STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 14-3000TTS

GERRY R. LATSON,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy, by video teleconference at sites in Tallahassee and Miami, Florida, on September 11, 2014.

APPEARANCES

For Petitioner: Cristina Rivera Correa, Esquire
Miami-Dade County School Board
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For Respondent: Brandon M. Vicari, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner has just cause to terminate the employment of Respondent, a Behavior Management Teacher (BMT), due to Respondent's inappropriate interaction with a

student on April 16, 2014, as alleged in the Amended Notice of Specific Charges.

PRELIMINARY STATEMENT

At its regularly scheduled meeting on June 18, 2014, Miami-Dade County School Board (Petitioner or School Board) voted to immediately suspend the employment of Gerry Latson (Respondent) and to initiate dismissal proceedings. On June 19, 2014, Respondent requested a formal administrative hearing to contest Petitioner's action. On June 24, 2014, Petitioner forwarded the request to the Division of Administrative Hearings (DOAH), which scheduled and conducted the hearing.

On September 4, 2014, the parties filed a Joint Pre-hearing Stipulation, including a statement of agreed facts that have been adopted and incorporated herein as necessary.

At the final hearing, which took place on September 11, 2014, Petitioner called the following witnesses: D.J., a student; Towanda Seabrook, Special Education (SPED) Chairperson, Office of Professional Standards; and Deborah Phillips, Emotional Behavioral Disorder (EBD) Clinician, Office of Professional Standards. Petitioner's Exhibits 1 through 20 were admitted in evidence. Respondent testified on his own behalf and offered no exhibits.

The one-volume final hearing Transcript was filed on October 24, 2014. Both parties timely filed proposed recommended

orders which were considered in the preparation of this Recommended Order.

Unless otherwise noted, citations to the Florida Statutes and Florida Administrative Code refer to the version in effect on April 16, 2014.

FINDINGS OF FACT

1. Petitioner is a duly-constituted school board charged with the duty of operating, controlling, and supervising all free public schools within Miami-Dade County, Florida, pursuant to article IX, section 4(b), Florida Constitution, and section 1001.32, Florida Statutes.

2. At all times material hereto, Respondent was employed as a BMT at Allapattah Middle School (Allapattah), a public school in Miami-Dade County, Florida. Respondent has been employed by the School Board for approximately 14 years pursuant to a professional service contract and subject to Florida Statutes, the regulations issued by the Florida State Board of Education, the policies and procedures of the School Board, and the provisions of the collective bargaining agreement in effect between Miami-Dade Public Schools and United Teachers of Dade (UTD contract).

3. During his employment with the school district, Respondent took a break from teaching to attend divinity school. He became a permanent teacher in 2007 and worked in Miami Senior

High School. Respondent transferred to Allapattah in 2011 at the request of its assistant principal. During the 2011-2012 school year, Respondent served as a SPED reading, language arts, and math teacher. During the 2012-2013 school year, Respondent held dual roles as the SPED Chair and a SPED teacher.

4. In November 2013, Respondent was offered and accepted the position of BMT at Allapattah. The BMT is considered the "first in line" to deal with a student who causes a disturbance in the classroom by behavior such as cursing or fighting. If called by a teacher to assist or a BMT observes a student acting out in such a way as to disrupt a classroom, the BMT intervenes to try and get both sides of the story regarding why the student is upset and tries to redirect or modify the student's behavior so that the student can remain in the classroom. If that is unsuccessful, the BMT removes the student to a special education classroom where the BMT uses other techniques, such as discussing respect, to calm the student. The BMT may also recommend an in-school or out-of-school suspension.

5. Respondent was in a graduate program for guidance counseling when offered the BMT position. He accepted the position because he felt the BMT role would help him better understand the student population with emotional/behavioral disorders (EBDs). As the BMT, Respondent was assigned 30 students with severe behavioral issues. Respondent also

continued some duties of the SPED Chair position until February 2014.

6. Respondent received uniformly satisfactory performance evaluations throughout his teaching career with Petitioner. He was not previously counseled or disciplined for any reason.

7. On April 16, 2014, Towanda Seabrook, the SPED Chairperson, entered a seventh-grade classroom for observation and saw two students being disruptive. N.H. was cursing the classroom teacher, and D.J. was talking with other students. Ms. Seabrook directed these students to leave the classroom and go with her to the SPED office/classroom.

8. The SPED office/classroom is in Allapattah's classroom 1165. It is a large room with several work stations and a conference table that are used by the EBD counselors, teachers, and the BMT. Attached and opening into the SPED office/classroom are the offices of the SPED Chairperson and EBD counselors.

9. After going with Ms. Seabrook to the SPED classroom, N.H. directed his profanity and ranting at Ms. Seabrook calling her a "motherfucker," "whore," and "bitch" and repeatedly saying "fuck you" to her. Ms. Seabrook attempted to defuse the situation by explaining that she is a mother and asking N.H. how would he like it if someone said these types of graphic things to his mother.

10. Ms. Seabrook chose not to go "toe to toe" with N.H. because she was aware that his exceptionality, EBD, causes him to be unable to control his emotions and temper. N.H. is known to curse and use profanity directed at teachers. Despite N.H.'s continued use of graphic language, Ms. Seabrook felt she had the situation under control and attempted to complete some SPED paperwork.

11. Respondent entered the classroom and heard N.H.'s barrage of profanity and aggression directed at Ms. Seabrook. Respondent was familiar with N.H. due to N.H.'s history of being disrespectful to teachers, running out of class, name calling, defiance, and fighting. Respondent worked with N.H. on an almost daily basis attempting to help N.H. stay in school and modify his behavior to facilitate learning. Respondent described N.H. as one of the most difficult students with whom he was assigned to work.

12. Because the BMT is supposed to be the first line of response to a belligerent and disruptive EBD student, Respondent immediately tried to diffuse the situation by reasoning with N.H. N.H. proceeded to call Respondent (an African-American male) "Nigger," "Ho" (whore), "pussy," "punk," and repeatedly said "fuck you." This tirade by N.H. went on for almost 45 minutes. During this time, N.H. and D.J. sat at the conference table in the classroom.

13. Throughout the 2013-2014 school year, Respondent had tried numerous strategies to assist N.H. in controlling his behavior and temper at school--all with no success. On April 16, 2014, after listening to N.H. verbally abuse Ms. Seabrook and himself, Respondent decided to use an unorthodox strategy to get N.H. to understand the gravity of his words and to calm down.

14. Respondent asked N.H. if he knew what "fucking" means. N.H. responded "a dick inside a pussy." Respondent replied, "A dick inside a pussy? Maybe if you were fucking you wouldn't behave this way," implying that if N.H. was having sex, perhaps he would be better able to control his emotions at school.

15. Ms. Seabrook overheard this portion of the conversation and it made her uncomfortable so she left the room. She believed this method used by Respondent was inappropriate and not likely to be successful, and she intended to talk to Respondent about it before advising the principal. Notably, Ms. Seabrook did not feel the need to intervene or immediately report the conversation and testified that in response to N.H.'s provocation, she may also have said "fuck you" back to N.H.

16. This graphic discussion was also overheard by Deborah Phillips, an EBD counselor, who was in an adjacent office with the door open. After N.H. called Respondent a "pussy," Respondent asked N.H. if he knew what one was, had ever seen one

or knew what to do with one. Ms. Phillips did not intervene or report the conversation. According to Ms. Phillips, this extremely graphic and profane interaction between N.H. and Respondent was only a minute or two. Ms. Phillips testified that she would not go toe to toe with N.H. because she believed it would only elevate the behavior.

17. While Respondent and N.H. were arguing, and Respondent asked N.H. to define the words he was using, D.J. used his cell phone to video and audio record approximately 25 seconds of the conversation. In the recording, Respondent is heard telling N.H. to spell "Ho." N.H. answered "hoe," and Respondent stated, "yea nigga--that's what I thought." During the brief recording, D.J. is heard laughing in the background.

18. The conversation had the desired effect. N.H. started laughing and immediately calmed down. Respondent was able to escort N.H. to the principal's office where it was decided that N.H. would not be suspended, but rather Respondent would drive N.H. home. During the ride home, N.H. was calm and there were no further incidents or inappropriate discussions.

19. The following school day, D.J.'s mother brought the recording to the attention of the principal who initiated an investigation. Respondent immediately expressed remorse and regret that he used this unconventional method of defusing N.H.'s

anger. Respondent admitted participating in the graphic dialogue and acknowledged that it was inappropriate.

20. As a result of the investigation, Respondent was suspended effective June 19, 2014, without pay and recommended for termination from employment.

Findings of Ultimate Fact

21. As discussed in greater detail below, Petitioner proved Respondent violated School Board Policy 3210, Standards of Ethical Conduct, but failed to demonstrate by a preponderance of the evidence that Respondent committed any of the other charged offenses.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties to and the subject matter of these proceedings pursuant to sections 120.569 and 120.57(1), Florida Statutes.

23. Because the School Board, acting through the superintendent, seeks to terminate Respondent's employment, which does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in its Amended Notice of Specific Charges by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. See 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); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

24. Section 1012.33(1)(a), Florida Statutes, includes the following definition of just cause to terminate a teacher's professional services contract:

> 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 or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

25. The Amended Notice of Specific Charges alleges the following: Respondent committed misconduct in office in violation of Florida Administrative Code Rule 6A-5.056(2); a violation of School Board Policy 3210, the Standards of Ethical Conduct; a violation of School Board Policy 3210.01, Code of Ethics; and a violation of School Board Policy 3212, Student Supervision and Welfare.

26. 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 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

27. Section 1001.02(1) 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.

28. Consistent with its rulemaking authority, the State Board of Education has defined "misconduct in office" in rule 6A-5.056(2), which reads 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;
>
> (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.

Code of Ethics and Principles of Professional Conduct

29. Florida Administrative Code Rule 6B-1.001, renumbered without change as rule 6A-10.080, Code of Ethics, 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.

30. Rule 6B-1.006, renumbered without change as rule 6A-10.081, sets forth the Principles of Professional Conduct. The School Board alleges that Respondent violated sections (3)(a), (e), and (f) of the rule, which read as follows:

(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.

* * *

(e) Shall not intentionally expose student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student's legal rights.

31. The School Board also alleges that Respondent violated rule 6A-10.081(5)(d) which provides:

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

* * *

> (d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

32. As was stated in Miami-Dade County School Board v. Brenes, Case No. 06-1758, 2007 Fla. Div. Adm. Hear. LEXIS 122, *42-43 n.12. (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007):

> Rule [6B-4.009(3)] plainly requires that a violation of both the Ethics Code and the Principles of Professional Education be shown, not merely a violation of one or the other. The precepts set forth in the Ethics Code, however, are so general and so obviously aspirational as to be of little practical use in defining normative behavior. It is one thing to say, for example, that teachers must "strive for professional growth." See Fla. Admin. Code R. 6B-1.001(2). It is quite another to define the behavior which constitutes such striving in a way that puts teachers on notice concerning what conduct is forbidden. The Principles of Professional Conduct accomplish the latter goal, enumerating specific "dos" and "don'ts." Thus, it is concluded that while any violation of one of the Principles would also be a violation of the Code of Ethics, the converse is not true. Put another way, in order to punish a teacher for misconduct in office, it is necessary but not sufficient that a violation of a broad ideal articulated in the Ethics Code be proved, whereas it is

> both necessary and sufficient that a violation of a specific rule in the Principles of Professional Conduct be proved. It is the necessary and sufficient condition to which the text refers.

33. While it is undisputed that Respondent did not exercise his "best professional judgment" during the incident in question, his actions did not violate the Principles of Professional Conduct.

34. Contrary to Petitioner's assertion, Respondent did not fail "to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety." By the time Respondent interacted with N.H. and D.J., both students had already been removed from the classroom learning environment due to their own misconduct. Petitioner presented no evidence to suggest that the brief, albeit profane and graphic, language used by Respondent, in any way jeopardized either students' mental or physical health or safety. Rather, the credible evidence, including the short video clip, shows that both students were already familiar with the terminology and thought the exchange was humorous.

35. Similarly, Respondent's actions did not intentionally expose a student to "unnecessary embarrassment or disparagement." Respondent merely parroted back N.H.'s own graphic language in an effort to defuse N.H.'s apparent anger. No evidence was presented that either student was unnecessarily embarrassed or

considered themselves somehow "disparaged" by the comments of Respondent. Although the comment of Respondent regarding N.H.'s inability to spell the slang term for "whore" could be construed as an attempt to belittle the student, no evidence was presented to suggest that the student considered it as such.

36. Nor did Respondent's conduct intentionally violate or deny the students legal rights or constitute "harassment or discriminatory conduct which unreasonably interferes" with the "orderly process of education or which created a hostile, intimidating, abusive, offensive, or oppressive environment."

37. The use of the word "nigger" is highly inflammatory in any environment and not appropriate under any circumstances in a school setting. As discussed in Motley v. Tractor Supply Co., 32 F. Supp. 2d 1026, 1057, n.13. (S.D. Ind. 1998), "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." The same is true in an educational setting between a teacher and a student.

38. However, one utterance, standing alone, is insufficient to create a "hostile environment," particularly when the student was the first to use the epithet. The evaluation of "hostile environment" claims requires an appraisal of the totality of the circumstances. This examination includes

"consideration of the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with . . . performance." Harris v. Forklift Systems Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 296, 114 S. Ct. 367 (1993).

39. In the instant case, the evidence reflected a one-time inappropriate interaction between Respondent and a student in the presence of another student. It was in no way physically threatening or humiliating. The student, an African-American male, was the first to use the racial epithet directed towards the teacher, also an African-American male. While highly inappropriate, in context, this dialogue between Respondent and the student does not rise to the level of creating an actionable hostile environment or constitute unlawful discrimination on the basis of race in violation of rule 6A-10.081(5)(d).

School Board Rules

40. The obligations of the teacher towards a student contained in School Board Policy 3210.01, Code of Ethics, mirror the language of the Principles of Professional Conduct for the Education Profession in Florida, rule 6A-10.081. For the reasons discussed above, Petitioner failed to demonstrate by a preponderance of the evidence that Respondent violated School Board Policy 3210.01.

41. Among other things, School Board Policy 3210(A)(21), Standards of Ethical Conduct, provides that teachers shall "not use abusive and/or profane language or display unseemly conduct in the workplace." It is undisputed that Respondent used the profane words "fuck," "ho," "nigga," and "pussy." Accordingly, Petitioner proved Respondent's violation of School Board Policy 3210. However, placing this infraction in context, this de minimis rule violation does not rise to the level of "misconduct in office" sufficient to support a determination of "just cause" for termination. See Abrams v. Seminole Cnty. Sch. Bd., 73 So. 3d 385 (Fla. 5th DCA 2011)(excessive use of profanity in educational setting on one occasion was not sufficient to impair the teacher's effectiveness in the school system such that dismissal was appropriate or warranted).

42. Although the evidence presented was insufficient to constitute "just cause" for termination, Respondent's rule violation should not go unpunished. The safety of the students and the integrity of the educational setting are paramount. Precedent exists for imposing discipline short of termination on school system personnel for rule violations that do not rise to the level of misconduct. See Broward Cnty. Sch. Bd. v. Alfonso Joseph, Case No. 13-0490TTS (Fla. DOAH July 8, 2013; Broward Cnty. Sch. Bd. Aug. 6, 2013)(teacher's use of profanity resulted

in suspension without pay rather than termination for rule violation that did not rise to level of "just cause").

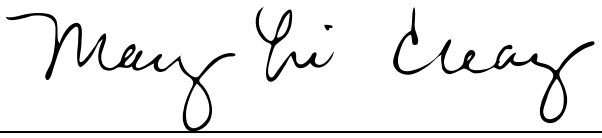
43. Here, in using profanity and graphic language directed towards the student, Respondent admittedly failed to exercise his best professional judgment. However, Respondent had not previously engaged in such conduct and his earnest remorse indicates he is unlikely to again engage in similar conduct.[1/] Respondent's conduct did not inflict harm or physical damage on the students, and he did not derive any pecuniary or other self-gain from his conduct. Respondent has been employed by Petitioner as a teacher for 14 years without any prior discipline and received uniformly satisfactory evaluations.

44. Under these circumstances, the undersigned recommends that Respondent be suspended without pay through the end of the first semester of the 2014-2015 school year. This penalty takes into account that Respondent's conduct, in using profanity and a racial epithet directed towards the student, was inappropriate under any circumstances--even the extremely challenging ones under which he found himself that day--but also places the conduct in perspective in relation to Respondent's excellent, otherwise incident-free teaching career and record of dedication to improving himself in the profession.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Miami-Dade County School Board, enter a final order: (1) finding that just cause does not exist to terminate Respondent's employment; and (2) imposing punishment consisting of suspension without pay from employment through the end of the first semester of the 2014-2015 school year for violation of School Board Policy 3210 that does not amount to misconduct in office.

DONE AND ENTERED this 20th day of November, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of November, 2014.

ENDNOTE

[1/] A downward adjustment in penalty based upon a wrongdoer's remorse is appropriate. See Raymond Baker v. Dep't of Child. & Fam. Servs., Case No. 97-4495 (Fla. DOAH Feb. 4, 1998; DCF Mar. 16, 1998)(DCF adopted the ALJ's Recommended Order in toto granting an exemption from disqualification for employment in a

position of special trust-based in part due to petitioner's remorse regarding the misdemeanor battery incident that gave rise to his disqualification); Eric J. Smith, as Comm'r of Educ. v. Leonard Wayne Budd, Case No. 11-2245PL (Fla. DOAH Oct. 17, 2011; DOE Jan. 23, 2012)(Educator's certificate should not be disciplined for turning over a student's desk to awaken student. Teacher immediately and repeatedly expressed remorse for his actions, and this was an isolated incident).

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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.