

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 02-2775
)
THOMAS BROWN,)
)
 Respondent.)

)

RECOMMENDED ORDER

A formal hearing in this case was held by Judge Stephen F. Dean, duly-designated Administrative Law Judge of the Division of Administrative Hearings on October 8 and 9, 2002, and continued and completed on October 31, 2002, at Jacksonville, Florida, on disputed issues relating to the proposed dismissal of Thomas P. Brown, a teacher in the Duval County School District.

APPEARANCES

For Petitioner: Derrel Q. Chatmon, Esquire
Duval County School Board
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

For Respondent: David A. Hertz, Esquire
Duval Teachers United
1601 Atlantic Boulevard
Jacksonville, Florida 32207

STATEMENT OF THE ISSUES

Whether the District has proven, by a preponderance of the evidence, that there was just cause to dismiss Thomas Brown, consistent with the provisions of the Duval County Teacher Tenure Act, Laws of Florida, Chapter 21197 (1941), as amended, and Chapter 120, Florida Statutes.

PRELIMINARY STATEMENT

On May 8, 2002, a Notice of Dismissal was issued by the Superintendent of the Duval County Public Schools alleging that Thomas Brown had demonstrated professional incompetency as set forth in subsection (c) of Section 4 of the Duval County Teacher Tenure Act, Laws of Florida, Chapter 21197. As a result, the Respondent requested an administrative hearing pursuant to Chapter 120, Florida Statutes.

On October 8 and 9, 2002, the Petitioner presented the testimony of Jack Shanklin, Dennis Hester, Patricia Ann Butterboldt, Mary Safer, Bobby Powell, and John D. Williams. The Petitioner submitted Exhibits numbered 11 and 14 through 45, all of which were admitted in evidence. The Respondent called Samuel E. McCreary and Freddie McClain, Jr., and testified on his own behalf.

The hearing was recessed until October 31, 2002, in order for the Petitioner to depose the Respondent's expert witness, Lenard C. Bowie, Ph.D. Although the Petitioner did depose Bowie

on October 17, 2002, the Respondent elected not to present any additional testimony or evidence. The three-volume transcript was filed on November 25, 3003. Thereafter, it was determined the proposed recommended orders would be submitted on Monday, December 23, 2002. The Respondent's order was lost in transmission and was not filed until February 5, 2003. Both sides submitted proposed recommended orders that were read and considered.

FINDINGS OF FACT

1. The Respondent, Thomas Brown, was a teacher of instructional music in the Duval County School District (District). As part of the instructional personnel with the District, Brown was subject to be evaluated on an annual basis pursuant to the teacher assessment system. The purpose for evaluating teachers is to make certain that instruction is occurring in the classroom and that students are learning the required subject matter. The evaluation process also makes certain that student safety in the classroom is taken into consideration by the instructional personnel (teachers). The District uses the teacher assessment system to evaluate all of its teachers regardless of the subject matter they instruct.

2. From the 1999-2000 and the 2000-2001 academic school years, Brown was a teacher at Andrew Jackson High School where Jack Shanklin (Shanklin) is principal. Shanklin has evaluated

teachers annually since he became a principal 22 years ago. He uses the classroom observation instrument within the teacher assessment system to evaluate all of his teachers.

3. At the beginning of the 2000-2001 academic year, Shanklin; Ms. Pierce, assistant principal; Dennis Hester, professional development cadre member; and Mr. Dudley took part in creating a success plan for Brown. A success plan is a course of action designed to prevent an at-risk teacher from getting an unsatisfactory annual evaluation by engendering professional improvement. Shanklin discussed the success plan with Brown before it was implemented. Brown did not have any objections to the plan.

4. Shanklin evaluated Brown for the 2000-2001 academic school year during March of 2001. He based his evaluation results on the observations and written reprimands that he had issued to Brown throughout the 2000-2001 year.

5. During the year, Shanklin observed Brown's classes. In preparation for a classroom visit, he reviewed Brown's lesson plans for October 18, 2000. Lesson plans describe the daily plan for instruction of the students on a particular day. Shanklin had previously directed Brown to turn in his lesson plans on a weekly basis in order to monitor Brown's progress because of his departure from planned lessons.

6. Shanklin attempted to observe Brown in his classroom on October 18, 2000; however, neither the class nor the teacher was present in Brown's classroom. Shanklin later found Brown and the class with the choral class in the auditorium; but Brown had failed to amend his lesson plans to include the choral visit, although he had adequate time to do. He had presented none of the lesson plan that had he filed.

7. Shanklin returned on October 19, 2000, to observe Brown's classroom ten minutes after class has begun. As he entered the classroom, two students ran out the back door. When questioned, Brown had no knowledge of their identity. Shanklin witnessed students harassing other students without correction from Brown while he was addressing the needs of only five of his 35 students. While Brown spoke with the small group, the other students were doing whatever they wanted. There were no class assignments being conducted by the other students.

8. Shanklin later identified one of the students who had been harassing other students as John Fields. Shanklin removed Fields from class because his behavior was so menacing. Brown should have prohibited and corrected the student misconduct, which he failed to do. Shanklin gave Brown a written reprimand by letter dated October 30, 2000.

9. Shanklin also observed Brown on December 4, 2000, during a previously announced observation. Brown did not begin class with an appropriate review of recent material or outline of the day's lesson. Student misconduct again was uncorrected by Brown. Students were moving around and talking during instruction by Brown without correction. This class was not a band class, but a music appreciation class, and there was no need for student movement during instruction. After this observation, Shanklin reviewed his observations with Brown in January of 2001.

10. Following the January discussion, Shanklin observed Brown again later that month, at a previously announced observation. He also discussed that visit with Brown.

11. Shanklin also had Dennis Hester, a professional cadre member, observe Brown's classroom instruction. As part of Hester's responsibilities to improve "less than satisfactory" teachers, Hester reviewed and approved the success plan developed for Brown. Pursuant to that plan, Hester assisted Brown with both formal and informal observations and conferences through 2000 and 2001. After multiple informal conferences in January, Hester began formal observations in February.

12. Hester utilized a number of tools to accurately document the classroom instruction by Brown. Domain One Instrument is a tool in the Florida Performance Measurement

System which identifies a teacher's ability to plan lessons. The Domain Two Instrument is a classroom management tool used in the Florida Performance Measurement System (FPMS) to assess how a classroom is run. Hester was trained to evaluate teachers by using both tools and has done so with over 30 teachers in Duval County. Hester also used a conference planning guide which is a list of behaviors observed indicating areas to be worked on, and the Clinical Educator Training (CET) anecdotal instrument to clarify the events of a classroom observation in detail.

13. Hester observed Brown's class on February 1, 2001, and saw a number of students off-tasks, and one child sleeping. Hester observed Brown tell the sleeping child to "wake up, no slobbering on the desk . . ." Brown should have taken positive steps to keep the student awake, and should not have accused him of "slobbering on the desk." Hester discussed these deficiencies with Brown towards the end of February.

14. Hester was due to have all of his evaluations completed on March 15, 2001. Although the Domain One, on planning lessons, was due from Brown to Hester on January 18, 2001 for a February 27, 2001, class observation, Hester did not receive it until March 7, 2001. Thereafter, Hester faxed his commentary of the Domain One to the school for Brown to review as the remaining time permitted.

15. Although Hester did not specifically provide Shanklin with his observation notes for review, the principal reviewed the cadre's notes which outlined the similar misconduct and classroom mismanagement Shanklin witnessed himself.

16. Shanklin's evaluation was also made with the consideration of an incident at the May graduation of 1999/2000 academic school year. Brown's band refused to perform after Brown instructed them to do so. It was later discovered that those students who refused to perform were academically ineligible to be in the class. In prior years, Brown had allowed ineligible students to perform in the school band against the school's rules and regulations, and had been told to stop permitting this.

17. On March 15, 2001, Shanklin gave Brown an unsatisfactory annual evaluation. In evaluating Brown as unsatisfactory for Competency No. 1, Shanklin considered his own observations of Brown's failing to follow his established lesson plans. Brown's failure to manage his classroom and correct student misbehavior supports Shanklin's unsatisfactory evaluation under Competency No. 3. Because of a lack of academic climate due to classroom mismanagement and unorganized instruction, Shanklin deemed Brown to have been unsatisfactory in Competency No. 4. In addition, regarding Competency No. 4, Brown allowed students to eat in his classroom which was critiqued by Shanklin

in a letter to Brown dated December 6, 2000. In evaluating Brown unsatisfactory under Competency No. 5, Shanklin considered Brown's failure to provide sufficient evidence that any real grades could be disseminated to Brown's students as there were no rubrics or student work visible for assessments. Finally, Shanklin gave Brown an unsatisfactory evaluation on Competency No. 9 because Brown never demonstrated any type of diversified lesson designed to maintain the attention of the students; which was needed as evidenced by the repeated observation of students sleeping in his class.

18. Following the 1999/2001 academic school year, Brown was transferred to Jefferson Davis Middle School where Bob Powell was principal. Powell created an initial success plan for Brown when he first arrived in the beginning of the year. After formally observing Brown, Powell created a second success plan dated October 29, 2001, which was discussed and agreed to by Brown. The plan was designed for Brown to implement the components for his own benefit.

19. Throughout the year, Powell observed Brown's classroom instruction. On November 20, 2001, Powell formally observed Brown's instruction. Thereafter, Powell also observed Brown on two more occasions on January 10 and 18 of 2002.

20. During his observations, Powell witnessed students talking during "warm-ups," whose attention Brown failed to get. Powell observed that Brown failed to provide praise to his successful students which is needed at the middle school age.

21. Powell noted problems Brown had with communicating with band parents. Powell was concerned that a band parent reported that Brown had threatened to fail and throw her child out of band practice which Brown had no authority to do. In addition, band parents also complained that Brown placed their names as chaperones on a field trip, without their permission. When this was revealed, the trip had to be cancelled.

22. Following the formal conferences with Brown, Powell discussed his observations with Brown. Brown admitted to Powell that other District personnel were telling him the same things Powell was mentioning. Notwithstanding the counseling, Brown was unable to constructively adapt.

23. Powell also requested Patricia Ann Butterboldt to observe Brown during his instruction at Jefferson Davis Middle School. Butterboldt is responsible for supervising and overseeing the curriculum of music teachers throughout the District. During the 2001/2002 academic school year, Butterboldt observed Brown with an intermediate class on two occasions.

24. On November 1, 2001, Butterboldt observed that Brown failed to follow his own instructional classroom schedule. In addition, Brown utilized students to instruct other students in complex musical exercises for which students had no ability to adequately conduct the drill. Butterboldt also witnessed Brown's students consistently off task.

25. On January 23, 2002, observation, Butterboldt again observed inappropriate classroom instruction and management, to include Brown's failure to correct the class for ridiculing a student. Butterboldt noted that even if students forget their instruments, the teacher is responsible to provide instruction to that student.

26. Following both Butterboldt's observations, Powell was provided copies of her observation's reports.

27. Sue Martin, professional cadre member, was requested by Powell to provide feedback on Brown's instruction. Her report was introduced as Exhibit 29.

28. During the same academic school year, Mrs. Saffer, vice-principal observed Brown pursuant to Powell's request. Saffer also utilized the classroom observation instrument during her observation of Brown.

29. Saffer observed that Brown failed to properly correct the behavior of non-responsive students. Although critical,

Saffer also complemented Brown on his positive action; however, after reviewing Brown's grade book for the day of her observation, Saffer was surprised that the students were awarded grades without any means of evaluation Saffer could decipher.

30. Afterwards, Saffer met with Brown weekly regarding his grade book. In addition to the grade book, Saffer also discussed with Brown her observations (formal and informal) of his instructional conduct throughout the school year.

31. Although Saffer did not evaluate Brown, she did provide her observations to Powell for his evaluation.

32. In addition to school assistance and counsel, Powell provided Brown with many opportunities for professional training. Brown attended at least two training sessions to Powell's knowledge. However, Powell learned that Brown rejected a training conference in Jacksonville offered to him by Butterboldt because he said the presenters of the conference were "racists."

33. On January 30, 2002, Powell provided Brown with a notice warning him of an unsatisfactory annual evaluation. Powell based his notice of a possible unsatisfactory evaluation on all of the observations and notations he made and had been provided to him.

34. Thereafter, Powell observed another instruction by Brown in February of 2002. However, Powell never witnessed Brown perform pursuant to the schedule attached to a letter drafted by Brown which allegedly addressed Powell's concerns.

35. Powell eventually prepared Brown's annual evaluation for the year which reflected Powell's assessment of Brown's unsatisfactory performance demonstrated throughout the academic year.

36. John Williams is the director of professional standards for the District who was responsible for generating the termination letter once he received the second unsatisfactory evaluation. After reviewing all of the notices and evaluations, Williams not only determined that the manner in which both principals utilized the teacher assessment system was appropriate, but that Brown's performance required that the District initiate Brown's termination from employment.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to the provisions of the Duval County Teacher Tenure Act, Laws of Florida, Chapter 21197 (1941), as amended, and Chapter 120, Florida Statutes.

38. This Order is entered pursuant to the contract between Duval County School Board and the Division of Administrative Hearings, which is authorized by Chapter 120, Florida Statutes.

39. The Petitioner seeks to dismiss the 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 (Tenure Act), applicable exclusively to teachers employed by the Duval County School District. The Tenure Act provides that teachers employed by the District may be discharged or demoted for the following reasons:

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

(e) Professional incompetency as a teacher

40. It is the Petitioner's burden to prove, by a preponderance of the evidence, that the Respondent has been guilty of the charges alleged. 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. Ferris v. Austin, 487 So. 2d 1163 (Fla. 5th DCA 1986); South Florida Water Management District v. Caluwe, 459 So. 2d 390 (Fla. 4th DCA 1984).

41. Section 4(e) of the Tenure Act provides that when professional incompetency is the basis for discharging a teacher, certain requirements must be met. These requirements include giving the teacher a clear and detailed statement upon which the claim of incompetency is based, giving at least one opportunity to transfer to a new school, giving one year during which an opportunity of specific in service training will be given to correct alleged deficiencies. Furthermore, the Tenure Act provided that the teacher "shall cooperate in undergoing specific in-service training." These prerequisites were met in this case.

42. On May 11, 2001, Superintendent John Fryer put Brown on notice in writing that unless his performance improved, he would be dismissed as a teacher with the District. He was offered the opportunity to transfer in this same letter, and elected to do so. He transferred to Jefferson Davis Middle School where Bobby Powell was the principal.

43. During the 2001/2002 academic school year, Brown was given specific instructions from Powell regarding the expectations for success at Jefferson Davis Middle School. In addition, Brown was given the opportunity to attend in-service training sessions and was personally assisted by Powell, Martin, Butterboldt and Saffer in their attempts to help Brown improve his performance. Brown, however, failed to meaningfully alter

his performance notwithstanding the various resources which the District made available to assist him.

44. Although the District has not formally defined "professional incompetency," incompetency as defined in the Florida Administrative Code has been accepted as persuasive in determining incompetency under the Tenure Act. School Board of Duval County v. Kerry Smith, DOAH Case No. 89-4132 (August 1990). The Florida Administrative Code states:

(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 added)

Rule 6B-4.009, Florida Administrative Code.

45. 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) Use procedures appropriate to accomplish the designated task to include but not 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.

(3) Practice instructional and social skills which assist students to interact constructively with their peers by encouraging expressions of ideas, opinions, and feelings.

(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.

(5) Utilize information and materials that are relevant to the designated task.

46. 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 subsection 6B-5.007(2), F.A.C.
- (4) Use management techniques appropriate to the particular setting.

47. These rules have been interpreted by case law.

Generally, behavior which provides evidence of incompetency includes, but is not limited to, the following:

1. Failure to adequately prepare and plan for instruction of students. Turlington v. Reaves, 9 FALR 1371 (1986)(Giving assignments without proper explanation of the assignment contributed to a finding of incompetency.)
2. Failure to employ appropriate disciplinary techniques suitable to the particular situation. Turlington v. Reaves, 9 FALR 1371 (1986)(Constant undercurrent of conversation constituted unsatisfactory classroom management and contributed to finding of professional incompetence); Turlington v. Walker, 9 FALR 2305 (1987)(Inability to control the behavior of disruptive students within the class

constituted incompetence); Department of Education v. Ferrara, 10 FALR 5766 (1987)(Inability to handle discipline problems revealed teacher incompetence).

3. Failure to utilize adequate techniques of instruction in the classroom warrants a finding of incompetency. Turlington v. Reaves, 9 FALR 1371 (1986). Failure to provide stimulative and varied learning experiences contributed to finding of incompetency. Department of Education v. Ferrara, 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). Dull presentation of the subject matter, which lacked an appropriate background, introduction and reinforcement, was a factor revealing teacher incompetence. Failure to pursue more than one teaching technique was a factor denoting incompetence. Department of Education v. Marshall, 10 FALR 4303 (1987).

4. Failure to create and maintain a classroom environment conducive to learning is incompetence. Turlington v. Walker, 9 FALR 2305 (1987). A chaotic classroom evidences a teacher's incompetence. Allowing non-essential, nonproductive movement of the students in the classroom contributed to a finding of incompetence. Castor v. Perry, 9 FALR 2305 (1987).

5. Failure to maintain proper supervision of students in the classroom is incompetence. Turlington v. Walker, 9 FALR 2302 (1987). Students being off-task advanced a finding of incompetence; Department of Education v. Ferrara, 10 FALR 5766 (1987); and Castor v. Perry, 9 FALR 5291 (1987).

48. In this case, Brown demonstrated that he was incapable of organizing the instruction of his students, managing his classroom environment, and delivering instruction on a consistent basis to all of his students. His classroom management ability and teaching techniques were observed on numerous occasions by Powell, Butterboldt, Martin, and Saffer. Brown was incapable of effectively delivering a pre-determined lesson and he failed to present interesting instruction to the students. He failed to change his teaching technique and materials despite the fact that he was counseled about their inappropriateness or ineffectiveness by District personnel. Brown was unable to adequately control his students, and failed to employ appropriate techniques to correct the students' behavior.

49. His actions, proven by a preponderance of the evidence, demonstrate Brown deprived his students of minimum educational or musical experience and constituted incompetence.

Refusal or Inexcusable Failure to Discharge the Duties of Employment

50. In sum, Brown repeatedly failed to perform his class management duties at Andrew Jackson High School despite the directives from Shanklin and Pierce. Brown refused to regulate his classes and to limit them to those students who were appropriately assigned. These refusals produced many of the

disruptions in Brown's classes at Andrew Jackson High School. At Jefferson Davis Middle School, Brown failed to maintain and implement constructive lesson plans which resulted in his failure to deliver classroom instruction to his students. Brown failed to amend his methods although he was afforded the added training, opportunity, and counseling to do so.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED:

That the Respondent, Thomas Brown, be dismissed from employment.

DONE AND ENTERED this 11th day of March, 2003, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 2003.

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.