

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-0487

ADRIAN ALLEN,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) heard this case in Fort Myers, Florida, on June 2, 2015.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire  
School District of Lee County  
2855 Colonial Boulevard  
Fort Myers, Florida 33966-1012

For Respondent: Robert J. Coleman, Esquire  
Coleman and Coleman  
Post Office Box 2089  
Fort Myers, Florida 33902-2089

STATEMENT OF THE ISSUE

Does Petitioner, Lee County School Board (School Board), have just cause to terminate the employment of Respondent, Adrian Allen?

PRELIMINARY STATEMENT

By petition dated December 5, 2014, the superintendent for the Lee County School District (School District) sought termination of Mr. Allen's employment. On January 28, 2015, the School Board referred this matter to DOAH for conduct of a final hearing. The undersigned set the hearing for March 24, 2015. One unopposed motion for continuance was granted, and the hearing was scheduled for June 2, 2015.

At the final hearing, the School Board presented testimony from Deputy Kevin Armstrong, Detective Erik Hurd, and Andrew Brown. School Board Exhibits 1 through 3, 5, 6B, and 7 through 12 were received into evidence. Mr. Allen presented no testimony. Mr. Allen's Exhibits 1 through 4 were admitted into evidence.

The Transcript of the proceeding was filed on June 23, 2015. The parties obtained an extension of time for filing proposed recommended orders. The parties' proposed recommended orders were timely filed and considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board owns and operates the public schools in Lee County, Florida. It is responsible for hiring, terminating, and overseeing all employees in the School District.

2. At all times material to this case, the School Board employed Mr. Allen as a custodian at Lehigh Acres Middle School. He has worked for the School District since April 29, 2010.

3. Mr. Allen is a member of the Support Personnel Association of Lee County (SPALC) and was a member during all times relevant to this matter.

4. On October 15, 2014, the Lee County Sheriff's Office arrested Mr. Allen for one count of child abuse. The alleged victim is Mr. Allen's two-year-old son. Eventually the state attorney chose not to prosecute Mr. Allen.

5. On October 10, 2014, Mr. Allen took the actions that led to his arrest. The same actions are the cause for his proposed dismissal.

6. The morning of October 10, 2014, Mr. Allen was caring for his two-year-old son at home. Mr. Allen was hung over and irritable. He fed his son and watched cartoons with him. Mr. Allen and his wife were "potty" training the child. Sometime after lunch, in the early afternoon, the child defecated in his pull-ups, instead of telling Mr. Allen that he needed to use the bathroom.

7. Mr. Allen lost his temper. He began "spanking" the small child. He struck the child at least ten times. Three or four of the blows were to the child's face and not "spanking" as normally understood. The others were to the child's buttocks and

thighs. The blows bruised the child severely enough that they were visible four days later.

8. Mr. Allen was immediately remorseful. Because he was upset and hung over, Mr. Allen called in sick to work, which started later that afternoon.

9. When Mr. Allen's wife came home, he told her what he had done, and she observed the bruises. She took photographs of the bruises and made Mr. Allen leave the house. The photographs were not offered into evidence. After a few days, Mr. Allen and his wife talked, and she allowed him to return after he promised to change his behavior, including drinking and losing his temper.

10. The bruises were discovered on October 14, 2014, when Mr. Allen left his child with the maternal grandparents. They called law enforcement. This led to a criminal investigation and Mr. Allen's arrest. During all his conversations with law enforcement officers, Mr. Allen was honest and remorseful.

11. People outside the family, the school, and law enforcement became aware of the incident. Mr. Allen and his wife began receiving critical messages about it.

12. When the School District learned of the charges, it began an investigation. In interviews with Andrew Brown, director of Professional Standards and Equity, Mr. Allen spoke truthfully and admitted what he had done.

13. The School District determined that there was probable cause for disciplinary action. On November 21, 2014, it suspended Mr. Allen without pay and benefits. The Petition for Termination and this proceeding followed.

14. Mr. Allen has never denied his actions. He did not testify about his remorse, the circumstances surrounding the event, or steps he has taken to prevent similar events.

15. Mr. Allen provided a letter from SalusCare stating that he was enrolled in the Family Intensive Treatment Team. The letter says the program addresses substance abuse, mental health, and other concerns. It said Mr. Allen was making progress in his treatment plans. The letter is hearsay and cannot be the basis of a finding of fact. There is no testimony or other non-hearsay evidence to corroborate it. Consequently, it is not considered. § 120.57(1)(c), Fla. Stat. (2014).<sup>1/</sup>

16. Similarly, Mr. Allen provided a Character Witness Reference form with positive statements about him from nine people. Its statements, too, are uncorroborated hearsay and will not be considered. § 120.57(1)(c), Fla. Stat.

17. Mr. Allen physically abused his small child. He has provided no evidence to support mitigation of discipline, other than a stipulated absence of discipline during his career with the School District.

## CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to School Board Policy 1.16(6)(c); sections 1012.40(2)(c), 120.569, and 120.57, Florida Statutes (2015); and the contract between the School Board and DOAH.

19. The School Board must prove its charges by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996). "Preponderance of evidence is defined as evidence 'which as a whole shows that the fact sought to be proved is more probable than not.'" State v. Edwards, 536 So. 2d 288, 292 n.3 (Fla. 1st DCA 1988)." Dufour v. State, 69 So. 3d 235, 252 (Fla. 2011); see also Escambia Cnty. Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 193; 55 So. 83, 92 (1911).

20. As a custodian, Respondent is an "educational support employee," as defined by section 1012.40(1)(a). His employment is governed by the applicable collective bargaining agreement. § 1012.40(2)(b), Fla. Stat. For Mr. Allen, the collective bargaining agreement (CBA) between the Lee County School Board and SPALC is applicable.

21. Section 1012.27 gives the superintendent of schools for Lee County authority to recommend to the School Board suspension or dismissal of an employee.

22. The School Board has the authority to terminate and/or suspend non-instructional personnel without pay and benefits pursuant to sections 1012.22(1)(f) and 1012.40(2)(c).

23. Section 7.10 of the CBA establishes "just cause" as the standard for discipline of an employee.

24. The School Board may terminate non-instructional employees for "reasons stated in the collective bargaining agreement or in district school board rules in cases where a collective bargaining agreement does not exist."

§ 1012.40(2)(b), Fla. Stat.

25. The School Board complaint asserts five charges against Mr. Allen. The first is that Mr. Allen's conduct is misconduct in office and justifies termination under the provisions of section 1012.33(1)(a). That section applies only to "instructional staff." The School Board did not prove that Mr. Allen was instructional staff. In fact, it proved that he was not. The School Board failed to prove its first charge.

26. The second charge is that Mr. Allen violated School Board Policy 5.02, Professional Standards, which requires dedication to high ethical standards. Policy 5.02 provides that "the School District of Lee County shall establish high standards and expectations for its professional faculty and staff, including [a six-item list]." The second item is "[d]edication to high ethical standards." Policy 5.02(2); R. Ex. 7.

27. On its face, the policy directs the School District to establish high standards and does not impose an obligation upon the employees of the School District. A final order of the School Board has determined that Policy 5.02 sets forth general aspirational standards or goals and is too vague to put employees on notice of the standard that they must meet. Lee Cnty. Sch. Bd. v. Rice, Case No. 13-1676 (Fla. DOAH Dec. 20, 2013; Lee Cnty. Sch. Bd. Jan. 28, 2014). Policy 5.02 cannot be the basis for a finding of misconduct in office.

28. The third charge is that Mr. Allen violated School Board Policy 5.03, General Requirements for Appointment and Employment. Policy 5.03 establishes the School District's general requirements for appointment or employment. The qualifications include that a "would be" employee "be of good moral character." Policy 5.03(a); R. Ex. 8. The record is devoid of evidence, authority, or argument about what constitutes "good moral character."

29. What constitutes "good moral character" is a question of fact to be determined by the trier-of-fact. Palamara v. Dep't of Bus. & Prof'l Reg., Div. of Fla. Land Sales, Condos. & Mobile Homes, 855 So. 2d 706 (Fla. 4th DCA 2003). Florida Administrative Code Rule 6A-5.056(1) applies to actions to dismiss school personnel for just cause under section 1012.33. The rule defines immorality as "conduct that is inconsistent with



the standards of public conscience and good morals. It is conduct that brings the individual concerned or the education profession into public disgrace or disrespect and impairs the individual's service in the community." Physical abuse of a toddler, let alone a person's own child, falls within that definition. The community was aware of Mr. Allen's actions due to the arrest. Mr. Allen and his wife received text and Facebook® messages about the child's injuries from relatives and other people who knew them.

30. The School Board proved that due to his own actions, Mr. Allen does not meet the requirement of good moral character for employment. This amounts to misconduct and just cause for termination.

31. The fourth charge is that Mr. Allen violated School Board Policy 5.04, Fingerprinting and Background Screening (R. Ex. 9). Policy 5.04(2)(d) provides that "a current employee who commits a crime during employment that would disqualify the employee from initial employment the employee may be recommended." The preponderance of the evidence persuasively established that Mr. Allen committed the third-degree felony of child abuse, regardless of whether he was prosecuted. § 827.02(c), Fla. Stat.; Raford v. State, 792 So. 2d 476 (Fla. 4th DCA 2001) (proof that defendant struck eight-month old three times with a belt leaving welts that were visible the next day

for defecating in his pants supported conviction of a violation of section 827.02(c).). The policy requires proof that the crime was committed, not conviction of the crime. See Walton v. Turlington, 444 So. 2d 1082, 1084 (Fla. 1st DCA 1984).<sup>2/</sup>

32. The School District's fifth charge is that Mr. Allen violated School Board Policy 5.29, Complaints Relating to Employees (R. Ex. 10). That policy requires that "all employees exemplify conduct that is lawful and professional." This policy establishes "procedures that shall be followed for complaints relating to employees." Only subsection (2) of this policy imposes an obligation on an employee to act and provides for discipline if the employee does not act. That section requires reporting of serious violations of policies, rules or statutes to an employee's supervisor. It does not apply here. The fifth charge does not articulate, and the evidence does not prove, an offense for which Mr. Allen may be disciplined.

33. The School Board proved that Mr. Allen violated School Board Policies 5.03 and 5.04. The record does not support any findings about steps Mr. Allen may have taken to ensure that an incident like the one of October 10, 2014, does not happen again. It also does not support a finding that the School District has positions Mr. Allen could fill that do not involve contact with school children. Consequently, these mitigating factors are not

available for consideration. The violations proven justify termination of Mr. Allen's employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Lee County School Board enter a final order finding just cause to terminate the employment of Adrian Allen and dismissing him from his position with the Lee County School District.

DONE AND ENTERED this 25th day of August, 2015, in Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of August, 2015.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, all statutory references are to the 2014 edition of the Florida Statutes.

<sup>2/</sup> "However, we agree that it is appellant's conduct, not the criminal charge of conviction nor the records thereof, which forms the basis of the Administrative Complaint. We are in

accord with appellee's contention that the expungement of the records of the criminal prosecution places appellant in the same position as if he had never been charged with the crime. This does not mean, of course, that appellant may not be held responsible for his actions in a non-criminal proceeding, for as the Commission appropriately observes, it is not necessary for a teacher to be charged with or convicted of a crime in order to be subject to revocation of his certificate based upon conduct reflecting gross immorality or 'moral turpitude.'"

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.