

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 16-3856PL

BARBARA WARREN,

Respondent.

_____ /

RECOMMENDED ORDER

This case was heard on September 16, 2016, in Tavares, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ron Weaver, Esquire
Post Office Box 770088
Ocala, Florida 34477-0088

For Respondent: James L. Homich, Esquire
621 East 5th Avenue
Mount Dora, Florida 32757

STATEMENT OF THE ISSUES

Whether there are sufficient grounds for the imposition of disciplinary sanctions against Respondent's teaching certificate and, if so, the nature of the sanctions.

PRELIMINARY STATEMENT

On February 16, 2016, the Commissioner of Education executed an Administrative Complaint against Respondent which alleged that, "[d]uring the 2013/2014 school year, Respondent failed to maintain proper control of her classroom. As a result of Respondent's failure, students walked in and out of her classroom without Respondent keeping track of them and students were in and out of their seats while in the classroom. On or about May 16, 2014, D.L. and J.G., two male students in Respondent's class, lit and smoked a cigar during class in the presence of Respondent."^{1/}

On March 17, 2016, Respondent timely filed an election of rights by which she requested a formal hearing. The matter was referred to the Division of Administrative Hearings for an evidentiary hearing.

The hearing was scheduled for September 16, 2016, and was convened as scheduled.

At the final hearing, Petitioner presented the testimony of Respondent, Barbara Warren (Petitioner or Ms. Warren); Barbara Longo, the principal of Oak Park Middle School (Oak Park); and Quiana Peterson, who was, at all times relevant to this proceeding, the Employee Relations Manager for the Lake County School District. Petitioner's Exhibits 1, 17, 24, 25, 27-30, 35, 36(A)-(F), and 37-42 were received into evidence.

Petitioner's Exhibit 1, the investigative summary, is almost entirely hearsay upon hearsay and has been given little evidentiary weight. Exhibit 37 is a cell phone video of the May 16, 2014, cigar-smoking incident.

In her case-in-chief, Respondent testified on her own behalf and presented the testimony of Tonya Pickens, who was, at all times relevant to this proceeding, an exceptional student educational instructor at Oak Park. Respondent's Exhibits 22 and 44 were received in evidence.

A one-volume Transcript of the proceedings was filed on October 17, 2016. Both parties thereafter timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order.

The actions that form the basis for the Administrative Complaint occurred in May 2014. This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Accordingly, all statutory and regulatory references shall be to the 2013 versions, unless otherwise specified.

FINDINGS OF FACT

1. The Florida Education Practices Commission is the state agency charged with the duty and responsibility to revoke or suspend, or take other appropriate action with regard to

teaching certificates as provided in sections 1012.795 and 1012.796, Florida Statutes (2016). § 1012.79(7), Fla. Stat.

2. Petitioner, as Commissioner of Education, is charged with the duty to file and prosecute administrative complaints against individuals who hold Florida teaching certificates and who are alleged to have violated standards of teacher conduct. § 1012.796(6), Fla. Stat.

3. Respondent holds Florida Educator's Certificate 484422, covering the areas of biology and mathematics, which is valid through June 30, 2017. During the 2013-2014 school year, Respondent was employed as a mathematics teacher at Oak Park.

4. Respondent worked at Oak Park from September 25, 2013, to May 20, 2014. On May 21, 2014, Respondent was removed from her classroom as a result of the May 16, 2014, student-smoking incident (the "incident") described herein and assigned to the school district office in a non-instructional position. Respondent was a first-year probationary teacher at Oak Park. Due to the incident, Respondent's employment with the school district was not renewed for the following school year. Respondent is currently employed at Emerald High School in Greenwood County, South Carolina.

5. Respondent had not been the subject of any previous complaints or disciplinary actions during her period of employment.

6. The first session of the Oak Park school day, extending from 9:04 to 9:34 a.m., is called Knights Unite ("KU"). KU is described as:

[A] 30 minute period where healthy relationships between the students, faculty and staff of OPMS can be built. It is a time set aside for mentoring, engaging students with interactive activities to build their character, interactive activities to review content and to give each student of Oak Park someone they can trust and confide in.

7. Respondent described the KU period as one in which she could help students to make up work, help them with independent study, allow students to meet with other teachers for help or independent study, engage in certain mandated activities, e.g., bullying lessons, and perform student-related administrative tasks. Fridays were typically independent study days in which students were allowed to make up work from the week.

8. On Friday, May 16, 2014, during the KU period, students were involved in independent study and with filling out required address forms. Students needing to go to the media center, the guidance office, the main office, or to meet with other teachers during the KU period are given passes. Allowing students to engage in those tasks, including issuing passes for students "to get assistance or additional paperwork from a different teacher" was not contrary to Oak Park policy, nor did it violate any standard. Except for the four students involved in the

incident, there was no evidence that any student left Respondent's classroom without a pass.

9. Petitioner suggested that the tasks being performed (or that were supposed to be performed) in Respondent's class on May 16, 2014, were inconsistent with Petitioner's written KU guidelines. Since the activities being performed by students, with the exception of those related to the incident, were not alleged as violations in the Administrative Complaint, compliance with the KU guidelines is not at issue. Furthermore, the evidence demonstrates that activities, such as individual mentoring or tutoring and individual catch-up work, are an appropriate use of KU period time.

10. According to Ms. Longo, there were 18 students in Respondent's KU class on May 16, 2014. At the time of the incident, each student had an individual desk. Currently, as depicted in the photographs in evidence, the classroom has been reconfigured with tables that seat multiple students.

11. At some point during the May 16, 2014, KU period, a group of four of Respondent's less responsible students huddled furtively in the back of the classroom. The two male students involved, D.L. and J.G., lit the butt of a small "Tiparello"-style cigar, and took a few quick puffs. They had their backs to Respondent's desk and ducked down to conceal their actions. One of the two female students, J.C., in order to preserve the

foolhardy act for posterity, took a cell phone video of the incident. The length of the video was a total of one minute and 51 seconds.

12. The cigar appeared to have been first lit at the 0:05 mark. The youthful miscreants did not intend to be discovered, as evidenced by one student's hushed statement that "I swear to God if you show anybody that [unintelligible] snitch." That their actions were not obvious is supported by the lack of attention that they drew from other more conscientious students in the class, who did not look up or react to the act of false bravado.

13. At the 0:17 second mark, Respondent can be seen at her desk at the front of the room attending to H.E., another student who was not involved in the incident. H.E. was generally positioned between Respondent and the cigar-smoking students, shielding Respondent from their actions. Respondent was also in the process of taking attendance. Ms. Longo testified that it is appropriate for Respondent to be at her desk to perform those tasks. Although Respondent and H.E. are only glimpsed at the 0:17 mark, it is not reasonable to conclude that H.E. simply vanished at that point, exposing the four troublemakers to Respondent's view. Rather, some seconds had to have passed before H.E. moved away.

14. The student's efforts to hide the cigar and fan away the smoke confirm their efforts to avoid detection. Although J.G. coughed, his proximity to the cell phone (one or two feet) makes it impossible to tell how noticeable the cough would be from a distance. At the 0:25 mark, D.L. eyed the recording cell phone and threw down with a devil-may-care "whazzup, whazzup."

15. From roughly the 0:33 mark to the 0:44 mark, the youthful miscreants hurriedly hid the evidence and assumed an attitude of casual insouciance. The video then went black from the 0:43 mark to the 0:55 mark and, although the picture returned, the cell phone was clearly being concealed from the 0:55 mark to the 1:03 mark. That thirty seconds of cover and concealment is consistent with Respondent's testimony that she got up and went over to the students' desk area.

16. The video resumed at the 1:03 mark and, after a few furtive sweeps of the area, clearly taken from a low vantage point, again went black from the 1:11 to the 1:18 mark.

17. At the 1:18 mark, the video resumed and, at the 1:22 mark, J.G. is seen lighting the half-inch butt with a Bic lighter. The behavior of J.G. and D.L. demonstrated a continued effort to conceal their actions.

18. At the 1:30 mark, the video shows that the students had been "busted." J.G., in a display of feigned innocence, loudly proclaimed "what is that smell?" By the 1:35 mark,

Respondent had called J.G. and the owner of the phone to her desk, and they dutifully complied. An unidentified student mentioned the word "perfume," and either J.G. or J.C. spoke of "cologne" in an obvious effort to explain the unusual aroma in the room. At the 1:48 mark, Respondent advised J.C. that Respondent would need her phone for the rest of the class. Though occurring after the 1:51 end of the video, Respondent successfully confiscated the phone, which Ms. Longo confirmed was the appropriate course of action.

19. Respondent indicated that she could momentarily smell something unusual in the room, which she attributed variously to incense, cologne, or deodorant. Due to the pervasive musty and mildewy smell in the class caused by a water leak and chronically wet carpeting, along with her blocked sinuses, she could not tell what it was. As stated convincingly by Ms. Pickens, "there were different types of smells in there on one day to the next depending on whether or not they put the fan in the classroom to dry out the carpet."

20. There was no evidence that Ms. Warren could see what was occurring while taking attendance and consulting with the student at her desk.^{2/} Petitioner's speculation that Respondent could have (or should have) seen exactly what was happening at the back of the room was just that - speculation.

21. After J.C.'s cell phone was confiscated by Respondent, D.L. came up with several excuses as to why he should be allowed to leave the classroom. His requests were denied. Thereafter, as Respondent was calling the office to report the incident, D.L. and J.G., followed by the girls, J.C. and C.W., left the classroom without permission. Teachers are not allowed to physically restrain students attempting to leave the classroom. Rather, the teacher is to "push the call button that's in every classroom immediately and say that so-and-so just walked out of my class." Respondent complied with that expectation by calling the office, which is an acceptable option. Since no administrators were available, Respondent gave the information regarding the students' escape from the classroom to Ms. Longo's secretary.

22. It took a while for anyone to respond to Respondent's call. The students returned to the classroom after about five minutes. After their return, Mr. Justus, who was the school's athletic director and "coach" for the social studies department, and a member of Ms. Longo's "leadership team," came to the room. Respondent wrote referrals on D.L. and J.G., and they left with Mr. Justus.

23. After the boys were taken from the classroom, Respondent sent an email to Mr. Wade, the associate principal and dean of discipline, and Mr. Justus to inquire about the

referral of the girls, J.C. and C.W., and to let them know that she had J.C.'s cell phone.

24. Two periods later, Mr. Wade came to Respondent's classroom, at which time Respondent turned over J.C.'s cell phone to him. By that time, she had retrieved a cigar wrapper from D.L.'s desk, which was also turned over to Mr. Wade.^{3/}

25. Ms. Peterson concluded that "[n]o evidence exists to show that Ms. Warren was ever aware that students were actually smoking a cigar in her class." She further testified that Respondent "wasn't aware they were smoking. She thought something was wrong, but that doesn't mean she knew that they were smoking. That could mean that someone's with something like a piece of paper."

26. On May 20, 2014, Respondent was removed from the classroom and reassigned to the school district office.

27. Respondent's inability to see exactly what was occurring in the back of the classroom did not prevent her from suspecting improper conduct by the students and acting on that suspicion by appropriately requesting assistance from administration, confiscating the cellular telephone of a student, and investigating the matter herself to find the wrapper.

28. The tone of the Administrative Complaint gives the impression that J.G. and D.L. put their feet up on their desks

and enjoyed a fine Cuban Presidente while under Respondent's approving gaze. Nothing could be further from the truth. The facts show that J.G. and D.L., in a manner that was as sneaky and surreptitious as possible, lit the small cigar and, over the course of approximately 28 seconds, took a few furtive puffs. After putting it out and hiding the evidence, the miscreants repeated the act for approximately 13 seconds before being nabbed. The suggestion that Respondent neglected her duties, failed to make reasonable effort to protect her students from conditions harmful to learning or to their mental or physical health or their safety, or engaged in personal conduct that seriously reduced her effectiveness as a teacher is simply not supported by the facts of this case.

CONCLUSIONS OF LAW

A. Jurisdiction

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

B. Standards

30. Section 1012.795(1), which establishes the violations that subject a holder of an educator certificate to disciplinary sanctions, provides, in pertinent part, that:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:

* * *

(g) Upon investigation, has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board.

* * *

(j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

31. Florida Administrative Code Rule 6A-10.081(3)(a), provides that:

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.

C. Burden and Standard of Proof

32. Petitioner bears the burden of proving the specific allegations of wrongdoing that support the charges alleged in the Administrative Complaint by clear and convincing evidence before disciplinary action may be taken against the professional license of a teacher. Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); § 120.57(1)(j), Fla. Stat.; see also Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

33. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof

[E]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

34. Section 1012.795 is penal in nature and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

D. Count 1 - Section 1012.795(1)(g)

35. Count 1 of the Administrative Complaint alleged that, as a result of the facts alleged:

The Respondent is in violation of Section 1012.795(1)(g), Florida Statutes in that Respondent has been found guilty of personal conduct which seriously reduces effectiveness as an employee of the school board.

36. Section 1012.795(1)(g) uses the term "guilt" when describing the personal conduct that would rise to the level of a violation. The use of the term could imply that there be a conviction of a crime involving a standard of personal conduct in order for Respondent to have "been found guilty." However, a long string of administrative orders, going back many years, has applied a broader construction of the term to mean a more general breach of standards of personal conduct that seriously reduce a Respondent's effectiveness as a teacher. See, e.g., Pam Stewart, as Comm'r of Educ. v. Roy Shewchuk, Case No. 13-1086PL (Fla. DOAH July 17, 2013; Fla. EPC Oct. 10, 2013); John Winn, as Comm'r of Educ. v. Richard Allen, Case No. 13-0140PL (Fla. DOAH June 4, 2013; Fla. EPC Sept. 12, 2013); John L. Winn, as Comm'r of Educ. v. Michelle O'Neill, Case No. 08-1597PL (Fla. DOAH June 30, 2008; Fla. EPC Oct. 15, 2008); John L. Winn, as Comm'r of Educ. v. Daniel Ray Madril, Case No. 07-3498PL (Fla. DOAH Nov. 9, 2007; Fla. EPC Mar. 6, 2008); Charlie Crist, as

Comm'r of Educ. v. Heather Cotton, Case No. 02-3942PL (Fla. DOAH Apr. 11, 2003; Fla. EPC June 12, 2003).

37. The evidence in this case demonstrates that Respondent engaged in no action that could, in any realistic manner, be considered to have seriously reduced her effectiveness as an employee of the Lake County School District. To the contrary, Respondent acted quickly, decisively, and effectively to end the actions of the small group of miscreants huddled in the back of the room, furtively puffing away on a small cigar. Despite their efforts to conceal their actions, she was able to put a stop to it in little more than a minute, and to retrieve evidence of the act which she dutifully turned over to the administration.

38. For the reasons set forth herein, Petitioner failed to prove, by clear and convincing evidence, that Respondent is guilty of personal conduct which seriously reduces her effectiveness as an employee of the Lake County School Board, and thus has not proven that Respondent violated section 1012.795(1)(g).

E. Counts 2 and 3 - Section 1012.795(1)(j) and Florida Administrative Code Rule 6A-10.081(3)(a)

39. Count 2 of the Administrative Complaint charged Respondent with violating section 1012.795(1)(j) by having violated the Principles of Professional Conduct for the

Education Profession prescribed by State Board of Education Rules. Thus, Count 2 does not constitute an independent violation, but rather is dependent upon a corresponding violation of the rules constituting the Principles of Professional Conduct.

40. Count 3 of the Administrative Complaint charged Respondent with violating rule 6A-10.081(3)(a) by failing to make reasonable effort to protect her students from conditions harmful to learning, to their mental or physical health, or to their safety.

41. As with Count 1, the evidence in this case demonstrates that Respondent took reasonable measures to protect her students. In the short period of time encompassed by the video of the incident, Respondent finished her interaction with the more industrious student with whom she was preoccupied for no less than the first 17 seconds of the video, tried to bring order to the troublemakers at the rear of the class, unsuccessfully tried to identify the vague odor -- an odor masked by the smell of mildew in the classroom and by her own stuffy nose -- and finally retrieved the evidence of the incident from a reluctant student. There is little more she could have done to put a halt to the actions of the young conspirators.

42. The Administrative Complaint also alleged that Respondent allowed the four daring students to escape her classroom and roam freely through the halls. However, once the students understood that their act had been discovered, and decided to leave the classroom to conceal the deed, there was little Respondent could do to stop them. She could not physically restrain them, and had she done so would likely be facing a different Administrative Complaint. Rather, she did exactly what she was supposed to do by immediately calling the office to report both the escape and the precipitating cause, and providing the cell phone with its incriminating video to the administrative staff.

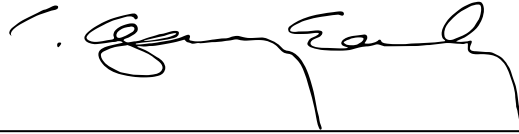
43. Petitioner failed to prove, by clear and convincing evidence, that Respondent failed to make reasonable effort to protect her students from conditions harmful to learning, to their mental or physical health, or to their safety in violation of rule 6A-10.081(3)(a), or that she violated the Principles of Professional Conduct as set forth in section 1012.795(1)(j).

RECOMMENDATION

Upon consideration of the Findings of Fact and Conclusions of Law reached herein, it is

RECOMMENDED that the Administrative Complaint be dismissed in its entirety.

DONE AND ENTERED this 17th day of November, 2016, in
Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of November, 2016.

ENDNOTES

^{1/} During the hearing, it was agreed that the allegation of Respondent's lack of control of the classroom and of students walking in and out of her class was related solely to the incident that occurred on May 16, 2014. See T. 154:14-155:17.

^{2/} The official "eSembler" computerized attendance program did not reflect that Respondent had entered attendance for May 16, 2014. However, Respondent was removed from her classroom before the end of the day. The evidence introduced by Respondent demonstrates that she had, in fact, taken attendance, but had not yet "submitted" it.

^{3/} Ms. Peterson seemed to believe that the cell phone and the cigar wrapper were retrieved by Mr. Wade, and not by Respondent, a belief expressed in her investigative report. Her description of Respondent's role in the confiscation of the cell phone and collection of evidence does not comport with the facts.

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.