

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANK R. PETRUZIELO,)	
Superintendent of Broward)	
County Schools,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-0322
)	
ERNEST SELLARS,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 9, 10, and 21, 1996, in Fort Lauderdale, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gerald A. Williams, Esquire
Mack, Williams, Haygood and McLean
980 North Federal Highway, Suite 305
Boca Raton, Florida 33432

For Respondent: Willie Jones, Esquire
Law Office of Willie Jones
305 South Andrews Avenue, Suite 721
Fort Lauderdale, Florida 33409

STATEMENT OF THE ISSUES

Whether the respondent committed the acts alleged in the Administrative Complaint dated December 8, 1995, and, if so, the penalty which should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated December 8, 1995, Frank Petruzielo, Superintendent of Schools for Broward County, ("Superintendent"), recommended to the School Board of Broward County ("School Board") that it immediately suspend Ernest Sellars from employment with the School Board without pay and that it terminate his employment as an instructional employee for violating various statutes, rules, and principles of professional conduct applicable to teachers. Mr. Sellars was charged in the Administrative Complaint with inflicting on the students in his second grade class improper disciplinary measures and punishment, both routinely and with regard to several students specified in the complaint, as follows:

D. During his employment at Park Ridge Elementary School, Respondent placed students under a wooden podium, having measurements of 26" high and 18.75" deep, as a means of punishment or discipline. Students were left under said podium, having little to no ventilation, without adult supervision, for an inordinate amount of time, thereby causing the children to configure their bodies in uncomfortable, indeed, even painful positions.

E. During his employment at Park Ridge Elementary School, Respondent routinely placed students in a dark, unlit cabinet next to a sink, having measurements of

22" high and 21.5" deep, as a means of punishment. Students were placed in said cabinet, having little to no ventilation, without adult supervision, for an inordinate amount of time, thereby causing the children to configure their bodies in uncomfortable, indeed, even painful positions.

F. During his employment at Park Ridge Elementary School, Respondent routinely placed students in a dark, unlit closet as a means of punishment or discipline. Students were left in said closet, having little to no ventilation, without adult supervision, for an inordinate amount of time.

G. During his employment at Park Ridge Elementary School, Respondent routinely placed students underneath classroom desks, as a means of punishment or discipline. Students were left underneath these desks, without adult supervision, for an inordinate amount of time, thereby causing the children to configure their bodies in uncomfortable, indeed, even painful

H. During his employment at Park Ridge Elementary School, Respondent routinely poked and struck children in the chest with two (2) fingers, as a means of punishment or discipline.

I. During his employment at Park Ridge Elementary School, Respondent routinely battered children by hitting them on the head with his closed fist, as a means of punishment or discipline.

J. During his employment at Park Ridge Elementary School, Respondent routinely forced children to lie flat on a bare floor, underneath a table, facing a wall, as a means of punishment or discipline.

K. During his employment at Park Ridge Elementary School, Respondent grabbed an eight-year-old student, (hereinafter referred to as "J.D.") around the front of his neck and hurled said student against a blackboard, causing him to hit his head against the wall, as a means of punishment or discipline.

L. During his employment at Park Ridge Elementary School, Respondent left J.D. and at least two other eight-year-old students (hereinafter referred to as "S.B." and "B.W.") in a dark, unlit closet, forcing them to miss going home at their assigned time for the day, as a means of punishment or discipline.

M. During his employment at Park Ridge Elementary School, Respondent left S.B., and at least three other eight-year-old students (hereinafter referred to as "T.S.," "B.M.," and "B.W.") in a dark, unlit cabinet, as a means of punishment or discipline.

N. During his employment at Park Ridge Elementary School, Respondent engaged in acts which constitute physical abuse of children.

O. On or about March 28, 1995, Respondent grabbed an eight-year-old second grade student (hereinafter referred to as "K.B." [sic]) by the neck and forced her into a dark, unlit closet. Respondent, left S.B. in the closet for at least two hours without adult supervision.

P. On or about March 28, 1995, in response to K.B.'s [sic] request for permission to visit the restroom, Respondent violently pushed K.B. [sic], causing her to fall to the ground and injure her knee.

The School Board met on December 19, 1995, and voted to suspend Mr. Sellars without pay, pending termination of his employment. Mr. Sellars timely requested a formal administrative hearing on the charges alleged in the complaint, and the request was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge.

At the hearing, the Superintendent presented the testimony of the following witnesses: Nina Hansen, a social

worker with the Broward County public school system; Walter Cooper, principal of Park Ridge Elementary School; Ronald Wright, director of professional standards for the Broward County public school system; and L. W., J. D., and J. J., students in Mr. Sellars's 1994-1995 second grade class. Petitioner's exhibits 1 through 4 were offered and received into evidence. Mr. Sellars testified in his own behalf and presented the testimony of J. A., a student in his 1994-1995 second grade class, and of Elizabeth Anderson, J. A.'s mother. Respondent's exhibit 1 was marked for identification though not offered into evidence; Respondent's exhibit 2 was offered and received into evidence.

Prior to the final hearing, the Superintendent requested that official recognition be taken of rules 6B-1.001 and 6B-1.006, Florida Administrative Code, which set out the Code of Ethics of the Education Profession and the Principles of Professional Conduct for the Education Profession, respectively; of rule chapter 6B-5, Florida Administrative Code, which sets out the Standards of Competent Professional Performance; of rule 5301 of the Broward County School Board, Behavior Management of Students; Park Ridge Elementary School Staff Handbook for 1994-1995; and the Code of Student Conduct for 1994-1995. Official recognition was granted in an order entered May 14, 1996.

At the hearing, the Superintendent moved to strike Mr. Sellars's Unilateral Prehearing Statement which was served the day before the hearing. The motion to strike the prehearing statement was denied. The Superintendent also moved to strike the Request for Production of Documents which Mr. Sellars served via facsimile the day before the hearing, after the close of business. An order was entered on October 14, 1996, granting the motion to strike the Request For Production of Documents as untimely. Finally, at the close of his case, the Superintendent requested that the Administrative Complaint be amended to conform with the evidence. Counsel for the petitioner did not specify the particulars of the requested amendment and could cite no authority which permits such an amendment in an administrative proceeding; the undersigned indicated her inclination to deny the motion but gave counsel leave to brief the point in their proposed recommended orders. The Superintendent did not do so, and the motion is **DENIED**.

The four children called to testify as witnesses in this administrative proceeding were each examined regarding their ability to observe, recollect, and communicate facts correctly, their moral sense of the duty to tell the truth, and their intention to tell the truth at the hearing. Each child was found competent to testify pursuant to the criteria set out in Griffin v. State, 526 So. 2d 752, 753-56 (Fla. 1st DCA 1988), and nothing occurring during their testimony

required reconsideration of this determination. Even so, it is the responsibility of the Administrative Law Judge to assess the credibility of witnesses, to weigh the evidence presented, and to resolve conflicts in the evidence. All of the admissible evidence presented at the final hearing in this case has been carefully considered in light of this responsibility.

The transcript of the hearing was filed with the Division on November 4, 1996. The Superintendent timely submitted proposed findings of fact and conclusions of law, and Mr. Sellars filed proposed findings of fact and conclusions of law on December 31, 1996, after having been granted an extension of time. The proposals of the parties have been duly considered.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. During the 1994-1995 school year, Ernest L. Sellars was employed as a teacher by the Broward County School Board. During that year, he taught second grade at Park Ridge Elementary School, where he had worked since the 1992-1993 school year. Prior to the 1994-1995 school year, Mr. Sellars taught a fifth-grade class at Park Ridge Elementary School.

2. Walter L. Cooper was the principal of Park Ridge Elementary School during the 1994-1995 school year. On March 16, 1995, Mr. Cooper submitted a Personnel Investigation Request to the School Board's Professional Standards Office regarding an allegation by Faith Williams that, at 8:15 a.m. on March 15, 1995, Mr. Sellars had physically abused her daughter, S. B., a student in his second grade class. The specific allegation stated in the request was that Mr. Sellars "grabbed her around her neck, threw her to the floor causing scratches on her knee."

3. Ronald S. Wright, the Professional Standards Director for the School Board, considered the request and recommended to the Superintendent that a special investigation be conducted into the allegations. The investigation was approved and assigned to the School Board's Special Investigative Unit, a state-certified law enforcement agency.

4. Rodney Green, an officer with the Special Investigative Unit, was assigned to conduct the investigation. He took the statements of eight students in Mr. Sellars second-grade class, S. B., J. D., L. W., J. J., B. W., C. B., C. A., and M. B., and of S. B.'s mother, Faith Williams. These statements were taken on April 3, 5, and 6, 1995. Either Mr. Cooper, Jacquelyn Haywood, the assistant principal, or a Ms. Bean were present while the students' statements were taken.

5. Mr. Sellars was notified of the investigation on April 7, 1995, and Officer Green took his statement on May 2, 1995.

6. At some point before Officer Green took the students' statements, each student was interviewed by either Mr. Cooper or Ms. Haywood. Immediately prior to taping the students' statements, Officer Green interviewed each of the students.

7. Photographs were taken of the classroom assigned to Mr. Sellars's second-grade class. These photographs were of the classroom's closet, the arrangement of the students' desks, the rear of Mr. Sellars's desk and the podium standing beside the desk, and the cabinet adjacent to the classroom's sink. These photographs, which appear to be the same as those received into evidence as Petitioner's exhibit 2, were shown to the students during the April, 1995, interviews and were attached to the investigative report.

8. Four of the students in Mr. Sellars's 1994-1995 second-grade class testified during the hearing, J. D., J. J., L. W., and J. A.. They were the only witnesses, with the exception of Mr. Sellars, to testify who had personal knowledge of Mr. Sellars's conduct in the classroom. The investigative report containing the statements taped by Officer Green was received into evidence without objection.¹

9. J. D. and L. W. testified at the hearing regarding their recollection of the incident in which Mr. Sellars allegedly physically abused S. B.² Their testimony was not only conflicting, it was not consistent with the statements they gave to Officer Green. In addition, far from explaining or supplementing the evidence given by J. D. and L. W. at the hearing, the descriptions of the incident included in the statements given to Officer Green varied widely both in the generalities and in the details, and it is difficult to conclude that the statements even dealt with the incident which allegedly took place on March 15, 1995.

10. J. D., J. J., L. W., and J. A. testified at the hearing regarding their recollection of the ways in which Mr. Sellars disciplined or punished children who were "bad" in class. Although the testimony of J. D., J. J., and L. W. was consistent in that each testified that Mr. Sellars would put "bad" students in the closet, in the cabinet, and under the desk/podium, the testimony was conclusory and inconsistent with regard to the details of the alleged confinement.³

12. For example, it cannot be concluded from the testimony whether students were actually put in the closet as punishment or whether they were sent to the closet for time-out. The closet was set up as a media center. Books, games, and supplies were stored on the closet shelves, and a large television on a stand was located just outside the closet.

The television was in front of the closet door and held it open, and, given the position of the television, it is unlikely that the door to the closet was ever closed.

13. J. D. testified that Mr. Sellars would poke students in the chest with his middle finger, which was essentially consistent with information he gave in his statement to Officer Green. However, none of the students testifying at the hearing corroborated this testimony, and the statements given by the other students to Officer Green, likewise, did not corroborate this testimony.

14. J. J. gave a graphic description in his testimony at the hearing of how Mr. Sellars put J. A. in the cabinet near the sink: "He would like, grab JA by the back of the neck and he had opened the thing and told JA get in there and JA got in there." (Transcript at 177)

15. J. A. testified that Mr. Sellars had never put him in the cabinet or the closet or under the podium and that he had never seen Mr. Sellars punish students by putting them in the closet or the cabinet, under the podium, or on the floor under tables or desks. He further testified that he had never seen Mr. Sellars poke students in the chest, hit them over the head with his fist, or slam them against the chalkboard or the wall and that Mr. Sellars had never done those things to him.

16. There was no evidence presented that Mr. Sellars had been the subject of any complaint alleging improper

discipline or child abuse other than the one filed by Faith Williams in March, 1995. Mr. Cooper testified that, had there been an allegation of child abuse, a report would have been filed.⁴

17. Elizabeth Anderson, J. A.'s mother, testified that her son had never told her about any instances in which Mr. Sellars had mistreated any of the students in the class.

18. Mr. Sellars categorically denied ever having committed any of the acts alleged in the Administrative Complaint.

19. The Superintendent has failed to present any evidence which can be used as the basis of findings of fact that Mr. Sellars committed the acts alleged in paragraphs F, G, I, J, K, L, or M of the Administrative Complaint.⁵ The Superintendent has failed to prove by the greater weight of the credible evidence presented at the hearing that Mr. Sellars committed the acts alleged in paragraphs D, E, H, N, O, or P of the Administrative Complaint.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 120.57(1), Florida Statutes (Supp. 1996).

21. "The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged

offense which may warrant dismissal." McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); see also Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990)(when a School Board seeks to terminate a teacher who is employed under a continuing contract, the allegations against him or her must be proven by a preponderance of the evidence).

22. Except for Mr. Sellars himself, the four students who testified at the hearing were the only witnesses with personal knowledge of the conditions in Mr. Sellars's classroom and of the way in which he treated the students in the class. Their testimony, including that of the student who testified on Mr. Sellars's behalf, was vague and contradictory, and it does not provide a basis for reaching a conclusion with any degree of confidence that Mr. Sellars committed the acts alleged in the Administrative Complaint.⁶

23. Based on the findings of fact herein, it is concluded that the Superintendent did not carry his burden of proving by a preponderance of the credible evidence that Mr. Sellars committed the acts alleged in the Administrative Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is **RECOMMENDED** that the Broward County School Board enter a final order dismissing the Administrative Complaint

against Ernest L. Sellars and reinstating Mr. Sellars without back pay or benefits lost during his suspension.

DONE AND ENTERED this 10th day of April, 1997, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO

Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of April, 1997.

ENDNOTES

¹ The authenticity and completeness of the statements included in the investigative report were not challenged at the hearing. Although all of the statements are hearsay within hearsay, they were considered both in assessing the credibility of the four students testifying at the hearing and in determining whether the hearsay statements explained or corroborated evidence presented at the hearing.

² J. J. was not asked any questions regarding the alleged incident involving S. B.; J. A. testified that he did not recall any such incident, which was consistent with the observation of Officer Green in the summary of his investigative report that J. A. "had no recollection of the incident."

³ In fact, these three students were very quick with their answers that Mr. Sellars put students in the closet, the cabinet, and the podium and gave the impression that the responses were rehearsed. Similar assertions were made by other students in the statements given to Officer Green; in several instances, as with the testimony at trial, the context in which the responses were given casts doubt on whether they were spontaneous and based on the children's own observations or whether they were based on discussions the children might

have had prior to giving their testimony or statements. Indeed, in some of the statements, Officer Green led the children through their responses, sometimes telling them to limit their answers to "yes or no."

⁴ Mr. Cooper testified that one of the reasons he requested an investigation of the allegations made by Faith Williams was that "we also had other concerns from parents regarding the same type of incidents." (Transcript at 189) He did not provide any more precise information regarding the nature of these concerns or of the incidents to which he is referring.

⁵ The only evidence supporting these charges is contained in the statements given by S. B., B. W., C. B., C. A., and M. B. to Officer Green. This evidence is hearsay and does not explain or supplement other evidence nor would it be admissible over objection in a civil action. This evidence may not, therefore, form the basis for a finding of fact. See Section 120.57(4), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.")

⁶ It is the responsibility of the administrative law judge to weigh the evidence, resolve conflicts in the evidence, and judge the credibility of the witnesses. Department of Business and Professional Regulation v. McCarthy, 638 So. 2d 574, 575 (Fla. 1st DCA 1994)(citing Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)); Martuccio v. Department of Professional Regulation, 622 So. 2d 607, 109 (Fla. 1st DCA 1993)("It is for the hearing officer to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence.")

All of the admissible evidence has been considered in this case, and the testimony and credibility of the four students who testified at the hearing has been carefully evaluated. The testimony given by these students at the hearing has been compared with the out-of-court statements given to Officer Green to determine the extent to which those out-of-court statements explain or supplement or lend credibility to the testimony given by the witnesses at the hearing. See section 120.57(4).

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.