STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 13-4418TTS

BRENDA FISCHER,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on April 15, 2014, by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Adrian J. Alvarez, Esquire
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For Respondent: Robert F. McKee, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists to suspend Respondent from her employment with the Broward County School Board.

PRELIMINARY STATEMENT

At its regularly scheduled meeting on November 5, 2013, Petitioner Broward County School Board ("Petitioner" or "School Board") voted to suspend Respondent without pay for five workdays.

Respondent timely requested a formal administrative hearing to contest Petitioner's action, and, on November 18, 2013, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. Petitioner's Administrative Complaint, which was forwarded to DOAH on the same date, alleges that Respondent is guilty of insubordination and/or misconduct in office, and, as such, just cause exists to suspend her from employment.

As noted above, the final hearing was held on April 15, 2014, during which Petitioner presented the testimony of six witnesses (N.S., T.C., Carol Fischer, Denise Jones, Derek Gordon, and Jimmy Arrojo) and introduced 11 exhibits, numbered 1-3, 5, 6, 8, 9, 9a, 9b, 9c, and 10. Respondent testified on her own behalf, but did not introduce any exhibits into evidence.

The final hearing Transcript was filed on May 15, 2014. Both parties timely filed proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

FINDINGS OF FACT

I. Background

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

2. At all times relevant to this proceeding, Respondent was employed as an art teacher at Western High School ("Western High").

3. Respondent's career with the School Board, which spans some 21 years, has not proceeded entirely without incident: on January 31, 1997, Respondent uttered profanity in the presence of her students, which resulted in the issuance of a written reprimand that directed her to "cease and desist from inappropriate remarks"; several months later, Respondent's further use of colorful language led to a second written reprimand; and, in August 2009, Respondent agreed to serve a three-day suspension "for inappropriate language." The School Board now seeks to suspend Respondent for five days based upon an allegation that, on August 16, 2013, she used profanity and "aggressively grabbed" a female student's arm during an episode

in Western High's parking lot. The facts relating to the instant charges are recounted below.

II. Instant Allegations

4. On the morning of August 16, 2013——the final weekday before the start of the 2013-2014 school year——Respondent arrived at Western High's campus to place the finishing touches on her classroom. On several occasions throughout the day, one of Western High's assistant principals announced that the school's parking lot would be locked at 5:30 p.m.

5. The final such warning, which was made at 5:15 p.m., prompted Respondent to exit the building approximately five minutes later. As she headed toward her vehicle, Respondent (accompanied by her mother, Carol Fischer, herself a longtime educator) noticed several groups of students decorating parking spaces in the school lot. As explained during the final hearing, the students' presence was not unusual, for incoming seniors at Western High were authorized, pursuant to a school fundraiser, to "purchase" a parking space and adorn it as each saw fit.

6. Mindful that the school gate would soon be locked, Respondent walked toward the groups and, from a distance of approximately 50 yards, loudly directed them to pack up their belongings and leave the campus. Each of the groups complied, save for one, which prompted Respondent to approach the

stragglers and repeatedly announce——with diminishing volume as she made her way closer——that they needed to go home.

7. Suffice it to say that these importunings had no discernable effect on the group's activities; as a result, Respondent continued toward the parking spot where the students were working. Now in their immediate vicinity, Respondent informed the group (which included two female students, N.S. and T.C., both of whom were incoming seniors at Western High) that they had two minutes to gather their possessions and leave the campus.

8. During the ensuing interaction, T.C. began to argue with Respondent and, to make matters worse, acted as if she intended to continue painting. Her patience understandably waning, Respondent reached toward T.C. and, in a non-violent fashion, placed her hand on the student's upper arm. This brief physical contact, intended to secure T.C.'s complete attention and gesture her in the direction of the exit, was instantly met with a vocal objection. Respondent immediately reacted by stepping backwards,[1/] at which point the group began to gather up the painting materials. T.C. and the other students departed the parking lot a short time later.

9. Contrary to the complaint's allegations, the credible evidence demonstrates that, although Respondent addressed the students with an elevated voice (but only as she approached from

a distance), she at no point used profanity or any other inappropriate language.[2/] Further, the record is pellucid that Respondent's momentary, gesturing contact with T.C. was completely innocuous and in no way constituted an "aggressive grab."[3/] Indeed, T.C. acknowledged during her final hearing testimony that Respondent plainly intended no harm.[4/]

10. Finally, and with respect to the charge of insubordination, there has been no showing that Respondent's behavior ran afoul of any direct order. Although the School Board attempted to prove the existence of a "no touching whatsoever" rule, the testimony on that point was internally contradictory and ultimately unpersuasive. In any event, and as discussed shortly, a general policy——i.e., one applicable to all employees——does not constitute a direct order for the purpose of sustaining an insubordination charge.

III. Ultimate Findings

11. It is determined, as a matter of ultimate fact, that Respondent is not guilty of misconduct in office.

12. It is determined, as a matter of ultimate fact, that Respondent is not guilty of insubordination.

CONCLUSIONS OF LAW

I. Jurisdiction

13. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this case

pursuant to sections 120.569 and 120.57(1), Florida Statutes.

II. The Burden and Standard of Proof

14. 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).

15. 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).

16. 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). 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").

17. 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).

III. The Charges Against Respondent

18. 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).

19. In its complaint, the School Board asserts that Respondent is guilty of gross insubordination and/or misconduct in office and that, as a consequence, just cause exists to impose a suspension. Each offense is discussed separately below, beginning with the charge of misconduct in office.

A. Misconduct in Office

20. Pursuant to Florida Administrative Code Rule 6A-5.056(2), the offense of "misconduct in office" is defined to include one or more of the following:

> (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in [Rule 6A-10.080], F.A.C.;
>
> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in [Rule 6A-10.081], 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.

(emphasis added).

21. In the Pre-Hearing Stipulation of the Parties,[5/] the School Board expressly limited its theory of misconduct in

office to three violations: Florida Administrative Code Rule 6A-10.080(2), a provision of the Code of Ethics providing that an educator's "primary professional concern will always be for the student," and that an educator "will seek to exercise the best professional judgment and integrity"; Florida Administrative Code Rule 6A-10.081(3)(a), a provision of the Principles of Professional Conduct that requires an educator to "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; and rule 6A-10.081(3)(f), which prohibits an educator from intentionally violating a student's legal rights.

22. Each of the School Board's charges is predicated upon its contention that, during the incident in question, Respondent used profanity and/or grabbed T.C. "aggressively." However, as detailed in the Findings of Fact, the credible evidence demonstrates that Respondent at no point utilized foul language during her interaction with the students. Further, the physical contact in question amounted to nothing more than a momentary, innocuous guiding motion——behavior that violates neither the Code of Ethics nor the Principles of Professional Conduct. See, e.g., St. Lucie Cnty. Sch. Bd. v. Woodcock, Case No. 12-2755TTS, 2013 Fla. Div. Adm. Hear. LEXIS 30 (Fla. DOAH Jan. 24, 2013)(concluding that educator's attempt to motion a student

toward a walkway by placing her hand on the child's back did not violate School Board Policy 6.301(2), a provision that required instructors to abide by the Code of Ethics and the Principles of Professional Conduct).

23. Finally, and with respect to the purported violation of rule 6A-10.081(3)(f), the record is devoid of evidence that Respondent acted with the intent to violate T.C.'s legal rights. See Broward Cnty. Sch. Bd. v. Finnk, Case No. 12-3278TTS, 2013 Fla. Div. Adm. Hear. LEXIS 358, *13 (Fla. DOAH June 18, 2013; BCSB Sept. 20, 2013)(dismissing charge of violating a student's legal rights where the evidence failed to establish that the educator acted with the necessary intent); Smith v. Mays, Case No. 11-743PL, 2011 Fla. Div. Adm. Hear. LEXIS 170, *21 (Fla. DOAH June 28, 2011; DOE Oct. 21, 2011)("Even if a violation of [the student's] legal rights did occur, Petitioner failed to prove that Respondent acted with the necessary intent").

24. For the reasons elucidated above, Respondent is not guilty of misconduct in office.

B. Gross Insubordination

25. As noted previously, Petitioner alleges also that Respondent is guilty of gross insubordination, which is defined as:

> [T]he intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or

> malfeasance as to involve failure in the performance of the required duties.

Fla. Admin. Code R. 6A-5.056(4)(emphasis added).

26. As reflected by the foregoing language, gross insubordination can be demonstrated in one of two ways: with proof that the educator intentionally refused to obey a direct, reasonable, properly-issued order; or with evidence that the educator committed misfeasance or malfeasance through the failure to perform his or her required duties. Only the first of these two avenues is potentially applicable here, for there is no allegation that Respondent has failed to carry out her professional duties.

27. Turning to the merits, the School Board has failed to demonstrate that Respondent intentionally refused to obey any direct order. To be sure, Respondent was under a proper directive (issued in 1997 as part of a written reprimand) to refrain from making inappropriate remarks; however, and as detailed previously, Respondent did not use profanity or any other foul language during her interaction with the students.

28. Nor has it been shown that the momentary, benign touching of T.C. violated a direct order. Although the School Board attempted to establish the existence of a general "no touching" policy, the testimony on that point has not been credited. Even assuming the existence of such a rule, it is

well settled that, for the purpose of sustaining an insubordination charge, a general policy does not constitute a direct order. Broward Cnty. Sch. Bd. v. Von Hagen, Case No. 11-567, 2011 Fla. Div. Adm. Hear. LEXIS 156, *12 (Fla. DOAH June 21, 2011; BCSB Aug. 16, 2011)(dismissing charge of gross insubordination; "The general policy directed to all employees is not a direct order to Respondent"); see also Miami-Dade Cnty. Sch. Bd. v. Anderson, Case No. 13-2414TTS, 2013 Fla. Div. Adm. Hear. LEXIS 861, *26 (Fla. DOAH Dec. 30, 2013; MDCPS Feb. 12, 2014)("Admonishing a teacher to comply with all [school board] rules is not tantamount to a direct order . . . ."). The charge of insubordination must therefore be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Broward County School Board enter a final order: exonerating Respondent of all charges brought against her in this proceeding; and awarding Respondent any lost pay and benefits she experienced as a result of the five-day suspension.

DONE AND ENTERED this 3rd day of June, 2014, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2014.

ENDNOTES

[1/] Hr'g Tr. 15:10-12.

[2/] Hr'g Tr. 22:1-4; 106:12-20.

[3/] Hr'g Tr. 19:19-20; 108:5-14.

[4/] Hr'g Tr. 37:24-38:1.

[5/] See Pre-Hearing Stipulation of the Parties, p. 1.

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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 must be filed with the agency that will issue the final order in this case.