STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INDIAN RIVER COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 16-0271TTS

BRIAN KRYSTOFORSKI,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was held in this case before Robert L. Kilbride, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on March 14, 2016, via video teleconference between Port St. Lucie and Tallahassee, Florida.

APPEARANCES

For Petitioner: Elizabeth Coke, Esquire
Richeson and Coke, P.A.
Post Office Box 4048
Fort Pierce, Florida 34948

For Respondent: Brian Krystoforski, pro se
1126 Southeast Maxwell Lane
Port St. Lucie, Florida 34952

STATEMENT OF THE ISSUES

The nature of the instant controversy is whether Petitioner has just cause to terminate Respondent under section 1012.33, Florida Statutes (2015),[1/] and whether Respondent's acts and/or

omissions disqualify him from being employed in the Indian River County School District ("School District").

PRELIMINARY STATEMENT

Respondent, Brian Krystoforski, pled guilty and was convicted of the felony charge of Driving While License Suspended ("DWLS"). The superintendent recommended to Petitioner, Indian River County School Board ("Petitioner" or "School Board"), that Respondent's employment with the School District be terminated for: (1) violation of the policy prohibiting conviction of a felony, (2) violation of the policy requiring self-reporting within 48 hours of a conviction, and (3) violation of the Education Practices Commission ("EPC") final order placing Respondent on probation. Petitioner alleges that Respondent's actions either independently or in combination make him ineligible for continued employment, which constitutes just cause under section 1012.33(6)(a) to terminate Respondent's employment.

Respondent filed a timely written request for a hearing with Petitioner.

Petitioner referred the matter to DOAH for a final hearing on this matter.

Pursuant to notice, a formal administrative hearing was held on March 14, 2016, via video teleconference before Judge Kilbride, the assigned DOAH ALJ. At the hearing, Petitioner presented the testimony of Dr. William Fritz, the assistant

superintendent for Human Resources and Risk Management for the School District. Petitioner's Exhibits A through L were admitted into evidence. Respondent presented testimony on his own behalf. Respondent's Exhibits 1 through 9, 11, 12, 17, 18, 36, and 37 were admitted into evidence.

The Transcript was filed with the Clerk of DOAH on April 5, 2016. The parties filed post-hearing proposed recommended orders, which were duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented at the final hearing, the undersigned makes the following findings of relevant and material facts:

1. Respondent was employed by the School Board as a classroom teacher.

2. As a teacher, Respondent was required to abide by all Florida Statutes which pertain to teachers, the Code of Ethics and Principles of Professional Conduct for the Education Profession in Florida, and all School Board policies.

Testimony of William Fritz

3. William Fritz, assistant superintendent for Human Resources and Risk Management, testified for the School Board.

4. One of his primary duties is to conduct employee disciplinary investigations for the School Board. He is considered the "point person" for such matters.

5. Fritz was informed by the fingerprint specialist in his office that Respondent had been arrested for felony DWLS. Subsequently, the same person informed him that Respondent had been convicted of the felony DWLS on October 6, 2015. The felony designation for Respondent's DWLS was based on this being his third or subsequent DWLS offense. The Judgment of Conviction dated October 6, 2015, designated the crime as "Driving While License Revoked-Permanently Revoked." Pet.'s Ex. F.

6. After learning of Respondent's felony conviction, Fritz conducted an internal investigation. He had an informal discussion with Respondent to discuss the matter. This occurred in November 2015.

7. When they met, Respondent told Fritz that he felt he did not need to self-report the conviction because the School District was automatically notified by the court.[2/]

8. Respondent explained to Fritz that there were some extenuating circumstances for the car trip that day involving a visit to a very ill friend.

9. As a follow-up to the meeting, Fritz reviewed the School Board policies pertaining to discipline. He concluded that the situation likely warranted termination. He requested to meet

with Respondent again, but his invitation was declined by Respondent.

10. During the course of his investigation and review of Respondent's personnel file, Fritz concluded that Respondent had been put on employment probation by EPC in 2012 and that the probation was still active when the 2014 arrest and subsequent conviction in 2015 occurred.

11. The EPC order proscribed certain conduct by Respondent during probation. The EPC order provided that Respondent "violate no law and shall fully comply with all District School Board policies, school rules, and State Board of Education rules."

12. Fritz concluded that the DWLS conviction violated that provision of the EPC order, as well as certain School Board employee rules and policies.

13. Notably, Fritz concluded that Respondent's 2015 felony DWLS conviction was a Category 3 violation of School Board Policy 3121.01. Convictions for Category 3 offenses, by definition, expressly prevented the hiring or retention of an employee "under any circumstances." Pet.'s Ex. K.[3/]

14. After reviewing all of the relevant documents and concluding his investigation, Fritz met with the School Board superintendent and recommended that Respondent be terminated. In arriving at that recommendation, Fritz took into account the

mitigating factors explained by Respondent during their first meeting, namely needing to visit a sick friend.

15. Fritz noted during his investigation that another final order of EPC had also been entered in 2007, disciplining Respondent for a conviction for driving under the influence ("DUI").

16. Fritz testified that there had been a termination of another teacher in the School District for a felony offense. The termination occurred in 2013 and was referred to DOAH, which recommended that termination was appropriate.

17. There was no suggestion or testimony during the course of Fritz's testimony that the recommendation to terminate Respondent was related in any manner to problems with Respondent's job performance or other conduct on the job. Rather, the felony conviction violated School Board policy requiring termination and also constituted violations of the EPC order and resulting EPC probation.

18. On cross-examination, Fritz acknowledged that the most recent felony conviction in October 2015 had not yet been addressed or ruled on by EPC insofar as Respondent's teaching certificate was concerned.

19. Fritz further testified that a collective bargaining agreement ("CBA") exists which governs the discipline of

teachers, including Respondent. Article 5.1, section (A) of the CBA, states as follows:

> Discipline of an MBU shall be progressive. Progression shall be as follows: documented verbal warning presented in a conference with the MBU, a letter of reprimand, suspension, termination. Serious first offenses may result in an immediate, strong consequence up to and including termination.

Resp.'s Ex. 18.

20. Fritz testified that Respondent's felony conviction for DWLS was a "serious first offense," which gave the School District the discretion to move directly to termination under Article 5.1, section (A) of the CBA.[4/]

21. When questioned by Respondent as to whether or not a felony conviction for a worthless check offense, for instance, could also result in a termination, Fritz pointed out Petitioner's Exhibit K, which specifically designated worthless check convictions as a different and separate "Category 5" offense. Category 5 offenses, by express definition and unlike Category 3 offenses, afforded the School District considerable leeway on discipline, on a case-by-case basis.

22. Conversely, Fritz testified that a felony conviction for DWLS fell under a different category, "Category 3," and was considered significant and serious enough to warrant termination of the employee.

Testimony of Brian Krystoforski

23. Respondent started teaching in 1984 and is in his 24th year of teaching in the state of Florida.

24. Respondent testified, and emphasized throughout the proceeding, that the School District was aware of a prior criminal traffic conviction and EPC sanctions in 2012 but, nonetheless, permitted Respondent to continue to teach in the School District.[5/]

25. Respondent testified that the 2012 EPC final order related, as well, to a prior DWLS felony conviction.

26. Respondent testified that, on the date he was arrested for the 2015 DWLS conviction, he was driving to visit a good friend who had serious medical issues and was very depressed. However, he acknowledges his trip was a "bad decision."

27. He characterized his plea of no contest on October 6, 2015, as more of a plea of convenience believing that his explanation for driving that day would mitigate the effect of the criminal plea and conviction before the circuit court judge.

28. The undersigned has considered the collection of exhibits offered by the parties and admitted into evidence.

29. The undersigned has also reviewed the plea colloquy from October 2015 before the circuit court judge who took Respondent's felony plea to DWLS.[6/]

30. Respondent emphasized that his felony conviction for DWLS should be evaluated using several mitigating factors found in Florida Administrative Code Rule 6B-11.007, Disciplinary Guidelines.[7/]

31. Insofar as the severity of this conviction is concerned, Respondent felt that he was just guilty of using "bad judgment."

32. Furthermore, Respondent argues that he is not a danger to the public under one of the mitigating factors outlined in the Florida Administrative Code.

33. Another mitigating factor Respondent felt should be considered is that he has been an educator for a long period of time. He felt that his commitment and participation as the football defensive coordinator at Vero Beach High School should also be considered a mitigating factor.

34. Respondent felt that there had been no actual damage, physical or otherwise, caused by his driving while license suspended. Furthermore, in 24 years of teaching, he has never been considered for termination for any other conduct or offenses. Finally, he argues that the effect of termination on his livelihood and ability to earn a living warrants consideration.

35. On cross-examination, the evidence revealed that Respondent had a conviction for DUI in 1988, a conviction for DUI

in 1990, and a conviction for a DUI in 2002. In 2004, adjudication was withheld for driving while intoxicated on a revoked license.

36. Respondent also conceded that EPC warned him that a permanent revocation of his educator certificate could occur under certain circumstances, particularly if the educator's certificate had been sanctioned by EPC on two or more previous occasions. Respondent testified that he had, indeed, been sanctioned by EPC on two previous occasions prior to this 2015 conviction for DWLS.

37. There is also evidence to show that Respondent has been characterized as a "highly effective" teacher during recent evaluations.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the subject matter and the parties to this proceeding. §§ 120.569, 120.57(1), and 1012.33(6)(a)2., Fla. Stat.

39. In the absence of a CBA establishing a different standard, a school board is required to prove disciplinary charges against an employee by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; M.H. v. Dep't of Child. & Fams., 977 So. 2d 755 (Fla. 2d DCA 2008); and Cropsey v. School Bd. of Manatee Cnty., 19 So. 3d 351 (Fla. 2d DCA 2009). That standard of proof applies in this case.

40. 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. In this case, that proposition would be whether or not there is just cause to terminate Respondent. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

41. A hearing at DOAH before an ALJ is "de novo." Evidence must be developed at the administrative hearing to justify the action contemplated by Petitioner. See, generally, § 120.57(1)(j) and (k), Fla. Stat. ("All proceedings conducted under this subsection shall be "de novo.").

42. Further, this de novo proceeding is intended to formulate and determine action by Petitioner and is not simply to review action taken earlier or preliminarily. Beverly Enters.-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19 (Fla. 1st DCA 1990).

43. Petitioner is the duly-constituted governing body of the School District. Art. IX, § 4, Fla. Const.; §§ 1001.20 and 1001.33, Fla. Stat. As such, it has the statutory authority to adopt rules governing personnel matters pursuant to section 1001.42(5).

44. An agency or school board's interpretation of its own rules and policies has traditionally been accorded considerable respect. Beach v. Great Western Bank, 692 So. 2d 146, 149 (Fla.

1997); and Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492 (Fla. 5th DCA 2000).

45. Although this deference is not absolute, and this is a de novo proceeding, courts and administrative tribunals should defer to the agency interpretation and application of its rules and policies, unless the agency's construction or interpretation of its rules or policies amounts to an unreasonable interpretation, or is clearly erroneous. Purvis, supra.; Legal Envtl. Assistance Found., Inc. v. Bd. of Cnty. Comm'rs of Brevard Cnty., 642 So. 2d 1081, 1083-84 (Fla. 1994).

46. Generally, in the absence of a rule or written policy specifically defining "just cause," a school board has broad discretion to set standards which subject an employee to discipline. Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217 (Fla. 2d DCA 1994)(concurring opinion Judge Blue). "Just cause" for discipline or "terminations for cause" must rationally and logically relate to misconduct, some violation of the law or dereliction of duty on the part of the officer or employee affected. State ex. rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948).

47. In this case, Petitioner properly followed its own internal procedures in investigating and disciplining Respondent.

48. School Board Policy 3121.01 is clear and unambiguous in its mandate that employees may not be retained, under any circumstances, for a Category 3 felony conviction.

49. Petitioner's conclusion that a felony DWLS was a Category 3 offense was not unreasonable, since it qualifies as "other felony crimes," and it is not a "felony crime involving worthless checks" under Category 5.

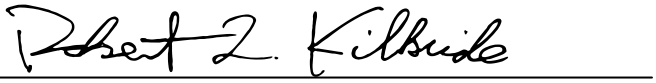
50. The discretion exercised by Petitioner to terminate Respondent was appropriate and consistent with its rules and past practices.

51. There is no legitimate factual or legal basis to recommend a different penalty than that proposed by Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Indian River County School Board implement its preliminary decision to terminate the employment of Respondent.

DONE AND ENTERED this 2nd day of May, 2016, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2016.

ENDNOTES

[1/] References to Florida Statutes are to the 2015 version, unless otherwise indicated.

[2/] Employees are obligated to self-report such convictions or incidents. Respondent did not do so.

[3/] The undersigned finds that a felony DWLS conviction qualifies as a Category 3 conviction under the policy.

[4/] The undersigned concludes that it was not unreasonable or clearly erroneous to conclude Respondent's felony conviction was a "serious first offense."

[5/] The undersigned is not aware of, nor has he been provided, any compelling case law to suggest that the School District has waived its enforcement prerogative or is estopped to mete out the discipline it now proposes under these circumstances. In fact, in Florida, equitable estoppel against government agencies is rarely permitted. Associated Indus. Inc. Co. v. Dep't of Labor & Emp. Sec., 923 So. 2d 1252 (Fla. 1st DCA 2006)("Equitable estoppel will apply against a governmental entity only in rare instances and under exceptional circumstances."). Those rare instances or exceptional circumstances do not exist in this case.

[6/] There is no dispute concerning this plea and felony conviction.

[7/] This Florida Administrative Code rule pertains to how, when, and under what circumstances an educator's teaching certificate may be impacted by EPC for certain conduct. While it may provide mitigating factors that an ALJ could consider as a part of his or her de novo review and ultimate recommendation, a school board is not bound by these factors. In the absence of state or federal law to the contrary, a school board may enact and enforce reasonable rules and policies governing its own employees. §§ 1001.41 and 1001.42(6), Fla. Stat.

COPIES FURNISHED:

Elizabeth Coke, Esquire
Richeson and Coke, P.A.
Post Office Box 4048
Fort Pierce, Florida 34948
(eServed)

Brian Krystoforski
1126 Southeast Maxwell Lane
Port St. Lucie, Florida 34952

Dr. Mark J. Rendell, Superintendent
Indian River County School Board
6500 57th Street
Vero Beach, Florida 32967

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Pam Stewart, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

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.