

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 18-1655TTS

DAVID SWINYAR,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was conducted in this case on August 20, 2018, in Jacksonville, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tracey Kort Parde, Esquire
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City of Jacksonville
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For Respondent: Stephanie Marisa Schaap, Esquire
Duval Teachers United
1601 Atlantic Boulevard
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STATEMENT OF THE CASE

Whether just cause exists to impose discipline on Respondent's employment; and, if so, what is the appropriate discipline.

PRELIMINARY STATEMENT

On February 22, 2018, Sonita Young, assistant superintendent of Human Resource Services for the Duval County School Board (School Board or Petitioner), issued a letter entitled "Step III Progressive Discipline-Reprimand and Suspension without Pay" (Step III Discipline) to Respondent, David Swinyar (Respondent), alleging:

You exercised gross poor judgment when you engaged in inappropriate communication in the presence of, and/or towards students, by saying the actual n-word in a conversation with students and/or when you referred to students. In response to a student's concern about your use of the n-word, you repeatedly said, "I didn't say that, but if I did I am sorry." Students also reported that you made other inappropriate or insensitive comments such as: calling students "dumb." [sic] and "You are in my class because you failed the FSA," [sic] You all should not be dating all these different African American boys because they are not worth it," [sic] Your conduct is unacceptable and will not be tolerated. The severity of your conduct warrants skipping steps in progressive discipline.

The Step III Discipline further stated that Respondent's conduct violated a number of the Principles of Professional Conduct of the Education Profession in Florida, under Florida Administrative Code Rule 6A-10.081, and advised Respondent of his reprimand and suspension without pay for 10 working days, pending approval by the School Board.

At its regularly scheduled meeting on March 6, 2018, the School Board voted to approve the discipline set forth in the Step III Discipline. Respondent timely requested an administrative hearing regarding the School Board's action. The School Board forwarded the matter to the Division of Administrative Hearings (DOAH) on March 29, 2018, for the assignment of an administrative law judge to conduct the hearing.

At the administrative hearing held August 20, 2018, the School Board presented the testimony of five witnesses: Students E.C. and J.B., both former Kernan Middle School students in Respondent's 2017-2018 pre-algebra class; Julie Hemphill, the principal of Kernan Middle School; Reginald Johnson, investigator for the School Board's Office of Professional Standards; and Sonita Young, the School Board's assistant superintendent of Human Resource Services. The School Board offered Exhibits P-1, P-3, P-6, and P-19, which were admitted into evidence. Respondent testified on his own behalf and presented the testimony of three witnesses: Students C.A., C.M., and S.B. Respondent did not offer any exhibits.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript within which to file their proposed recommended orders. The one-volume Transcript was filed on September 5, 2018. After

that, a request for an extension of time was granted, and the parties timely filed their respective proposed recommended orders, both of which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board is charged with the duty to operate, control and supervise free public schools within the School District of Duval County, Florida, pursuant to article IX, section 4(b) of the Florida Constitution, and section 1012.22, Florida Statutes.^{1/}

2. Respondent was a teacher at Kernan Middle School during the 2017-2018 school year. He had been employed with Duval County Schools for six years and had never been disciplined regarding his employment with the School Board.

3. As an instructional employee, Respondent's employment is governed by the 2017-2020 collective bargaining agreement between the School Board and the Duval Teachers United (Collective Bargaining Agreement).

4. Respondent taught pre-algebra during the 2017-2018 school year for students who had not performed well on the state standardized test. In order to improve those scores, the students were placed in two math classes with Respondent, instead of just one.

5. On October 11, 2017, a member of the School Board advised the principal of Kernan Middle School, Julie Hemphill, that a parent of one of Respondent's students had made a complaint against Respondent. Prior to receiving word of the complaint, Ms. Hemphill had never heard any complaints about Respondent from any parent, student, or other school staff. There is no evidence that any other administrator at Kernan Middle School had received a complaint about Respondent prior to October 11, 2017.

6. Shortly after hearing about it, Ms. Hemphill reached out to the parent who had made the complaint. The parent told Ms. Hemphill that Respondent had yelled and waved his hands in students' faces, told his students that they were in his class because they had failed the standardized tests, called his students idiots, and used racial slurs in his classroom in front of students. Ms. Hemphill's understanding after speaking with the parent was that the alleged racial slurs were made sometime at the end of August 2017.

7. Ms. Hemphill reported the allegations to the School Board's Office of Equity and Inclusion. An investigator for the School Board, Reginald Johnson, was assigned the case. Mr. Johnson came to Kernan Middle School and spoke with some of Respondent's students.

8. Mr. Johnson first contacted Respondent in the second week of October 2017, and advised Respondent that there were allegations against him. After that, during the investigation, Respondent continued teaching his same classes and students at Kernan Middle School for approximately five months until his suspension was approved by the School Board on March 6, 2018.

9. After his suspension was over, Respondent was not allowed to return to his classroom for the remainder of the year. He was not reappointed for another teaching position.

10. In support of its case against Respondent, the School Board presented the testimony of two former students^{2/} of Respondent who were in Respondent's classroom at the time that he allegedly made the derogatory and racial statements. The testimony from those two students presented different accounts of the allegations and were not persuasive in proving the allegations against Respondent.

11. The first student called as a witness by the School Board, E.C., had gotten into trouble, and did not receive good grades while in Respondent's class. According to E.C., Respondent had used racial slurs against a particular student and used the n-word in front of the whole class many times during the school year. When confronted with his written statement, which stated that he "thought" he heard Respondent use the n-word, E.C. said, "It might have been, but I'm pretty

sure that's what I heard because everybody around me was saying the same thing, and we wouldn't all be hearing different things."

12. E.C.'s testimony did not support the allegation that Respondent called his students "dumb." E.C. did not recall that Respondent called him "dumb," but rather testified that Respondent would not tell him that he did a good job.

13. The other student presented as a witness by the School Board was J.B. According to J.B., he heard Respondent say the n-word in November or December, near the Christmas break, during an alleged discussion in class by Respondent about interracial dating, Respondent's daughter, and religion. J.B. testified that he only heard Respondent say the n-word one time, and that he believed that Respondent said it "on accident." As J.B. explained in his testimony:

Like I guess he was like--I don't think he like knew he said it, but he said it-- I guess he was just going off, and in between those words he said the n-word.

* * *

He didn't--he didn't realize he said the n-word, but the class heard he said the n-word. So after he said it, I guess the conversation, like the whole conversation ended, and we just went back to doing work.

14. Regarding the allegation that Respondent told students that they were "dumb," J.B. testified:

When we're not getting a question right and like, let's say if we didn't get the question right, he would tell the whole class stop acting dumb and get the question right. And it would just frustrate me exactly. I don't know about the entire class, but it would frustrate me because, of course, I'm in intense math and I don't know what I'm doing and I'm here to figure out how I can improve and be good at mathematics.

15. Respondent gave credible testimony refuting the allegations. He testified that he never referred to a student as "dumb," and understood that many of the students had low self-esteem. He would often encourage them and say "guys, look, you're not dumb. You can achieve and you're going to do great and amazing things if you work at it."

16. The students in Respondent's class had discipline issues involving the use of profanity. There was a specific incident during the pertinent time frame during the 2017-2018 school year when two students in Respondent's class were speaking to each other aggressively using the n-word. Respondent intervened and told the students, by spelling out the words, that they were not to use the terms "n-i-g-g-a or n-i-g-g-e-r." As soon as Respondent spelled g-e-r, a student yelled out, "Did you hear what he said?" After that, the students in the class began to act with exuberance, smiling and laughing. Respondent had been trying to give a quiz and the class came off task. At the time, a student asked Respondent whether he had

said the n-word. Although Respondent told the class that he did not say that word, the off-task behavior continued. Respondent then told the class, "I didn't say it, but for those you who think I did, I deeply apologize, but we need to get things going."

17. Respondent described another incident that happened when coming back from lunch one day and hearing a student using the f-word towards his girlfriend several times. Upon returning to the classroom, Respondent said, "Girls, upon no circumstances should you allow a young man to disrespect you like that." Respondent further told the class that if he "had a daughter and a young man spoke to her like that he would tell her to break up with him because he is not worth your time." Mr. Swinyar does not have a daughter.

18. In addition to his own testimony refuting the allegations, Respondent presented testimony of three of his former students who were in his classroom during the time that he allegedly made the derogatory and racial statements. All three of those students testified that they had never heard Respondent use the n-word and did not hear Respondent say anything inappropriate.

19. S.B, one of the three students who testified on Respondent's behalf, related the incident where a fellow student in Respondent's class had said the n-word. When Respondent told

the student not to use that term, most of the students in the room thought that Respondent, himself, said the n-word.

However, according to S.B., who assured that he had been listening, testified that Respondent did not say it.

20. Regarding Respondent's alleged comment about his students' test scores, S.B. testified that Respondent told his class that their scores were just a little low so they were in his class to improve them. S.B.'s testimony is credited.

21. C.A., another student giving testimony for Respondent who was in Respondent's class during the 2017-2018 school year, testified that he was concerned because he was not very good at math, but that he improved with Respondent's help. C.A. never heard Respondent use bad words or say anything inappropriate.

22. The third student testifying on behalf of Respondent, C.M., testified that she never heard Respondent say anything rude, never heard him say curse words, and never heard him say anything racist.

23. Sonita Young, the School Board's assistant superintendent for Human Resources Services, is responsible for making recommendations to the superintendent as to disciplinary matters, investigates complaints against teachers, and was responsible for the recommendations set forth in the Step III Discipline against Respondent in this case.

24. Article V, section C, of the Collective Bargaining Agreement provides for progressive discipline for teachers. Pursuant to that policy, the progressive discipline policy starts at verbal reprimand and escalates up through termination. The Collective Bargaining Agreement allows for the steps to be skipped for acts of severe misconduct. In addition, there must be just cause to suspend a teacher without pay.

25. Ms. Young stated that her decision to skip lower level disciplinary steps, and instead to suspend Respondent without pay, was based on the severity of the alleged inappropriate term, the alleged multiple times the term was used, that it was allegedly used in front of a classroom full of students, and that the students were allegedly very troubled by the comments. She also stated that other comments attributed to Respondent regarding the reason for the students being in the class, their lack of academic performance, and comments regarding whom students should date, justified her recommendation for Respondent's suspension.

26. However, based on the insufficiency of the evidence, it is found that the School Board did not prove the allegations against Respondent, and that the Step III Discipline was unwarranted.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the parties and subject matter of this proceeding. § 120.569 and 120.57(1), Fla. Stat. (2018).

28. This is a penal disciplinary proceeding brought pursuant to section 1012.33, Florida Statutes, to uphold Respondent's suspension from employment. Petitioner bears the burden to prove each element of each charged offense by a preponderance of the evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Lake Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990). A 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, 289 (Fla. 2000).

29. As a teacher, Respondent's employment and the suspension of said employment is governed by the Collective Bargaining Agreement.

30. The Collective Bargaining Agreement requires a showing of "just cause" to support the imposition of discipline against a teacher. As defined 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.

31. The factor listed in section 1012.33 pertinent to the allegations against Respondent is misconduct in office. Florida Administrative Code Rule 6B-4.009(3) defines misconduct in office applicable to disciplinary proceedings against teachers as follows:

Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

32. With respect to the Code of Ethics and Principles of Professional Conduct, the School Board alleged that Respondent's alleged conduct was in violation of the Principles of Professional Conduct of the Education Profession found in Florida Administrative Code Rule 6A-10.081. Specifically, the following portions of the principles were alleged to have been violated by the Respondent.

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.

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

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.

33. The evidence does not support a finding or conclusion that Respondent's primary professional concern deviated from the students and the development of their potential. While the evidence shows that not all students thrived in Respondent's class, the evidence indicated that others appreciated and were helped by Respondent's teaching.

34. The evidence did not show that Respondent failed to appreciate the importance of maintaining the respect and confidence of his colleagues, students, parents, and other members of the community, nor did it show that he conducted himself in an unethical manner, or otherwise violated rule 6A-10.081.

35. As the evidence failed to prove the factual allegations against Respondent set forth in the Step III Discipline, it was insufficient to demonstrate that Respondent's effectiveness in the school system was impaired because of that alleged conduct. The evidence did not show that Respondent's

students had academic issues, or had to be treated for any problem based on Respondent's alleged conduct.

36. While press coverage of the allegations against Respondent may have resulted in community reaction and emails to the school principal, considering the fact that the allegations were not proven, those reactions cannot be fairly attributed to Respondent's behavior.

37. Although impaired effectiveness can be inferred when conduct is sufficiently serious, such is not the case here. Cf., Walker v. Highlands Cnty. Sch. Bd., 752 So. 2d 127 (Fla. 2d DCA 2000) (misconduct where continued ineffectiveness in school system). The evidence was insufficient to support the allegations and did not otherwise show continued ineffectiveness on the part of Respondent. In fact, he continued to teach for months after the allegations were reported to the School Board.

38. The evidence presented by the School Board was also insufficient to prove, by a preponderance of the evidence, that Respondent violated the cited provisions of the Code of Ethics or Principles of Professional Conduct set for in the Step III Discipline. Petitioner failed to establish, by a preponderance of the evidence, that Respondent violated rules 6A-10.081(1)(b) and (c) or 6A-10.081(2)(a)1., or otherwise engaged in misconduct.

39. Even if the evidence supported a finding that Respondent's conduct warranted discipline, the facts in this case do not justify skipping two steps of the progressive discipline policy under the Collective Bargaining Agreement. In Quiller v. Duval County School Board, 171 So. 3d 745 (Fla. 1st DCA 2015), the First District Court of Appeal reversed and remanded the School Board's rejection of an administrative law judge's recommended order where the administrative law judge had found that the behavior at issue did not constitute severe acts of misconduct as contemplated in the progressive discipline policy. The allegations in that case had several instances of the educator using profanity towards and in front of students. Specifically, the teacher in that case was accused of calling students the n-word. The teacher had previously received discipline twice for similar conduct but had not received a suspension without pay. Instead of following progressive discipline, the School Board had skipped Step III Discipline and moved directly to termination.

40. In even further contrast with the one step of progressive discipline skipped in Quiller, in this case, Respondent had never before been disciplined, and the School Board skipped two steps of progressive discipline for alleged

actions which, even if they had been proven, were arguably less severe than those alleged in Quiller.

41. In sum, the School Board did not prove its case.

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:

1. Dismissing the allegations against Respondent set forth in the Step III Discipline and rescinding any discipline imposed thereby; and

2. Reimbursing Respondent for any pay or benefits that he did not receive as a result of the School Board's actions in this case, plus interest from the date that any such pay or benefit was withheld, as appropriate under applicable law.

DONE AND ENTERED this 7th day of December, 2018, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 2018.

ENDNOTES

^{1/} 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 (2017), unless otherwise noted.

^{2/} At the hearing, the student who purportedly heard the statements that were reported by his parent to the School Board member was excluded as a witness because of the School Board's failure to timely update its witness list.

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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.