

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 16-0427TTS

ERNEST WOODARD,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on August 23 and 24, 2016, in Jacksonville, Florida, before Administrative Law Judge W. David Watkins of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Wendy Byndloss, Esquire
Office of General Counsel
City of Jacksonville
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

For Respondent: Stephanie Marisa Schaap, Esquire
Duval Teachers United
1601 Atlantic Boulevard
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STATEMENT OF THE ISSUES

The issues in this case are whether just cause exists to discipline Respondent based on allegations that he used inappropriate language when talking to students, in violation of

the Principles of Professional Conduct, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

By letter dated September 29, 2015, Ernest Woodard (Woodard) received a Step III Progressive Discipline - Reprimand and Suspension Without Pay (Revised 9/29/15) from Petitioner for alleged conduct which violated the Florida Code of Ethics, Florida Administrative Code Rules 6A-10.080(2) and 6A-10.080(3)^{1/}; and the Principles of Professional Conduct, rule 6A-10.081(3)(a). The allegations were that Woodard exercised poor judgment when he engaged in inappropriate communication with and/or in the presence of students by calling or referring to students as "D.A.N.," an acronym for "dumb ass niggers."

At hearing, Petitioner presented the testimony of the following witnesses: Sonita Young (Duval County Public Schools ("DCPS") assistant superintendent for Human Resources); Reginald Johnson (DCPS Investigator); Jason Ludban (former DCPS math teacher at Northwestern Middle School ("Northwestern")); Linda Raggins (current DCPS Floating Relief Exceptional Student Education teacher at Northwestern); D.M. (sixth-grade student at Northwestern during the 2014-2015 school year); H.N.J. (sixth-grade student at Northwestern during the 2014-2015 school year); B.S. (sixth-grade student at Northwestern during the 2014-2015 school year); K.H. (sixth-grade student at Northwestern during

the 2014-2015 school year); and D.H. (seventh-grade student at Northwestern during the 2014-2015 school year). Petitioner's Exhibits 1, 2, 4, and 5 were received in evidence.

Respondent testified and called the following additional witnesses: Jasmine Daniels, Tiffany Thomas, Tabitha Johnson, Pastor Frederick Newbill, Dr. Arvin Johnson (former DCPS principal of Northwestern), Ricky Stanford, Daniel Drayton and Niger Lambey. Respondent did not offer any exhibits in evidence.

The two-volume final hearing Transcript was filed on September 19, 2016. Each party timely submitted a Proposed Recommended Order, and both parties' submissions were given due consideration in the preparation of this Recommended Order. In addition, the parties submitted a Statement of Stipulated Facts. To the extent relevant, those stipulated facts have been incorporated herein.

Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2016 codification.

FINDINGS OF FACT

1. Woodard has worked in the Duval County public school system since 2002. There was no evidence presented of any prior incidents of inappropriate behavior, or of discipline being imposed upon Woodard by the School Board.

2. During the 2014-2015 school year, Woodard was employed by Petitioner as an In-School Suspension ("ISSP") teacher at Northwestern. The ISSP teacher is an instructional and leadership position, and the ISSP teacher is supposed to set an example for students and help them modify their behavior.

3. The ISSP class was created to allow students who engage in disciplinary misconduct to remain in school rather than being removed from the classroom environment. The referral of students to ISSP can come from administrators, teachers, or any other employee who observes student misconduct. Although Woodard taught the ISSP class, he did not discipline students or assign them to ISSP, and he did not give students grades.

4. During the 2014-2015 school year at Northwestern, Woodard was assigned to the gym in the mornings, where sixth-graders were directed to go after eating breakfast in the cafeteria, to wait for their teachers to pick them up and take them to class.

5. On January 23, 2014, the Duval County School District's ("District") Office of Professional Standards opened an investigation of allegations that Woodard used inappropriate communications with and/or in the presence of students. The investigation, which was conducted by Investigator Reginald Johnson in the District's Office of Professional Standards, sustained the allegations.

6. On September 29, 2015, Woodard received a Step III Progressive Discipline - Reprimand and Suspension Without Pay (Revised 9/29/15) for conduct the District alleged violated the Florida Code of Ethics, rules 6A-10.080(2) and 6A-10.080(3) and the Principles of Professional Conduct, rule 6A-10.081(3)(a). The Step III Progressive Discipline alleged that Woodard used the term D.A.N. or DAN when talking to or referring to students at Northwestern, which the District alleged was an acronym for "dumb ass niggers."

7. In his defense, Woodard testified that in mentoring students, he shared stories from his childhood and his own life in order to be more relatable to students. According to Woodard, he used the story of his childhood friend Dan to impress upon students that it is not where you start, it is where you end up. Woodard's friend Dan used to skip school, get to school late, fight, and disrespect authority, and Woodard urged his students not to be a Dan. As discussed below, Woodard's testimony in this regard is not credible.

8. Student D.M. testified that Woodard called students D.A.N.s in the gym and in ISSP class when the students were either acting up or in trouble. D.M. also testified Woodard wrote the word D.A.N. on the board in ISSP class with periods in the word, and the word stayed on the board in ISSP class. D.M. never heard Woodard tell a story about a friend named Dan.

9. Student H.N.J. was in ISSP class with about seven other students when Woodard told them that D.A.N. meant "dumb ass niggers." H.N.J. said Woodard called students D.A.N.s when they were acting up and disrespectful, and that Woodard gave two meanings of the word D.A.N.--"dumb and nobody" and "dumb ass niggers." H.N.J. does not remember Woodard relating a story about a friend named Dan. Woodard's use of the word D.A.N. toward students made H.N.J. feel put down and "sad and mad at the same time," and the fact that Woodard was a teacher made this worse.

10. Student B.S. stated Woodard yelled at students and called them D.A.N.s in the gym whenever they were talking loud or would not listen. B.S. does not recall Woodard telling a story about a friend named Dan. B.S. learned that D.A.N. means "dumb ass niggers" from A.W., another student. Woodard's reference to students as D.A.N.s made B.S. feel "sorry and mad," and she began crying on the witness stand.

11. Student K.H. testified that Woodard called her a D.A.N. when she stepped out of line in the gym and that he called other students D.A.N.s when they were misbehaving, fighting, or being loud. K.H.'s friend told her that D.A.N. means "dumb ass nigger." K.H. never heard Woodard tell a story about a friend named Dan. K.H. and her brother, student D.H., complained to their mother about Woodard calling students

D.A.N.s. The mother of K.H. and D.H. contacted Northwestern and later the media after the school did not do anything about the complaint. Woodard's use of the term D.A.N. made K.H. "feel disrespected and low life because it's not supposed to be used towards children" and because Woodard is a teacher and the same race as K.H.

12. During the 2014-2015 school year, student D.H., was in the seventh grade at Northwestern. D.H. heard his friends in math class calling each other D.A.N.s. So he asked one of his friends what D.A.N. meant. D.H.'s friend (a student named "J") told D.H. that D.A.N. meant "dumb ass niggers" and that Woodard called kids that word. D.H. was bothered that someone of his own race was calling him that, and also that it came from a teacher.

13. The students' descriptions of Woodard's comments and behavior were fairly consistent. The things they reported hearing and observing were very similar to contemporaneously written statements from them and other students. The alleged remarks were similar in nature to one another but not exactly the same, so the comments did not seem rehearsed or planned. The students were very direct and unwavering when testifying at final hearing. The testimony of H.N.J. was particularly persuasive and clearly established that Woodard intended to use

the term D.A.N. as a derogatory epithet: either "dumb and nobody"; or "dumb ass niggers."

14. Significantly, none of the students who appeared at hearing would have had a motive to testify falsely. As noted, Woodard did not assign grades to any of these students or assign them to ISSP, so none would have had an axe to grind with Woodard. The testimony of the students is credible.

15. Teacher Linda Raggins testified that she heard Woodard tell students in the gym "to not act like Dan." Toward the end of the school year, Raggins asked Woodard "who is Dan?" Woodard gave Raggins two explanations, the first of which she did not recall. The second explanation Woodard gave Raggins was that "some people use Dan to mean dumb ass niggers, but that's not how I - that's not what I'm talking about." Raggins did not recall Woodard providing any other meaning for the word D.A.N. Raggins is a union representative and first agreed to provide a written statement, but then declined to provide a statement on the advice of counsel. Raggins did not tell Investigator Johnson that Woodard told a story about someone named Dan.

16. Former teacher Jason Ludban heard Woodard use the term D.A.N. a handful of times. Ludban said that Woodard used the term D.A.N. "openly and loudly for all to hear," which made Ludban believe it was acceptable. Ludban learned from a student that D.A.N. meant "dumb ass niggers." Ludban never heard

Woodard tell a story about a friend named Dan. If Ludban believed that Woodard was using the term D.A.N. to mean "dumb ass niggers," Ludban would have had a duty to report it.

17. Woodard gave Investigator Johnson the names of three additional student witnesses, whom Johnson interviewed. One of the students confirmed that Woodard wrote the word "D.A.N." with periods on the board in ISSP class. Two of the students told Johnson that Woodard told them the story of a friend named Dan, but this occurred about two weeks prior to the date Johnson interviewed them, after the allegations were reported in the media and when Woodard was already facing discipline.

18. Despite Woodard's claim that Dan was a real person, Investigator Johnson does not recall Woodard telling him the last name of Dan or giving him any contact information for "Dan." Johnson would have interviewed Dan if Woodard had provided that information. Woodard also did not provide Investigator Johnson with the names of any adults at Northwestern to whom Woodard told the Dan story. None of the witnesses Investigator Johnson interviewed--students or adults--stated that Woodard told them a story about a friend named Dan.

19. It is within management's discretion to skip a step of progressive discipline if the conduct is severe. Assistant Superintendent Sonita Young recommended Step III discipline against Woodard because he was in a position of authority and

his role was to provide support to students in terms of behavior modification, but Woodard used derogatory language that was offensive toward students. In deciding whether discipline is warranted, the District looks at the totality of the circumstances, including the number of times an incident occurred, how many witnesses there were to the incident, the severity of the incident, whether harm occurred to the child's physical or mental well-being, whether the employee has been previously disciplined for the same conduct, and whether the employee acknowledged his behavior and is willing to modify his behavior.

20. According to Assistant Superintendent Young, the factors supporting the Step III discipline were that Woodard said the derogatory word D.A.N. to multiple students, the students were middle school students, the student population was fragile and of very low socioeconomic status, and the conduct was repeated over a period of time rather than a singular incident. The fact that this language was used by a teacher, a person in a position of authority whom students have the right to feel "safe" around, were additional factors supporting the discipline. Young believes that Woodard's use of the word D.A.N. toward or around students showed poor judgment and was damaging to them.

21. Respondent called various character and fact witnesses (Jasmine Daniels, Tiffany Thomas, Tabitha Johnson, Pastor Fredrick Newbill, Niger Lambey, Ricky Stanford, and Daniel Drayton) who testified that Woodard told the story of his friend Dan at a church youth group, in his sermons, or that they knew the story from growing up with Woodard. However, none of the witnesses testified that they heard Woodard tell the Dan story to District students or in a District classroom. Pastor Newbill testified that in his community, D.A.N. has been used as a racial epithet for "dumb ass niggers" for at least the last 25 years.

22. Dr. Arvin Johnson, the former principal of Northwestern, received a complaint about Woodard from a parent in May 2015, near the end of the 2014-2015 school year. Dr. Johnson, who is a friend of Woodard, heard Woodard use the term D.A.N. with students once or twice, but he never heard Woodard tell students a story about a friend named Dan. Although Dr. Johnson has known or worked with Woodard for approximately 12 years, the first time Woodard told Dr. Johnson the story of a friend named Dan was in connection with the parent's complaint against Woodard in May 2015.

23. Although Woodard has been employed with the District since 2002, he admitted that he did not tell the Dan story to students during the first 12 years of his employment. Woodard

did not begin telling the Dan story to District students until the 2014-2015 school year. After not speaking to Daniel Drayton for several years, Woodard called Drayton in 2015 to remind him of the Dan story. Woodard stated that if he knew there was a negative interpretation of D.A.N. he would not have used the term, but his explanation to Ms. Raggins shows that he knew that a racially derogatory meaning of the word D.A.N. existed.

24. Woodard claims that the students lied about him using D.A.N. as an acronym for "dumb ass niggers," but he could not offer an explanation as to why students, whom he claims "loved" him, and were excited to attend his class, would lie about him.

25. The greater weight of the evidence supports the contention that Woodard used the term D.A.N. in the presence of his ISSP students as a derogatory racial epithet.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract with the Duval County School Board. The proceedings are governed by sections 120.57 and 120.569, Florida Statutes.

27. Respondent was an instructional employee as defined by section 1012.01(2), Florida Statutes. Petitioner has the authority to suspend or terminate instructional employees pursuant to sections 1012.22(1)(f) and 1012.33(1)a and (6)(a)

28. The burden of proof in this proceeding is on the School Board to prove by a preponderance of the evidence that just cause exists to reprimand and suspend Woodard's employment with the School Board or, presumably, to impose some other sanction. McNeil v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996). Preponderance of the evidence is evidence that more likely than not tends to prove the proposition set forth by a proponent. Gross v. Lyons, 763 So. 2d 276 (Fla. 2000).

29. Whether Respondent committed the charged offense 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, 66 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). In the face of disputed testimony, the fact-finder is required to make credibility determinations.

30. In the absence of a rule or written policy defining just cause, the School Board has discretion to set standards which subject an employee to discipline. See Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217 (Fla. 2d DCA 1994). Nonetheless, just cause for discipline must rationally and logically relate to an employee's conduct in the performance of the employee's job duties and be in connection with inefficiency, delinquency, poor

leadership, and lack of role modeling or misconduct. State ex. rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948); In Re: Grievance of Towle, 665 A.2d 55 (Vt. 1995). Woodard was clearly guilty of failing to provide good leadership and role modeling to his students on occasion.

31. Just cause for purposes of discipline is addressed in section 1012.33:

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, incompetency, gross insubordination, willful neglect of duty, or being convicted and found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude."

32. The Principles of Professional Conduct for the Education Profession in Florida, under which classroom teachers operate in the Duval County school system, includes the following provisions:

Rule 6A-10.081(1)(a)--The educator values the work 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.

Rule 6A-10.081(1)(b)--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.

Rule 6A-10.081(1)(c)--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 educate strives to achieve and sustain the highest degree of ethical conduct.

Additionally, the following provisions of the Principles of Professional Conduct are applicable to this case:

Rule 6A-10.081(2)(a)1--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.

Rule 6A-10.081(2)(a)5--Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

33. Pursuant to the definition of "just cause" under section 1012.33, there is no question that Respondent's actions constituted "misconduct in office." It is axiomatic that the duty of a teacher to protect students from conditions harmful "to the student's mental and/or physical health" is completely breached when a teacher resorts to repeatedly using profanity and derogatory language toward students and in their presence. Numerous cases involving school boards or the Educational Practices Commission have found the repeated use of profane and derogatory language toward students violates this principle. In an analogous case, Pinellas County School Board v. Jerome

Jackson, Case No. 92-1786 (Fla. DOAH Dec. 7 1992), the administrative law judge found that Respondent's use of profanity towards students and staff, intoxication, and other disruptive conduct, supported a finding of immorality and lack of professionalism; and that calling a student a "dumb nigger" exposed the student to unnecessary embarrassment or disparagement. Similarly, in Department of Education, Education Practices Commission v. Ferrell, Case No. 87-5482 (Fla. DOAH May 4, 1988), the administrative law judge found that the respondent violated the rules of professional conduct by repeatedly using profanity and derogatory terms toward students and stating to a black student "you remind me of a nigger" in the presence of other black students.

34. The greater weight of the evidence supports a finding that Woodard's actions were in violation of the standards of conduct to which he was bound. A teacher must not use language in front of a student that will negatively affect his effectiveness, professionalism, or confidence in the eyes of students and their families.

35. Notwithstanding the above, Woodard's actions were not immoral, there was no gross insubordination or willful neglect of duty, nor was a crime involved.

36. Article V, C. 1, of the Collective Bargaining Agreement between the School Board and the teachers' union, to

which Woodard belongs, sets forth the Progressive Discipline Policy to be followed. It states in pertinent part:

The following progressive steps must be followed in administering discipline, it being understood, however, that some more severe acts of misconduct [not defined] may warrant circumventing the established procedure:

- a. Verbal Reprimand
 - 1. No written conference summary is placed in personnel file;
 - 2. Employees must be told that a verbal reprimand initiates the discipline process.
- b. Written Reprimand
- c. Suspension without pay
- d. Termination

37. By all accounts, with the exception of the actions at issue herein, Woodard was an effective and well-liked teacher. There was no evidence that the behavior displayed by Woodard during the 2014-2015 school year at Northwestern was anything other than an isolated, albeit serious, lapse in judgment.

38. Here, the School Board proposes to skip two steps of progressive discipline, going from a verbal reprimand to suspension without pay. While reprehensible and completely unprofessional, Woodard's misconduct is severe enough to skip one, but not two steps of the contractual progressive discipline policy.

39. There is sufficient reason for sanctioning Woodard, but suspension without pay is not justified under the circumstances. Rather, a written reprimand is sufficient to impress upon Woodard that his conduct toward the students in his ISSP class was wholly unacceptable, and is warranted in this instance.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Petitioner, Duval County School Board, rescinding its suspension of the employment of Ernest Woodard and, instead, issuing a written reprimand.

DONE AND ENTERED this 30th day of November, 2016, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2016.

ENDNOTE

^{1/} The Code of Ethics of the Education Profession in Florida (Florida Administrative Code Rule 6A-10.080) was repealed as of March 23, 2016. However, the relevant provisions of the former Code have been codified, unchanged, in rule 6A-10.081.

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.