

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARION COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 20-1528

MICHAEL HICKMAN,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed hearing was held on August 5, 2020, via Zoom conference, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark E. Levitt, Esquire
Allen, Norton & Blue, P.A.
1477 West Fairbanks Avenue, Suite 100
Winter Park, Florida 32789

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761-1526

STATEMENT OF THE ISSUE

Whether Petitioner, Marion County School Board (“Petitioner” or “Board”), had just cause to terminate Respondent for misconduct in office as alleged in the Administrative Complaint (“Complaint”) dated December 10, 2019.

PRELIMINARY STATEMENT

Dr. Heidi Maier, then-Marion County Superintendent of Schools, filed a Complaint against Respondent on December 10, 2019, recommending termination of Respondent's employment with the Board. Respondent timely filed a Petition for Administrative Hearing to contest the recommendation of termination, which was referred to the Division of Administrative Hearings ("Division") on March 24, 2020, for the assignment of an administrative law judge, pursuant to the Board's contract with the Division.

The case was originally scheduled for final hearing live in Ocala, Florida on August 5, 2020, and was rescheduled via Zoom conference. The final hearing commenced as scheduled on August 5, 2020.

At the final hearing, Petitioner offered the testimony of Jaycee Oliver, executive director of employee relations, and introduced Exhibits 1 through 9 and 12, which were admitted in evidence.

Respondent testified on his own behalf and did not introduce any exhibits into evidence.

A one-volume Transcript of the hearing was filed with the Division on August 18, 2020. The parties timely filed Proposed Recommended Orders which have been considered by the undersigned in preparation of this Recommended Order.

Unless otherwise noted, all references to the Florida Statutes are to the 2019 version.

FINDINGS OF FACT

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the public schools within Marion County. *See* Art. IX, § 4(b), Fla. Const.; § 1001.32(2), Fla. Stat. Petitioner is authorized to discipline instructional staff and other school employees. *See* § 1012.22(1)(f), Fla. Stat.

2. At all times relevant hereto, Respondent was employed as a Student Services Manager at Belleview High School in Marion County, pursuant to a professional services contract with the Board.

3. On November 5, 2019, following an incident in which Respondent intervened in a physical altercation between students, Respondent complained to administration that he may have been injured.

4. Respondent was referred to a doctor who provides treatment to Board employees who are injured on the job. As part of his evaluation for a possible workers' compensation covered injury, Respondent was administered a routine urine drug screen.

5. The results of the drug screen were positive for THC and marijuana metabolites. Respondent does not dispute either the test administration or results.

6. Respondent is approved by the State of Florida through the medical marijuana use registry to obtain medical marijuana for his personal medical treatment. Respondent obtained his medical marijuana card in October 2018, and uses medical marijuana to treat pain associated with injuries he received while serving in the U.S. Marines in Desert Storm in 1991.

7. The Board maintains Alcohol and Drug-Free Workplace Policy 6.33. Section II.B. of that policy provides that "it is a condition of employment for [a Board] employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body."

8. Section IV.B. includes marijuana within a list of substances use of which is considered illegal, pursuant to section 202 of the Controlled Substances Act, 21 C.F.R., §§ 1300.11 through 1300.15. However, this section

notes that “when the use of a controlled substance is pursuant to the instructions of a physician, the employee shall immediately notify his/her supervisor.”

9. At no time prior to his positive drug screen did Respondent notify his supervisor that he was using medical marijuana.

10. Respondent has been employed by the Board since 2010. He began as a physical education coach at Horizon Academy, where he was subsequently promoted to a dean’s position. After the dean’s position at Horizon Academy was eliminated, Respondent transferred to Emerald Shores Elementary where he served as a dean. The record does not establish the date on which Respondent transferred to Belleview, but Respondent served as a dean of students at Belleview until he was placed on unpaid administrative leave on January 13, 2020. Respondent was placed on paid administrative leave on January 29, 2020, where he remains pending the outcome of this case.

CONCLUSIONS OF LAW

11. The Division has jurisdiction over the subject matter of and parties to this case, pursuant to sections 1012.33(6), 120.569, and 120.57(1), Florida Statutes.

12. Petitioner seeks to terminate Respondent’s employment, and has the burden of proving the allegations set forth in its Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence applicable to the loss of a license or certification. *Cropsey v. Sch. Bd. of Manatee Cty.*, 19 So. 3d 351 (Fla. 2d DCA 2009), *rev. denied*, 29 So. 3d 1118 (Fla. 2010); *Cisneros v. Sch. Bd. of Miami-Dade Cty.*, 990 So. 2d 1179 (Fla. 3d DCA 2008).

13. Florida Administrative Code Rule 6A-5.056 sets forth criteria for suspension and dismissal of school personnel. Subsection (2) defines Misconduct in Office in pertinent part, as follows:

(2) 'Misconduct in Office' means one or more of the following:

* * *

(c) A violation of the adopted school board rules[.]

14. Respondent violated School Board Rule 6.33 when he reported to work with the presence of marijuana in his body. *See Marion Cty. Sch. Bd. R. 6.33 § 2.B.*

15. Respondent does not contest that he violated the applicable rule when he tested positive for marijuana. Rather, Respondent argues that because he took marijuana under the State of Florida's recognized constitutional and statutory medical marijuana provisions, he should not be terminated from employment. Respondent's position is not supported by the statute governing use of medical marijuana in Florida.

16. Article X, Section 29 of the Florida Constitution, adopted in 2016, authorizes the use of medical marijuana to treat a "debilitating medical condition" by a "qualifying patient" upon the recommendation of a physician who issues a certification to the patient. *See Art. X, § 29, Fla. Const.*

17. The Legislature enacted section 381.986, Florida Statutes, to implement the constitutional provisions. The statute establishes the entire regulatory scheme for administering the medical marijuana program, including the definition of qualifying medical conditions, qualifying physicians, the physician certification, establishing a medical marijuana use registry, issuance of identification cards to qualifying patients, and establishing medical marijuana treatment centers.

18. The plain language of the statute specifically recognizes the authority of the Board to continue to enforce its Alcohol and Drug-Free Workplace policy. *See § 381.986(15)(a), Fla. Stat.* ("This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy."). Further, the statutes provides, "[t]his section does not

require an employer to accommodate ... any employee working while under the influence of marijuana.” § 381.986(15)(b), Fla. Stat.

19. Essentially, Respondent’s argument is that it is unfair to terminate him for taking medical marijuana that is legal under Florida Law.¹

20. Respondent seeks an equitable remedy which the undersigned is not authorized to provide. *See Biltmore Constr. Co. v. Fla. Dep’t of Gen. Servs.*, 363 So. 2d 851, 853-54 (Fla. 1st DCA 1978) (“While an administrative agency may exercise quasi-judicial power when authorized by statute, it may not exercise power which is basically and fundamentally judicial such as the grant of an equitable remedy.”).

21. Petitioner established just cause for terminating Respondent as specified in the Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Marion County School Board enter a final order upholding the charges against Respondent Michael Hickman, and terminate Respondent, or impose other discipline consistent with Florida Administrative Code Rule 6A-5.056.²

¹ Respondent additionally argues that the Board’s position is unfair because it penalizes him for use of medical marijuana to treat chronic pain, but would allow him to continue teaching under the influence of opioid pain medications, which he took for years prior to the availability of medical marijuana.

² The undersigned notes that the remedy of suspension is also available under the applicable rule. Further, the parties made no argument that the Board’s discretion to impose a different penalty is foreclosed, or that the Board may not consider mitigating circumstances.

DONE AND ENTERED this 2nd day of September, 2020, in Tallahassee,
Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of September, 2020.

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.