

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESCAMBIA COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 17-4220

JUSTIN WARREN,

Respondent.

_____ /

RECOMMENDED ORDER

On September 21, 2017, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings ("Division"), conducted a duly-noticed final hearing by video teleconference in Pensacola and Tallahassee, Florida, pursuant to section 120.57(1), Florida Statutes (2017).

APPEARANCES

For Petitioner: Joseph L. Hammons, Esquire
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Pensacola, Florida 32501-3125

For Respondent: Mark S. Levine, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner had just cause to suspend Respondent without pay pending disposition of felony criminal charges.

PRELIMINARY STATEMENT

By letter dated June 21, 2017, Dr. Alan Scott, Assistant Superintendent of Human Resources of the School District of Escambia County ("Petitioner" or "School Board"), issued a Notice letter ("Notice") to Justin Warren ("Respondent" or Mr. Warren") notifying him that Petitioner took action approving a recommendation to suspend Respondent without pay based on conduct described in the Notice of Suspension letter. The Notice of Suspension letter alleged that the conduct at issue was that Respondent was arrested for violating section 812.014(2)(b)1., Florida Statutes, a disqualifying offense.

On July 24, 2017, Respondent timely requested a hearing to dispute Petitioner's action; and on the same date, the School Board referred this case to the Division for assignment to an Administrative Law Judge.

On July 25, 2017, this matter was assigned to the undersigned. The undersigned issued a Notice of Hearing scheduling this matter for hearing by video teleconference with locations in Pensacola and Tallahassee, Florida, on September 21, 2017.

The hearing commenced as scheduled with both parties represented by counsel. Petitioner presented the testimony of the following witnesses: Laura Touchstone, Principal of Pine Forest High School, and Dr. Alan Scott. Respondent presented

the testimony of Keith Leonard, Director of Human Resources. The parties offered Joint Exhibits 1 through 3, 4a, 4b, and 5. The undersigned also took official recognition of sections 812.014(b)1., 1012.40(2)(b), 1012.315, 1012.465, and 432.02, Florida Statutes, and School Board Rule 2.04(6), which are listed on the Parties' Amended Request for Judicial Notice.

The one-volume Transcript was filed with the Division on October 23, 2017. The parties requested that they be permitted 20 days to file their proposed recommended orders ("PROs"). On November 6, 2017, Respondent filed a motion requesting additional time to file PROs, which the undersigned granted. On November 17, 2017, Respondent filed a second motion for extension of time to file PROs, which was also granted. The undersigned entered an Order extending the time to file PROs to November 20, 2017. The parties timely filed PROs, which have been considered in preparation of this Recommended Order ("RO"). In addition, a pre-hearing stipulation was filed by the parties stipulating to certain facts and those facts are incorporated into this RO, to the extent relevant.

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 (2016), unless otherwise noted.

FINDINGS OF FACT

The stipulations of the parties in the pre-hearing stipulation, the testimony presented, and the evidence received at the final hearing support the following Findings of Fact:

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the system of public schools in Escambia County, Florida. Art. IX, § 4(b), Fla. Const.; § 1001.32, Fla. Stat. The School Board has the statutory responsibility to prescribe qualifications for positions of employment and for the suspension and dismissal of employees subject to the requirements of chapter 1012.

2. At all times relevant to this proceeding, Respondent is a noninstructional support employee, who has been employed as a Custodial Worker I by the School Board since October 13, 2014. Mr. Warren worked 40 hours a week at Pine Forest High School. Mr. Warren's position with the School Board is annual, rather than based on the academic school year calendar.

3. During the regular school year, students are required to be on campus from 8:30 a.m. to 3:30 p.m. After the school day, there are students who remain at the school for various activities with clubs and organizations. While students are present, custodial workers complete their duties and work assignments throughout the school. On a regular school day

students may be present at the school for clubs and organizations until as late as 9:00 p.m.

4. Respondent works the 2:00 p.m. to 10:30 p.m. shift and would be present when students are present.

5. The background regarding Respondent's arrest arises from a dispute where it was alleged that he forged a quitclaim deed, transferring property from his uncle to himself. On May 9, 2017, Respondent was arrested. Thereafter, an information was filed against Respondent by the State Attorney's Office alleging that he knowingly obtained or endeavored to obtain certain property of another valued at \$20,000.00 or more, but less than \$100,000.00, in violation of section 812.014(1)(a) and (1)(b), and (2)(b)1., a second degree felony.

6. At the time of the final hearing, Respondent's criminal case was pending final disposition.

7. On May 18, 2017, Superintendent of the School Board, Malcolm Thomas, provided written notice to Respondent that he was suspended "with pay effective immediately . . . pending the outcome of an arrest for §812.014.2b1 [sic], F.S., a disqualifying offense." The Superintendent's letter did not provide authority for the Superintendent's action. The Superintendent also cited no authority for his position that the alleged offense was a "disqualifying offense."

8. Also, on May 18, 2017, the Superintendent notified Respondent of his intent to recommend to the School Board that Mr. Warren be placed on suspension without pay beginning June 21, 2017. In his request to the School Board, the Superintendent stated that his recommendation was "based on conduct as more specifically identified in the notice letter to the employee." Similar to the notice regarding the intended recommendation, the Superintendent cited no authority for his recommendation, nor his position that the alleged offense was a "disqualifying offense."

9. By letter dated June 21, 2017, Dr. Scott advised Respondent that the School Board voted to accept the Superintendent's recommendation placing him on suspension without pay, effective June 21, 2017. As cause for Mr. Warren's suspension without pay, Dr. Scott's letter stated that it is "based on conduct as more specifically identified in the [Superintendent's] notice letter to the employee." Dr. Scott's letter did not use the term "disqualifying offense," nor did it cite any authority for the School Board's action.

10. Respondent had no history of disciplinary action during his employment by the School Board. In addition, Ms. Touchstone testified that Respondent "has been a good employee for us."

CONCLUSIONS OF LAW

A. Jurisdiction

11. 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

12. 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].”

13. The School Board has the authority to suspend noninstructional employees pursuant to section 1012.27(5).

14. Respondent is a noninstructional employee of the School Board.

15. Section 1012.32 provides the requirement for eligibility for a person seeking employment in the school system, in relevant part:

(1) To be eligible for appointment in any position in any district school system, a person must be of good moral character; must have attained the age of 18 years, if he or she is to be employed in an instructional capacity; must not be ineligible for such employment under s. 1012.315. . . .

(2) (a) Instructional and noninstructional personnel who are hired or contracted to fill positions that require direct contact with students in any district school system or university lab school must, upon employment or engagement to provide services, undergo background screening as required under s. 1012.465 or s. 1012.56, whichever is applicable.

16. Section 1012.465 provides, in relevant part:

(1) Except as provided in s. 1012.467 or s. 1012.468, noninstructional school district employees or contractual personnel who are permitted access on school grounds when students are present, who have direct contact with students or who have access to or control of school funds must meet level 2 screening requirements as described in s. 1012.32. Contractual personnel shall include any vendor, individual, or entity under contract with a school or the school board.

* * *

(3) If it is found that a person who is employed or under contract in a capacity described in subsection (1) does not meet the level 2 requirements, the person shall be immediately suspended from working in that capacity and shall remain suspended until final resolution of any appeals.

17. Section 435.04 addresses level 2 screening standards and provides, in relevant part:

(1) (a) All employees required by law to be screened pursuant to this section must undergo security background investigations as a condition of employment and continued employment which includes, but need not be limited to, fingerprinting for statewide criminal history records checks through the Department of Law Enforcement, and national

criminal history records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

* * *

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the following provisions of state law or similar law of another jurisdiction:

* * *

(cc) Chapter 812, relating to theft, robbery, and related crimes, if the offense is a felony.

C. The Burden and Standard of Proof

18. Petitioner seeks to suspend without pay Respondent's employment as a noninstructional employee, 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 (Fla. 2d DCA 1996); 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 (Fla. 3d DCA 1990).

19. 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).

20. 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 suspension without pay in its Notice of recommendation of suspension, those are the only grounds upon which suspension 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 noninstructional employee based on matters not specifically alleged in the Notice of recommendation of suspension. 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.").

21. The notice of recommendation of suspension without pay alleged that Respondent was "arrested for a disqualifying offense." Thus, the scope of this proceeding is properly restricted to those matters as charged by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

22. School Board Policy 2.04(6) provides guidelines for disqualifying applicants from employment. While this policy incorporates the disqualifying offenses from both sections 435.04(2) and 1012.315, the incorporated sections maintain vastly different definitions of "disqualifying offense." Moreover, the School Board policy requires that a "conviction" of an offense listed in section 435.04 or 1012.315 would disqualify employment.

23. Under section 435.04, a person may be disqualified if he has been arrested for and is awaiting final disposition of, has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or has been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the enumerated provisions of state law or similar law of another jurisdiction.

24. Under section 1012.315, instructional personnel and school administrators, as defined in section 1012.01, are ineligible for employment in any position that requires direct contact with students in a district school system, if the instructional personnel or school administrator has been convicted of certain enumerated offenses. This provision does not apply to Respondent as he is a noninstructional employee who does not have direct contact with students. Furthermore, Respondent was not convicted of an offense as his criminal matter is pending final disposition. Moreover, Respondent's alleged offense is not listed under section 1012.315.

25. Petitioner argues Respondent is on notice that School Board Rule 2.04(6) requires, for continued employment, that Respondent must maintain a record clear of disqualifying offenses. However, Respondent is entitled to notice of the specific charge against him.

26. Respondent was issued a Notice of a recommendation to suspend his employment without pay for being arrested for a disqualifying offense. However, the Notice failed to inform him of the specific statutory provisions to support the violation. As referenced in the Conclusions of Law, paragraphs 23 and 24 herein, there are different requirements for disqualification under sections 435.04, 1012.315, and 1012.465.

27. The evidence produced at hearing does not demonstrate Respondent was provided adequate notice of the charges against him. Notwithstanding the inadequate Notice, Respondent has not demonstrated any prejudice which would warrant reversal of the School Board's action.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Escambia County School Board, issue a final order affirming suspension without pay of Respondent's employment, pending disposition of his criminal charges.

DONE AND ENTERED this 22nd day of December, 2017, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
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Filed with the Clerk of the
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this 22nd day of December, 2017.

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.