

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 16-3301

ORLANDO TORRES,

Respondent.

_____ /

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 September 7 and 8, 2016.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

Did Petitioner, Gregory K. Adkins, as Superintendent for the Board of the School District of Lee County, Florida (Superintendent), prove just cause to terminate the employment of Respondent, Orlando Torres?

PRELIMINARY STATEMENT

By petition dated April 29, 2016, the Superintendent sought to terminate the District's employment of Mr. Torres. The Superintendent seeks to terminate Mr. Torres' employment for just cause as permitted by section 102.33(1)(a), Florida Statutes (2016).^{1/} The petition says that Mr. Torres violated School Board Policy 5.02, Professional Standards; Policy 5.03, General Requirements for Appointment or Employment; Policy 5.29, Complaints Relating to Employees; and Policy 5.30, Complaint Procedures for Sexual Harassment by Employees. Finally, the petition asserts that Mr. Torres violated Paragraph 7.12, Workplace Civility, of the Support Personnel Association of Lee County (SPALC) collective bargaining agreement, which prohibits profane or harassing conduct in the workplace.

Mr. Torres disputed the charges and requested a formal administrative hearing. On June 15, 2016, the Superintendent referred the matter to DOAH to conduct the requested hearing. The undersigned conducted the hearing on September 7 and 8, 2016.

The parties entered into a Joint Pre-hearing Stipulation that established certain facts. At the final hearing, the Superintendent presented the testimony of Russell Barrs, Andrew Brown, N.M., Edward Mathews, Angela Cruzado-Medina, C.P., and S.S. (Initials are used to avoid disclosing the identity of

minors.) Superintendent's Exhibits 1 through 8 and 11 through 15 were admitted into evidence.

Mr. Torres presented testimony from S.A., Jerriel Filler, L.M., Z.M., Christopher Riley, Samuel Pabon, Jr., and himself. Mr. Torres' Exhibits 1 through 6 were admitted into evidence.

At the conclusion of the hearing, the parties agreed to file proposed recommended orders within ten days of filing the Transcript. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Superintendent, on behalf of the School Board of Lee County (Board), is responsible for hiring, overseeing, and terminating, all employees in the school district.

2. At all times material to this case, the Board employed Mr. Torres as a security specialist at East Lee County High School (East Lee). Mr. Torres also sometimes served as an assistant coach and/or substitute athletic trainer.

3. Mr. Torres has worked for the Board since August 5, 2011. For the 2011 through 2015 school years Mr. Torres' received a final Performance Evaluation with a score of "Effective" in all areas assessed. The "Manager Comments" on Mr. Torres' Final Performance Evaluations consisted of the following: "Mr. Torres is an integral part of the MLE [Mirror

Lakes Elementary] team. He has been a great addition to our staff [2014-2015 Evaluation]"; "Mr. Torres is a very valuable asset and is well respected and supported as an integral part of the MLE team [2013-2014 Evaluation]"; "Orlando performs various duties at East: security and coaching. He has done a good job with both. Orlando was accepting of taking on the night security position until a candidate was hired [2012-2013 Evaluation]"; and "Orlando is a team player and is always willing to go above and beyond to help staff and students [2011-2012 Evaluation]."

4. Mr. Torres is a member of SPALC and was a member during all periods relevant to this matter.

5. On February 4, 2016, the Board's Department of Professional Standards and Equity (PS&E) received reports that on several occasions Mr. Torres made inappropriate comments and sexual remarks in the presence of or to female high school students. The comments included suggestions that Mr. Torres was interested in sex with the students. The comments caused the students extreme discomfort and embarrassment and created an inhospitable learning environment. The Board investigated. The information it collected caused the Board to terminate Mr. Torres' employment.

6. PS&E Coordinator, Andy Brown, conducted an investigation that included interviews of several students and of Mr. Torres. When Mr. Torres met Mr. Brown for his interview, Mr. Torres did

not know the reason for the interview. Mr. Brown advised Mr. Torres that he was the subject of an investigation and asked him if he knew what it was about. Mr. Torres said: "When I meet with a female, I always have another female present." This was not true. Mr. Torres' spontaneous and dishonest statement in response to simply being asked if he knew what the investigation was about is persuasive evidence that he had improper conversations with female students and is a contributing factor to concluding that his testimony denying the charges is not credible.

7. In November and December of 2015, and January 2016, Mr. Torres made several sexually charged, inappropriate comments to students. Five of the incidents involved N.M., who was an eleventh grade student at the time.

8. N.M.'s mother worked at the school. Consequently, N.M. stayed at school after classes until her mother left work. N.M.'s mother arranged for N.M. to assist Mr. Torres in his training tasks after school. This is how she met Mr. Torres. The arrangement lasted about a week. Around November 2015, Mr. Torres gave N.M. a "high-five." He prolonged the contact by grabbing her hand and intertwining his fingers with hers. In a separate incident, while giving N.M. a "bandaid" for a scratch, Mr. Torres asked her if she would ever get involved with a married man. She said no and walked away.

9. On another occasion, N.M. encountered Mr. Torres while she was walking to lunch. N.M. was wearing what she described as a "burgundy semi-see-through" shirt. Mr. Torres told her to cover up her "goodies" or her "girls," referring to her breasts, so nobody else could see them. N.M.'s testimony used the word "girls" while her statement in February 2016 said "goodies." This minor discrepancy is understandable given the passage of time and the stresses of an interview and testimony.

10. On yet another occasion, Mr. Torres remarked in Spanish, when N.M. bent down, "I like ass."

11. Mr. Torres spoke to N.M. after she had been called to the school office to provide a statement about a conflict that Mr. Torres had with another student. When he learned the purpose of the request for a statement from N.M., Mr. Torres said, "I thought I was gonna get in trouble for flirting with you; thank god we didn't take it to second base."

12. In early February, N.M. was walking with her then-friend S.S., when Mr. Torres exited a room and saw them. He said "you look delic . . . , beautiful," to N.M., shifting from "delicious" to "beautiful" when he noticed S.S. Mr. Torres also made a comment about wishing N.M. was 18.

13. Another Security Specialist, Russell Barrs, who N.M. considered a friend, overheard bits of a conversation between N.M. and S.S. about the encounter. He asked N.M. about it. She replied with generalities

14. A day or two later N.M. met with Mr. Barrs and provided complete information about Mr. Torres' comments to her. Mr. Barrs reported this to Assistant Principal Edward Matthews. Mr. Matthews launched the investigation.

15. It is noteworthy that S.S., whose friendship with N.M. ended, still testified to the same events as N.M. did. The two had a falling out sometime in 2016. The testimony of S.S. was not a matter of loyal support for a friend. In fact, the tone and body language of both students gave the distinct impression that the end of the friendship was not pleasant.

16. N.M.'s mother had just started working at the school. N.M. did not immediately report Mr. Torres' advances to her mother or other adults. When she did report them, her initial statements were incomplete and vague. She just told her mother she was not comfortable being in the room with Mr. Torres. She also told her mother that Mr. Torres "says things." Later, after speaking to Mr. Barrs, N.M. provided her mother a complete description of the comments.

17. After classes, Mr. Torres spent a good deal of time in the training room where first aid supplies and ice are stored for student-athletes. The training room was divided into two smaller rooms separated by a door that was usually shut. One room contained the ice machine, other equipment, and supplies. The other part of the room served as an office for Mr. Torres. Students, including N.M. and C.P., assisted or visited with Mr. Torres in the training room at times.

18. C.P. was a female student who served as one of the managers for the girls' basketball team. Once while observing her prepare an ice pack by sucking air out of it, Mr. Torres said words to the effect of "like how you suck a boy's dick."

19. C.P. was a ninth grader at the time. Mr. Torres also told her that he would like to marry her when she turned 18. Another time, Mr. Torres tried to hug C.P. Mr. Torres also told C.P. that they should not talk in the hall because the security video cameras may record them.

20. Another time, after overhearing a discussion in Spanish by several female students about sexual activity, Mr. Torres told C.P. that if he ever had sex with her he would break her.

21. Two or three times Mr. Torres told C.P. that she was beautiful and he wanted to marry her after she graduated.

22. The comments made C.P. extremely uncomfortable and unsure of what to do. She was scared. She quit her position as manager to avoid contact with Mr. Torres.

23. Like N.M., C.P. was slow to report the comments to an adult. When she first told her step-mother she described Mr. Torres' comments as coming from a substitute teacher. C.P. was scared and did not want to get involved. When she did, the details understandably came out in bits and pieces.

24. Mr. Torres' improper familiarity with students N.M. and C.P. and his sexually charged comments were frequent and varied. They were improper and detrimental to the emotional and mental health of the students.

25. The crux of Mr. Torres' defense is that none of the testimony about his actions is true. His testimony is not as credible as that of the students who testified to his offenses. One reason, mentioned earlier, is Mr. Torres' spontaneous statement when Mr. Brown met him for the interview that he was never alone with a female. It manifests guilt and anxiousness that would not be present without his being aware of his improper behavior.

26. Another reason is that the testimony of the students is sufficiently consistent to provide credibility. And N.M., C.P., and S.S. all made reports within a few months of Mr. Torres' comments. A third reason is that N.M.'s testimony was supported

by S.S. at hearing even though their earlier friendship had ended. A fourth reason is that there is no evidence of a motive for N.M., S.S., and C.P. to fabricate their reports. For the time period when Mr. Torres made the comment to C.P. about "breaking her," several students offered differing testimony about who was in the room when and whether Mr. Torres was giving a student instruction on a trumpet. This testimony is not sufficient to impeach the credibility of N.M. and C.P. Those were not the students to whom the offending remarks were made. The details of that day would not have been noteworthy to them at the time. Similarly, given the nature of Mr. Torres' comments, the details of exactly who was present when would have been secondary to N.M. and C.P.

27. Finally, Mr. Torres made one particularly transparent and deliberate effort to manipulate the truth during cross-examination that undermines relying on Mr. Torres' testimony. Early in the hearing, in Mr. Torres' presence, the Board attempted to enter evidence that during prior employment as a detention officer with the Sheriff of Lee County, Mr. Torres reacted to teasing by other officers by drawing his service pistol. The objection to the evidence was sustained.

28. Later Mr. Torres testified that the testimony against him was not credible because he would never take such risks at a school where his wife was also employed, his children were

students, and N.M.'s mother was employed. This testimony opened the door to the pistol drawing incident as evidence of Mr. Torres taking risky actions at work.

29. The exchange about the incident, starting at page 329 of Volume II of the Transcript, follows:

Q: But you engaged in risky behavior in your two law enforcement jobs prior, did you not?

A: I don't consider that risky behavior.

Q: Well, you don't consider pulling your service revolver as risky behavior?
[objection and ruling]

A: I have never carried a revolver.

Q: Your service weapon, sir?

ALJ: You said you never carried a revolver. Have you ever carried a pistol?

A: Yes sir.

ALJ: Next question.

Q: Would you consider pulling your service pistol in an inappropriate manner risky behavior, sir?

A: Yes, sir.

30. Mr. Torres testified with full knowledge from the earlier attempt to introduce evidence of the incident to what the question referred. His answer was hair-splitting at best and demonstrated a willingness to shade, if not evade, the truth that significantly undermines his credibility.

CONCLUSIONS OF LAW

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

32. The 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).

33. As a security specialist, Mr. Torres is an "educational support employee," as defined by section 1012.40(1)(a). The SPLAC bargaining agreement applies to his employment. § 1012.40(2)(b), Fla. Stat. Section 7.10 of the agreement provides that disciplinary actions against educational support personnel may be taken only for "just cause." It does not define "just cause."

34. The Board uses a statutory definition of just cause for discipline of instructional staff in disciplining educational

support personnel. The definition provides: "Just cause includes . . . the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office," § 1012.33(1)(a), Fla. Stat.

35. Sections 1012.22(1)(f) and 1012.40(2)(c) give the Board authority to terminate and/or suspend non-instructional personnel without pay and benefits.

36. 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. The collective bargaining agreement states that discipline shall be reasonably related to the seriousness of the offense and the employee's record.

37. The Complaint asserts six charges against Mr. Torres. The first is that Mr. Torres's behavior is misconduct in office and justifies termination under the provisions of section 1012.33(1)(a). That section applies only to instructional staff, supervisors, and school principals. The School Board did not prove that Mr. Torres was instructional staff, a supervisor, or a principal. It proved that he was an educational support employee. § 1012.40(1)(a), Fla. Stat. The Board failed to prove its first charge.

38. The second is that Mr. Torres violated Board Policy 5.02. On its face, the policy directs the school district to establish high standards. It 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 a 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. The Board has not proven this charge.

39. The third charge is that Mr. Torres violated Policy 5.03. This policy, titled "General Requirements for Appointment or Employment," establishes "general requirements for appointment or employment." The qualifications include a requirement of good moral character. Policy 5.03(2)(a). 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).

40. 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." Mr. Torres' sexually charged comments to the minor female students are inconsistent with "standards of public conscience and good morals." See generally, § 794.05, Fla. Stat. (second degree felony for person over 24 years of age to engage in sexual activity with a person age 16 or 17 years of age); § 800.04(4), Fla. Stat. (second degree felony for a person of any age to engage in sexual activity with a person 12 years of age or older but less than 16 years of age) as indicators of the enhanced standards of public conscience and good morals in matters of sex and minors, although there has been no charge that Mr. Torres engaged in sexual activity. The Board proved a violation of Policy 5.03.

41. The fourth charge is that Mr. Torres violated Policy 5.29. The policy establishes the procedures to be "followed for complaints relating to employees:" Subsection (1) of the policy states that "all employees are expected to exemplify conduct that is lawful and professional and contributes to a positive learning environment for students." 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. Lee County School Board, Case No. 15-487 (Fla. DOAH August 25, 2015; Lee Cnty. Sch. Bd. October 20, 2015). The fourth charge does not articulate, and the evidence does not prove, an offense for which Mr. Torres may be disciplined.

42. The fifth charge is that Mr. Torres violated Policy 5.30. Titled "Complaint Procedures for Sexual Harassment by Employees, the policy sets forth "procedures for sexual harassment complaints." It first defines sexual harassment and then establishes procedures for reporting and investigating sexual harassment. Policy 5.30 does not create a disciplinary offense relevant in this proceeding. The fifth charge does not articulate, and the evidence does not prove, an offense for which Mr. Torres may be disciplined.

43. The sixth charge asserts that Mr. Torres violated a requirement created by the SPALC Contract. Paragraph 7.12 of Article 7 states:

WORK PLACE CIVILITY: Employees shall not engage in speech, conduct, behavior (verbal or nonverbal), or commit any act of any type which is reasonably interpreted as abusive, profane, intolerant, menacing, intimidating, threatening, or harassing against any person in the workplace. Bargaining unit employees may address alleged violations of this provision through the grievance procedures as outlined in Article 5 of this agreement. The resolution of a complaint under this provision may result in the involuntary, temporary transfer of an employee or

employees pursuant to provision 7.04 of this agreement. Such transfer may become permanent when deemed necessary by the Superintendent or the Superintendent's designee.

44. The plain language of this provision creates a protection for employees from the conduct of other employees. The reference to paragraph 7.04, which governs involuntary transfer of an employee to another school or site, confirms this. Mr. Torres conduct was toward students, not other employees. Paragraph 7.12 does not create a disciplinary offense relevant in this proceeding. The sixth charge does not articulate, and the evidence does not prove, an offense for which Mr. Torres may be disciplined.

45. The Board proved Mr. Torres repeatedly violated Board Policy 5.03. The violations were deliberate and egregious. They betray the core mission of a school, caring for students, and the central purpose of Mr. Torres's position, providing security and safety for students. The violations were so serious that discharge from employment is an appropriate discipline, despite Mr. Torres' history of favorable evaluations.

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 Respondent, Orlando Torres, and dismissing him from his position with the Lee County School District.

DONE AND ENTERED this 31st day of October, 2016, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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 31st day of October, 2016.

ENDNOTES

^{1/} Unless otherwise noted, all statutory references are to the 2016 edition of the Florida Statutes.

COPIES FURNISHED:

Robert J. Coleman, Esquire
Coleman and Coleman
Post Office Box 2089
Fort Myers, Florida 33902
(eServed)

Robert Dodig, Jr., Esquire
School District of Lee County
2855 Colonial Boulevard
Fort Myers, Florida 33966
(eServed)

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

Dr. Gregory Adkins, Superintendent
2855 Colonial Boulevard
Fort Myers, Florida 33966-1012
(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.