

FINDINGS OF FACT

1. Before his current assignment to a textbook depository, respondent Kerby Clifton Smith taught school for the Duval County School Board for 26 years. Mr. Smith holds a teacher's certificate, No. 145127, authorizing him to teach physical education to sixth through twelfth graders and science to seventh, eighth and ninth graders.

2. In 1980-81, respondent received an unsatisfactory evaluation, which he attributed to the distraction of his mother's terminal illness, culminating ultimately in her death on Thanksgiving Day 1981. Otherwise, his annual evaluations were satisfactory through the 1986-87 school year.

3. He began in August of 1963 as a physical education teacher at Lake Shore Junior High School. He ended that school year and spent all the next at "Paxon Junior High School teaching physical education, coaching track, baseball and basketball." (T.557)

4. Mr. Smith returned to Lake Shore Junior High School in the fall of 1965. Until 1967, all his classes were physical education classes. In 1967, when he began teaching three science classes, he continued to teach two physical education classes, and to coach after school.

5. After 1974, although he continued to work as a coach, he did not teach physical education classes, with the exception of a single physical education course for hearing impaired students. Instead, he taught physical science and earth science (or earth and space science) to junior high or middle school students, mainly with ninth-graders.

Leaves Lake Shore

6. With the intention of pursuing computer science training, respondent requested a leave of absence for the school year 1986-87. Request granted, he began at Jacksonville University in the fall of 1986. But when he began to run out of money toward the end of the first semester, he decided to return to work.

7. Because his position at Lake Shore was filled, he was sent to Fort Caroline Junior High School, where he substituted for eight days before he took over a retiring science teacher's five earth science classes, effective February 2, 1987. Soon after Mr. Smith began teaching the science classes, the principal at Fort Caroline Junior High School, Mr. Pratt-Dannals, conducted a formal observation, the first of at least three he conducted before the academic year ended.

8. He gave respondent special attention because, during the school years 1981-82 and 1982-83, when Mr. Pratt-Dannals was dean of boys at Lake Shore Junior High School, he had concluded that "a general lack of proper classroom decorum" (T.43) in one or more of Mr. Smith's classes accounted for an "inordinate number of referrals" (T.53) to the dean's office.

9. But he evaluated Mr. Smith's teaching in the spring of 1987 as satisfactory over all. He also offered criticisms of various aspects of his performance as a teacher, telling him he needed to improve. He urged Mr. Smith to enroll in certain methodology courses in the summer of 1987, but Mr. Smith declined because he "had the summer planned." T. 617.

10. When Mr. Smith returned in the fall, he found himself without a classroom of his own. As a "travelling teacher," he moved from one classroom to another in the course of the school day. This may have accounted for some of his classes' getting off to less than a smooth start. T. 573.

1987-88 Observations

11. On September 15, 1987, Mr. Pratt-Dannals observed Mr. Smith teaching an earth science class. On a "Summative Observation Instrument" he kept track of specified behaviors classed either as effective, or as ineffective, indicators. The former outnumbered the latter, and Mr. Pratt-Dannals commended respondent for "asking a large number of questions on the film strip" which he saw as evidence of a "desire to involve students in the discussion." Petitioner's Exhibit No. 5.

12. But, from where he sat, Mr. Pratt-Dannals saw "students openly cheating on the quiz," (T.88) (although he took no action against the supposed offenders.) Mr. Smith did not see students cheating. T.594-5. "Mr. Smith warned a student to stop talking. The student continued to talk, and there was no repercussion." (T.88)

13. On October 21, 1987, Mr. Pratt-Dannals observed another of Mr. Smith's earth science classes devoted, except for 18 minutes, to a test. He saw "13 students . . . openly sharing answers on the test," (T.88) again without taking any action. Again Mr. Smith did not see students cheating. T.594-5.

14. Using the same "Summative Observation Instrument," Mr. Pratt-Dannals identified about as many "ineffective indicators" as "effective indicators." Among the ineffective teaching behaviors Mr. Pratt-Dannals made note of on October 21, 1987, was Mr. Smith's defining "seismograph" for the class without giving an example. (T.90)

15. When one student said to another, "You do and I'll beat your butt," (T.88) and the other responded, "Faggot," neither the principal nor the teacher intervened, although respondent later reprimanded both students outside the class. T. 582. Mr. Smith recognized the voice of only one of the protagonists, and decided against "ask[ing] a class of 35 which one of you said, you're a faggot?" T.585. From the owner of the voice he recognized, he learned the identity of the other miscreant.

16. On November 5, 1987, Mr. Pratt-Dannals observed Mr. Smith administering yet another test to yet another earth science class. Using the same form as before, he recorded more ineffective indicators than effective indicators. Petitioner's Exhibit No. 7. Mr. Pratt-Dannals testified:

There's some additions and corrections to the test at the beginning of the period that created some confusion. These were said orally, so the student had to understand what he was saying orally and write it down on his test in order to do well on the test. I suggested Mr. Smith write these on the board if there were corrections necessary. The cheating continued, particularly where students sat next to each other. This was when Mr. Smith was helping another student. There is a term called with-itness, and that

is where a teacher is able to do two things at one time. One of the things that would be required in this situation would be to assist a student who may have a question about the test while continuing to look over the rest of the class to determine if any cheating was going on. He told one student that he would deduct 10 points the next time he was talking. This was on the test. The student talked, and he did not deduct the points.

In written remarks made at the time, Mr. Pratt-Dannals noted, "While there was some cheating going on, it was less than before," and suggested, "It looks like it is time to rewrite the 'House Rules' on your cart. The pencil scribble detracts from the impact." Petitioner's Exhibit No. 7.

17. When Mr. Pratt-Dannals next observed respondent's teaching, on December 1, 1987, he perceived no "classroom management problems." (T.100) But he felt "[t]here were problems with presentation of content," id., specifically the effort to discuss dinosaurs, AIDS, the space program and the greenhouse effect in the same class period. He nevertheless commended respondent on a "[g]enerally good question/answer time with extension or correction as needed," Petitioner's Exhibit No. 8, and recorded many more "effective indicators" than "ineffective indicators." Id.

18. Biweekly the science department received 50 student issues and a teacher's edition of Science World, a magazine to which the school subscribed. "There were eight science teachers and one set of magazines." T.591. The chairman of the science department asked science teachers to include all topics pertinent to their courses covered in the magazine "in our lesson plan biweekly." T.586. The then current issue contained articles on dinosaurs, AIDS, the space program, and the greenhouse effect (as well as numerous other topics) and respondent had passed copies out to the students.

19. On February 18, 1988, Mr. Pratt-Dannals again observed respondent teaching and again recorded many more "effective indicators" than "ineffective indicators." But "problems with classroom management persisted, specifically open talking, interrupting and socializing." (T. 117) Nevertheless, according to Mr. Pratt-Dannals, "almost half of [Mr. Smith's] interventions were effective." Petitioner's Exhibit No. 9.

20. Mr. Pratt-Dannals commended Mr. Smith for "[g]ood use of materials, orienting statements, and beginning review . . . [g]ood circulation during seatwork . . . [and a]dequate coverage of 4 of 6 of the concepts," Petitioner's Exhibit No. 9, he explicated on February 18, 1988. The two concepts Mr. Pratt-Dannals felt received inadequate coverage "were that light passing through a prism gives a spectrum . . . [and] that the earth is spherical, therefore, that the light hits the earth directly at the equator, but it hits it at an angle at the poles. [Mr. Smith] stated those but did not give any kind of application." T.118.

21. Finally, Mr. Pratt-Dannals again observed respondent's teaching on March 2, 1988. He saw Mr. Smith stop misconduct effectively on three occasions, but, on nine occasions, misconduct

extended beyond a reasonable period of time.

In other words, he might say, Okay, that's enough, stop talking, and the talking continued for a period of time following that. It may be that the talking continued throughout the whole period [, while the principal sat, mutely observing.] In many cases it continued for a longer period of time than was reasonable if the students were responding to his correction.

T. 124. Mr. Smith also failed to give examples of several (but not all) of the terms he defined. According to Mr. Pratt-Dannals, the "problem . . . was that a definition was provided with no example . . . similar to," (T.124) the situation with "seismograph."

22. In conjunction with his observations that school year, Mr. Pratt-Dannals read Mr. Smith's lesson plans for each of the half dozen classes he sat in on. These, he found, "minimally covered what is required." T.130. Aside from these six, he read no other lesson plans Mr. Smith prepared that year. He evaluated Mr. Smith's performance as a teacher as unsatisfactory principally because of classroom management problems. T.131.

23. At Mr. Pratt-Dannals' behest, Gloriden J. Norris came to the school to evaluate respondent's teaching and test administration on December 18, 1987, and again on January 20, 1988. After her first visit, she reported, "[n]o major problem identified from these observations." Petitioner's Exhibit No. 26. On her second visit she recorded 30 effective teaching behaviors and only two ineffective teaching behaviors. Petitioner's Exhibit No. 28. Both Mrs. Norris and Mr. Pratt-Dannals gave Mr. Smith advance notice before observing his teaching.

24. On the other hand, Daniel L. Weems, one of the science teachers whose classrooms respondent made intermittent use of, had occasion to enter his room without notice, during his own free period, while Mr. Smith was teaching there, "in the range of once a week," (T.188) for from two to 15 minutes at a time. Not infrequently he found that Mr. Smith did not have all the students' full attention. He observed "[o]n a number of occasions things such as heads down on the desk, writing notes or letters to one another, just talking with one another, being teenagers." T.177.

MLST

25. Petitioner requires students in its earth science courses to pass a Minimum Level Skills Test (MLST) demonstrating mastery of a specified fraction of about 19 percent of the course objectives, in order to pass the course. In March of 1988, Mr. Pratt-Dannals told Mr. Smith he was concerned that his students would not be properly prepared for the standardized test; and encouraged him to make special efforts to prepare them. Mr. Smith did make special efforts.

26. The percentage of his students who passed the science MLST the first time they took it was higher than comparable percentages for two other science teachers' students, but lower than the comparable percentage for one of the

other science teachers' students. Respondent's Exhibit No. 5. Mr. Smith's students' scores on the earth science MLST were not significantly better or worse than their scores on minimum level skills tests in other subject areas.

1988-89

27. At respondent's request, he was transferred from Fort Caroline Junior High School after Mr. Pratt-Dannals gave him an unsatisfactory evaluation. That summer he signed up for two of the three education courses Mr. Pratt-Dannals recommended that he take during the summer, but they were cancelled for lack of adequate enrollment. The third recommended course was already completed by the time he looked into it.

28. Mr. Smith's request to teach physical education during the 1988-89 school year was not honored. Instead, he was assigned to teach two science courses, four classes of life science, which he had never taught before, and one class of physical science at the Eugene J. Butler Seventh Grade Center (Butler). His physical science students had all failed earlier attempts to pass the seventh grade.

29. For the first two weeks of school or longer, Mr. Smith called students' names, and they raised their hands when he took roll, but after that he would simply "darken in the circles" (T.603) on a "bubble sheet" that listed the class roll. Once he had learned their names, this procedure saved class time, he felt. In each class, he asked a student to remind him to fill in the sheet before the hour was up.

30. Before conducting his initial formal observation, Butler's principal, Kenneth Leon Manuel looked for respondent's lesson plans, but did not find them on file. When he did see the lesson plans, he concluded they "did not comply with the format of objectives, instructional strategies, materials and evaluation." Petitioner's Exhibit No. 14.

31. In the classroom, he noticed several students "discours[ing] while [Mr. Smith] was talking," (T.259) on September 13, 1988, and again on October 18, 1988. Also on September 13, 1988, "several students walked in and out of the classroom. Like one kid would walk in with the hall pass. And by the time he put the hall pass down, another kid would get up, get the hall pass and walk out." T.260.

32. Carole Lippert Benson, Butler's vice-principal, conducted a "formal observation" in one of Mr. Smith's classes on September 28, 1988. Even though class began four minutes late, five students were tardy. "The teacher usually makes some sort of notation that the child was tardy, or gives them some sort of reprimand," (T.404), but respondent did neither.

33. When he began his presentation, one student was at the pencil sharpener and three others were out of their seats. He stood at an overhead projector with his back to half the class. Some students talked. One put his head down and went to sleep. A girl put on make up. Mr. Smith did not have the attention of several students.

34. Kathleen Bowles, the science and health department chairperson at Butler had her planning period second hour during the 1988-89 school year. She walked through respondent's second period class on her way to the science department's storage rooms, "probably 20 times or more, throughout the entire

school year." T.246. She saw children talking among themselves, writing notes and out of their seats. She even saw some listening to radios or cassette players with headphones. School policy forbids Walkman radios on campus.

35. Mr. Smith violated departmental policy by letting the children "dissect pumpkins" without safety goggles, and nearly violated department policy "when he was going to dissect earthworms, and the safety contracts had not been signed." Although Ms. Bowles reported a "very high" noise level, a classroom teacher nearer by was not disturbed.

36. On November 9, 1988, Kathleen Marie Poe, who then worked for petitioner as "a science consultant with professional development" (T.454) attended one of respondent's classes in order to conduct a scheduled formal observation. When the tardy bell rang two boys were arguing over which should retrieve a desk that had been moved for an earlier class. A student arrived late. One of the students walking around the room refused to obey several exhortations to sit down, so Mr. Smith ordered him to leave the class room "and that child wouldn't step outside, so they finally negotiated that he asked him to sit in the back of the room." T.455. But, when a girl finished sharpening her pencil, the recently seated student rose to sharpen his pencil.

37. After these preliminaries, and a quiz, Mr. Smith made use of an overhead projector and began a far ranging lecture on sea life, mentioning (without defining that day) mollusks, bivalves, scallops, univalves, stingrays, echinoderms and the Great Barrier Reef. During the lecture, one girl put on make up, another did her English homework.

38. On November 17, 1988, a student arriving for Mr. Smith's sixth period class told him he did not feel well, and asked to go home. Mr. Smith answered, "[S]ee if you can't tough it out one more period. Your mom's not going to want to come over here. Go . . . put your head down." T.624. Instead of putting his head down, the child lay down on a table.

39. Mr. Manuel and Levi Garrett, another administrator in petitioner's employ, were present for the first five minutes of this class. Mr. Smith introduced Mr. Garrett to the students before proceeding with a scheduled VCR presentation. Neither Mr. Manuel's testimony that, "There were several kids that walked in and just lay down on the table," (T.266) nor his assertion that respondent's lesson plans were not on respondent's desk has been credited.

40. On February 1, 1989, Ms. Norris observed respondent at Mr. Manuel's request. "Other than the inadequate preparation and delivery of content, [she] also concluded that there were some problems in inconsistency in . . . effective strategies . . . used to manage student conduct." T.384. On the test he gave that class, "there's a mixture of multiple choice and matching without directions." T.386.

41. On February 15, 1989, Mr. Manuel conducted another formal observation, this time of respondent's third and fourth period classes. With regard to the third period class, Mr. Manuel reported:

[B]asically the behaviors that were in that particular class during that time, there was a lot of deviant behavior. Mr. Smith, at one time, responded to the deviant behavior, "Neil, you better get busy. You guys get busy."

There was continuous conversation with a student that had a missing lunch ticket. During the period of time in this particular classroom, Mr. Smith did circulate around the classroom. There were numerous misconducts [sic] of students going on. He had the opportunity to cease and desist some of that; however, in some cases he did not.

Also, in that particular one, in that specific case, one student had indicated to Mr. Smith that he had completed the assigned task [an essay] . . . [A]nd Mr. Smith explained to him to continue to work on the essay. . . . The child just went ahead on.

T.275-7. About a third of the class finished the essay early, and had no additional assignment other than (possibly) homework.

42. The fourth period class was the physical science class, full of students who were repeating. Several students "were continuously off task." T.279. Mr. Smith told a student she should have raised her hand, and she said he had not required another student to do that. After two warnings, Mr. Smith "wrote [a student] up on a referral, told him to leave the classroom." T.280. Another student was playing with the thermostat. Still another student "was constantly talking and complaining." T.281.

43. On February 28, 1989, Ms. Poe again observed respondent, whose strength she had earlier described as "science content/knowledge." Petitioner's Exhibit No. 33. In connection with her February visit, she prepared written comments. "Some conduct problems - 4 students out of their seats - talking back - frequent interruptions. One was sent out on a referral (girl) transparencies were clearer as were his directions. He never raised his voice and was calm throughout the hour." Petitioner's Exhibit No. 33.

44. Ms. Poe felt respondent "need[ed] to provide positive feedback to students' answers and . . . for correct behavior and to be consistent with his own set of classroom rules." Id. She also noticed that "he kept calling on the same students, the ones who were paying attention, to answer the question." T. 459. Two boys played "paper football across the desk," (T.456) a boy threw "basketball paper wads . . . three of them in a row", id, a distance of about six feet, and "[t]here were a couple of paper airplanes being flown around the room." T.456.

45. Mr. Manuel conducted a final observation on March 13, 1989. After this observation he told respondent that he wished he had taught so well for the whole year or words to that effect. He told him that this was the type of teaching he had been looking for and was generally complimentary. Nevertheless the next day he made a final evaluation that Mr. Smith's work for the year had been unsatisfactory. After January 30, 1989, respondent did not file lesson plans until June 14, 1989, when he filed lesson plans for some four months' classes late.

MLST At Butler

46. Of the 21 students in Mr. Smith's year-long physical science class, only ten passed the physical science MLST the first time it was administered. T.302. Petitioner's Exhibit No. 23. Even fewer students passed the course itself. "That's the class that were repeaters . . ." T.603. Most of the students who flunked the class "failed because we had an attendance policy. If you missed more than seven days [in "[e]ach grading period" (T.607)] . . . you automatically received an F or an E in the class." Id.

47. Students in Mr. Smith's four first semester life science classes passed the life science MLST at rates of 34.8, 52.0, 52.2, and 63.6 percent, as compared to a 77.7 percent pass rate for all teachers' first semester life science students. Petitioner's Exhibit No. 24. But students in Mr. Smith's second semester life science classes passed the life science MLST at rates of 92.0, 93.8, 94.1 and 94.7 percent as compared to an average 93.9 percent for all teachers' life science students that semester. Petitioner's Exhibit No. 25.

Popular With Colleagues

48. A number of respondent's colleagues testified for him at hearing. Paul Z. Martin, a teacher at Lake Shore Junior High School from 1954 to 1976, said, in answer to counsel's questions:

A He got along fine. I got jealous of him a lot of times, because he could handle the students so well, and the students liked him, and he had no problem there at all.

And another thing -- let me say right there -- you know, things will happen, which is natural. They'll come up in class, or maybe under me or maybe under another coach. And, well, two or three times I recall where I would ask Kerby to go see if he could resolve that situation, and he did. He did a good job. He's a good disciplinarian.

Q Good disciplinarian?

A Good disciplinarian. And his work in his classroom was very efficient. (TR 344)

49. Barbara Miller who taught at Lake Shore Junior High School for twenty-six (26) years and who, like Mr. Martin, had no personal knowledge of respondent's performance at Fort Caroline Junior High School testified:

I think he is a very competent teacher.

I say this due to the fact that when I walked into his classroom the many, many times that I did, that his class was in order, that he had control of his classroom, that his test scores were good, that his grades were better than mine, that he did take an interest in the children. And I have one real criteria for being a good teacher, and that is it involves

the heart and the love of your job and the love of the children, and I absolutely will say under oath that Kerby has these things, that he enjoyed his job, he loved the kids, and he gave to them beyond the capacity of just your 7:30 - to - 2:40 requirement. And that says a lot for me. (TR 359, 360)

50. A former principal, John Rowell, who served as principal at Lake Shore Junior High School, until 1969 testified:

I would say he tries to reach every student that he can. He's very pleasant, and he -- for me, he maintained good order in the classroom and a well-disciplined gym class, and his teams that he coached were well-disciplined teams.

He called on the kids to recite. He would explain, and they would recite.

Q Do you think he was a competent teacher?

A Yes. He was a competent teacher for me. Between 1963 and 1969, he was a very competent teacher." (TR 484-485)

51. Another colleague who had not taught with Mr. Smith since he left Lake Shore Junior High School was Betty Tut who had herself taught for some twenty-five (25) years. She said:

Did you ever observe Kerby Smith in the classroom?

A No, not observe him in the classroom, but we taught P.E. kind of together. Sometimes we would be outside, but this was some time ago, not recent.

Q But you could see each other?

A Yes.

Q What was his conduct with the class when you observed him?

A Very caring and compassionate about them and wanting them to do well. He was very concerned about each of the kids and wanted them to do exceptionally well in what he was doing. I know that much.

Q Did he seem to have control of his class?

A Being outside, he had pretty good control outside. But when he was inside, I did not observe him. (TR 494)

52. Another Lake Shore colleague, Floyd Watson, who taught at Lake Shore Junior High School from 1966 to 1988, answered counsel's questions, as follows:

Q How did Mr. Smith conduct this classes?

A What do you mean?

Q You saw him in some of his classes. What were they like; well-run, poorly-run, whatever?

A Of course, I'm not a science teacher, so I can't say that sort of thing.

Q Did you find any atypical disciplinary problems in his classes, as compared to the others that you were familiar with?

A No.

Q Did he seem to have a rapport with the students or lack or rapport?

A He seemed to have a good rapport. I think, with the latter part of the years, I was just thinking, when I came down here the other day, that he seemed to have a right good rapport, especially with minority students. Not all teachers have that." (TR 502)

"Q In your opinion, from '63 to '85, was Mr. Smith a competent teacher?

A Yes.

Q And the reason for that statement?

A Well, I think he's knowledgeable in his subject matter. I think he put the material across to the students. He did have a classroom management so that a student that wanted to learn could learn.

He was able to talk with the students and get along with them reasonably well. Of course, like any teacher, you don't satisfy all of them. That never happens.

But, overall, I think he got along very well with the students, and they tend to respect him. He made it such that if they wanted to learn they could, and he would try to teach them. (TR 503, 504)

53. Robert A. Birmingham, an occupational specialist at Lake Shore Junior High School, 1985-1990, testified:

Q What was the conduct of his classroom when you were there?

A They're junior high kids, you know. In an educational setting, there can be noise, and it's educational noise, and there can be uncontrolled noise. And I don't recall anything that I was unhappy with. (sic)
(TR 510)

54. Phil Valla, a 20-year teacher who taught with respondent early in his career, testified:

Q How did he conduct his classes, as far as demeanor and the rest of it?

A How did he conduct his classes?

Q Yes. From your viewpoint as a teacher, yourself, do you have an opinion about how Kerby conducted his classes?

A His classes were fine.

Q Do you think he's a competent teacher?

A Yes, sir.

Q And could you tell the Hearing Officer why you think he's a competent teacher?

A When we worked together, we seemed to accomplish everything we set out to do with the kids, and he seemed to get along real well with the kids and fellow coaches.

Q How was discipline in his class?

A Fine.

Q What rapport, if any, did he have with his students?

A It was excellent. He had superior rapport with the students.

Q Do you think the students respected him?

A Yes, sir.

Q You say he accomplished everything he wanted to accomplish; was that subject matter?

A Yes, sir.

Q Do you think that got across?

A Yes, sir. We taught -- our goals were to teach skills in physical education, and we accomplished that in those years.

(TR 516, 517)

55. And Georgette Macarthur, a teacher with 28 years of experience, offered her opinion, in response to counsel's questions:

Q Do you have any opinion about how he conducted his classes?

A Yes. He had a real special, I think, rapport with the students, and they liked him, and they performed for him. And I don't think he had a military discipline style, but that mold -- everybody doesn't fit that mold. His style of discipline was a little more relaxed, but the students learned well, I think, and they all did what they were supposed to do.

I'm more of a relaxed teacher, myself. And I can see that what is right for one teacher, as far as discipline goes, is not right for another teacher. And students can't learn in chaos. That's not what I'm saying. What I'm saying is that if they're all tense and tight sometimes they don't do their best.

I really like the way Kerby teaches, from my memory. It's been several years, but, from what I know, I really like the way he teaches.

Q You've known him for over 20 years at Lakeshore (sic)?

A Right, right.

Q That's a long time to observe somebody.

A That's right. That -- well, go on with your questions.

Q And he left to go on a sabbatical?

A Yes, and then he came back.

Q And then -- I don't -- if I asked you this -- did I ask you, "Do you think he's a competent teacher?"

A Yes, I do. From my observations and just from what I have known, I do think he's competent. (TR 524, 525)

On the other hand, Messrs. Pratt-Dannals and Manuel, along with Ms. Bowles testified that respondent was not a competent teacher.

56. Of the 6200 teachers the school board of Duval County employed in 1988-89, it sought to terminate the employment of only three. Raymond Bailey, petitioner's "director of certificated personnel," (T.200) testified:

A competent teacher is one that has knowledge of subject matter, is able to impart and deliver that subject matter to students. That competent teacher also is one that is competent in the area of classroom management, meaning managing the learning activities that take place within those four walls. He's also an individual that is effective in his delivery of curricular material to students, interpreting the curriculum of the district and, again, imparting its students. He is an individual that is charged with the responsibility of teaching the curriculum as outlined by the district and has the knowledge and background to proceed through that and to provide his students with the very best education.

While it is clear respondent did not provide his students with "the very best education," the evidence fell well short of a showing that he was among the three worst teachers in the school system.

57. At one point when respondent was teaching at Lake Shore and Mr. Wechsler was serving as principal, all five or six science teachers were evaluated by the School District's "teacher educational consultant for science" (T.369), Gloriden J. Norris. Ms. Norris, who observed all of the teachers in their classrooms, did not conclude that respondent's performance was significantly worse than any of the other science teachers' performances. (T.399-400).

CONCLUSIONS OF LAW

58. Petitioner seeks to dismiss respondent for cause, as defined by Chapter 21197, Laws of Florida, 1941, as amended. Chapter 21197, Laws of Florida, 1941 is the Teacher Tenure Act, applicable exclusively to teachers employed by the Duval County School Board (Tenure Act). The Tenure Act provides that teachers employed by the Duval County School Board may be discharged or demoted for professional incompetency:

Section 4. Causes for the discharge or the demotion of a teacher shall be:

(e) Professional incompetency as a teacher
. . . 72-576, Laws of Florida (1977).

In its proposed recommended order, the School Board raised the possibility for the first time of a demotion instead of termination, but this does not relieve the Board of its obligation to show cause for dismissal, if it is to remove respondent's tenure as a teacher. Tenure Act, Section 4. In the final paragraph of the proposed recommended order, moreover, the Board prays for dismissal.

59. Petitioner has the burden to prove, by a preponderance of the evidence, that respondent has been guilty of the professional incompetence the Board has alleged. See *Ferris v. Turlington*, 510 So.2d 292, 294, n.2 (Fla. 1987) (While the standard of proof in license revocation cases is clear and convincing evidence, termination of employment only requires proof by a preponderance of the evidence, citing *Ferris v. Austin*, 487 So.2d 1163 (5th DCA 1986)); *South Florida Water Management Dist. v. Caluwe*, 459 So.2d 390 (4th DCA 1984).

60. The Duval County School Board has not adopted rules defining professional incompetency. Petitioner cites *Smith v. School Board of Leon County*, 405 So.2d 183 (Fla. 1st DCA 1981) for the proposition that, when a school board does not adopt rules defining professional incompetency, the state board's rules, set out in the Florida Administrative Code, apply. But the state board's rules implement statutes held applicable in *Smith*, not the Teacher Tenure Act that applies here. The *Smith* decision does not say that rules apply where statutes they interpret do not.

61. Although not definitive, the rules petitioner cites are nevertheless instructive. Incompetency is defined in the Florida Administrative Code as follows:

- (1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:
 - (a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.
 - (b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

(Emphasis supplied.) Rule 6B-4.009, Florida Administrative Code. Chapter 6B of the Florida Administrative Code contains "the minimal standards of the education profession in Florida." Rule 6B-5.004, Florida Administrative Code, requires that teachers

(2) Select, adapt or develop, and sequence instructional materials and activities for the designated set of instructional objectives and student needs.

(3) Create interest through the use of materials and techniques appropriate to the varying abilities and backgrounds of students.

(4) Use individual students interests and abilities when planning and implementing instruction.

62. Rule 6B-5.005, Florida Administrative Code, provides:

The educator, commensurate with job requirements and delegated authority, shall demonstrate competence in the following instructional procedures:

(2) Use procedures appropriate to accomplish the designated task to include but not to be limited to:

(a) Identifying long range goals for a given subject area.

(b) Constructing and sequencing related short range objectives for a given subject area.

(4) Give directions for carrying out an instructional activity by assuring that the task is understood and using feedback techniques which are relevant to the designated task.

Rule 6B-5.007, Florida Administrative Code, entitled Management Techniques, provides, as follows:

The educator, commensurate with job requirements and delegated authority, shall demonstrate competence in the following management techniques:

(1) Resolve discipline problems in compliance with the policies of the school, rules of the district school board and the State Board, and Florida Statutes.

- (2) Maintain consistency in the application of policy and practice by:
 - (a) Establishing routines and procedures for the use of materials and the physical movement of students.
 - (b) Formulating appropriate standards for student behavior.
 - (c) Identifying inappropriate behavior and employing appropriate techniques for correction.
- (3) Maintain standards of conduct required in Rule 6B-5.007(2), F.A.C.
- (4) Use management techniques appropriate to the particular setting.

Petitioner's counsel has synthesized cases construing the foregoing rules:

63. "These rules have been interpreted by case law. Generally, behaviors by the teacher which provide evidence of his or her incompetency include, but are not limited to, the following:

"(a) A teacher who fails to adequately prepare and plan for the instruction of his/her students is incompetent. *Turlington v. Reaves*, 9 FALR 1371 (1986) (The fact that the teacher gave assignments without properly explaining the assignment contributed to a finding of incompetency.)

"(b) A teacher's failure to prepare lesson plans or failure to prepare adequate lesson plans is evidence of incompetency. *Turlington v. Reaves*, 9 FALR 1371 (1986) (Teachers incomplete lesson plans were considered in determining her incompetence); *Castor v. Perry*, 9 FALR 5291 (1987).

"(c) A teacher's failure to employ appropriate disciplinary techniques suitable to the particular situation substantiates a finding of incompetency. *Turlington v. Reaves*, 9 FALR 1371 (1986) (Teachers failure to exercise consistent discipline and failure to administer reprimand for disruptive behavior conducted a finding of incompetence.)

"(d) A teacher's failure to adequately manage and control students in the classroom lead to a finding of incompetency. *Turlington v. Reaves*, 9 FALR 1371 (1986) (Students failure to raise hands before speaking and the constant undercurrent of conversation constituted unsatisfactory classroom management and contributed to finding of professional incompetence); *Turlington v. Walker*, 9 FALR 2305 (1987) (Teachers inability

to control the behavior of disruptive students within her class through verbal or nonverbal strategies constituted incompetence); Department of Education v. Ferrarra, 10 FALR 5766 (1987) (Teachers inability to handle discipline problems revealed teacher incompetence)." Petitioner's Proposed Recommended Order, pp. 27-29.

"(e) A teacher's failure to utilize adequate techniques of instruction in the classroom warrants a finding of incompetence. Turlington v. Reaves, 9 FALR 1371 (1986) (Teacher's failure to provide stimulating and varied learning experiences contributed to finding of incompetency); Department of Education v. Ferrarra, 10 FALR 5766 (1987) (Teaching technique which consisted primarily of giving students a reading assignment and having them answer questions in class was inadequate and was a factor denoting teacher incompetence); Castor v. Brewer, 9 FALR 5339 (1987) (Teacher's dull presentation of the subject matter, said presentation lacking an appropriate background, introduction and reinforcement, was a factor revealing teacher incompetence); Department of Education v. Marshall, 10 FALR 4303 (1987) (Teachers failure to use more than one teaching technique was a factor denoting incompetence).

"(f) When a teacher improperly sequences lessons, evidence of incompetence exists. Turlington v. Reaves, 9 FALR 1371 (1986) (Teachers improperly sequenced lessons confused the students and contributed to finding of incompetency); Turlington v. Walker, 9 FALR 2305 (1987) (Improperly sequenced lessons render the teacher unable to deliver instruction to students and lends to a finding of incompetency).

"(g) A teacher who fails to create and maintain a classroom environment conducive to learning is incompetent. Turlington v. Walker, 9 FALR 2305 (1987) (A chaotic classroom evidences a teacher's incompetence); Castor v. Perry, 9 FALR 2305 (1987) (Fact that teacher allowed nonessential, nonproductive movement of the students in the classroom contributed to a finding of the teacher's incompetence).

"(h) When a teacher fails to maintain proper supervision of students in the classroom s/he is incompetent. Turlington v. Walker, 9 FALR 2302 (1987) (The fact that a teacher's students were not on task advanced a finding

of incompetence); Department of Education v. Ferrara, 10 FALR 5766 (1987) (The fact that students openly copied each others work and cheated on exams was a factor indicating teacher incompetence); Castor v. Brewer, 9 FALR 5339 (1987); Castor v. Perry, 9 FALR 5291 (1987) (Students observed off task were a factor considered in judging a teacher to be incompetent).

"(i) When there are errors in the teachers lessons, a finding of incompetence is appropriate. Department of Education v. Marshall, 10 FALR 4303 (1987)."

64. Respondent neglected to file lesson plans, which creates problems, if a substitute teacher has to fill in. But the proof did not establish that he failed to prepare lesson plans or plan for his classes. The evidence showed that he had serious problems maintaining good order in the classroom. Nothing in the evidence indicated, however, that other teachers do not have problems managing their classes, and "incompetency is a relative term." Rule 6B-4.009(1), Florida Administrative Code.

65. Not all teachers can be paradigms for the profession. Among the some 6,197 teachers the Duval County School Board deemed competent in 1988-89, thousands are "below average," in managing their classes. Hundreds necessarily fall in the bottom ten percent. The evidence did not show that respondent's performance, weak as it was in 1988-89, was worse than theirs. For the school year 1987-88, the evidence did not show clearly that his performance was below average.

66. New courses and a class of repeating students seem nearly to have overwhelmed respondent the first semester of the 1988-89 school year, but Mr. Manuel's final evaluation and the second semester MLST results both evinced a comeback.

67. The issue here is not whether Mr. Smith might be able to do something else better or whether he would enjoy it more. The issue is not whether Mr. Smith is a good teacher, able "to provide his students with the very best education." The question is whether he is willing and able to teach in a minimally acceptable way. Or, more precisely, whether the School Board has proven that he is unable or unwilling to teach in accordance with minimally acceptable standards. On this record, the Board has not carried its burden.

RECOMMENDATION

It is accordingly, recommended that petitioner renew respondent's employment contract.

RECOMMENDED this 22nd day of August, 1990, in Tallahassee, Florida.

ROBERT T. BENTON, II
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 1990.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 89-4132

Petitioner's proposed findings of fact Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 26, 27, 28, 29, 30, 31, 37, 38, 39, 40, 45, 79, 87, and 89 have been adopted, in substance, insofar as material.

Petitioner's proposed findings of fact Nos. 7, 12, 13 and 14 pertain to matters outside the two-year period alleged by the Board, or are otherwise immaterial. Petitioner's proposed findings Nos. 15, 16, 17, 18, 23, 24, 25, 32, 33, 34, 36, 46 and 81 pertain to subordinate matters.

With respect to petitioner's proposed findings of fact Nos. 19 through 22, see finding of fact Nos. 11 through 22.

Petitioner's proposed findings of fact Nos. 35 and 86 were not established by the evidence.

With respect to petitioner's proposed finding of fact No. 41, the testimony was that in no other case of this kind was a teacher assigned to teach subjects he had never taught before.

With respect to petitioner's proposed findings of fact Nos. 42, 43 and 44, the evidence did not show that he was at any less disadvantage teaching life science, and the "special accommodations" were contrary to his request to teach physical education.

With respect to petitioner's proposed findings of fact Nos. 47 through 65, 82, 83 and 84, see findings of fact Nos. 27 through 45.

With respect to petitioner's proposed findings of fact Nos. 66 through 75, see findings of fact Nos. 46 and 47.

Petitioner's proposed findings of fact Nos. 76, 77, and 78 have been adopted in substance, insofar as material, except that Mr. Manuel's testimony that lesson plans were not on respondent's desk has been rejected.

With respect to petitioner's proposed findings of fact Nos. 80 and 85, that is the answer he gave on deposition.

With respect to petitioner's proposed findings of fact Nos. 85 and 88, petitioner proved respondent was a weak teacher, but did not prove that he was incompetent, within the meaning of the statute.

Respondent's proposed findings of fact Nos. 1, 2, 3, 4, 5, 8, 10, 13, 17 and 18 have been adopted, in substance, insofar as material.

Respondent's proposed findings of fact Nos. 6 and 15 pertain to subordinate matters.

The final two sentences of respondent's proposed finding of fact No. 7 have been adopted, in substance, insofar as material, but there were not six formal evaluations.

With respect to respondent's proposed finding of fact No. 9, nobody testified that a traveling teacher should have any greater problems with discipline after the first few minutes of class.

With respect to respondent's proposed finding of fact No. 11, the evidence did not show that he actually attended summer courses.

With respect to respondent's proposed finding of fact No. 12, the first sentence has been adopted but it is not clear what comparison the second sentence is intended to make.

Respondent's proposed finding of fact No. 14 is rejected.

With respect to respondent's proposed finding of fact No. 16, she characterized certain behavior as inconsistent.

COPIES FURNISHED:

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