

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-2800TTS

RICHTER FLAMBERT,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Mary Li Creasy for final hearing by webcast on September 17, 2015, with sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Christopher J. La Piano, Esquire
Miami-Dade County School Board
Suite 430
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Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend Respondent, a teacher, for 30 days without pay for pushing a student.

PRELIMINARY STATEMENT

On May 13, 2015, at its scheduled meeting, Petitioner, Miami-Dade County School Board ("School Board"), took action to suspend Respondent, Richter Flambert ("Respondent"), from his teaching position at North Dade Middle School (NDM) for 30 days without pay. Respondent timely requested an administrative hearing. The School Board referred the matter to the Division of Administrative Hearings ("DOAH") on May 19, 2015, to assign an Administrative Law Judge to conduct the final hearing. The final hearing initially was set for July 15, 2015. Petitioner filed an Unopposed Motion for Continuance and Reschedule Final Hearing which was granted. The matter was reset for hearing on September 17, 2015.

The School Board charged Respondent with misconduct in office for instigating a verbal altercation with a student and pushing that student. At the final hearing, the School Board presented the testimony of the following: Natasha Green ("Green"), substitute teacher at NDM; D.H., former NDM student; and N.M., former NDM student. School Board Exhibits 1 through 8 and pages 41, 42, 43, and 45 of Exhibit 9 were received into evidence.

Respondent testified on his own behalf and offered no additional witnesses or exhibits.

The one-volume final hearing Transcript was filed on November 10, 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 Miami-Dade County, Florida.

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

3. At all times material to this case, Respondent's employment with the School Board was governed by Florida law, the School Board's policies, and the collective bargaining agreement between the School Board and the United Teachers of Dade.

4. The proposed discipline is based upon conduct occurring on Thursday, March 4, 2014. On that day, 14-year-old eighth-grade student, D.H., entered Respondent's classroom approximately ten minutes late. Respondent told D.H., "You are going to jail." When D.H. asked why and said he had done nothing

wrong, Respondent did not answer and instructed D.H. to immediately leave the classroom. This interaction was observed by other students in the classroom. D.H. exited to the hallway outside of Respondent's class.

5. At or about this same time, substitute teacher Green was walking several students who had been disruptive to other classrooms. Green took a female student to Respondent's class. Green saw D.H. and told him to go into the classroom. Green opened Respondent's classroom door and asked if she could leave the female student with Respondent and he agreed.

6. While Green and Respondent were talking, D.H. attempted to re-enter the classroom as directed by Green. Respondent stood in front of D.H. and told him he was not allowed to enter. D.H. asked why and said he was going to enter. Respondent replied, "You'd have to go through me first. I wanna see that." D.H. replied, "Man, I ain't studying you, I don't even see you." Respondent and D.H. then got in a heated verbal exchange.

7. Green tried unsuccessfully to have Respondent calm down and go back in the classroom. Respondent taunted D.H. by saying he was waiting for D.H. to throw the first punch and that he would give D.H. a "beat down." Respondent escalated the situation by calling D.H. "weak" and saying "You have no power. That's why you always get beat up."

8. D.H. was visibly upset and Green kept him separated from Respondent. Respondent went back into the classroom and closed the door, but continued making comments, gestures, and laughing at D.H. in front of his classmates. D.H. remained in the hall yelling.

9. Respondent opened the door again and said if D.H. put his hands on him, he would give him a beat down. D.H. moved from behind Green, towards Respondent, and got a few inches from him and said, "I'm right here. What are you going to do?" D.H. did not touch Respondent. Respondent hit D.H. hard with two open hands to D.H.'s chest causing D.H. to stumble several steps and fall into Green. At the time of this incident, Respondent weighed 220 pounds. D.H. was 14 and weighed approximately 140 pounds.

10. Green told another student to call security and then convinced Respondent to go back in his classroom. Green took D.H. to her classroom. D.H. was not physically injured, but was embarrassed.

11. As a result of the investigation, Respondent was suspended without pay for a period of 30 days for misconduct in office, in violation of State Board of Education and School Board rules.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the parties and the subject matter of these proceedings pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

13. 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).

14. 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.

15. 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; and a violation of School Board Policy 3210.01, Code of Ethics.

16. 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).

17. 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.

18. 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

19. 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.

20. 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 subsections (3) (a) and (e) 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.

21. 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.

22. Respondent clearly did not exercise his "best professional judgment" during the incident in question and his actions violated the Principles of Professional Conduct. Respondent's mocking and taunting D.H. in front of his peers and another teacher exposed D.H. to unnecessary embarrassment.

23. Respondent failed "to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety." By threatening D.H. with a "beat down," and forcefully shoving D.H. so that he lost his balance, Respondent needlessly created an explosive situation that could have resulted in serious injury to all involved.

24. Respondent's argument, that D.H. was a volatile student and that he was merely trying to protect himself from physical harm, is not credible. Respondent was physically much larger than D.H. If Respondent was concerned for his physical safety, he should not have continued taunting D.H. through the window of the classroom door, mocked him in front of his classmates, or re-opened the door to re-engage with D.H. Respondent did not call for security until after he pushed D.H. Although Respondent believed D.H. had several prior suspensions, Respondent had not previously seen or heard of D.H. becoming physically aggressive with any teachers.

School Board Rules

25. 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, the School Board demonstrated by a preponderance of the evidence that Respondent violated School Board Policies 3210 and 3210.01.

26. While teachers are unfortunately periodically placed in stressful and threatening situations, the credible testimony of Green,^{1/} D.H., and student witness, N.M., leads to the conclusion that this incident was instigated and exacerbated by the unprofessional actions of Respondent. As such, it constitutes misconduct in office and just cause for a 30-day suspension without pay.


27. This penalty takes into account that although Respondent seriously jeopardized student safety, the student was not actually physically harmed, and accounts for Respondent's 15-year teaching career without prior discipline for this type of infraction.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order finding Richter Flambert guilty of misconduct

in office, suspending his employment without pay for a period of 30 school days, and placing him on probation for a period of one year.

DONE AND ENTERED this 11th day of December, 2015, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of December, 2015.

ENDNOTE

^{1/} Respondent's effort to cast Green as a vindictive, spurned potential paramour was not believable, particularly in light of the students' corroboration of Green's first-hand account of the incident in question.

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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.