

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 01-2038
)
 WILLIAM FOX,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 12, 2001, via video teleconference, with the parties appearing in West Palm Beach, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who was present in Tallahassee, Florida; on September 26, 2001, in West Palm Beach, Florida; on October 11, 2001, in West Palm Beach, Florida, via video teleconference with Judge Malono in Tallahassee, Florida; and on March 20, 2002, in West Palm Beach, Florida, via telephone conference, with Judge Malono presiding in Tallahassee, Florida.

APPEARANCES

For Petitioner: Alan M. Aronson, Esquire
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For Respondent: Lawrence M. Fuchs, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner's decision to suspend the Respondent without pay for a period of five working days should be sustained.¹

PRELIMINARY STATEMENT

In a Notice of Suspension Without Pay dated May 8, 2001, the Superintendent of the Palm Beach County school system ("Superintendent") notified William Fox that he was recommending to the Palm Beach County School Board ("School Board") that, at its May 16, 2001, meeting, Mr. Fox be suspended without pay from his position as a teacher for a period of five working days, beginning May 17, 2001, and ending May 23, 2001. The grounds for the recommendation were stated in the notice as follows: "On or about December 19, 2000, you used inappropriate language with students and parents. On March 28, 2000, you received a Written Reprimand for making inappropriate comments to students."

In an Administrative Complaint dated May 23, 2001, the Superintendent alleged the following factual basis for the suspension recommendation:

7. On or about December 19 through 20, 2000, Respondent used inappropriate language and made inappropriate comments towards students and parents.

8. Language and comments included but were not limited to the Respondent swearing at students and parents, calling students "jack-asses", and telling a parent he would "see her son at his funeral."

9. On March 28, 2000, Respondent received a Written Reprimand for having made similar inappropriate comments to students and parents.

The Superintendent alleged as the legal basis for the administrative charges the following:

10. Pursuant to Florida 6B-1.001(3), Florida Administrative Code, Code of Ethics of the Education Profession in Florida:

(3) Aware of the importance of maintaining the respect and confidence of one's colleague, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

11. Just cause exists for the requested relief pursuant to Fla. Stat. §231.36; Article II, Section M, of The Collective Bargaining Agreement between the School District and The Classroom Teachers Association; and School Board Policy 3.27.

In addition, in the introductory paragraph of the Administrative Complaint, it was alleged that Mr. Fox also violated Rules 6B-1.006 and 6B-4.009(6), Florida Administrative Code. Mr. Fox timely requested an administrative hearing, and the

School Board transmitted this matter to the Division of Administrative Hearings for assignment of an administrative law judge.

Pursuant to notice, the final hearing was convened on September 12, 2001. The School Board presented the testimony of the following witnesses: B.W., a former student of Mr. Fox; L.G., B.W's mother; Anthony Rochon, a Crisis Intervention Teacher at Jefferson Davis Community Middle School ("Jefferson Davis"); Todd Smith, assistant principal for the sixth grade at Jefferson Davis; Oliver Johnson, a compliance administrator for the School Board; and Paul LaChance, Director of the School Board's Department of Professional Standards. Petitioner's Exhibits 1 through 7 were offered and received into evidence. Petitioner's Exhibit 1 is the investigative file compiled by Mr. Johnson, the School Board's investigator in this case. Although the School Board presented sufficient testimony to establish that the report is a business record, see Section 90.803(6), Florida Statutes, this exhibit was received subject to a hearsay objection with respect to the hearsay statements contained in the report. See Section 120.57(1)(c), Florida Statutes.

At the beginning of the final hearing on September 12, 2001, counsel for the School Board indicated that student S.M. and his mother M.M, who had been subpoenaed to testify as

witnesses for the School Board, could not be present at the hearing. Counsel for the School Board requested that the hearing be continued to allow him to present the testimony of these two witnesses. Counsel for Mr. Fox indicated that Mr. Fox did not wish to present any evidence until the School Board had presented its case in its entirety. A continuation of the hearing was, therefore, scheduled for September 26, 2001.

The hearing on September 26, 2001, was scheduled to begin at 8:30 a.m., but counsel for the School Board informed the undersigned that, although new subpoenas for S.M. and M.M. commanding their presence on September 26, 2001, at 8:30 a.m. had been served, they had not yet appeared. At approximately 9:00 a.m., counsel for the School Board telephoned M.M., who told him that, because of a family emergency, neither she nor her son could appear to testify that day. Counsel for the School Board indicated that these were very important witnesses and that he had been instructed to request another continuance of the hearing so that he could present their testimony. The request was granted over the objections of counsel for Mr. Fox, and a second continuation of the hearing was scheduled for October 11, 2001. Counsel for the School Board was advised by the undersigned that he should consider going to circuit court to enforce the subpoenas and that the hearing would not be

continued for a third time should S.M. and M.M. fail to appear on October 11, 2001.

After the hearing was convened on October 11, 2001, counsel for the School Board stated that he had been directed not to go to circuit court to enforce the subpoenas for S.M. and M.M. He stated that he had again served subpoenas on them, that he had telephoned M.M. on the morning of October 10, 2001, and was assured that she and her son would appear; however, when counsel for the School Board spoke with M.M. on the afternoon of October 10, 2001, she assured him that, regardless of any legal obligation she might have under the subpoenas, she and her son would not appear at the hearing.

Counsel for the School Board stated that he did not believe he had sufficient evidence to sustain the charges and that he would work with counsel for Mr. Fox to craft a settlement agreement that would include dismissal of the Administrative Complaint with prejudice and would include provisions to make Mr. Fox whole with respect to back pay. Counsel for the School Board stated that he believed this could be accomplished in time to put the matter on the agenda for the School Board's November 2001, meeting. The case was, therefore, placed in abeyance pending action by the School Board on a settlement agreement.

In a status report dated January 3, 2002, counsel for the School Board advised that a Settlement Agreement and General Release was negotiated and signed by Mr. Fox and that the agreement would be presented to the School Board at its February 20, 2002, meeting. In a status report dated March 5, 2002, counsel for the School Board advised that the matter had not been placed on the agenda for the February meeting. During a telephone conference held on March 7, 2002, the undersigned was advised that the School Board did not intend to take any action on the settlement agreement.

A third continuation of the hearing was scheduled for March 20, 2002. At the hearing on March 20, 2002, the School Board rested its case. Mr. Fox testified on his own behalf but offered no exhibits into evidence.

The final volume of the four-volume transcript of the proceedings was filed with the Division of Administrative Hearings on April 1, 2002, and the School Board timely filed its proposed findings of fact and conclusions of law, which has been considered in the preparation of this Recommended Order.

Mr. Fox did not file any post-hearing submission.

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. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise all free public schools within the School District of Miami-Dade County, Florida. Article IX, Florida Constitution; Section 230.03, Florida Statutes.

2. Mr. Fox is a teacher of emotionally handicapped students who has been employed by the School Board for approximately 27 years and has taught at Jefferson Davis for the past 23 years. He is employed by the School Board under a continuing contract.

3. On March 28, 2000, Mr. Fox was issued a written reprimand by the Director of the School Board's Department of Employee Relations for making inappropriate comments to students.

4. During the 2000-2001 school year, Mr. Fox taught a sixth grade class composed of six to eight emotionally handicapped students, some of whom had behavioral problems. The students in the class were between 11 and 12 years of age.

5. B.W. was a student in Mr. Fox's class from the first part of November 2000 until he was transferred in the spring to another class for emotionally handicapped students.² B.W. testified that Mr. Fox cussed in class, using words like "damn" and "asshole," and saying things like "quit your bitching." B.W. testified that he "believed" he overheard Mr. Fox say

"fuck" in a conversation with another teacher about restaurants and cars. B.W. agreed when counsel for the School Board asked him if Mr. Fox ever told him, another student in the class, to "shut the hell up."³ B.W. recalled that, when Mr. Fox was talking to a girl in the class who had been fighting, he overheard Mr. Fox tell her, in response to something that she said to him, that he would see her at her funeral.⁴ B.W. also testified that some of Mr. Fox's actions in the classroom bothered him.⁵

6. B.W. told his mother that Mr. Fox was being "real rude,"⁶ and he complained to her about Mr. Fox almost every day.

7. L.G., B.W.'s mother, testified that B.W. complained to her about Mr. Fox. B.W. told her that, one time, Mr. Fox told him to "shut the hell up."⁷ B.W. also told her that Mr. Fox used the "f- word" to a teacher, and B.W. told her that Mr. Fox "said the word, damn, one time."⁸ B.W. also told her that Mr. Fox told him to "sit back down in the damn seat."⁹ When B.W. told her these things, L.G. testified that she would contact Todd Smith and Anthony Rochon at Jefferson Davis; she spoke with them weekly.

8. L.G. testified that she had written in B.W.'s agenda book that Mr. Fox should correspond with her or call her on the telephone if there were a problem with B.W. According to L.G., Mr. Fox called her at work one day and told her that he had a

problem with B.W. L.G. went to the school immediately and went into the classroom to help her son. L.G. testified that Mr. Fox was rude to her on this occasion because he told her in a gruff voice: "'Tell him to do that page there.'"¹⁰

9. L.G. also testified that Mr. Fox telephoned her to talk about B.W. not doing his work and being obnoxious in class. L.G. testified that Mr. Fox was rude and unprofessional during these conversations; he was "very short" with her and once told her that B.W. "wouldn't do his damn work."¹¹

10. The 2000-2001 school year was Anthony Rochon's first year as the Crisis Intervention Teacher at Jefferson Davis. His job is to assist the special education teachers with students who become overly disruptive in the classroom. The students are removed from the classroom and sent to him for counseling. In many cases, the students are very angry when they come into his office; Mr. Rochon must sometimes send the student home because he or she cannot be calmed down, but, other times, the student stays with Mr. Rochon the entire day or returns to the classroom.

11. At unspecified times during the 2000-2001 school year, Mr. Rochon received complaints regarding Mr. Fox's comments and actions in the classroom. These complaints came primarily from four male students, including B.W. and S.M., although other students in Mr. Fox's class would occasionally complain.

Mr. Rochon received more complaints from the students in Mr. Fox's class than he did with respect to the other two classes for the emotionally handicapped at Jefferson Davis.

12. Mr. Rochon could not remember during his testimony specifically what each student said about Mr. Fox, but he thinks that B.W. may have said that Mr. Fox cursed at him "or something like that."¹²

13. With respect to the other complaints, Mr. Rochon recalled that "[s]ome [students] would say he cursed at them, used profanity. Some would say he made derogatory remarks about their intelligence. And those were basically their major complaints. Yelled at them."¹³ Some students complained to Mr. Rochon that Mr. Fox called them stupid or yelled at them, told them that they were not wanted in the class and "should be somewhere else."¹⁴

14. In most cases, Mr. Rochon would talk to the student and discover that the student had been angry and misinterpreted what Mr. Fox said. In a few cases, the student would not tell him what the problem was but would become upset and would refuse to return to the classroom; Mr. Rochon would refer these cases to Todd Smith, the assistant principal for the sixth grade.

15. Mr. Rochon also received complaints from the mothers of three of the four male students, including B.W.'s mother and S.M.'s mother. L.G., B.W.'s mother, complained to Mr. Rochon

that her son complained to her about things that Mr. Fox said to him, and L.G. complained that Mr. Fox was rude to her. M.M., S.M.'s mother, complained to Mr. Rochon that Mr. Fox hung up on her and was rude to her "or something" and that she received "excessive phone calls or something from Mr. Fox about things her child was doing in class."¹⁵

16. Mr. Rochon has no records of the complaints he received from students or parents, and he does not know whether the accusations against Mr. Fox were true.

17. Mr. Fox frequently sent both B.W. and S.M. to Mr. Rochon for intervention. B.W. was sent to Mr. Rochon two or three times per week, and S.M. was sent more often than B.W. Mr. Fox sent both students to Mr. Rochon for intervention because they were disrupting his classroom and he could not teach.

18. Sometimes Mr. Rochon would go to Mr. Fox's classroom to remove B.W. or S.M. in response to a request from Mr. Fox for intervention. Mr. Fox personally observed B.W. "running around the classroom, maybe talking loudly or having an argument with another student and refusing to stop when Mr. Fox asked him to."¹⁶ He personally observed S.M. to be "generally . . . loud, would sometimes use profanity. He would leave the room a lot. Mr. Fox had to call me to go find him a lot. He was more of a

volatile student in the sense that when he became very angry, he became very aggressive."¹⁷

19. The 2000-2001 school year was Mr. Smith's first year as the assistant principal for the sixth grade at Jefferson Davis. In the fall of 2000, Mr. Smith began receiving complaints from students about Mr. Fox's behavior in the classroom. Mr. Smith also received complaints from the parents of the four male students who complained to Mr. Rochon, especially from the mothers of B.W. and S.M. The complaints began in November 2000, at about the time B.W. was placed in Mr. Fox's classroom.¹⁸

20. Relevant to the issues herein, L.G., B.W.'s mother, complained to Mr. Smith that B.W. complained to her that Mr. Fox used inappropriate language and some profanity, specifically "bullshit," in the classroom. M.M, S.M.'s mother, made similar allegations against Mr. Fox, and she complained to Mr. Smith that Mr. Fox made some inappropriate comments and used some profanity, but she did not give Mr. Smith any specifics. L.G. and M.M. both complained to Mr. Smith that Mr. Fox was unprofessional in his conversations with them, but they did not give any specific instances of such behavior.

21. At their parents' requests, both B.W. and S.M. were transferred out of Mr. Fox's classroom. B.W. testified that he asked Mr. Smith to "get me out of the class because he [Mr. Fox]

was rude, and he would make comments to other children which I thought were inappropriate, and they bothered me."¹⁹

22. At about the same time, Mr. Smith discussed the complaints with Mr. Fox, and there were no further complaints from parents. Only one student complained to Mr. Smith about Mr. Fox after Mr. Smith's conversation with Mr. Fox.

23. Mr. Smith turned over the information regarding the complaints of L.G. and M.M. to the principal of Jefferson Davis, and the principal contacted the Personnel Department and referred the matter for investigation.

24. The investigation of Mr. Fox was assigned to Mr. Johnson on January 17, 2001. Mr. Johnson interviewed S.M., the alleged "student victim," on February 1, 2001; he interviewed B.W. and two other students in Mr. Fox's class on March 13, 2001; and he interviewed a seventh grade student on April 10, 2001, who had been in Mr. Fox's class the previous year. Mr. Johnson also interviewed S.M.'s aunt on March 20, 2001, and S.M.'s mother, M.M., on April 10, 2001.²⁰

25. Mr. Johnson made notes during these interviews and later compiled the notes into summaries of the interviews that were included in his investigation report. He compiled some other documents in this investigation report, including S.M.'s extensive disciplinary history, the written reprimand issued to

Mr. Fox on March 28, 2000, and Mr. Fox's evaluations for the 1998-1999 and 1999-2000 school years.²¹

26. Mr. Johnson presented the investigation report to a case management committee, which determined that there was probable cause to discipline Mr. Fox and that the appropriate penalty would be a five-day suspension without pay, which would be progressive discipline because of the written reprimand of March 28, 2000.

Summary.

27. The School Board presented no evidence that establishes that Mr. Fox used inappropriate language or made inappropriate comments to students or parents on December 19 or 20, 2000.

28. But even going beyond the limited time frame alleged in the Administrative Complaint, the evidence is simply not qualitatively or quantitatively sufficient to establish clearly and convincingly that Mr. Fox made inappropriate comments and used inappropriate language in the classroom or to parents. And, even had the evidence supported a finding that Mr. Fox had made inappropriate comments or used inappropriate language on December 19 and 20, 2000, or even during the 2000-2001 school year, such behavior does not involve conviction for an act of moral turpitude, the only specific violation with which Mr. Fox is charged.

29. The only direct evidence of Mr. Fox's behavior in the classroom was the testimony of B.W.. The remaining evidence was either hearsay or hearsay within hearsay: It consisted of the testimony of L.G. with respect to B.W.'s complaints to her about Mr. Fox's comments and language in the classroom; the testimony of Mr. Rochon and Mr. Smith with respect to complaints of primarily unspecified comments and language attributed to Mr. Fox conveyed to them by students and parents, who reported only what their children had told them about Mr. Fox's comments and language in the classroom; and the summaries of the interviews Mr. Johnson conducted with a few students and the aunt and mother of one student.

30. Given all the facts and circumstances in this case, including B.W.'s demeanor as a witness and the use of leading questions to develop his testimony, B.W.'s testimony is not sufficiently credible or persuasive of itself to constitute clear and convincing evidence that Mr. Fox made inappropriate comments and used inappropriate language in his classroom. Furthermore, the hearsay evidence regarding the student complaints about Mr. Fox's language and comments in the classroom, which formed the primary body of evidence against Mr. Fox, cannot be used to enhance B.W.'s credibility and is not sufficiently persuasive, when viewed as supplementing or explaining B.W.'s testimony, to establish clearly and

convincingly that Mr. Fox made inappropriate comments or used inappropriate language in the classroom.²²

31. The only direct evidence of Mr. Fox's behavior towards parents is the rather vague testimony of L.G. that Mr. Fox was unprofessional and rude and that, one time, Mr. Fox used the word "damn" in a conversation with her; the other evidence consisted of the testimony of Mr. Rochon and Mr. Smith regarding the complaints of two parents and the summaries of interviews with a student's mother and aunt that were included in the investigation report. A description of Mr. Fox's comments as rude and unprofessional is not sufficiently specific to establish that his comments were inappropriate, and L.G.'s testimony that Mr. Fox said "damn" in one conversation with her, even if true, is not sufficient to support a finding that Mr. Fox's use of the word was inappropriate, especially given the absence in the record of any evidence that the School Board considers inappropriate the use of the word "damn" to a parent.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2001).

33. Pursuant to Section 230.23(5)(f), Florida Statutes (2001), the School Board is authorized to suspend

members of the school system's instructional personnel in a manner consistent with the provisions of Chapter 231, Florida Statutes.

34. Section 231.36(4), Florida Statutes (2000), provides in pertinent part:

(c) Any member of the district administrative or supervisory staff and any member of the instructional staff, including any principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against any such employee of the district school board, the district school board may suspend such person without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid.

35. Article II, Section M, of The Collective Bargaining Agreement Between the School District of Palm Beach County, Florida, and Palm Beach County Classroom Teachers Association, effective July 1, 1999 - June 30, 2002, deals with discipline of School Board employees. Section M provides in pertinent part:

1. Without the consent of the employee and the Association, disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action.

2. All disciplinary action shall be governed by applicable statutes and provision of this Agreement. . . .

Therefore, the School Board bears the burden of proving the violations alleged in the Administrative Complaint by clear and convincing evidence.

36. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

37. Based on the findings of fact herein, the School Board has failed to prove by clear and convincing evidence that Mr. Fox committed the acts alleged in the Administrative Complaint as the factual basis justifying his suspension without pay. However, even if the factual basis for imposing discipline had been established with the requisite degree of proof, the School Board failed to allege in the Administrative Complaint

any legal basis for the five-day suspension without pay imposed on Mr. Fox.

38. The only reference to Section 231.36 in the Administrative Complaint was in paragraph 11, in which the School Board asserted that "[j]ust cause exists for the requested relief pursuant to Fla. Stat. §231.36." The introductory paragraph of the Administrative Complaint contains the most expansive statement of the legal bases for Mr. Fox's suspension without pay. In that paragraph, the School Board alleges that Mr. Fox violated Rule 6B-1.001(3), Florida Administrative Code;²³ Rule 6B-1.006, Florida Administrative Code; and Rule 6B-4.009(6), Florida Administrative Code.²⁴

39. Rule 6B-1.001, Florida Administrative Code, is the Code of Ethics of the Education Profession in Florida. Rule 6B-1.006(3), Florida Administrative Code, provides: "Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct."

40. Rule 6B-1.006, Florida Administrative Code, is the entire Code of Professional Conduct for the Education Profession in Florida, and consists of a number of provisions. The School Board failed in its Administrative Complaint to identify which of the several provisions of this rule defining the duty of a

teacher toward his or her students that Mr. Fox allegedly violated.

41. A violation of a provision of the Code of Professional Conduct or the Code of Ethics is not alone a sufficient basis on which to impose discipline on a teacher. Such a violation is, however, a basis for discipline when it is charged that the teacher committed misconduct in office. In Rule 6B-4.009(3), Florida Administrative Code, "[m]isconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC, and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC, which is so serious as to impair the individual's effectiveness in the school system."

42. Mr. Fox has not been charged anywhere in the Administrative Complaint with having committed misconduct in office, and, therefore, he cannot, as a matter of law, be found to have violated Rules 6B-1.001(3) or 6B-1.006, Florida Administrative Code. Disciplinary action may be based only upon those offenses specifically alleged in the administrative complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Kinney v. Department of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987);

Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

43. The School Board cited Rule 6B-4.009(6), Florida Administrative Code, as the third rule that Mr. Fox allegedly violated by allegedly using inappropriate language and making inappropriate comments to students and parents.

Rule 6B-4.009(6), Florida Administrative Code, provides:

"Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude."

44. Section 231.36(4)(c), Florida Statutes (2000), quoted above, provides as one basis for suspension of a teacher employed under a continuing services contract "conviction of a crime involving moral turpitude." The School Board did not allege in the Administrative Complaint, or submit any proof at the final hearing, to establish that Mr. Fox has ever been convicted of a crime, much less a crime involving moral turpitude.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Palm Beach

County, Florida, enter a final order rescinding the five-day suspension of William Fox and ordering that his salary for these five days be paid.

DONE AND ENTERED this 20th day of May, 2002, 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 20th day of May, 2002.

ENDNOTES

- 1/ The parties stipulated at the final hearing that Mr. Fox served his suspension from May 17 through May 23, 2001.
- 2/ The time of the transfer is not established in the record.
- 3/ Transcript at 17.
- 4/ Transcript at 23.
- 5/ Mr. Fox was not charged in either the Notice of Suspension Without Pay or the Administrative Complaint with engaging in inappropriate actions in the classroom, and no findings of fact will be made with respect to any allegedly inappropriate actions of Mr. Fox.
- 6/ Transcript at 21.
- 7/ Transcript at 34.

8/ Transcript at 35.

9/ Transcript at 39.

10/ Transcript at 37.

11/ Transcript at 42.

12/ Transcript at 52.

13/ Transcript at 53.

14/ Transcript at 67.

15/ Transcript at 59.

16/ Transcript at 61.

17/ Transcript at 62.

18/ B.W. was "mainstreamed" into regular classes at the beginning of the school year but was placed in Mr. Fox's class for emotionally handicapped students in November 2001.

19/ Transcript at 26.

20/ Mr. Johnson testified that he interviewed L.G., B.W.'s mother, during his investigation. However, Mr. Johnson's investigation report does not contain a statement that can reasonably be attributed to L.G.

21/ Mr. Fox's performance was rated acceptable in each category and overall.

22/ The hearsay evidence was admitted pursuant to Section 120.569(2)(g), Florida Statutes, and Section 120.57(1)(c), Florida Statutes ("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."). Although the School Board established the foundation for admitting into evidence the investigation file compiled by Mr. Johnson as a business record of the School Board, the summaries of interviews included in the file constitute hearsay that could not be admitted over objection in a civil action.

There is some question in the undersigned's mind as to whether the hearsay evidence consisting of the statements of other students, as told to Mr. Smith, Mr. Rochon, and Mr. Johnson, can properly be bootstrapped onto B.W.'s testimony as somehow "supplementing or explaining" that testimony. Nonetheless, the information in the interview summaries and in the hearsay statements included in the testimony of L.G., Mr. Rochon, and Mr. Smith has been carefully evaluated with respect to its "rational and persuasive force." Ehrhardt, C.W., Florida Evidence (2002 edition), Section 803.6c at p. 774.

^{23/} As noted in the Preliminary Statement, this violation is repeated in paragraph 10 of the Administrative Complaint.

^{24/} Mr. Fox is also charged, in the alternative, with violation of School Board Directive and Policy 3.27 and Article II, Section M, of the Collective Bargaining Agreement, which are in evidence as Petitioner's Exhibits 6 and 3, respectively. School Board Policy 6Gx50-3.27 does nothing more, however, than set forth the procedures that must be followed in the suspension and dismissal of employees. Article II, Section M of the Collective Bargaining Agreement does nothing more than set forth the procedures to be followed in disciplining employees, including the imposition of progressive discipline.

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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.