

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 17-3640TTS

JASON PERRY,

AMENDED TO CORRECT
APPEARANCES

Respondent.

_____ /

AMENDED RECOMMENDED ORDER

On August 24, 2017, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings ("Division"), conducted a duly-noticed final hearing in Jacksonville, Florida, pursuant to 120.57(1), Florida Statutes (2017).

APPEARANCES

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

For Respondent: Jason Perry, pro se
11755 Chestnut Oak Drive
Jacksonville, Florida 32218

STATEMENT OF THE ISSUE

The issue to be determined is whether just cause exists to terminate Respondent's employment as a teacher in the Duval County School System.

PRELIMINARY STATEMENT

By letter dated March 17, 2017, Petitioner, Duval County School Board ("Petitioner" or "School Board"), provided Respondent, Jason Perry ("Respondent" or "Mr. Perry"), with a Notice of Termination of Employment Contract and Immediate Suspension without Pay ("Notice"). The Notice alleged Mr. Perry exercised poor judgment by engaging in behavior which resulted in his being arrested four times during the past two years and accruing excessive leave without pay. On the basis of that alleged conduct, Petitioner alleged that Respondent violated section 1012.33(1)(a) by violating Florida Administrative Code Rules 6A-5.056(2)(b), 6A-10.081(1)(b) and (1)(c), and 6A-10.081(2)(a)1.

The Notice informed Mr. Perry of his right to a hearing to contest the allegations in the Notice. By letter received by the School Board on April 7, 2017, Respondent timely filed a request for an administrative hearing to dispute the allegations in the Notice.

On June 22, 2017, the School Board referred this case to the Division for assignment to an administrative law judge and the case was assigned to the undersigned to conduct the final hearing.

The final hearing was scheduled for August 24, 2017. The hearing initially convened at 9:30 a.m. as scheduled. However,

Petitioner was not present at that time. The undersigned held a 20-minute recess to allow Respondent the opportunity to appear. After the recess, with Respondent having arrived at the hearing location, the hearing reconvened at 9:50 a.m., and continued until conclusion.

At the final hearing, Petitioner presented the testimony of three witnesses: Reginald Johnson, an investigator for the Office of Equity and Inclusion/Professional Standards for the School Board; Scott Schneider, the principal at Robert E. Lee High School within the School Board system; and Sonita D. Young, the assistant superintendent of Human Resources for the School Board. Petitioner offered Exhibits 1, 2, and 4 through 6, which were admitted into evidence without objection. Petitioner's Exhibit 3 (the investigator's investigative report) was admitted over objection. Respondent testified on his own behalf and offered Exhibit 1, which was admitted over objection.

A one-volume Transcript of the hearing was filed on September 21, 2017. Petitioner timely filed a Proposed Recommended Order ("PRO"), which has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

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). Thus, references to statutes are to Florida Statutes (2015-2016).

FINDINGS OF FACT

Background

1. Petitioner, the School Board, is the constitutional entity authorized to operate, control, and supervise the Duval County School System. Petitioner's authority to supervise the school system includes the hiring, discipline, and termination of employees within the school district.

2. At all times material to this matter, Respondent was employed by the School Board as a teacher at Robert E. Lee High School and Raines High School. During the 2016-2017 school year, Respondent was a mathematics teacher.

3. Mr. Perry is subject to the collective bargaining agreement for teaching personnel between the School Board and the Duval Teacher's Union ("DTU").

4. On March 17, 2017, the School Board issued a Notice, notifying Mr. Perry of its intent to recommend suspension without pay and termination of Mr. Perry's position as a teacher.

5. On April 4, 2017, the School Board, at a regularly scheduled meeting, voted to accept the recommendation to suspend without pay and terminate Mr. Perry. The allegations and

charges in the Notice served as the bases upon which the School Board members cast their votes.

6. On April 7, 2017, Respondent timely filed a request for an administrative hearing to dispute the allegations in the Notice.

Prior Disciplinary Action

7. The School Board has issued prior disciplinary action against Mr. Perry. A School Board teacher may receive progressive or non-progressive disciplinary action. Progressive discipline is formal action that begins with less severe discipline and progresses to more severe discipline. On the other hand, non-progressive discipline is informal action.

8. The Notice listed the prior disciplinary action imposed against Mr. Perry as discussed further below.

9. In October 2014, Respondent was investigated for inviting students to view his Twitter page,^{1/} which allegedly contained inappropriate and offensive images. Mr. Perry was issued a verbal warning, which is considered non-progressive discipline.

10. In March 2015, Respondent was arrested for Making Repeated Harassing Phone Calls, a misdemeanor, to which he entered into a pre-trial intervention program. On September 25, 2015, Respondent received Progressive Discipline (Step II) of a

written reprimand. This was Mr. Perry's first disciplinary action involving progressive discipline.

11. In January 2016, Respondent was arrested a second time and charged with stalking, a misdemeanor, to which he pled nolo contendere. On May 31, 2016, Respondent received Progressive Discipline (Step II) of a written reprimand.

Recent Conduct

12. In addition to the prior arrests resulting in prior discipline, the Notice indicates Respondent had two additional arrests. The Notice references arrests on August 5, 2016, and January 24, 2017.

13. Regarding the August 2016 arrest, the evidence offered at hearing does not support the allegations in the Notice regarding that arrest or the alleged subsequent incarceration.

14. On January 24, 2017, Respondent was arrested for Violation of Injunction for Protective Order.

15. Regarding the January 2017 arrest, Petitioner offered at hearing Respondent's email (dated February 20, 2017) to Reginald Johnson, in its case-in-chief. In the email, Respondent admits that he was arrested on January 24, 2017. The statement was offered by Petitioner against Respondent, and thus, meets a hearsay exception.^{2/}

16. In an attempt to explain the circumstances surrounding the January 2017 arrest, Petitioner offered a police report

(with attached affidavits), which was included in Mr. Johnson's investigative report. The police report and affidavits contain hearsay that does not meet a hearsay exception.^{3/} Therefore, any statements in the police report and affidavits cannot be relied upon to support a finding of fact. Furthermore, since the affiants did not testify at hearing, Respondent did not have an opportunity to cross-examine them.

17. Mr. Johnson also included summaries of the affidavits in his investigative report. The summaries, like the affidavits, are hearsay and are not credible evidence to support a finding of fact.

18. Mr. Perry also accrued a number of unexcused absences during the 2016-2017 academic school year. Between August 29, 2016, through March 6, 2017, Petitioner accrued 58 days of unauthorized leave without pay ("LWOP"). There were approximately 180 days in the academic school year. Based on the number of absences, Respondent was absent approximately 32 percent of the school days, which is excessive.

19. The School Board policy specifically requires requests for leave to be made and approved in advance of the period of leave. Mr. Schneider explained the protocol for teachers to report absences. If a teacher is unable to request leave before an absence, the teacher is required to call in to the school and complete a leave request form upon return to work.

20. Mr. Schneider explained that when a teacher does not request leave before an absence, it affects the administration's ability to obtain a substitute teacher. Mr. Schneider also discussed the impact of Mr. Perry's absence on parents and students. Mr. Perry's absences resulted in the inability of students and parents to determine the students' current grades.

21. Mr. Schneider also testified that he "thinks the students felt a lack of confidence and then they have increased anxiety" regarding lack of knowledge of their grades and test scores. However, Mr. Schneider did not identify any students or parents who confirmed his assertion. Therefore, the undersigned is not persuaded by Mr. Schneider's unsubstantiated testimony regarding the impact Mr. Perry's absences had on students.

22. Mr. Perry testified that the LWOP was a result of his incarceration because he was unable to report his absences to the appropriate school officials. However, there was no credible evidence to support Respondent's assertion that he was unable to report his absences and seek approval for leave for the 58 days he was absent from work. Although he was incarcerated, it was Respondent's responsibility to properly request leave according to the leave policy.

Disciplinary Action Recommendation

23. At the completion of the investigation of the allegations against Mr. Perry, his investigative file was

referred to Human Resource Services for review. Ms. Young, the assistant superintendent of Human Resources, is responsible for overseeing the Department of Equity and Inclusion and Professional Standards, which conducts investigations of complaints made against district employees for misconduct. Ms. Young's duties include reviewing investigative records to determine a recommendation of disciplinary action based on the progressive discipline policy. Ms. Young primarily reviews cases involving allegations that could result in suspension without pay or termination.

24. The progressive discipline policy provides four levels of discipline beginning with a verbal reprimand (Step I), written reprimand (Step II), suspension without pay (Step III), and termination (Step IV).

25. The purpose of progressive discipline is to allow the teacher an opportunity to rehabilitate his or her behavior. However, any of the steps may be skipped if the conduct is deemed severe as determined by assessing the totality of the circumstances. The factors considered include the nature of incident, whether there is a pattern of behavior, whether students are involved, and whether there are mitigating or aggravating circumstances.

26. Ms. Young reviewed Mr. Perry's investigative file and determined that Mr. Perry's pattern of numerous arrests and

excessive absences resulting in leave without pay demonstrated that he was unable to perform his duties as a teacher. Ms. Young explained that a teacher's conduct outside of work may be considered misconduct because it impacts the teacher's reputation in the community with peers and with students.

27. Regarding mitigating factors, Ms. Young considered Mr. Perry's cooperation as a mitigating factor. Although Ms. Young had no information regarding Mr. Perry's conduct within the classroom, Mr. Schneider testified that Mr. Perry had an effective rating for conduct in the classroom.

Ultimate Findings of Fact

28. The undersigned recognizes that Petitioner's actions arise from a set of events related to a child custody dispute. Based on the facts set forth herein, the preponderance of the evidence supports a finding that Petitioner's actions resulted in a number of arrests over the course of 18 months.

29. The preponderance of the evidence demonstrates that Respondent accrued excessive absences by accruing 58 absences resulting in LWOP during the 2016-2017 academic school year.

CONCLUSIONS OF LAW

Jurisdiction

30. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this

proceeding pursuant to sections 120.569, 120.57(1), and 1012.33(6) (a), Florida Statutes.

Standards

31. Section 1012.22(1) provides, in part, that a district school board shall “[d]esignate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees . . . , subject to the requirements of [chapter 1012].”

32. Respondent is an employee of petitioner pursuant to section 1012.33. Respondent was an instructional employee as defined by section 1012.01(2).

33. 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).

34. The standard for termination of instructional personnel is “just cause,” pursuant to section 1012.33(1)(a).

35. Section 1012.33(1)(a) provides that a teacher's contract “shall contain provisions for dismissal during the term of the contract for just cause,” which includes misconduct in office as defined by rule of the State Board of Education.

36. Florida Administrative Code Rule 6A-5.056 establishes the criteria for suspension and dismissal of school personnel for misconduct.

37. Rule 6A-5.056(2) provides that:

"Misconduct in Office" means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleague's ability to effectively perform duties.

38. Petitioner alleges Respondent violated the Principles of Professional Conduct. Rule 6A-10.081 provides, in pertinent part:

(1) Florida educators shall be guided by the following ethical principles:

* * *

(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;

(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 educator strives to achieve and sustain the highest degree of ethical conduct.

(2) Florida educators shall comply with the following disciplinary principles. Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(a) Obligation to the student requires that the individual:

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.

Burden and Standard of Proof

39. Petitioner seeks to discipline Respondent, which does not involve the loss of a license or certification. Thus, Petitioner has the burden of proving the allegations in its notice of recommendation of termination by a preponderance of the evidence. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009); Cisneros v. Sch. Bd. of Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

40. The preponderance of the evidence standard "is defined as 'the greater weight of the evidence,' Black's Law Dictionary 1201 (7th ed. 1999), or evidence that 'more likely than not' tends to prove a certain proposition." Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000). See also Haines v. Dep't of Child. & Fams., 983 So. 2d 602, 606 (Fla. 5th DCA 2008).

Application of Standards to the Facts

41. The School Board in this case has cited three specific aspects of the Principles of Professional Conduct as the bases for Mr. Perry's termination. The charges include misconduct by violating the principles of professional conduct for the education profession including rules 6A-10.081(1)(b) and (1)(c), and 6A-10.081(2)(a)1.

42. The allegations of fact set forth in the charging document are the facts upon which this proceeding is predicated. Once the School Board has delineated the offenses alleged to justify termination in its notice of recommendation of termination, those are the only grounds upon which dismissal may be predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). See also Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits the School Board

from disciplining a teacher based on matters not specifically alleged in the notice of recommendation of termination. See Pilla v. Sch. Bd. of Dade Cnty., 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); Texton v. Hancock, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978); see also Sternberg v. Dep't of Prof'l Reg., 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985) ("For the hearing officer and the Board to have then found Dr. Sternberg guilty of an offense with which he was not charged was to deny him due process.").

43. Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner in the Notice. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

44. The School Board proved by a preponderance of the evidence that it had just cause to terminate Respondent for misconduct. Specifically, the School Board proved that Respondent violated the Principles of Professional Conduct by failing to maintain professional judgment, a violation of rule 6A-10.081(1)(b); and failing to maintain the respect and confidence of his colleagues, students, parents, and the community, a violation of rule 6A-10.081(1)(c).

45. Petitioner did not prove by a preponderance of the evidence that Respondent failed to protect students from

conditions harmful to learning which was an alleged violation of rule 6A-10.081(2) (a) (1).

46. As discussed in the Findings of Fact herein, Petitioner offered a police report with supporting affidavits to support factual allegations of Petitioner's arrests. In its PRO, Petitioner argued that the police report and supporting affidavits are not hearsay because they were offered to show that Petitioner carefully investigated the underlying conduct which was the basis for Respondent's arrests and the disposition of those arrests.

47. Here, the report and affidavits were offered as evidence of the underlying conduct related to Respondent's arrest, and therefore, they were being offered for the truth of the matters asserted therein. Thus, they are hearsay. Petitioner did not offer sufficient evidence to demonstrate that the police report and affidavits would be otherwise admissible in a civil action.

48. In addition, Petitioner argued in its PRO, for the first time in this matter, that Respondent violated section 1012.67 by *willfully* being absent without leave for 58 days in the 2016-2017 school year.^{4/} However, that statutory violation was not alleged in Petitioner's Notice.

49. The relevant allegations in the Notice state "During this time, your attendance record revealed that you accrued

58 days of unauthorized LWOP.” The factual allegations did not include the element of willfulness. Equally concerning, is that the School Board did not charge Mr. Perry with a violation of section 1012.67 in the Notice, yet it argues in its PRO that Mr. Perry is in violation of that charge.

50. The teacher must have fair notice and an opportunity to be heard on each factual allegation and charge against him. Because this new charge was raised after the conclusion of the hearing, Petitioner did not provide Mr. Perry fair notice or an opportunity to be heard regarding the charge. The late addition of this additional charge did not allow Mr. Perry a fair opportunity to develop a defense to the allegation. As a result, Mr. Perry did not have sufficient notice or adequate opportunity to defend himself against the charge.

51. Therefore, a violation of section 1012.67 cannot be considered when analyzing whether Respondent violated rule 6A-10.081(2)(a)(1). The undersigned will neither consider nor find a violation related to section 1012.67 as it is not alleged in the Notice and such a ruling would be a violation of due process.

52. To be clear, while the undersigned will not consider a violation of rule 6A-10.081(2)(a)1. where section 1012.67 served as the basis for the violation, there was not sufficient

evidence presented at hearing to otherwise prove a violation of rule 6A-10.081(2)(a)1.

Disciplinary Policy

53. Article V. C. 1 of the CBA, the Progressive Discipline Policy, provides as follows, in relevant part:

When reasonably possible, the school principal or site based supervisor shall administer progressive discipline. The following progressive steps must be followed in administering discipline, it being understood, however, that some more severe acts of misconduct 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

54. Teachers are held to a higher moral standard than others in the community because they are leaders and role models. See Adams v. State Prof'l Practices Council, 406 So. 2d 1170, 1172 (Fla. 1st DCA 1981). Petitioner had sufficient justification to warrant proceeding to termination of Respondent's employment.

55. The evidence produced at the hearing demonstrates that Petitioner had just cause to terminate the employment of

Respondent for misconduct in office as outlined in the findings of fact herein.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Duval County School Board, enter a final order terminating the employment of Jason Perry as a teacher.

DONE AND ENTERED this 27th day of November, 2017, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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 27th day of November, 2017.

ENDNOTES

^{1/} Twitter is a free, public social messaging service for sending and receiving short messages.

^{2/} See § 90.803(18)(a), Fla. Stat.

^{3/} The officer did not directly observe any of the events on January 6, 2017, that were documented in his report. Ms. S.L. was also not present at the time of the events. Therefore, the

officer and S.L.'s statements were based on unsubstantiated statements from other individuals.

^{4/} See Section 1012.67, which provides that any district school board employee who is willfully absent from duty without leave shall forfeit compensation for the time of such absence, and his or her employment shall be subject to termination by the district school board.

COPIES FURNISHED:

Wendy Byndloss, Esquire
Office of General Counsel
City of Jacksonville
117 West Duval Street, Suite 480
Jacksonville, Florida 32202
(eServed)

Jason Perry
11755 Chestnut Oak Drive
Jacksonville, Florida 32218

Dr. Patricia Wiliis, Superintendent
Duval County Public Schools
1701 Prudential Drive
Jacksonville, Florida 32207-8152

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

Pam Stewart, Commissioner
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.