

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-1898TTS

DANIELLE ARNOLD,

Respondent.

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RECOMMENDED ORDER

This case came before Administrative Law Judge Mary Li Creasy for final hearing by webcast on October 5 and 6, 2015, with sites in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

For Petitioner: Adrian J. Alvarez, Esquire
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For Respondent: Mark S. Wilensky, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend Respondent, a teacher, for ten days without pay for failing to supervise a third-grade student who left campus alone and walked home during the school day.

PRELIMINARY STATEMENT

On April 15, 2015, at its scheduled meeting, Petitioner, Broward County School Board ("School Board"), took action to suspend Respondent, Danielle Arnold ("Respondent"), for ten days without pay. Respondent was advised of her right to request an administrative hearing within 21 days. Respondent timely requested an administrative hearing. Subsequently, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. The final hearing initially was set for June 18 and 19, 2014. After multiple continuances, granted at the requests of the parties, the case was set for hearing on October 5 and 6, 2015.

The School Board charged Respondent with misconduct in office and willful neglect of duty for failing to supervise a student who left campus during school hours undetected. At the final hearing, the School Board presented the testimony of the following: Davida Shacter ("Shacter"), Principal of North Andrews Gardens Elementary School (NAGE); Susan Copper, Employee and Labor Relations Department employee; Mark Narkier, Cadre Director for the School Board; C.C., mother of student C.S.; and the deposition testimony of Dr. Desmond Blackburn, former Chief of School Performance and Accountability for the School Board. School Board Exhibits 1, 4(a) and (b), 5, 6, 9, 12, 14, 15, 18,

and 19 were received into evidence upon stipulation of the parties.

Respondent testified on her own behalf and presented the additional testimony of the following: Lisa Engle, teacher at NAGE; Deanna Pelletier ("Pelletier"), teacher at NAGE; and the deposition testimony of Elizabeth Raeihle, former teacher at NAGE. Respondent did not offer any exhibits into evidence.

The two-volume final hearing Transcript was filed on November 2, 2015. The parties timely filed proposed recommended orders, which were given consideration 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 violations.

FINDINGS OF FACT

1. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise the public schools within Broward County, Florida.

2. At all times material to this case, Respondent was employed by the School Board as a third-grade teacher at NAGE, a public school in Broward County, Florida. Respondent has taught for the School Board for 15 years without receipt of any prior discipline.

3. The proposed discipline is based upon conduct occurring on Thursday, March 4, 2014. During the 2013-2014 school year,

Respondent co-taught a third-grade class with Pelletier. Respondent and Pelletier had adjoining classrooms. Each was assigned approximately 18 students. Respondent taught English and social studies, and Pelletier taught math and science. Their classes switched in the afternoon.

4. At approximately 11:45 a.m. on March 4, 2014, Respondent told her students to clean their desks and line-up for lunch. The students lined up and Respondent opened and stood at the door. The students moved into the hallway in a line where they were instructed to stop. Respondent checked the classroom to see if any students were left behind and saw three students (two girls and a boy, C.S.) completing a social studies test. Respondent instructed the students to finish up and join their classmates in line.

5. A student who was holding the door with Respondent asked to go back in the classroom to get a tissue. While Respondent waited for the remaining students to exit the classroom, the line began to move down the hall toward the stairs to the right of the classroom door. Respondent told the students in line to wait. When she looked back into the classroom, Respondent saw one female student remaining. When that student exited the room, Respondent assumed that all students had gotten in line. Respondent walked her class down the hall on the second floor,

down the stairs, and waited at the stairs to watch her students enter the cafeteria for lunch.

6. Unbeknownst to Respondent, C.S. remained in the classroom bathroom and did not exit the classroom with his classmates to go to lunch.

7. Respondent's usual habit was to walk her students all the way to the cafeteria doors; however, on this day, she only walked them to the bottom of the stairs where she had an unobstructed view as she watched them enter the cafeteria. Respondent then went to the main office to pick up some printouts from the office printer. Respondent then returned to the cafeteria to pick up a few of her students who were coming back with her to the classroom to enjoy "lunch bunch" as a reward for good behavior.

8. After lunch, Respondent and/or Pelletier returned to the cafeteria to pick up the students and take them to their designated "specials" classes. Respondent was unaware that C.S. was missing.

9. After Respondent initially left the classroom, but before she returned with the "lunch bunch," C.S. left the classroom, surreptitiously went down the stairs, ducked under the cameras near the front office, and exited the school property through the car circle. C.S. proceeded to walk 14 blocks home, past a construction site, and near an extremely busy road, and

entered the house where he was discovered by his grandmother at approximately 12:20 p.m. C.S. was unharmed on his walk home.

10. C.S.'s grandmother contacted C.S.'s mom, C.C., at work and told her that her son was at the house instead of at school. After going home and checking on C.S.'s safety, C.C. immediately drove to NAGE and asked Shacter if she knew where her son was located. C.C. also checked the sign-out log to see if anyone signed her son out. C.C. informed Shacter that C.S. was at home, had climbed through a window to get inside, and had his backpack with him. C.C. was understandably angry and upset.

11. Shacter called Respondent's classroom but no one was there. Next, she called Guidance Counselor Lamar to stay with C.C. while she went to find Respondent. When Shacter went to Respondent's classroom, she found Respondent, Pelletier, and Pelletier's intern. Shacter asked about C.S., and Respondent said that she took him to the cafeteria for lunch. Shacter directed Respondent to look for the backpack. Respondent went to C.S.'s desk and was surprised that his backpack was gone.

12. Shacter took Respondent to meet with C.C. Respondent also told C.C. that she had taken C.S. to the cafeteria. Because C.C. was so upset, Shacter separated Respondent from C.C. Shacter requested to interview C.S. at home or at school, but C.C. refused. Shacter asked that Lamar go to the house, which

would be less threatening for the child, and C.C. allowed Lamar to go to her home and speak with C.S.

13. C.S. reported that he was in the class bathroom just prior to lunch. When he came out of the bathroom, his class was gone. He had a stomach ache so he decided to go home.

14. Video from the school's security camera system shows C.S. leaving the classroom after his class departed for lunch. The video also shows C.S. took several evasive actions to avoid detection, including ducking behind a trashcan and hugging the walls and ducking below the windows to exit without being caught.

15. The classroom teacher is primarily responsible to account for, and supervise, her assigned students while they are at school. At the time of the incident, the School Board and NAGE had no policy, procedure, or protocol for assuring that all students remained within the supervision of their teachers at all times. Prior to this incident, the method of accounting for students throughout the day, particularly when moving from one part of the campus to another, was left to the discretion of each individual teacher by NAGE.

16. As a result of the investigation that followed this incident, the School Board voted to suspend Respondent with pay for ten days.

Findings of Ultimate Fact

17. As discussed in greater detail below, the School Board failed to demonstrate by a preponderance of the evidence that the Respondent engaged in misconduct in office or willful neglect of duty.

CONCLUSIONS OF LAW

18. Respondent is an instructional employee, as that term is defined in section 1012.01(2), Florida Statutes (2013). The School Board has the authority to suspend instructional employees pursuant to sections 1012.22(1)(f), 1012.33(4)(c), and 1012.33(6)(a).

19. To do so, the School Board must prove, by a preponderance of the evidence, that Respondent committed the violations alleged in the Administrative Complaint, and that such violations constitute "just cause" for suspension.

§§ 1012.33(1)(a) and (6), Fla. Stat.; Mitchell v. Sch. Bd., 972 So. 2d 900, 901 (Fla. 3d DCA 2007); Gabriele v. Sch. Bd. of Manatee Cnty., 114 So. 3d 477, 480 (Fla. 2d DCA 2013).

20. 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).

The preponderance of the evidence standard is less stringent than the standard of clear and convincing evidence applicable to loss

of a license or certification. Cisneros v. Sch. Bd. of Miami-Dade Cnty., 990 So. 2d 1179 (Fla. 3d DCA 2008).

21. Whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 11 387, 389 (Fla. 1st DCA 1995); McMillian v. Nassau Cnty. Sch. Bd., 629 So. 2d 226, 228 (Fla. 1st DCA 1993).

22. Sections 1012.33(1)(a) and (6) provide in pertinent part that instructional staff may be suspended during the term of their employment contract only for "just cause." "Just cause" is defined in section 1012.33(1)(a) to include "misconduct in office" and "willful neglect of duty."

23. 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.

24. Consistent with this rulemaking authority, the State Board of Education has defined "misconduct in office" in Florida Administrative Code Rule 6A-5.056(2), effective July 8, 2012, which provides:

(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.

25. Rule 6A-10.080 entitled "Code of Ethics of the Education Profession in Florida" (formerly numbered as rule 6B-1.001) provides:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(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.

26. While rule 6A-5.056(2)(a) provides that violation of the Code of Ethics rule constitutes "misconduct," it has been frequently noted that the precepts set forth in the above-cited "Code of Ethics" are "so general and so obviously aspirational as

to be of little practical use in defining normative behavior.”

Walton Cnty. Sch. Bd. v. Hurley, Case No. 14-0429 (Fla. DOAH May 14, 2014); Miami-Dade Cnty. Sch. Bd. v. Anderson, Case No. 13-2414 (Fla. DOAH Jan. 14, 2014).

27. Rule 6A-5.056(2)(b) incorporates by reference rule 6A-10.081, which is titled: “Principles of Professional Conduct for the Education Profession in Florida.” Rule 6A-10.081 (formerly rule 6B-1.006) provides, in pertinent part:

(3) Obligation to the student requires that the individual:

(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.

28. Consistent with its rulemaking authority, the State Board of Education has defined “willful neglect of duty” in rule 6A-5.056(5) to mean “intentional or reckless failure to carry out required duties.”

29. While the parents and School Board are justifiably concerned that C.S.'s undetected departure from school could have resulted in him being lost, kidnapped, hit by a car, or otherwise harmed, the incident is not an automatic or “per se” violation of the Code of Ethics or Principle of the Profession.

30. Respondent made a reasonable effort to protect C.S. and other students from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

Respondent directed all students to line-up for lunch. She checked the classroom twice to make sure the students were in the line. It was reasonable, when she saw the classroom empty, to presume that the students had, in fact, lined up as directed. It was unreasonable for her to assume a student was in the bathroom when the classroom procedure was to require students to wait until they arrived at the cafeteria if they needed to use the bathroom immediately prior to lunch.

31. Although in hindsight, it certainly would have been preferable for Respondent to have conducted a headcount upon exiting her classroom and arriving at the cafeteria, this would have been wholly inconsistent with the then existing practices at NAGE.

32. The credible testimony of all witnesses from NAGE was that no procedure or protocol was required or suggested for keeping track of students when moving from one campus location to another, by the School Board or NAGE administration prior to this incident.^{1/} Accordingly, double-checking the classroom prior to departure and observing students arrive at the cafeteria was, under these circumstances, "reasonable."

33. Whether C.S. hid in the classroom bathroom, or unintentionally remained behind, is not pertinent to the determination in this case. In light of the lack of direction from administration on how to account for students, it was


unreasonable for Respondent to check the bathroom, under the desks, in a closet, or elsewhere, to determine if a child was hiding or left behind.

34. The School Board failed to demonstrate by preponderance of the evidence that Respondent engaged in misconduct in office or willful neglect of duty.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order finding that no "just cause" exists to discipline Respondent.

DONE AND ENTERED this 10th day of December, 2015, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of December, 2015.

ENDNOTE

^{1/} Three days after this incident, Shacter called a meeting of all teachers and issued directives requiring, among other things, taking attendance when moving students from one location to another on campus, checking restrooms before leaving the classroom, and having teachers stand at the middle or back of a line to better observe students. Had these procedures been in place on March 4, 2014, it is likely this incident would not have occurred. However, the fact that these procedures were easily implemented does not mean that Respondent was guilty of willful neglect on the date in question.

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.