There was also evidence that another sexual incident (again involving one or more of the same children) may have occurred a week or so later, i.e., after Mrs. James had been removed from the classroom. No evidence was presented to indicate whether the teacher in charge at the time of that incident was similarly disciplined.

The School Board Decision

29. The day after the sexual touching incident, Mrs. James was notified that she was being removed from the classroom pending further action on the investigation. Three weeks later she received notice that her employment contract was being terminated.

30. The stated basis of the School Board's decision was that Mrs. James failed to properly supervise her students. The position stated by the School Board (through its human resources representative) was that the sexual conduct incident was the primary reason for recommending termination of Mrs. James employment contract. The egregious nature of that incident, coupled with a "pattern of failure to supervise students properly," constituted a "severe act of misconduct." The School Board, therefore, felt it expedient to skip the progressive discipline step of suspension without pay and go directly to the most serious penalty: Termination of Employment.

The Four-Step Discipline Process

31. The notice of termination Mrs. James was issued is the Step IV discipline found in a four step process. Step I generally involves a verbal reprimand. A Step II discipline is a written reprimand; Step III is suspension without pay. Under the School Board policies and the collective bargaining

agreement, the steps are progressive and each must be preceded by the former step.

32. In this case, Mrs. James' Step I discipline was a verbal reprimand for failing to adequately supervise "two first grade students on the playground." This was the March 13, 2012, incident. The Step II discipline (written reprimand) was issued concerning the child who improperly boarded a bus on November 14, 2012.

33. There was no Step III discipline imposed on Mrs. James prior to issuance of the Step IV termination letter. The only caveat to the progressive discipline process is that "some more severe acts of misconduct may warrant circumventing the established procedure." Art. V, Collective Bargaining Agreement. According to the School's human resources director, this caveat was invoked in Mrs. James' case.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract with the School District of Duval County. The proceedings are governed by sections 120.57 and 120.569, Florida Statutes. (Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2012 codification.)

35. The School Board is the duly constituted governing body of the Duval County School District. §4, Art. IX, Fla. Const.; §§ 1001.30 and 1001.33, Fla. Stat. The Superintendent of Schools has the authority to recommend to the School Board that an employee be suspended or dismissed from employment. § 1012.27(5), Fla. Stat.

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

37. The burden of proof in this proceeding is on the School Board to prove, by a preponderance of the evidence, that just cause exists to terminate the employment contract of Mrs. James. McNeil v. Pinellas Cnty Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996). Preponderance of the evidence is evidence that more likely than not tends to prove the proposition set forth by a proponent. Gross v. Lyons, 763 So. 2d 276 (Fla. 2000).

38. In the absence of a rule or written policy defining just cause, the School Board has discretion to set standards which subject an employee to discipline. See Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217 (Fla. 2d 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 be in connection with inefficiency, delinquency, poor

leadership, and 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).

39. Just cause for purposes of discipline is discussed in section 1012.33, Florida Statutes:

(1)(a) [J]ust 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 and found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude; . . . ".

40. The School Board alleges incompetency based upon Mrs. James' alleged "pattern of inadequate supervision of students under her care." The evidence presented at final hearing falls woefully short of proving any such pattern. There is, for example, no competent, substantial evidence that Mrs. James failed to supervise the children on the playground or failed to deliver the extended day student to the proper place. Further, there is no credible evidence that Mrs. James failed to adequately supervise her students even during the sexual incident.

41. The School Board alleges Mrs. James violated Code of Ethics provisions 6A-10.080(2) and (3), which state:

(2) The educator's primary professional concern will always be for the student and

for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

42. Again, there is no credible evidence in the record that Mrs. James failed to have primary concern for her students or failed to seek to exercise the best judgment and integrity. Nor was there evidence that Mrs. James failed to strive to achieve and sustain the highest degree of ethical conduct.

43. The School Board also alleges violation by Mrs. James of one of the Principles of Professional Conduct, to wit:

6A-10.081(3)(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.

44. The sexual incident, in and of itself, does not prove that Mrs. James failed to make reasonable efforts to protect her students. That students would behave in that fashion is sad and disheartening, but it does not, ipso facto, suggest that the supervising teacher failed to protect her students. Individual actions by a single student cannot always be prevented, even when the teacher does his or her best. For example, why were

the teachers in the classroom during the other incidents not disciplined?

45. The evidence, taken as a whole, demonstrated that Mrs. James was falsely accused of failing to properly supervise her students. Although it appears from her annual performance evaluations that her most difficult area was classroom management, she nonetheless operated at a satisfactory level and demonstrated sufficient abilities.

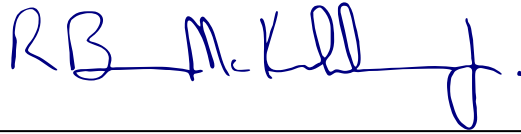
46. The School Board did not explain how the evidence presented would establish a violation of the cited Code of Ethics and Principle of Professional Conduct. Its conclusion was mere conjecture and based upon fallacious premises.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Duval County School Board, dismissing all charges and rescinding the termination of the employment contract of Donna James for the reasons set forth above.

DONE AND ENTERED this 23rd day of July, 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 23rd day of July, 2013.

ENDNOTES

¹ Mrs. James did not receive any discipline for this incident, so it is unclear why it was listed as a "past disciplinary action" in the termination letter.

² Mrs. James had never had a written reprimand before, so she was not fully aware of her rights under the collective bargaining agreement.

³ Mr. James was Duval County Teacher of the Year for the 2012-2013 school year.

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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.