

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 03-4052
)	
BENJAMIN LEON GARY,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 10 through 12, 2004, in Viera, Florida, before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Benjamin B. Garagozlo, Esquire
3585 Murrell Road
Rockledge, Florida 32955

For Respondent: Mark S. Levine, Esquire
Levine, Stivers & Myers
245 East Virginia Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Respondent violated Florida Administrative Code Rules 6B-1.001, 6B-1.006(3)(a), 6B-1.006(3)(e), 6B-1.006(3)(f), 6B-1.006(3)(g), and 6B-1.006(3)(h), and, if so, whether such

conduct is just cause for dismissal of Respondent pursuant to Subsection 1012.33(6)(a), Florida Statutes (2003).

PRELIMINARY STATEMENT

On October 14, 2003, by a Petition for Dismissal, Richard A. DiPatri, Superintendent of the Brevard County School Board, recommended to Petitioner, the Brevard County School Board (School Board), that Respondent, Benjamin Leon Gary (Gary), be dismissed from his employment with the School Board. The Petition for Dismissal was presented to the School Board, which approved Gary's dismissal. Gary requested an administrative hearing on October 20, 2003. The case was forwarded to the Division of Administrative Hearings on November 3, 2003. The case was originally assigned to Administrative Law Judge Daniel M. Kilbride and was reassigned to Administrative Law Judge Susan B. Kirkland to conduct the final hearing.

At the final hearing, Petitioner called the following witnesses: Benjamin Gary, A.H., L.D., K.S., Angela D. Poppell, Tina Hall, Candice Rosa, John Lau, S.D., M.G., D.B., M.R., C.J., Geila Jernigan, Delaney Chapman, S.L., Patricia Morgan, J.W., Jolynn Chapman, Richard DiPatri, and Terrance Humphrey. Petitioner's Exhibits 1, 2, 4 (also identified as Petitioner's Exhibit 24), 16 through 19, 21, and 27 were admitted in

evidence. Petitioner's Exhibits 3, 20, and 29 were not accepted in evidence.

At the final hearing, Respondent testified in his own behalf and called the following witnesses: Michelle Knight, Andrea Palmer, N.M., S.H., A.B., J.D., D.R., Ann Cissell, H.C., J.G., K.M., C.W., L.B., and Leroy Berry. Respondent's Exhibits 1 and 2 were admitted in evidence.

The four-volume Transcript of the final hearing was filed on April 5, 2004. The parties agreed to file their proposed recommended orders on or before April 15, 2004. The parties timely filed their proposed recommended orders, which have been considered by the undersigned in rendering this Recommended Order.

FINDINGS OF FACT

1. During the 2002-2003 school year, Gary was employed by the School Board as a band and orchestra director at James Madison Middle School (Madison). Gary had been employed by the School Board for two years previous to the 2002-2003 school year.

2. Prior to the incidents which are at issue in this case, Gary had been thought of by the Madison school administrators, students, and parents as an excellent teacher, who was able to inspire and motivate students.

3. Gary taught C.J., a ninth-grader, advanced band and intermediate band during the 2002-2003 school year. Sometime during that school year, Gary noticed a dead dragonfly on a window in the band classroom. The dragonfly was removed from the window and placed in a trash receptacle. C.J. said that he would eat the dragonfly for a dollar. Another student said that he would give C.J. a dollar, and Gary said, "Okay." C.J. retrieved the dead dragonfly from the trash can and ate the insect. Gary gave C.J. a dollar.

4. C.J.'s parents learned of the dragonfly incident through a younger cousin of C.J., who also attended Madison. C.J.'s mother went to see Gary to discuss the incident. Gary indicated to the mother that he was sorry for what had happened and that it was poor judgment on his part. C.J.'s mother felt that they had addressed the issue during their conversation and left the meeting satisfied about the issue. Gary did not advise school administration about C.J. and the dragonfly.

5. After the dragonfly incident another situation arose involving Gary and C.J.'s eating an inappropriate item. Gary and some students, including C.J., were eating lunch in the cafeteria. Gary was eating baked ziti and began chewing on a particularly hard piece of ziti. He removed the ziti from his mouth and placed it on the side of his plate. Gary offered C.J. 12 dollars to eat the ziti, saying, "I bet you won't eat this

piece of baked ziti." C.J. replied, "Oh, yes, I will." Gary then told C.J. not to eat the chewed food. Other students were egging C.J. on to eat the ziti, and C.J. picked the food off Gary's plate and ate it.

6. One of C.J.'s cousins related the ziti incident to C.J.'s mother, and C.J.'s mother paid Gary another visit. The mother was not happy about the ziti episode and spent more time discussing the issue with Gary than she did when she visited him concerning the dragonfly. Gary told C.J.'s mother that he had bet C.J. 12 dollars to eat the ziti. The mother told Gary not to pay C.J. the money. Before she left the school on the day of the ziti discussion, she went to see Gary a second time to inquire about the status of his health because C.J. had eaten food that had previously been in Gary's mouth. Gary assured her that he was in good health. Gary did not advise school administration about the ziti incident.

7. Gary was provided a copy of the school district's "Code of Ethics" which contained a section entitled "How to Use Common Sense and Professional Judgment to Avoid Legal Complications in Teaching." One of the admonishments in this section was "[k]eep your hands and other parts of your body to yourself."

8. During the 2002-2003 school year, Gary put his hands inside students' pockets and searched for candy, chewing gum, notes, and money. He admitted searching the pockets of D.B.,

S.D., M.R., N.M., D.R., and L.B. Such actions were inappropriate and caused some of the students to feel uncomfortable. If a teacher suspects that a child has candy, chewing gum, or notes in his pocket, the correct procedure is to have the child empty his pockets so that the contents can be viewed. The teacher is not to put his hands in the student's pockets.

9. L.D. was a student at Madison during the 2002-2003 school year, and Gary was her band instructor. L.D. considered Gary to be a "really good friend" as well as a teacher. During the 2002-2003 school year, L.D. was sitting on the stairs in the band room playing her band instrument. She played incorrectly, Gary came up to her, aggressively grabbed her neck, and said "urrrr." She told him to stop, and he did. She did not think that his actions were sexual in nature, but did feel that they were inappropriate for a teacher.

10. During the 2002-2003 school year, J.W. attended seventh grade at Madison. Gary was her band teacher. J.W. has hugged Gary, and he has hugged her back. J.W. has seen Gary hug other students at Madison.

11. D.B. was a honor roll student at Madison. During the 2002-2003 school year, she was in Gary's first period orchestra class. She played the violin, and, during a two-week period when her violin was broken, she helped Gary in his office.

12. Gary's office was located within the band room. The office had a door with a glass window, which took up at least three-quarters of the upper half of the door. Adjacent to the door, there was a large picture window which was on approximately the same level with the door window, but which was almost twice the size of the door window. A desk with a computer on it was located underneath the picture window. The top of the computer monitor came just below the bottom of the picture window. Occupants of the office could be seen from the band room; however, the evidence does not establish that the occupants could be seen fully from the band room.

13. Gary made inappropriate comments to D.B., including telling her that she had sexy lips and telling her that she smelled good. These comments made D.B. feel uncomfortable. Gary also inappropriately touched D.B. While she and Gary were in his office, Gary "touched her inner thigh" and "rubbed it" and asked her if she knew how beautiful she was. In a second incident, Gary held her hand and rubbed her arm while she in his office to file papers during first period orchestra. During a third incident, Gary put his fingers inside her shorts at her waist, pulled her toward him, and asked her what she wanted. This incident took place when the door to the office was open. In another incident, D.B. asked Gary to tune her violin, and he put his hand up the bottom of her shirt. All the incidents

happened during first period orchestra class when students were in the band room.

14. Gary argues that D.B.'s testimony is not credible because of a conversation D.B. had with some fellow classmates. J.D., a classmate of D.B., was talking with D.B. and another classmate K.S. during fifth period of the 2002-2003 school year while Gary was still teaching at Madison. K.S. said, "You know what's being said about Mr. Gary is not true," and D.B. said, "Yeah, it's not true, don't say anything." The evidence did not establish what was being said about Gary and whether it concerned D.B.'s allegations against Gary. Thus, the evidence does not establish that D.B. was fabricating her allegations about Gary.

15. Gary admits that he may have touched D.B. on occasion, but that the touching was not sexual in nature or inappropriate.

16. M.R. was enrolled in Gary's second period and sixth period band classes during the 2002-2003 school year. She alleged that beginning in January 2003, Gary inappropriately touched her person. M.R. alleged that on two occasions when she was in Gary's office with the office door open and other students were present in the band room, Gary touched the outside of her clothing in her vaginal area. She also alleged that in a third incident that Gary placed his hand inside her pants underneath her underwear and rubbed her vagina. The third

incident allegedly took place in the office with the door open and while other students were present in the band room. On a fourth occasion, M.R. alleged that Gary came up behind her in the filing room, placed his hands inside her shirt, and touched her breasts.

17. The alleged incidents supposedly happened during third period lunch when other students were in the band room eating lunch or practicing. Of the students who testified at the final hearing and spent most of their lunch periods in the band room, none saw any inappropriate contact between Gary and M.R.

18. M.R. had wanted to be first chair flute in her band class, but Gary made another student first chair. M.R. was angry about Gary's selection for first chair and told her friend J.W. sometime after Christmas 2002 that she was going to get even with Gary for not making her first chair. K.M., who was a student at Madison, overheard M.R. tell another student that the allegations and problems facing Gary were "what he deserves for not promoting me up in chair."

19. M.R. does not have a good reputation in the community for truth and veracity. Her testimony concerning inappropriate touching by Gary is not credible, and it is found that those incidents did not happen.

20. The School Board established other incidents of inappropriate behavior by Gary. Such behavior included telling

a student that he could not wait until she was 21 so that he could be all over her and that it was a good thing that she was pretty because her brains would not get her anywhere; tickling her at the end of class; pulling her against her will onto his lap, and placing his arms around her arms and waist. Gary would also sit with students in the same chair in his office. Gary failed to tell school administrators of possible sexual misconduct between two students in the student restroom, when he became aware that some misconduct probably occurred between the two students. Although, the School Board proved these incidents, the School Board failed to allege the incidents in the Petition for Dismissal.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2000).

22. The School Board seeks to dismiss Gary pursuant to Subsection 1012.33(6)(a), Florida Statutes (2003), which provides that instructional staff of the school districts may be dismissed for just cause. Just cause includes misconduct in office, which is defined by Florida Administrative Code Rule 6B-4.009(3) as follows:

Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-

1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

23. The Petition for Dismissal which serves as the basis for Gary's dismissal alleges the following factual allegations:

(a) During the 2002-2003 school year Respondent did on several occasions make sexually suggestive comments to and did inappropriately touch a minor female student, Jane Doe, by placing his hands in her pockets and under her clothing, by rubbing her thigh and stomach area and putting his arms around her in a sexually suggestive way.

(b) During the 2002-2003 school year Respondent did on several occasions inappropriately touch a minor female student, Mary Doe, by placing his hands in her pants and under her shirt and fondling her private areas.

(c) During the 2002-2003 school year Respondent did inappropriately touch other minor female students by placing his hands in their pockets, rubbing their necks, hugging, and otherwise failing to maintain a professional distance between himself and the students.

(d) During the 2002-2003 school year Respondent did bet a minor male student in his class to eat spit out food and an insect resulting in the student ingesting both items.

24. The School Board must establish the allegations in the Petition for Dismissal by a preponderance of the evidence.

McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d

DCA 1996); Sublett v. Sumter County School Board, 664 So. 2d 1178 (Fla. 5th DCA 1995).

25. The School Board alleged that Gary's above-referenced actions violated the Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6B-1.001, which provides:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) 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.

26. The School Board also alleged that Gary violated the Principles of Professional Conduct for the Education Profession in Florida by violating Florida Administrative Code Rules 6B-1.006(3)(a), (e), (f), (g), and (h), which provide:

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful

to learning and/or to the student's mental and/or physical health and/or safety.

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student's legal rights.

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

(h) Shall not exploit a relationship with a student for personal gain or advantage.

27. A teacher's ineffectiveness in a school system may be inferred from the teacher's misconduct. See Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000). The misconduct in this case involves Gary's inappropriate comments to students, inappropriate touching of students, and betting a student money to eat an insect and to eat food chewed by Gary. The misconduct goes to the very heart of a teacher's relationship to his students. As such, it can be inferred that such conduct impairs Gary's effectiveness in the Brevard County School system.

28. The School Board did establish that Gary's actions regarding C.J. and the ingestion of a dragonfly and chewed ziti violated Florida Administrative Code Rules 6B-1.006(3)(a)

and 6B-1.001. The first incident involving the dragonfly might be viewed as a lapse of good judgment, but the second incident involving the baked ziti can only be construed as misconduct in office, especially in light of C.J.'s mother's conversation with Gary concerning her displeasure over the eating of the dragonfly.

29. The School Board did establish that Gary violated Florida Administrative Code Rules 6B-1.001 and 6B-1.006(3)(a) by searching the pockets of students for chewing gum, candy wrappers, notes, and money. It is inappropriate for a teacher to place his hands in a student's pocket and search the student. Gary's actions constitute misconduct in office.

30. The School Board did establish that Gary violated Florida Administrative Code Rules 6B-1.006(3)(a) and 6B-1.001, by rubbing L.D.'s neck aggressively when he was displeased with her playing of her band instrument. Such violation is misconduct in office.

31. The School Board did establish that Gary's inappropriate comments to D.B. and his inappropriate touching of D.B. violated Florida Administrative Code Rules 6B-1.006(3)(a), (e), (f), (g), and (h), and 6B-1.001. Such violations constitute misconduct in office.

32. The School Board did not establish the allegations in the Petition for Dismissal relating to Gary's placing his hands

in M.R.'s pants and under her shirt and fondling her private parts.

33. During the final hearing, the School Board established other violations of misconduct in office as set forth in paragraph 20 above. These facts were not alleged in the Petition for Dismissal and, therefore, cannot be used as a basis for Gary's dismissal. See *McMillian v. Nassau County School Board*, 629 So. 2d 226, 229 (Fla. 1st DCA 1993). However, the violations of misconduct that the School Board has alleged and established constitute just cause for Gary's dismissal.

RECOMMENDATION

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

RECOMMENDED that a Final Order dismissing Benjamin Leon Gary for just cause from his employment as a teacher with the School Board.

DONE AND ENTERED this 24th day of June, 2004, in
Tallahassee, Leon County, Florida.

Susan B. Kirklund

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Administrative Law Judge
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Filed with the Clerk of the
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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.