

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-2404TTS

MICHAEL BISHOP,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing by video teleconference on October 21, 2013, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Heather L. Ward, Esquire
Miami-Dade County Public Schools
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

For Respondent: Branden M. Vicari, Esquire
Herdman and Sakellarides, P.A.
29605 U.S. Highway 19, North, Suite 110
Clearwater, Florida 33761

STATEMENT OF THE ISSUE

Whether Respondent's employment as a teacher by the Miami-Dade County School Board should be terminated for the reasons specified in the letter of notification of suspension and dismissal dated June 20, 2013, and the Amended Notice of Specific Charges filed on October 2, 2013.

PRELIMINARY STATEMENT

On June 19, 2013, at its scheduled meeting, Petitioner, Miami-Dade County School Board, took action to suspend Respondent, Michael Bishop, without pay and initiate proceedings to terminate his employment. Respondent was notified of same via correspondence dated June 20, 2013, and of his availability to challenge the school board's action.

Respondent timely requested a formal administrative hearing, and, on June 26, 2013, Petitioner referred the matter to the Division of Administrative Hearings ("DOAH"), where it was assigned to the undersigned.

On July 29, 2013, Petitioner filed its Notice of Specific Charges alleging Respondent should be suspended without pay and dismissed due to his failure to correct performance deficiencies and incompetency due to inefficiency.

The final hearing initially was set for August 28, 2013. On August 9, 2013, Respondent filed a Motion to Continue and Reschedule Final Hearing. The motion was granted, and the cause was re-scheduled for final hearing on September 25, 2013. On September 18, 2013, Petitioner filed a Motion to Continue and Reschedule Final Hearing. The motion was granted, and the cause was re-scheduled for final hearing on October 21, 2013, and then upon joint motion to October 23, 2013.

On October 2, 2013, Petitioner filed a Motion to Amend Notice of Specific Charges. The motion was granted on October 3, 2013. Petitioner's Amended Notice of Specific Charges alleges Respondent should be suspended without pay and dismissed solely for incompetency due to inefficiency and incapacity.

On October 15, 2013, the parties filed a Joint Pre-hearing Stipulation and stipulated to certain facts contained in Section E of the Joint Pre-hearing Stipulation. To the extent relevant, those facts have been incorporated in this Recommended Order.

The final hearing went forward as scheduled. On December 4, 2013, Petitioner filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders. The motion was granted, and the parties were ordered to submit proposed recommended orders on or before December 20, 2013.

The final hearing Transcript was filed on December 2, 2013. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. Petitioner and Respondent timely filed proposed recommended orders, which were considered in preparing this Recommended Order. Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violation.

FINDINGS OF FACT

The Parties

1. Petitioner is a duly constituted school board charged with the duty to operate, control, and supervise all free public schools within the School District of Miami-Dade County, Florida, pursuant to Florida Constitution Article IX, section 4(b), and section 1001.32, Florida Statutes.

2. At all times relevant to this proceeding, Respondent was employed as a special education ("SPED") teacher at Mandarin Lakes K-8 Academy ("Mandarin Lakes"), a public school in the Miami-Dade County Public School District, pursuant to a professional services contract.

3. At all times relevant to this proceeding, Respondent's employment with Petitioner was governed by Florida law, Petitioner's policies and procedures, and the collective bargaining agreement between Miami-Dade County Public Schools and the United Teachers of Dade.

Respondent's Classification

4. During the 2012-2013 school year, it is undisputed that Respondent was classified as a SPED teacher. Petitioner's Amended Notice of Specific Charges avers that Respondent was employed as a SPED "inclusion teacher." Respondent, in his Proposed Recommended Order, also maintains that, during the 2012-2013 school year, he was a SPED inclusion teacher. Petitioner's

witnesses, however, presented conflicting evidence regarding whether Respondent, for the 2012-2013 school year, was charged with the duties and responsibilities of an inclusion teacher or a "co-teacher."

5. Inclusion teaching occurs where "two or more teachers are assigned to a group of students, but one of the teachers is responsible for only one student or a small group of students in the classroom." See § 1003.03(5)(c)2., Fla. Stat. "Co-teaching" is when "two or more teachers are assigned to a group of students and each teacher is responsible for all of the students during the entire period." See § 1003.03(5)(c)1., Fla. Stat. Moreover, in the co-teaching setting, "each teacher is responsible for planning, delivering, and evaluating instruction for all students in the class or subject for the entire period." Id.

6. The undersigned ultimately finds that, during the 2012-2013 school year, Respondent was a SPED inclusion teacher. As such, Respondent was responsible for providing support to a small group of special education students within the general education classroom.^{1/}

The Events Giving Rise to this Proceeding

7. Petitioner alleges, in its Amended Notice of Specific Charges, that, "[d]uring the 2012-2013 school year, school administrators observed Respondent in his capacity as a SPED inclusion teacher and noticed issues with his teaching ability."

8. In April 2013, Angela Fleites, the principal of Mandarin Lakes, formally observed Respondent in the classroom. Principal Fleites broadly enumerated Respondent's responsibilities to include: (1) ensuring the children were on point; (2) following and processing instruction; and (3) having success in the particular lesson.

9. Principal Fleites observed that Respondent was not focused on the task at hand and was not paying attention to the needs of the special education students. Specifically, she observed Respondent "walking aimlessly" around the room without direction or specific purpose.

10. During the April 2013 formal observation, Respondent provided Principal Fleites with a copy of his lesson plans. While the lesson plans were appropriate, Principal Fleites, without offering any specificity, opined Respondent was not implementing the lesson plans. Principal Fleites also observed Respondent failing to re-direct off-task behavior of special education students. Based on the facts recounted above, Principal Fleites opines that Respondent did not address the individual learning needs of his SPED students.

11. In a follow-up formal observation conducted in May 2013, Principal Fleites observed that Respondent was paying more attention to the primary teacher than the needs of the special education students. Again, Principal Fleites observed

Respondent walking around the classroom aimlessly and providing very little, if any, redirection to the students demonstrating off-task behavior.

12. Respondent, as requested, provided his lesson plans to Principal Fleites during the May 2013 observation. Again, she opined that while the lesson plans were appropriate, Respondent failed to implement the same. Principal Fleites, however, could provide no greater detail on this point other than "the lesson plan clearly talked about the individual needs of students and meeting those individual needs, and that was not happening. . . ." Based on the above observation, Principal Fleites opined Respondent was not addressing the academic needs of his students.

13. Principal Fleites is familiar with Petitioner's procedure regarding a fitness-for-duty exam.^{2/} Despite her familiarity, she never asked or requested that a fitness-for-duty determination be conducted for Respondent. She did however, on two occasions, recommend Respondent to the Employee Assistance Program; however, Respondent did not present himself to same.

14. In December 2012, Renita Lee, an assistant principal at Mandarin Lakes, formally observed Respondent in the classroom. During this 30-minute observation, Ms. Lee recalled Respondent simply standing in a corner in the back of the classroom. On

that occasion, Respondent did not have lesson plans available for review.

15. During this observation, Ms. Lee noticed several students who were off-task; however, Respondent did not address the behavior. Ms. Lee's recollection was that at least two of the off-task students were special education students. Based upon the aforementioned facts, Ms. Lee opined that Respondent failed to address the students' individual learning needs during the 30-minute observation period.

16. Ms. Lee again observed Respondent in the classroom in January 2013. On this occasion, Ms. Lee observed, over a two-hour period, Respondent walking aimlessly around the room. She testified that Respondent neither assisted nor re-directed the students. Based on the above-observation, Ms. Lee opined that Respondent did not address the academic needs of his students.

17. Ms. Lee noted that Respondent was "supposed to focus on students that are in need of assistance for a particular benchmark." A benchmark, as defined by Ms. Lee, is "a set of objectives that students are expected to know to where they were going to actually be tested on for FCAT." Ms. Lee acknowledged that, through testing and available test results, one can determine whether Respondent's students have met the particular benchmarks.

18. At times, Ms. Lee observed that Respondent had fallen asleep while sitting upright in a faculty meeting.

19. Kenneth Williams, an assistant principal at Mandarin Lakes during the 2012-2013 school year, formally observed Respondent in the classroom in March 2013. Mr. Williams observed that Respondent was "in a daze" and not paying attention to the needs of the learners. Mr. Williams testified that Respondent did not redirect two students who were displaying off-task behavior.^{3/}

20. During the same observation period, Mr. Williams received a piece of paper from Respondent; however, the same was not a typical lesson plan in that the document did not outline Respondent's duties and instructions for the SPED students on that occasion.

21. John Soderholm, an eighth-grade science teacher at Mandarin Lakes, perceived Respondent as a "co-teacher" in his classroom. With that belief, Mr. Soderholm was critical of Respondent's engagement with the classroom population as a whole. Specifically, on two occasions Mr. Soderholm requested Respondent to lead the entire class; however, Respondent did not accept the invitation. Concerning the special education students, Mr. Soderholm observed Respondent making "minimal attempts to walk around and be in the classroom"; however, he opined that Respondent never truly engaged.

22. Haronique Durham, an eight-grade teacher at Mandarin Lakes, perceived Respondent's role as an inclusion teacher and a co-teacher in her classroom. According to Ms. Durham, Respondent did not interact with the students, but rather, "usually walked back and forth in the back of the room pacing and he either looks up to the sky and covers his mouth and walks back and forth." According to Ms. Durham, Respondent never helped the students in her class and never taught a lesson. Ms. Durham acknowledged that special education students have an Individual Education Plan ("IEP"), which, among other things, sets forth specific goals for the individual student.

23. Ira Gardner, a physical education teacher at Mandarin Lakes during the 2012-2013 school year, on more than one occasion observed children "hanging out of the third floor window" of a classroom. On one such occasion, upon entering the classroom, he observed that Respondent was the only teacher in the classroom, and admonished Respondent that "[y]ou got to look at everybody" and that "[t]hese kids are all over the place."

24. Mr. Gardner, Assistant Principal Williams, Assistant Principal Lee, and Principal Fleites credibly testified that Respondent, on one or more occasions, appeared to be engaged in an audible conversation with himself.

CONCLUSIONS OF LAW

25. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.33(6), 120.569, and 120.57(1), Florida Statutes. Pursuant to section 120.65(11), Petitioner has contracted with DOAH to conduct these hearings.

26. Petitioner seeks to terminate Respondent's employment. In order to do so, Petitioner must prove by a preponderance of the evidence that Respondent committed the violations as alleged in the Amended Notice of Specific Charges. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990).

27. 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. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

28. Any member of the instructional staff in a district school system may be suspended or dismissed at any time during the term of his or her employment contract for just cause, as provided in section 1012.33(1)(a). § 1012.33(6)(a), Fla. Stat.

29. The term "just cause":

[I]ncludes, 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, two annual performance evaluation ratings of

unsatisfactory within a 3-year period under s. 101.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34, 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.

§ 1012.33(1) (a), Fla. Stat.

30. In its Amended Notice of Specific Charges, Petitioner avers Respondent's alleged incompetency constitutes just cause for his dismissal. Whether Respondent is guilty of incompetency is a question of ultimate fact to be decided in the context of the 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).

31. Section 1001.02(1), Florida Statutes, grants the State Board of Education authority to adopt rules pursuant to sections 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

32. Consistent with its rulemaking authority, the State Board of Education has defined "incompetency" to implement section 1012.33(1) (a) via Florida Administrative Code Rule 6A-5.056. Rule 6A-5.056(3) provides, in pertinent part, as follows:

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the

required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;
2. Failure to communicate appropriately with and relate to students;
3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;

* * *

(b) "Incapacity" means one or more of the following:

1. Lack of emotional stability;

Failure to Communicate Appropriately and Relate

33. Petitioner first seeks to terminate Respondent's employment on the grounds of incompetency due to inefficiency. Petitioner alleges in its Amended Notice of Specific Charges, and argues in its Proposed Recommended Order, that Respondent was inefficient under rule 6A-5.056(3)(a)2. by his failure to communicate appropriately with and relate to his SPED students; and rule 6A-5.056(3)(a)3. by his failure to communicate appropriately with and relate to his colleagues, administrators, subordinates, or parents.

34. To establish incompetency, Petitioner is first required to prove one or more of the charged inefficiencies.^{4/} Secondly,

assuming, arguendo, that Petitioner has proved one or more of the charged insufficiencies, it is incumbent upon Petitioner to present sufficient evidence to establish the "required duty" at issue to be discharged. As a matter of logic and plain reading of the subject rule, "the required duty" cannot be equivalent to the charged inefficiency, as such a construction would render the phrase "the required duty" a nullity or superfluous.

35. Thereafter, Petitioner must provide the nexis between the proven inefficiency and the non-discharge of the established required duty. Petitioner may succeed by establishing that, as a result of the proven inefficiency, Respondent had (1) an inability; (2) lacked fitness; or (3) failed to discharge "the required duty."

36. Assuming, without deciding, that Petitioner established Respondent's failure to communicate appropriately and relate with students, Petitioner must further prove that said inefficiency resulted in Respondent's failure to discharge the required duty.^{5/}

37. Ostensibly, to set forth the required duty, Petitioner presented several witnesses who opined that Respondent did not address the "academic needs of his students" due to his communicational and relational shortcomings. As noted in the Findings of Fact, as a SPED inclusion teacher, Respondent was responsible for a small group of special education students in a general education classroom.

38. Recognizing that the academic needs of special education students are often unique to the students themselves and reflected in their respective IEPs, the witnesses displayed no insight into those particular student's academic needs or to the IEPs themselves. Indeed, Petitioner failed to present any evidence concerning the academic needs of any special education student under Respondent's charge, or how Respondent's alleged failure to communicate appropriately or relate to the special education students resulted in a failure to meet those students' individual academic needs.

39. Assuming, without deciding, that Petitioner established Respondent's failure to communicate appropriately and relate with colleagues or administrators, Petitioner must further prove that said inefficiency resulted in Respondent's failure to discharge the required duty. Petitioner failed to present any evidence to establish the "required duty" at issue to be discharged vis-à-vis the failure to communicate appropriately and relate with colleagues or administrators.

40. Accordingly, Petitioner did not establish that Respondent failed to discharge the required duty as a result of the above-charged inefficiencies and, therefore, failed to establish incompetency due to inefficiency, pursuant to rule 6A-5.056(3)(a)2. and 3.

Failure to Perform Duties Prescribed by Law

41. Petitioner alleges in its Amended Notice of Specific Charges, but does not argue in its Proposed Recommended Order, that Respondent was inefficient under rule 6A-5.056(3)(a)1. by his failure to perform duties prescribed by law.

42. Section 1012.53, titled "Duties of Instructional Personnel," provides as follows:

(1) The primary duty of instructional personnel is to work diligently and faithfully to help students meet or exceed annual learning goals, to meet state and local achievement requirements, and to master the skills required to graduate from high school prepared for postsecondary education and work. This duty applies to instructional personnel whether they teach or function in a support role.

(2) Members of the instructional staff of the public schools shall perform duties prescribed by rules of the district school board. The rules shall include, but are not limited to, rules relating to a teacher's duty to help students master challenging standards and meet all state and local requirements for achievement; teaching efficiently and faithfully, using prescribed materials and methods, including technology-based instruction; recordkeeping; and fulfilling the terms of any contract, unless released from the contract by the district school board.

43. Applying the same analysis contained in the previous section, Petitioner is first required to prove the charged inefficiency. Here, Petitioner failed to reference or present evidence concerning any specific duty prescribed by law that

Respondent allegedly failed to perform. Accordingly, Petitioner has failed to prove that Respondent is incompetent due to inefficiency, pursuant to rule 6A-5.056(3)(a)1.

Incapacity

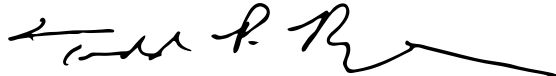
44. Petitioner alleges in its Amended Notice of Specific Charges, but does not argue in its Proposed Recommended Order, that Respondent was incompetent due to incapacity under rule 6A-5.056(3)(b)1. by his lack of emotional stability. Petitioner presented the credible testimony of several witnesses who perceived that Respondent, on several occasions, was engaged in a conversation with himself. The evidence also supports a finding that Respondent displayed unusual mannerisms and behavior in and outside the classroom. Despite Respondent's unusual behavior, Petitioner did not seek a fitness-for-duty determination be conducted for Respondent.

45. The undersigned concludes that the evidence presented is insufficient to establish, by a preponderance of the evidence, that Respondent lacked emotional stability. Accordingly, the undersigned concludes Petitioner failed to establish that Respondent is incompetent due to incapacity, pursuant to rule 6A-5.056(3)(b)1.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 31st day of January, 2014, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
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 31st day of January, 2014.

ENDNOTES

^{1/} While the role and responsibilities of an inclusion teacher may vary considerably based upon the inclusive model of support Respondent was assigned to provide, neither party presented conclusive evidence concerning the same, and, therefore, the undersigned has not made any findings of fact or conclusions of law based on such distinctions.

^{2/} Joyce Castro, the district director for the Office of Professional Standards for Miami-Dade County Public Schools, explained that a fitness-for-duty determination can be requested when there is a concern regarding a teacher's emotional stability in the classroom.

^{3/} The record is void concerning whether the off-task students were general education students or special education students.

^{4/} The subject rule fails to define or otherwise provide guidance to the terms "communicate appropriately" and "relate," which by their very nature are relative and highly subjective. As such, an objective standard is necessary to gauge whether Respondent failed to communicate appropriately and relate under the facts and circumstances at issue. Without a neutral principle to apply, the undersigned would be simply advancing his personal opinion as to whether Respondent communicated inappropriately or failed to relate with students, colleagues, and administrators. Here, Petitioner neither proved nor argued for the existence of such a standard of conduct.

^{5/} The record is void of any competent evidence that Respondent had an inability or lacked fitness to discharge the required duty.

COPIES FURNISHED:

Heather L. Ward, Esquire
Miami-Dade County Public Schools
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

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

Alberto M. Carvalho, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 912
Miami, Florida 33132-1308

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

Pam Stewart, Commissioner
Department of Education
Turlington Building, Suite 1514
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.