6-24-04

BEFORE THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

BREVARD COUNTY SCHOOL BOARD, Petitioner, v. BENJAMIN LEON GARY, Respondent.	BOARD AGENDA ITEM NO. G-5 AUGUST 10, 2004 DOAH CASE NO. 03-4052

SBK-C105
AT

FINAL ORDER

THIS CAUSE was referred to the Division of Administrative Hearings for a formal administrative hearing. The assigned Administrative Law Judge ("ALJ)" has submitted a Recommended Order to the Agency, Brevard County School Board ("School Board"). The Recommended Order of June 24, 2004, entered herein is incorporated by reference. Timely exceptions were filed by the Respondent.

RULING ON EXCEPTIONS

Respondent, Benjamin Leon Gary ("Gary"), has interposed exceptions to the ALJ's Findings of Fact contained in paragraph 6 (as incomplete), paragraph 9 (as incomplete), paragraph 11 (as not supported by the record), paragraph 12 (as not supported by the record), paragraph 13 (as incorrect) and paragraph 14 (as inherently incorrect and incomplete). Gary also objects to the Conclusions of Law contained in paragraph 27 (as not applicable to the case), paragraph 28, (as incorrect), paragraph 29 (as incorrect), paragraph 30 (as incorrect), paragraph 31 (as incorrect), and paragraph 33 (as incorrect). Finally, he objects

to the recommendation of dismissal as "unduly excessive, not supported by the record evidence and based on erroneous conclusions" and then argues for progressive discipline, even though he acknowledges there is no collective bargaining agreement in place which calls for such progressive discipline. Gary's exceptions are addressed seriatim below.

A. Exceptions of Respondent Benjamin Leon Gary to Findings of Fact:

Finding #6: Gary claims that the ALJ's findings regarding the spit out ziti incident are incomplete. Gary himself fails to acknowledge, however, that C.J.'s mother also testified that Gary's behavior regarding the eating of the dead dragonfly and the spit out ziti by her son at the instigation of Gary (and on a bet) was "absolutely not" appropriate behavior for a teacher. See Jernigan TR 320. The ALJ's finding of fact in paragraph 6 is supported by competent substantial evidence.

Finding #11: Gary claims that the finding that D.B. was an honor roll student at Madison should be stricken, citing TR 505 and the testimony of Principal Humphrey. A review of this passage reveals, however, that the objection sustained by the ALJ was to the phrasing of a questions regarding D.B.'s reputation for honesty or dishonesty, which Humphrey ultimately could not answer. More importantly, at TR 223 D.B. herself testified that she received A's and B's and her GPA was 3.8 during 7th grade at Madison. Gary's challenge to this finding is wholly misplaced and without merit.

Finding #13: Despite extensive evidence in the record as detailed above which the ALJ found credible, Gary attempts to discount the testimony of D.B. by claiming that she fabricated the allegations against Gary. As the ALJ herself explained in finding of fact number 14, the testimony of J.D. at TR 565 did not establish what the students were actually talking about and whether it even addressed D.B.'s allegations against Gary. The findings set forth at paragraph 13 and 14 required the ALJ to weigh the evidence and judge the credibility of the witnesses in the context of the testimony presented. The School Board is not authorized to reweigh conflicting evidence (see e.g. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Gary's exception to Finding #13 is without merit.

Finding #14: In his continued effort to discredit D.B.'s testimony, Gary contends that Finding #14 is "inherently incorrect and incomplete". His claim that D.B. admitted fabricating the allegations against Gary is a gross misstatement of the testimony of J.D. at TR 565, from which it cannot be determined what the students were even discussing as "untrue", as the ALJ explained. His bald assertion that D.B. "has a reputation for being a liar" and that the "only evidence in the record regarding D.B,'s credibility...is that she has a reputation for lying, and that she lied about these events" is also flatly contradicted by the record. In fact, Officer Morgan (the school resource officer and also parent of N.M.) testified that she believed D.B. to be an honest person and that she had never heard anything bad about her at

Madison Middle School. Morgan: TR 382. The testimony cited by Gary at TR 348-49 also does not state that D.B. "has a reputation for being a liar" but instead simply discloses that, according to S.L., "She will tell lies sometimes" and then cites an example where D.B. exaggerated an event in gymnastics. S.L.: TR 348-49. K.M. also testified that she had never heard anything negative about D.B. as to honesty or dishonesty. K.M.: TR 637. The ALJ was clearly entitled to conclude this that this testimony did not establish that D.B. has a reputation for being a liar, as Gary would like to contend, and that finding by the ALJ is one which the School Board is not authorized to reweigh. Gary's attempts to claim that D.B. "had previously lied about being raped" are also unfounded and fail to disclose the rest of the testimony on this issue. Specifically, while D.B. acknowledged at TR 247-48 that she had never been raped although a note she had written at one time said she had, at TR 257-58 she testified that at the time of writing the note she believed "rape" to include being forced to kiss someone against her will "because I didn't want it, and he forced me" (which had occurred), and it was only later that she learned what the term "rape" means in adult language. D.B. TR 257-58. Finally, Gary seeks to discredit D.B. by claiming that her decision not to sign up for classes the next year with Gary could not have been based on his "actions" since the decision had to have been made before those "actions" allegedly took place. In making this argument Gary ignores the testimony, however, by D.B. that the inappropriate comments made by her by Gary began at the end of the

first semester (well before any decisions were made on elective courses for the next year) and it was only the touchings that took place within three weeks of the first week of May. D.B. TR: 256-57. Consequently, from the evidence presented at the hearing - including the witness' own demeanor and responses to her extensive questioning - the ALJ found D.B. to be a credible witness. The ALJ's findings in paragraph 14. of the Recommended Order are clearly supported by competent, substantial evidence and cannot, therefore, be overturned, rejected or ignored by the School Board.

As is demonstrated above, an examination of the transcript and record of the proceedings show that the findings of fact complained of by Gary are supported by competent, substantial evidence in the record as required. The ALJ weighed the conflicting evidence, accepting certain testimony as credible while rejecting other testimony. The exceptions Gary has submitted are simply re-argument about the factual findings and creditability determinations made by the ALJ in the Recommended Order. Consequently, Gary's exceptions do not provide a basis for the rejection of the ALJ's findings of fact.

B. Exceptions of Respondent Benjamin Leon Gary To Conclusions of Law:

Gary's exceptions to the ALJ's conclusions of law are equally without merit, as discussed below. They are based in essence on Gary's dissatisfaction with the ALJ's conclusions that violations of Florida Administrative Rule 6B-1.001 and Rule 6B-1.006(3)(a), (e), (f), (g), and (h) can be inferred from the proven incidents

themselves as well as from actual testimony received of ineffectiveness.

Conclusion #27: The ALJ properly cited the decision in Walker v. Highlands County School Board, 752 So.2d 127 (Fla. 3d DCA 2000), for the legal principle that ineffectiveness can be inferred from a teacher's misconduct. This decision is a correct statement of the law of Florida. The Fifth District Court of Appeal has also explained that impaired effectiveness can be inferred from certain misconduct, and the "alternative of parading the competing opinions of students, parents and co-workers would appear to be even less enlightening." Purvis v. Marion County School Board, 766 So.2d 492 (Fla. 5th DCA 2000). Here, moreover, there was direct testimony that Gary's inappropriate comments, inappropriate touching, and betting a student to eat an insect and chewed food were clearly improper (Hernigan TR 320; Chapman TR 328; Morgan TR 392), that the Superintendent considered the actions proved to be "outrageous behavior on the part of a teacher" that would have prevented his recommendation for renewal if then known (DiPatri TR 446-52, would "absolutely not" want Gary back in the District as a teacher, TR 452), and that the school principal considered the actions proved to show that Gary had "broken his code of ethics beyond to where he can be effective" (Humphrey TR 508-09). Deputy Superintendent Lee Berry also testified that effectiveness as a teacher was considered in determining disciplinary action, and the fact that Gary had inappropriately touched female students impaired his effectiveness. Berry: TR 684-86. Popularity with students and parents cannot

serve as a cover for conduct that is clearly inappropriate and unacceptable in a teacher, and which leaves students testifying that they felt uncomfortable or are scared of a teacher.

Conclusion #28: Gary also attempts to claim that betting a student to eat a dead insect or previously chewed foot is not "harmful to learning and/or to the student's mental and/or physical health and/or safety" as required by Rule 6B-1.006(3)(a), Fla. Administrative Code. The chewed foot incident, however, clearly involved the prospect of C.J. ingesting Gary's bodily fluids and caused C.J.'s mother to express concern for Gary's health. Jernigan TR 318-20. That neither the chewed food nor the dead bug caused C.J. to become physically ill is not dispositive. As Dr. DiPatri testified, "it defies description, I just can't understand, because those two incidents alone are serious, outrageous behavior on the part of the teacher". DiPatri TR 445-48. This conduct was also considered improper by Angela Poppell, school counselor at Madison (TR 133) and Tine Marie Hall, U.S. history teacher at Madison (TR 150). Even student H.C. considered it not appropriate for a good teacher to dare a student to eat foot the teacher had chewed. H.C.: TR 621

Conclusions #29 and #30: In challenging Conclusions #29 and #30, Gary seems to contend that searching students' pockets contrary to established procedures and touching students in other prohibited ways is inappropriate only when it is sexual in nature, so Gary's conduct should be excused (and D.B.'s testimony disbelieved). As the ALJ found, the Code of Ethics materials given

to Gary contained the express admonition "keep your hands and other body parts to yourself". See Finding of Fact #7. Gary himself admitted at the hearing that his actions in touching students were inappropriate (Gary: TR 54-55, 60-61). The ALJ's conclusion that Gary's conduct was improper was supported by testimony as well from School Counselor Poppell (TR 133-34), District Music Resource Teacher Chapman (TR 329) and School Resource Officer Morgan (TR 384, 397). His contact with L.D. was not, furthermore, necessarily "friendly or parental" but was described by L.D. as "aggressive" (although like her dad might do) and "inappropriate" and not something she would expect a teacher to do. L.D. TR: 98, 109-10. As the ALJ explained at the hearing: "[E]ven common sense is going to tell you that inappropriate touching is misconduct in office." TR 482.

Conclusion #31: Gary's exceptions to Conclusion of Law #31 are based entirely on his unsubstantiated claim that D.B. could not be believed. As shown above, the ALJ's finding that D.B.'s testimony was credible is entirely supported by the record, and the resulting conclusion of law is justified.

Conclusion #33 and challenge to recommendation of dismissal: As noted above, Gary bases his challenge to the dismissal on the claim that he should have been subjected to "progressive discipline" even though Gary himself acknowledges that the collective bargaining agreement has no bearing on this issue. From her findings of fact the ALJ clearly found that Gary engaged in multiple incidences of seriously inappropriate behavior with a

variety of students, including clearly unacceptable touching, contact and remarks to minor female students. In paragraph 27. of the Recommended Order the ALJ found that the misconduct committed by Gary **"goes to the very heart of a teacher's relationship to his students"** (emphasis added). Under the circumstances and the testimony of the teaching professionals as well as the student and parent witnesses who acknowledge that Gary's actions were inappropriate or improper, the ALJ's recommendation of dismissal is clearly correct and reasonable and is accepted by the School Board.

FINDINGS OF FACT

The School Board adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The School Board adopts the conclusions of law set forth in the Recommended Order.

It is Therefore Ordered That:

A. Respondent's exceptions to the findings of fact set forth in paragraphs 6, 9, 11, 12, 13 and 14 of the Recommended Order are denied.

B. Respondent's exceptions to the conclusions of law set forth in paragraphs 27, 28, 29, 30, 31 and 33 of the Recommended Order are denied.

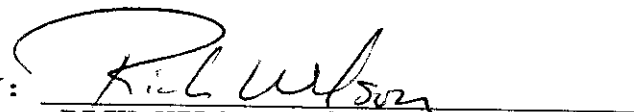
C. Respondent's exception to the Administrative Law Judge's recommended penalty of dismissal of Respondent from employment for just cause is denied.

D. The Recommended Order is adopted as the Final Order of the School Board of Brevard County.

E. Respondent, Benjamin Leon Gary, is dismissed from employment as a teacher for just cause and his professional services contract terminated effective October 14, 2003.

DONE AND ORDERED this 13 day of August, 2004, in Viera, Brevard County, Florida.

THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

BY: 

RICH WILSON, Chairman

RIGHT TO APPEAL

Parties to this Final Agency Action are hereby advised of their right to seek judicial review of this Final Agency Action pursuant to Section 120.68, Florida Statutes, and Florida Rules of Appellate Procedure 9.030(b)(1)(C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Florida Rule of Appellate Procedure 9.110, with the Clerk of the School Board of Brevard County, 2700 Judge Fran Jamieson Way, Viera, Florida 32940. The second copy of the Notice of Appeal, together with the filing fee, must be filed with the appropriate District Court of Appeal.

Filed with the clerk in the office of the Superintendent this 13 day of August, 2004.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U. S. Mail to the persons named below on this 13 day of August, 2004.

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