

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INDIAN RIVER COUNTY SCHOOL
BOARD,

Petitioner,

vs.

Case No. 13-4036TTS

WILLIAM HOWLE,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing on May 1, 2014, in Vero Beach, Florida.

APPEARANCES

For Petitioner: Elizabeth Coke, Esquire
Richeson & Coke, P.A.
317 South Second Street
Post Office Box 4048
Fort Pierce, Florida 34950

For Respondent: Nicholas Caggia, Esquire
Law Office of Thomas L. Johnson
510 Vonderburg Drive, Suite 309
Brandon, Florida 33511

STATEMENT OF THE ISSUE

Whether Respondent's employment as a teacher by the Indian River County School Board should be terminated for the reasons specified in the Charging Letter dated September 20, 2013.

PRELIMINARY STATEMENT

On September 20, 2013, Dr. Frances J. Adams, Ed.D., Superintendent for the School District of Indian River County ("District"), Florida, notified Respondent that she would recommend termination of Respondent's employment with the District at the scheduled October 8, 2013, meeting. On October 8, 2013, Petitioner accepted the recommendation and terminated Respondent.

Respondent timely requested a formal administrative hearing, and on October 15, 2013, Petitioner referred the matter to the Division of Administrative Hearings ("DOAH"), where it was assigned to the undersigned.

The final hearing initially was set for January 30 through 31, 2014. On January 29, 2014, Petitioner filed an unopposed Motion to Continue the Final Hearing. The motion was granted and the cause was re-scheduled for final hearing on May 1 through 2, 2014.

On April 24, 2014, 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.

Both parties were represented by counsel at the hearing, which went forward as planned. The final hearing Transcript was

filed on June 11, 2014. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

On June 17, 2014, Respondent filed an unopposed Motion for Request for Extension of Time to File Proposed Recommended Orders. The motion was granted and the parties were ordered to file proposed recommended orders on or before July 3, 2014. The parties 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

1. Petitioner is the entity charged with the duty to operate, control, and supervise the public schools within Indian River County, Florida.

2. At all times pertinent to this case, Respondent was employed as a physical education teacher at the Alternative Education Center, a public school in Indian River County, Florida.

3. On October 16, 2012, Respondent was arrested and charged with purchase of marijuana and possession of more than 20 grams of cannabis, both of which are third degree felonies.

4. On March 6, 2013, Respondent entered a plea of no contest to the above-noted criminal charges and entered into the Drug Court Intervention Program.

5. Pending the outcome of Respondent's criminal charges, on October 18, 2012, Respondent was reassigned to work at the Support Services Complex ("Complex"). Respondent was directed to report to Rick Chuma, Director of Purchasing for the District, on October 19, 2012, at 8:00 a.m.

6. Mr. Chuma testified that individuals, such as Respondent, who are reassigned to the Complex are typically assigned menial tasks such as shredding paper or other minor projects. Specific to Respondent, Mr. Chuma recalled Respondent's duties as shredding paper and, on one occasion, working for Patrick McCarty, the Director of Food Services, cleaning the kitchen.

7. Mr. Chuma conceded that there would be occasions where Respondent did not have any tasks to perform at the Complex; however, he noted that under such circumstances Respondent was not permitted to leave during his assigned hours (excepting breaks or lunch).

8. Denise Roberts, the Executive Director of Human Resources, testified that Respondent was assigned to work at the Complex from approximately 7:30 a.m. to 11:30 a.m. or 12:00 p.m. At the Complex, individuals such as Respondent kept an accounting

of their time by completing a "Personnel Time Sheet" on a daily basis. Margaret Irene Herman, Mr. Chuma's assistant, ensures personnel are signed in and out. The timesheets cover a two-week period and are maintained in a basket on her desk.

9. Respondent had an individual time sheet and would document for each day when he arrived and left the Complex. Although personnel are expected to complete the form in real time, that is, sign in upon arrival, and sign out when departing, some personnel would sign in and out upon arrival at work. This was not a disciplinable offense if the employee worked during the documented time period.

10. In February 2013, after approximately four months at the Complex, concerns arose regarding Respondent's whereabouts at the Complex during his assigned hours. On one occasion, Ms. Roberts received a call from Ms. Herman inquiring as to whether Respondent had requested and been authorized leave, because he could not be located. Mr. Chuma testified that, on one occasion, he was asked to locate Respondent at the Complex, and he could not be located. Patrick McCarty also testified that, on one occasion, he was asked to locate Respondent, but was unsuccessful.^{1/} On the above-noted occasions, Respondent had signed in and out on his timesheet as working a full day.

11. Although Respondent continued to have access to and utilize his work email, and Petitioner had his phone number,

Petitioner never attempted to locate Respondent via those channels. Instead, Petitioner contacted Kenneth Thompson, the plant manager of the Complex, to review video surveillance of the Complex. Ms. Roberts and Mr. McCarty recalled viewing one video surveillance clip that purportedly showed Respondent arriving at the Complex and then leaving the Complex several minutes later. Ms. Herman testified that she viewed approximately three separate video clips similarly showing Respondent arriving at work and then leaving several minutes later.^{2/}

12. Respondent conceded that there were days when he arrived at the Complex, signed in and out as working his scheduled hours, and then left the Complex several minutes later for the entire day. On those occasions, Respondent did not notify anyone of his absence. There is no evidence that Respondent requested leave on those occasions. The evidence reveals that Respondent received his full pay for the days that he was willfully absent.

13. At some point in time, Respondent was informed that he was required to sign in and out in the presence of Ms. Herman.^{3/} Thereafter, Respondent complied and there is no evidence of further incidents regarding Respondent being physically present at the Complex.

14. On July 1, 2013, William Fritz was assigned as the Assistant Superintendent for Human Resources and Risk Management.

Shortly thereafter, Mr. Fritz conducted an investigation regarding the above-noted conduct. At the conclusion of his investigation, Mr. Fritz recommended Respondent's termination, and the Superintendent ultimately supported that recommendation.

CONCLUSIONS OF LAW

15. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 101.33(6), 120.569, and 120.57(1), Florida Statutes. Pursuant to section 120.65(11), Petitioner has contracted with DOAH to conduct these hearings.

16. 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 alleged in the Charging Letter. 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).

17. 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).

18. 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.

19. 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, . . . 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.

20. In its Charging Letter, Petitioner avers misconduct in office as the ground for terminating Respondent. Whether Respondent is guilty of misconduct in office, which is discussed below, 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).

21. 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.

Misconduct in Office

22. Petitioner contends that Respondent has committed misconduct in office in two respects. First, Petitioner avers that Respondent's criminal pleas violate adopted School Board Rule 3.04(H)(6). Secondly, Petitioner contends that Respondent violated adopted School Board Rules 3.22, 3.25, 2.07, and 2.17

(incorporating Florida Administrative Code Rule 6A-10.081(5) (a) and (h)), in the following manner:

On at least five days, you failed to attend work, and failed to claim leave for the time when you were absent. You knowingly signed in for work and immediately left the premises on each occasion. You knowingly were compensated for such time.

23. Florida Administrative Code Rule 6A-5.056(2) provides, in pertinent part, as follows:

(2) "Misconduct in Office" 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.

Criminal Pleas

24. Petitioner's Rule 3.04(H) (6) provides, in relevant part, as follows:

QUALIFICATIONS FOR INSTRUCTIONAL PERSONNEL

* * *

A person who is found to have been adjudicated guilty of a crime or misdemeanor specified below, or who has been convicted of any crime involving moral turpitude as defined by rule of the State Board of Education, shall not be employed, engaged to provide services, or to serve in any position

that requires direct contact with students. The specific categories of convictions and the effect of a conviction upon an application for employment are as follows:

(a) Category One: Felony sexual related crimes, lewd and lascivious crimes, and felony child abuse crimes. The District will not hire an applicant or retain in its employment any person who has been convicted of a Category One offense under any circumstance.

(b) Category Two: Felony crimes of violence and felony sale of controlled substances. The District will not hire an applicant or retain in its employment a person who has been convicted of a Category Two Offense under any circumstances.

(c) Category Three: Other felony crimes (except those designated under Category Five), any other misdemeanor crimes of a sexual nature, and misdemeanor crimes related to children. The District will not hire an applicant or retain in its employment any person who has been convicted of a Category Three Offense under any circumstance.

25. Petitioner's Rule 3.04(H) (7) provides the following expansive definition of "conviction":

The term "conviction" for the purposes of these Administrative Policies means a conviction by a jury or by a court; and shall also include the forfeiture of any bail, bond, or other security deposited to secure appearance by a person charged with having committed a felony or misdemeanor, the payment of a fine, a plea of nolo contendere (no contest), the imposition of a deferred or suspended sentence by the court, adjudication withheld, finding of guilt or the date of entry into a pre-trial intervention, pre-trial diversion or similar program provided that such pretrial intervention or pretrial

diversion program is completed by the end of the relevant waiting period.

26. It is undisputed that, on March 6, 2013, Respondent entered a plea of no contest to the charges of purchase of marijuana and possession of more than 20 grams of cannabis, third degree felonies, and entered into the Drug Court Intervention Program. As defined by Rule 3.04(H) (6) and (7), Respondent has been "convicted" of a Category Three felony crime. Accordingly, Respondent violated an adopted school board rule and thus committed misconduct in office.

Absence Without Leave/Permission

27. Petitioner's Rule 3.22(B) provides, in relevant part, as follows:

Any teacher or supervisor who expects to be absent from duty for any cause shall notify the principal and the substitute center the day before such absence, when possible; but in no circumstance, no [sic] later than one hour prior to the opening of school except in an emergency where prior notification is NOT possible. In the event of an emergency the principal or supervisor shall be notified as soon as possible.

28. Petitioner's Rule 3.25, entitled "Absence Without Leave," provides that:

Any member of the instructional or administrative staff who is willfully absent from duty without leave shall interrupt continuity of contract purposes and shall forfeit compensation for the time of the absence and his contract shall be subject to cancellation.

29. Petitioner's Rule 2.07, entitled "Duty Hours of Employees," provides that:

Based on the recommendations of the Superintendent, the School Board will establish annually the duty hours of all classifications of personnel, both instructional and non-instructional. Under no conditions may an employee deviate from the minimum required hours of duty without the approval of the immediate supervisor.

30. Petitioner's Rule 2.17, entitled "Ethics Policy- Employee Standards of Conduct," provides, inter alia, that each member of the instructional staff shall abide by the Principles of Professional Conduct for the Education Profession in Florida. Florida Administrative Code Rule 6B-1.006, renumbered without change as rule 6A-10.081, is entitled "Principles of Professional Conduct for the Education Profession in Florida," and provides in relevant part:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

* * *

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

* * *

(h) Shall not submit fraudulent information on any document in connection with professional activities.

31. Applying the above-findings of fact to Rules 3.22, 3.25, 2.07, and 2.17, the undersigned concludes that Petitioner proved by a preponderance of the evidence that Respondent violated Rules 3.25, 2.07, and 2.17 (by violating rule 6A-10.081(5)(a) and (h)), and, therefore, is guilty of misconduct in office. Rule 3.22 is inapplicable to Respondent's tenure at the Complex, and, therefore, Respondent has not violated the same.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Indian River County School Board enter a final order finding William Howle guilty of misconduct in office, and terminating his employment.

DONE AND ENTERED this 4th day of August, 2014, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of August, 2014.

ENDNOTES

^{1/} The undersigned cannot determine from the record the specific dates that coincide with the unsuccessful efforts to locate Respondent.

^{2/} Video surveillance footage from the Complex documents Respondent arriving and departing from the Complex parking lot within five minutes on the following dates:
February 7, 8, 11 through 15, and 22, 2013.

^{3/} The undersigned is unable to determine from the record when the timesheet procedure change occurred.

COPIES FURNISHED:

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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.