

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-1975TTS

PATRICK GELLER,

Respondent.

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RECOMMENDED ORDER

On November 19, 2013, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Adrian J. Alvarez, Esquire
Haliczer Pettis and Schwamm
One Financial Plaza, Seventh Floor
Fort Lauderdale, Florida 33394

For Respondent: Melissa C. Mihok, Esquire
Kelly & McKee, P.A.
1718 East Seventh Avenue, Suite 301
Tampa, Florida 33605

STATEMENT OF THE ISSUE

The issue is whether Respondent is sleeping in class and failing to supervise his students, so as to violate the prohibitions against misconduct in office and incompetence, as provided by Florida Administrative Code Rule 6A-5.056.

PRELIMINARY STATEMENT

By Administrative Complaint dated May 10, 2013, Petitioner alleged that, on April 9, 2013, Respondent was asleep at his desk at the start of a class period and remained asleep, in the presence of his students, for several minutes after class was scheduled to start. The Administrative Complaint asserts that Respondent thus failed to provide appropriate supervision to his students and engaged in behavior that disrupted the students' learning environment.

Petitioner conducted a predisciplinary meeting and proposed to suspend Respondent for two days without pay. Respondent timely requested a formal hearing.

At the hearing, Petitioner called six witnesses and offered into evidence six exhibits: Petitioner Exhibits 1-4, 8, and 11. Respondent called one witness and offered no exhibits into evidence. All exhibits were admitted except the emails from Petitioner Exhibit 2, which were proffered. Petitioner Exhibits 1 and 11 were admitted, but not for the purpose of proving that Respondent committed the alleged acts and omissions. Additionally, Petitioner withdrew from Petitioner Exhibit 1 the statement of student T. B.

The court reporter filed the transcript on December 30, 2013. The parties filed proposed recommended orders on January 9, 2014.

FINDINGS OF FACT

1. Respondent has been employed by Petitioner as a classroom teacher for 12 years, all at Cypress Bay High School. During his teaching career, he has taught physical and earth science, except, on occasion, when he has been assigned to teach biology. He has earned exclusively satisfactory marks on each of his annual evaluations, including his most current evaluation.

2. On the evening of April 8, Respondent and his wife were up all night with their special-needs daughter. The next morning, Respondent reported to work punctually and taught his first period course.

3. Respondent was exhausted from lack of sleep the previous night. While seated in his chair between classes, he lifted his eyes toward the heavens, emitted a quiet sigh, and prayed silently for the strength to get through the day at work.

4. His head tilted back and his eyes closed, Respondent was lost in prayer as the students filtered into the classroom.^{1/} Although in a deeply relaxed state, Respondent could hear the students taking their seats and preparing for class to start. Stirring slightly at the bell signifying the start of class, Respondent emerged from his prayerful reverie after no more than two minutes into second period; he was in this state for no more than four minutes immediately prior to the bell.

5. On these facts, it is impossible to infer from the evidence that Respondent was sleeping at the start of class. He was disengaged, though, so, as he began instruction, he appropriately apologized for his inattention for what was no more than the first couple of minutes of class and explained that he and his wife had had a rough night with a sick child.

6. At all material times, the white board at the front of the classroom was full of written material, and the students had bellwork to perform at the start of every class. There were no behavioral problems during the time that Respondent had failed to give the class his undivided attention, and his inattentiveness did not affect learning that day.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1012.33(6)(a)2., Fla. Stat.

8. Section 1012.33(6)(a) authorizes Petitioner to dismiss or suspend an instructional employee for just cause.

9. The material portions of Florida Administrative Code Rule 6A-5.056(2) and (3) provide:

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

(d) Behavior that disrupts the student's learning environment[.]

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law[.]

10. Petitioner must prove the material allegations by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

11. Petitioner has failed to prove that Respondent's acts and omissions constitute behavior that disrupts the student's learning environment or a failure to perform prescribed duties.

RECOMMENDATION

It is RECOMMENDED that Petitioner enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 13th day of January, 2014, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of January, 2014.

ENDNOTE

^{1/} Respondent's mouth may have been open. He is a large, thick-necked man. A respiratory issue causes his mouth to open when he tilts his head back.

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.