

PRELIMINARY STATEMENT

By letter dated June 6, 2000, Superintendent of Schools H. Benjamin Marlin (Marlin), acting on behalf of the School Board of Palm Beach County (School Board), notified Respondent, Barry Hill (Hill) of his recommendation to terminate Hill's employment.

The events giving rise to this case occurred on or about December 16, 1999, when Hill was arrested and charged with driving under the influence (DUI) and driving with an expired license tag and a broken taillight.

The School Board alleged that during the personal property inventory that followed Hill's arrest, the police discovered a plastic baggie containing 7.4 grams of cocaine, which constituted the additional offense of introduction of contraband into a correctional institution.

The School Board further alleged that two additional clear plastic baggies, each containing 7.7 grams of cocaine, were recovered from the car Hill was driving at the time of the traffic stop.

The School Board asserts that the foregoing narcotics related offenses constitute just cause for termination. Pursuant to the Collective Bargaining Agreement between Palm Beach County Classroom Teachers Association (CTA) and the School Board, Article II, Section M, these charges must be

substantiated by clear and convincing evidence in order to justify termination.

On June 14, 2000, the School Board voted to terminate Hill, who thereafter made a timely request for a formal hearing before the Division of Administrative Hearings (DOAH).

At the final hearing, the School Board presented the testimony of V. Gray, Delray Beach Police Officer; Scott McGuire, Delray Beach Police Officer; Paul Houlihan, Principal of Palm Beach Gardens High School; Craig Lawson, Assistant State Attorney; Christopher Jellinek, Criminal Probation Officer for the Department of Corrections; Ray Miller, Personnel Compliance Administrator for the School District; Sharon Kelley, Director of Employee Relations for the School District; James P. Kelly, Chief of the Palm Beach County School District Police; and Gina Evanzia, Senior Forensic Scientist for the Palm Beach County Sheriff's Office Crime Laboratory.

Hill presented the testimony of Helene Samango, Executive Director of the CTA; and his former attorneys Michael Dubiner and Mark Wilensky. Hill also testified in his own behalf.

Petitioner's Exhibits 1, 8-10, 13-14, 28-34, and 42-44 were admitted into evidence. Respondent did not admit any exhibits into evidence.

Official recognition was taken of Chapter 435, Section 230.23, Florida Statutes; Section 230.33, Florida

Statutes; Section 120.569, Florida Statutes; Section 120.57, Florida Statutes; Section 231.36, Florida Statutes; State Board of Education Administrative Rules Chapter 6B-1 and Chapter 6B-4, Florida Administrative Code; School Board Policies 3.12 and 3.27; and School Board Directive 3.27.

The Transcript of the formal hearing was filed on February 15, 2001. Petitioner filed a Motion for Leave to Amend Administrative Complaint on February 28, 2001, which was granted on March 13, 2001. Respondent filed a Motion for Dismissal on March 1, 2001, which was denied on March 13, 2001.

The rendition of this Recommended Order was delayed when the parties timely filed unopposed motions for enlargements of time in which to file their Proposed Recommended Orders. Good cause was shown as to each motion, and extensions of time were therefore granted through May 10, 2001.

FINDINGS OF FACT

1. Hill was a School Board employee from 1978 up to and including December 15, 1999. In the 1999-2000 school year, Hill was assigned to Palm Beach Gardens High School. Although classified as a "teacher on special assignment," his employment responsibilities paralleled those of an Assistant Principal.

2. Hill's job responsibilities included monitoring the halls, supervising the campus and working with students in

various functions. He was also responsible for student discipline.

3. Hill enjoyed his work with students and was good at it. He was very well liked by students and interacted positively with them. His authority was rarely challenged.

4. In his last two annual evaluations, Hill was described as a "team player" who "maintains excellent rapport with all students" and serves a "vital role" in the operation of the school.

5. Hill's life and previously unblemished career began to unravel on the night of December 16, 1999. Sometime around midnight, Hill was the subject of a traffic stop. Hill was driving a car owned by his sister, and was alone when pulled over on Atlantic Avenue, Delray Beach, Florida.

6. Hill was detained because a Delray Beach police officer had observed that Hill's driving was erratic; that his left taillight was out; and the car's license tag was out of date.

7. At all times during the traffic stop and the events which transpired after, Hill conducted himself as a "perfect gentleman." He was polite and fully cooperative with the police.

8. After failing a roadside sobriety test, Hill was arrested and taken to the Palm Beach County Jail.

9. Hill consented to a breath test, which revealed an unlawful blood alcohol level of .159/.158.

10. The test result triggered an automatic suspension of Hill's driving privileges; however, those privileges were reinstated by the Department of Highway Safety and Motor Vehicles when it came to light that the so-called Intoxilyzer breath analysis machine on which Hill's test was performed had not been maintained in the manner required by law.

11. While being held in custody, Hill's personal belongings, including the contents of his pockets, were taken from him at the jail. During this process, police claim to have found a baggie weighing 7.4 ounces and containing cocaine.

12. The evidence established that at least two Delray Beach police officers were involved in the portion of the booking process which resulted in the alleged discovery of a "dime bag" of cocaine; however, at the final hearing, Delray Beach Police Officer Scott McGuire (McGuire) was the only witness produced by the School Board who claimed knowledge of the circumstances surrounding the alleged discovery of the baggie, which allegedly contained 7.4 grams of cocaine.

13. McGuire's testimony fell far short of clear and convincing evidence that Hill did in fact possess a dime bag, a baggie, 7.4 grams of cocaine, or 7.4 grams of a substance containing cocaine.

14. McGuire's testimony alternated general statements about what usually happens during the booking process with what happened with respect to Hill's booking on the night of December 16, 1999. McGuire's casual demeanor while testifying, coupled with the imprecise nature of the questions asked and the answers given by him, rendered the undersigned unable to conclude that an appropriate chain of custody had been maintained. In other words, the School Board failed to establish by clear and convincing evidence that the contents of Hill's pockets--and only the contents of Hill's pockets--were at all times accounted for and handled in a manner adequate to assure that no items were removed or added.

15. Initially, the School Board, relying solely upon police reports, asserted that the baggie alleged to have been found in Hill's possession contained 7.4 grams of cocaine.

16. That assertion was negated by Gina Evanzia (Evanzia), Senior Forensic Scientist for the Palm Beach County Sheriff's Office Crime Laboratory and the only School Board witness with personal knowledge of the actual baggie alleged to have been found among Hill's possessions.

17. Evanzia testified that the baggie which the School Board attributed to Hill was not large enough to hold 7.4 grams of anything.

18. The baggie provided to Evanzia for testing and alleged to have come out of Hill's pocket contained 18 milligrams of a substance which contained cocaine, and not the 7.4 grams alleged to have been found in Hill's possession on the night of December 16, 1999.

19. At the time of Hill's arrest and at final hearing, neither McGuire nor any other witness provided a useful physical description of the baggie alleged to have been in Hill's pocket.

20. The gaps in McGuire's testimony coupled with the unexplained discrepancies between the 7.4 gram baggie alleged to have been found in Hill's possession and the much smaller baggie about which Evanzia testified makes it impossible to determine what, if any, contraband was found on Hill's person.

21. The alleged discovery of the 7.4 gram baggie resulted in the police recommending that Hill be charged with introducing contraband into a correctional facility. Declining to do so, the State Attorney instead charged Hill with possession of cocaine.

22. Prior to the time Hill was transported to the jail, the arresting officers searched Hill's sister's car for contraband. Finding none, the police made arrangements for the car to be impounded and towed to a privately owned lot for storage.

23. After the car was placed in the custody of the towing company, one of its employees claimed to have found two more baggies alleged to contain significant amounts of cocaine in plain sight on the floorboard of the car.

24. Police tested the baggies for fingerprints but found none. There is no credible evidence that there was any cocaine on the floorboard of the car while it was in Hill's possession and control. The testimony of Officer V. Gray (Gray) that he failed to spot the baggies "[because he] didn't have a flashlight to go through the car real good" was so implausible that Gray was readily cross-examined out of it on the next page of transcript. 1/ No criminal charges were brought against Hill on account of these baggies.

25. Although Hill had substantial and legitimate defenses to the criminal charges which the State Attorney did elect to file, Hill accepted responsibility for the arrest by accepting the State Attorney's offer to enter into a plea bargain which would take into account Hill's previously spotless record.

26. The State Attorney, believing that Hill should be afforded an opportunity to atone for the aberrational events of December 16, 1999, and to rehabilitate himself, permitted Hill to plead guilty to a misdemeanor charge of driving while intoxicated, and to dispose of the cocaine charge by entering a pretrial intervention (PTI) program.

27. At the time of the final hearing, Hill was in full compliance with all of the terms of the PTI agreement.

28. At all times material to this case, Hill was appropriately contrite about the DUI arrest. He was and is willing to demonstrate his contrition and his commitment to public service by accepting any assignment, coupled with any degree of probation and/or supervision deemed appropriate by the School Board, to assure that he is fully rehabilitated before being allowed to resume contact with students.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

30. Pursuant to Section 231.36 (4)(c), Florida Statutes, instructional personnel may be dismissed for proper or just cause. Under the terms of the Collective Bargaining Agreement between Palm Beach County Classroom Teachers Association and the School District of Palm Beach County, Florida, Article II, Section M, the material allegations must be proved by clear and convincing evidence.

31. "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The

evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Smith v. Department of Health and Rehabilitative Services, 522 So. 2d 956, 957 (Fla. 1st DCA 1988); citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

32. The School Board has failed to meet this heavy burden of proof. It has failed to establish by clear and convincing evidence that Hill was in possession of cocaine on December 16, 1999.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a Final Order reinstating Hill's employment with the School Board with back pay and benefits retroactive to the date of termination.

DONE AND ENTERED this 13th day of June, 2001, in Tallahassee, Leon County, Florida.

FLORENCE SNYDER RIVAS
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 June, 2001.

ENDNOTE

1/ Q: Assuming...it was actually
 found on the floorboard in plain view in the
 vehicle, you wouldn't need a flashlight to
 see that?

 A: I wouldn't think so.

Transcript, Volume I, pages 30, ln. 23-31, ln.1.

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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.