STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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BROWARD COUNTY SCHOOL BOARD,      )
                                  )
     Petitioner,                  )
                                  )
vs.                               )   Case No. 09-2762
                                  )
RUSSEL PITTMAN,                   )
                                  )
     Respondent.                  )
__________________________________)
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RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on October 4, 2010, by video teleconference (over the Internet) at sites in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

For Petitioner: Carmen Rodriguez, Esquire
Paul D. Gibbs, Esquire
Law Offices of Carmen Rodriguez P. A.
15715 South Dixie Highway, Suite 411
Palmetto Bay, Florida 33157-1884

For Respondent: Steve Rossi, Esquire
Travis Stock, Esquire
Law Offices of Steve Rossi, P.A.
Sole Building, Ground Floor, Suite 2
533 Northeast Third Avenue
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On April 17, 2009, James Notter, the Broward County Superintendent of Schools, issued an Administrative Complaint recommending that Respondent be dismissed from his teaching position for allegedly having engaged in inappropriate conduct of a physical nature with two minor students, E. G. and M. S, which constituted "moral turpitude," "immorality," and "misconduct in office," as those terms are used in Section 1012.33, Florida Statutes, and Florida Administrative Code Rule 6B-4.009.

Respondent requested an administrative hearing on the Superintendent's recommendation. Respondent's hearing request was referred to DOAH on May 19, 2009.

The final hearing in the instant case was originally scheduled for August 17 and 18, 2009, but was ultimately held, as noted above, on October 4, 2010.[2] Five witnesses testified at the hearing: E. G.; M. S.; Elizabeth Larson; Marvin Whitest; and Respondent. In addition to the testimony of these five witnesses, one exhibit (Petitioner's Exhibit 1), was offered and received into evidence (over Respondent's objection).

At the conclusion of the hearing, the undersigned announced, on the record, that the parties would have 30 days from the date of the filing of the hearing transcript with DOAH to file their proposed recommended orders.

The hearing Transcript (consisting of one volume) was filed with DOAH on October 21, 2010.

On November 9, 2010, Respondent filed an unopposed motion requesting that the proposed recommended order deadline be extended to December 6, 2010. By Order issued that same day, the motion was granted.

Respondent and Petitioner timely filed their Proposed Recommended Orders on December 6, 2010.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. The Broward County School Board (School Board) is responsible for the operation, control and supervision of all public schools (grades K through 12) in Broward County, Florida (including, among others, Pines Middle School (Pines)), and for otherwise providing public instruction to school-aged children in the county.

2. Respondent has been employed by the School Board as a teacher since August 23, 1988. The first seven years of his employment he worked as an elementary school "general music

teacher." For the following 13 years (and at all times material to the instant case), he was Pines' "instrumental music teacher or band director."

3. Respondent has an unblemished disciplinary record as a School Board employee.

4. Among the many band students Respondent taught at Pines were E. G. and M. S.

5. E. G. graduated from Pines in 2008. She has known Respondent for approximately five years.

6. Up until the incident in question in the instant case, E. G. had considered Respondent to be a trusted "mentor," who was a "father figure" to her. She had confided in Respondent, discussing with him details about her personal life. Her interactions with Respondent had not been confined to the school setting. She had spoken with him on her cell phone, and he had visited her at her home (albeit not on a regular basis).[3] At no time had Respondent said or done anything that E. G. had deemed inappropriate or had made her feel uncomfortable in his presence.

7. E. G.'s relationship with Respondent, however, changed dramatically (for the worse) on July 2, 2008 (which was shortly after she had graduated from Pines). On that date, Respondent, together with his brother, Marvin Whitest, paid E. G. (who was 14 years of age at the time) a visit at her home.[4] E. G. was

"getting ready" to go to the mall with her mother (Ms. G.) and her mother's friend, Odelia. Ms. G. and Odelia were in the apartment with E. G. at the time of Respondent's and Mr. Whitest's visit.

8. There came a time during the visit that Respondent and E. G. were alone in the living room while Ms. G., Odelia, and Mr. Whitest were on the balcony (which overlooked a lake) conversing and taking in the scenery.[5] Respondent and E. G. were standing approximately three to six feet from the balcony door, when Respondent suddenly pulled the top of the front of E. G.'s shirt "forward and [started] looking down." E. G. reacted by "put[ting] her hand over [her shirt]" to deny Respondent the access he was seeking. Undeterred, Respondent then "tried to give [E. G.] a side hug," by "stick[ing] his [right] hand under [E. G.'s] [right] arm." E. G. resisted by trying to keep her right arm as close to her side as she could. Still not discouraged, Respondent put his hands on E. G.'s shoulders, positioned her so that she was "facing away from [him]," and then, from behind, "guided" her a few feet to the doorway of her bedroom, where she "[could not] be seen from the balcony." There, standing behind E. G. (and facing her back), Respondent "went over [her] right shoulder with his right hand," "grabbed [her] right breast" over her shirt, and "squeeze[d] [it] three times." Respondent then tried to go under E. G.'s

shirt and touch her bare breast. As soon as E. G. felt "skin on skin contact," she "shrugged [Respondent] off," walked away, and went into the bathroom (which was off the living room). As E. G. left, Respondent told her, "Good, you know when to stop." He also told her that she was his "temptation." There was nothing accidental about what Respondent had done to E. G. While his actions may not have been carefully planned or thought out, they were intentional.[6]

9. E. G. remained in the bathroom until she heard her mother, Odelia, and Mr. Whitest[7] start coming back into the living room from the balcony.

10. Shortly thereafter, Respondent and Mr. Whitest concluded their visit and exited the apartment. Ms. G. and Odelia went downstairs with them when they left. E. G. came down a brief time later, while Respondent and Mr. Whitest were still "at the bottom of the stairs" with Ms. G. and Odelia. E. G. was "still in shock" and disbelief. She had not yet completely processed what Respondent--a teacher she had revered and had let in to her personal life--had just done to her. Acting like nothing out of the ordinary had happened, she "hugged [Respondent] goodbye"[8] (in the presence of Ms. G., Odelia, and Mr. Whitest). Respondent then entered his vehicle and drove off with Mr. Whitest.

11. Later that same day, at around 6:20 p.m., Respondent called E. G. on her cell phone and asked her "if [she] was okay" (without indicating why he was inquiring).

12. E. G. "originally had no intention [of] telling [her] mother" about Respondent's indiscretions. She just "wanted to shrug it off and forget about it" and not "get [Respondent] in trouble . . . mainly because he ha[d] a son."

13. The morning of July 4, 2008, Jan Jared, the mother of one E. G.'s friends, called E. G. on her cell phone. E. G., who had "had a nightmare" featuring Respondent during the night[9] and "was really upset," told Ms. Jared "what had happened" during Respondent's visit two days before[10] and asked "if [she, E. G.] should tell [Ms. G.]." Ms. Jared, who was a teacher, told E. G. that "if [E. G.] didn't say anything [she, Ms. Jared] would have to by law." Later that day, E. G. told her mother about the incident and that she had spoken to Ms. Jared about it earlier in the day. She asked her mother to "not call the police."

14. Against E. G.'s wishes, Ms. G. (from her apartment, together with Ms. Jared, who had "come over") telephonically advised the Pembroke Pines police what E. G. had told them about E. G.'s encounter with Respondent two days earlier at the apartment. The police came to the apartment that same day (July 4, 2008) and "took a statement."

15. Approximately ten days later, for the first time since the evening of July 2, 2008, Respondent tried calling E. G. on her cell phone. E. G., who was in Ms. G.'s car at the time, did not answer, and Respondent left a message. When told by E. G. that Respondent had called, Ms. G. drove with E. G. directly to the Pembroke Pines police station.

16. After arriving at the station, E. G. was taken to see Detective Victoria Hines. Detective Hines listened to the message Respondent had left on E. G.'s cell phone. She then asked E. G. to call Respondent back, which E. G. did (at the police station, in the presence of Detective Hines).

17. E. G. and Respondent spoke for about 15 minutes, before Respondent said he had to go. He told E. G. he would call her back shortly, which he did. They then spoke for approximately another 48 minutes. Their entire telephone conversation (which lasted for over an hour) was monitored by the police and recorded.[11]

18. Most of their conversation was devoted to a discussion of what Respondent had done to E. G. when the two of them were alone in the living room of E. G.'s apartment on July 2, 2008. The following are highlights of the conversation.

19. Towards the beginning of the conversation, E. G. told Respondent, "I looked up to you a lot and didn't expect that" (referring to what Respondent had done to her).[12] Respondent

responded that he had not expected it "either." He went on to admit that it was a "big mistake," the product of "bad judgment," and there was "no excuse for it." "I'm a human being and I make mistakes," and "I'm not perfect," he told her. He expressed the "hope" that E. G. "d[id]n't take him as a bad person" because of this one "mistake," and suggested that that a person should not be judged based on a single, isolated incident. He wanted her, he said, to "look at [him] as [she had] always d[one]" prior to the incident.

20. After having been told by E. G. that she had "tried to block it out and not think about it" (again referring to what Respondent had done to her), Respondent said, "Thank god you didn't spank me."

21. Asked by E. G. what would happen if his son or wife found out about what had happened, Respondent answered that he had not "thought about that at the time" of the incident and, if he had "thought about that," he would not have done what he did.

22. Respondent told E. G. that he "la[id] awake at night just troubled" and "uncertain of hurting [E. G.] and the other people who looked at [him] in the [positive] way that they d[id]."

23. "Absolutely not" was the response Respondent gave when E. G. posed the question, "Did I lead you on? He later stated that E. G. had not "done anything wrong."

24. Throughout the conversation, Respondent repeatedly apologized for what he had had done (which, he indicated, was "uncharacteristic of [him]," "very out of character," something that had "never happened before," a "one time thing"), and he promised "it wo[uld]n't happen again." Pledging to "make it up" to her, he begged E. G. for her "forgiveness" and to "[l]et [him] earn [her] respect back" by letting him "show [her]," by his actions when "with [her]," that he was worthy of her respect. He told her he was "at [her] mercy."

25. When E. G. asked Respondent how he knew "it wo[uld]n't happen again," he replied that, "now that [E. G.] ha[d] brought it to [his] attention that [he] actually could do something like that," he would take precautions to avoid repeating the same "mistake" in the future.

26. In response to E. G.'s query of, "What if I hadn't stopped you," Respondent said, "I would have stopped . . . . Common sense has to kick in sometimes, you know." When, later in the conversation, E. G. expressed a contrary view (opining, "That day if I hadn't stopped you probably would have kept going"), Respondent, maintaining his previously stated position on the matter, responded, "I don't think so." Respondent never challenged E. G.'s assertion that she had "stopped" Respondent.

27. After being told by Respondent that he "looked at [her] as more than a student" and felt as if he had a

father/daughter-like relationship with her, E. G. said, "I saw you as a dad too. . . . [b]ut dads just don't touch their daughters like that," to which Respondent replied, "You're right."

28. Responding to E. G.'s inquiry as to why he had "touch[ed] [her] like that," Respondent offered, "Maybe it was the first time I was really looking at you growing up, or I did at that time. . . . I looked at you growing up in a way I hadn't before." Both E. G. and Respondent agreed that this was "kinda weird," after which Respondent told E. G., "This may sound strange. I don't want you to take it the wrong way. . . . But I always loved you. Love can conquer anything."

29. Later, Respondent added, "You're attractive. Is that a reason? You've always been, but I never looked at you like that before." Respondent followed up these comments by stating, "There is a natural tendency for a male to be attracted in different ways to a female, and it has to be contained to the proper time, and person, and age, and relationship." He compared this "natural tendency" to E. G's desire to text on her cell phone, and he reminded her of "how hard" it was for her not to text "when [her] phone [was] just sitting there." "Texting [was] okay," he told her, provided it was at the "proper time, place," and with the "proper person." The message he was obviously trying to convey was that, just like E. G. had to

"contain," within the bounds of propriety, her urges to text, he had to "contain," within the bounds of propriety, his urges to be with a female, "how[ever] hard" that might be.

30. It was E. G. who ended the conversation. After Respondent had asked her whether she "cared" for him more than "any other average person" or "any other teacher," she told Respondent that she "ha[d] to go."

31. The comments that were made during E. G.'s and Respondent's police-monitored telephone conversation lent credence to the account E. G. had given the police of the inappropriate physical contact Respondent had had with her in her apartment on July 2, 2008. Respondent was thereafter arrested and criminally charged with having engaged in such conduct. He had a jury trial, at which E. G. testified and the recording of this conversation was played for the jury. At the conclusion of the trial, Respondent was found not guilty by the jury.

32. Contrary to what he had told E. G. during their police-monitored telephone conversation, E. G. was not the first person Respondent had intentionally touched in an inappropriate manner.

33. In 2004, he had victimized M. S., another former student of his. At the time of the incident, M. S. was a 14-year-old ninth grade high school student.

34. M. S. had first met Respondent, through her sister,[13] when M. S. was in fifth grade. Respondent had been M. S.'s band teacher throughout middle school (from her sixth to eight grade years). He had been one of her two favorite middle school teachers (the other having been Barry Johnson, her geography teacher). M. S. had considered Respondent to be a "mentor, a father figure, a great teacher." Like E. G., she had confided in Respondent and sought his advice on personal matters.

35. On the day in question, after her school day ended,[14] M. S. went to Pines with the intention of seeing Respondent and Mr. Johnson. She wanted to show them how much she had matured since she had graduated from middle school earlier that calendar year. Her boyfriend, D. G., drove her to Pines. He remained (alone) in the car during the visit.

36. M. S. first went to the band room to see Respondent. She knocked on the door, and a student unlocked the door and let her in. When the students in room departed and no one else was present, Respondent approached M. S. and hugged her, as they exchanged verbal greetings. While still embracing M. S., he repeatedly asked her if "he c[ould] touch them," referring to M. S.'s breasts. M. S.'s only response was to "laugh[] nervously." Although M. S. had never answered his question, Respondent "slowly" moved his hands (over M. S.'s clothing) from her back to the side of her breasts, as M. S. "lean[ed] back" in

an unsuccessful attempt to ward off Respondent's advances. Respondent's hands were on M. S.'s breasts for approximately five or six seconds. Never before had Respondent done anything like this to her. This intentional touching of M. S.'s breasts came to an abrupt end when Respondent, hearing someone at the door, "ended [his] embrace" and "backed up." At the same, he asked M. S., "How is everything," in an apparent attempt to make it seem (to the "someone" at the door) as if he and M. S. were greeting each other for the first time that day. The "someone" at the door turned out to be Elizabeth Larson, the assistant band director.[15] When Ms. Larson entered the room,[16] M. S. "spoke with her briefly."[17] M. S. and Respondent then "walked into [a] connecting room" where the instruments were stored. There, Respondent inquired if M. S. "still ha[d] the same phone number." When M. S. responded in the negative, Respondent asked her for her new number, and she gave it to him.[18] Respondent thereupon reciprocated and gave M. S. his telephone number, after which M. S. excused herself and left, saying she was "going to go see some other teachers."[19]

37. Instead of visiting Mr. Johnson (as she had originally intended to do) or any other teacher, M. S. ("walk[ing] fast") went directly to D. G.'s car and got in. She was crying. D. G. asked her what was wrong, and she replied that the teacher she had just visited had "touched [her] incorrectly." D. G. wanted

to go into the school and confront the teacher, but M. S., not wanting any "more stress," asked him to just "take [her] home," which he did.

38. M. S. did not "want to believe" what had happened in the band room during her visit. She decided, at least initially, that she would not say anything about it to anyone and try to go on "liv[ing] [her] life" as if the incident had not occurred.[20]

39. It was not until approximately four years later, after having learned that Respondent had been arrested for molesting another student (E. G.), that M. S. changed her mind and told someone (other than D. G.) what Respondent had done to her.

40. Ironically, the "someone" she told was Ms. Larson. Ms. Larson happened to come into the hair salon at which M. S. was working at the time, and M. S. took this opportunity to tell her, albeit in "vague[]" terms, "what had happened" during her post-graduation visit with Respondent in the band room four years earlier. Ms. Larson advised that she was under an obligation to formally report to the school police what M. S. had told her. M. S. responded, "Okay, just have them contact me."

41. M. S. was subsequently contacted by a School Board police detective.

42. The police investigation resulted in criminal charges being filed against Respondent for having inappropriately touched M. S. Those charges are still pending.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

44. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat.

45. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See §§ 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat.

46. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons," provided it exercises

these powers in a manner that is consistent with the requirements of law. § 447.209, Fla. Stat.

47. At all times material to the instant case, district school boards have had the right, under Section 1012.33(6)(a), Florida Statutes, to dismiss, for "just cause," teachers having professional service contracts.

48. At all times material to the instant case, "just cause," as used in Section 1012.33, Florida Statutes, has been legislatively defined (in Subsection (1)(a) of the statute) to include, "but . . . not [be] limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude." The "but . . . not limited to" language in the statute makes abundantly clear that the list of things constituting "just cause" was intended by the Legislature to be non-exclusive and that other wrongdoing may also constitute "just cause" for dismissal. See Dietz v. Lee County School Board, 647 So. 2d 217, 218-19 (Fla. 2d DCA 1994)(Blue, J., specially concurring)("We assume that drunkenness and immorality, which are not included in the non-exclusive list of sins [set forth in Section 231.36(1)(a), Florida Statutes (2001), the predecessor

of Section 1012.33(1)(a), Florida Statutes] constituting just cause,[[21]] would also be grounds for dismissal. . . . In amending section 231.36 and creating a new contract status for teachers (professional service) and by failing to further define just cause, the legislature gave school boards broad discretion to determine when a teacher may be dismissed during the contract term. . . . I agree with the majority--that the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause.'").

49. "Immorality" has been defined "by rule of the State Board of Education" (specifically Florida Administrative Code Rule 6B-4.009(2)[22]) as follows:

> Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

50. "Misconduct in office" has been defined "by rule of the State Board of Education" (specifically 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.

51. The Code of Ethics of the Education Profession (as set forth in Florida Administrative Code Rule 6B-1.001) provides as follows:

> (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.

52. The Principles of Professional Conduct for the Education Profession in Florida (set forth in Florida Administrative Code Rule 6B-1.006) require a teacher, as part of his or her "[o]bligation to the student," to "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"; to "not intentionally violate or deny a

student's legal rights"; and to "not exploit a relationship with a student for personal gain or advantage."

53. "Immorality" and "misconduct in office" may be established, even in the absence of "specific" or "independent" evidence of impairment, where the conduct engaged in by the teacher is of such a nature that it "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's service and effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands County School Board, 752 So. 2d 127, 128-29 (Fla. 2d DCA 2000); Summers v. School Board of Marion County, 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995); Brevard County School Board v. Jones, No. 06-1033, 2006 Fla. Div. Adm. Hear. LEXIS 287 *17 (Fla. DOAH June 30, 2006)(Recommended Order)("[T]he need to demonstrate 'impaired effectiveness' is not necessary in instances where the misconduct by a teacher speaks for itself, or it can be inferred from the conduct in question."); and Miami-Dade County School Board v. Lefkowitz, No. 03-0186, 2003 Fla. Div. Adm. Hear. LEXIS 675 **23-24 (Fla. DOAH July 31, 2003)(Recommended Order)("The School Board failed to prove by a preponderance of the direct evidence that Mr. Lefkowitz's actions were so serious that they impaired his effectiveness as a teacher. Nonetheless, based on

the findings of fact herein, it may be inferred that Mr. Lefkowitz's conduct impaired his effectiveness as a teacher in the Miami-Dade County public school system.")(citation omitted).

54. A teacher's engaging in inappropriate physical conduct of a sexual nature with a minor student (as Respondent has been accused of doing in the instant case) is an example of such conduct that "speaks for itself" and constitutes "immorality" and "misconduct in office," as those terms are used in Section 1012.33, Florida Statutes. See Lee County School Board v. Lewis, No. 05-1450, 2005 Fla. Div. Adm. Hear. LEXIS 1327 *25 (Fla. DOAH October 20, 2005)(Recommended Order)("In this case, the seriousness of Respondent's misconduct in inappropriately touching S. W., 'speaks for itself' because it undermines the foundation of the relationship between a teacher and his students."); Brevard County School Board v. Gary, No. 03-4052, 2004 Fla. Div. Adm. Hear. LEXIS 1731 *14-15 (Fla. DOAH June 24, 2004)(Recommended Order)("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."); and Miami-

Dade County School Board v. Durrant, No. 98-3949, 1999 Fla. Div. Adm. Hear. LEXIS 5227 *16 n.8 (Fla. DOAH July 6, 1999)(Recommended Order)("Here, there was direct proof that Respondent's conduct [involving sexual activity with a student] adversely affected his effectiveness in the school system. Moreover, such a conclusion may also be reasonably drawn in the absence of 'specific evidence' of impairment of the teacher's 'effectiveness as an employee,' where, as here, the 'personal conduct' in which the teacher engaged is of such nature that it 'must have impaired [the teacher's] effectiveness.'"); see also Tomerlin v. Dade County School Board, 318 So. 2d 159, 160 (Fla. 1st DCA 1975)("Although Tomerlin's immoral act [of performing cunnilingus on his stepdaughter] was done at his home and after school hours, it was indirectly related to his job. His conduct is an incident of a perverse personality which makes him a danger to school children and unfit to teach them. Mothers and fathers would question the safety of their children; children would discuss Tomerlin's conduct and morals. All of these relate to Tomerlin's job performance. . . . A school teacher holds a position of great trust. We entrust the custody of our children to the teacher. We look to the teacher to educate and to prepare ou[r] children for their adult lives. To fulfill this trust, the teacher must be of good moral character; to require less would jeopardize the future lives of our

children."); and Broward County School Board v. Sapp, No. 01-3803, 2002 Fla. Div. Adm. Hear. LEXIS 1574 *16 (Fla. DOAH September 24, 2002)(Recommended Order)("[A]s a teacher and coach, Sapp was required to be a role model for his students. To be effective in this position of trust and confidence, he needed to maintain a high degree of trustworthiness, honesty, judgment, and discretion.").

55. "[U]nder Florida law, a [district] school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."[23] McIntyre v. Seminole County School Board, 779 So. 2d 639, 641 (Fla. 5th DCA 2001).

56. Pursuant to Section 1012.33(6)(a), Florida Statutes, the hearing may be conducted, "at the district school board's election," either by the district school board itself or by a DOAH administrative law judge (who, following the hearing, makes a recommendation to the district school board).

57. The teacher must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, or policy] the [district school board] alleges has been violated and the conduct which

occasioned [said] violation." Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring). The teacher may be suspended without pay pending the outcome of the termination proceeding; "but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid." § 1012.33(6)(a), Fla. Stat.

58. At the termination hearing, the burden is on the district school board to prove the allegations contained in the notice. Unless there is a collective bargaining agreement covering the bargaining unit of which the teacher is a member that provides otherwise[24] (and there is no record evidence that there exists such a controlling collective bargaining agreement provision in the instant case), the district school board's proof need only meet the preponderance of the evidence standard. See Cisneros v. School Board of Miami-Dade County, 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008)("As the ALJ properly found, the School Board had the burden of proving the allegations of moral turpitude by a preponderance of the evidence."); McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal."); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We

agree with the hearing officer that for the School Board to demonstrate just cause for termination, it must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true . . . ."); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not involve the loss of a license and, therefore, Allen's losses are adequately protected by the preponderance of the evidence standard."); and Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence to support both charges by a preponderance of the evidence standard."). This burden "is satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt.'" Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974).

59. In determining whether the district school board has met its burden of proof, it is necessary to evaluate the district school board's evidentiary presentation in light of the

specific allegation(s) made in the written notice of charges. Due process prohibits a district school board from disciplining a teacher based on matters not specifically alleged in the notice of charges, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Pilla v. School Board of Dade County, 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); and Texton v. Hancock, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978).

60. The written notice of charges in the instant case (the Administrative Complaint) alleges that there is "just cause" to terminate Respondent's employment as a professional service contract teacher with the School Board based on his having engaged in inappropriate physical conduct with minor female students (involving, among other things, his deliberate touching of their breasts) on two separate occasions: once in July 2008, with E. G.; and on an earlier occasion in December 2004, with M. S. According to the Administrative Complaint, this conduct constitutes "moral turpitude," "immorality," and "misconduct in office," as those terms are used in Section 1012.33, Florida Statutes, and Florida Administrative Code Rule 6B-4.009.

61. The preponderance of the record evidence establishes that Respondent engaged in the inappropriate physical conduct alleged in the Administrative Complaint.

62. E. G. and M. S. both testified at the final hearing that Respondent had subjected them to the inappropriate touching described in the Administrative Complaint, accusations that Respondent denied when he took the stand. The outcome of the instant case turns on whose testimony the undersigned believes. Having carefully considered the matter, the undersigned has accepted E. G.'s and M. S.'s accusatory testimony and rejected (as unworthy of belief) Respondent's exculpatory testimony to the contrary.

63. E. G. and M. S. were both very credible and convincing witnesses who, unlike Respondent (whose teaching job hangs in the balance),[25] had no apparent motive or reason to testify falsely in this matter. Their testimony was neither inherently unreasonable, nor implausible, and it withstood the probing and skillful cross-examination of Respondent's counsel. Moreover, E. G.'s testimony is supported by an extremely powerful piece of corroborative evidence: the recording of the post-incident, police-monitored telephone conversation E. G. had with Respondent (Petitioner's Exhibit 1).[26] (Respondent's efforts, in his testimony, to try to explain away the damaging statements made by him during this telephone conversation were extremely weak and entirely unpersuasive.)

64. Based on his assessment of the demeanor and credibility of the witnesses who testified at the final hearing

(including E. G., M. S., and Respondent), and his evaluation of the evidentiary record as a whole, the undersigned has determined that E. G. and M. S. were telling the truth when they testified how Respondent had inappropriately touched them, whereas Respondent's testimony denying their accusations was a fabrication concocted by him to try to save his job and otherwise avoid being punished for his transgressions.[27]

65. As a result of his having engaged in the inappropriate physical conduct alleged in the Administrative Complaint (as established by the preponderance of the record evidence), Respondent is guilty of "immorality," as defined in Florida Administrative Code Rule 6B-4.009(2), and "misconduct in office," as defined in Florida Administrative Code Rule 6B-4.009(3).[28] The School Board, therefore, has "just cause," as defined in Section 1012.33(1)(a), Florida Statutes, to dismiss Respondent pursuant to Subsection (6)(a) of the statute.

RECOMMENDATION

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

RECOMMENDED that the Broward County School Board issue a final order terminating Respondent's employment as a professional service contract teacher with the School Board for the reasons set forth above.

DONE AND ENTERED this 22nd day of December, 2010, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2010.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

[2] The delay in the case going to hearing was due, in large measure, to the pendency of criminal charges against Respondent.

[3] E. G.'s mother was always at home during these visits.

[4] E. G. and her mother lived in a second floor apartment.

[5] A sliding glass door separated the balcony from the living room.

[6] This finding of fact is based on E. G.'s hearing testimony. E. G.'s version of what occurred when she and Respondent were alone in the living room (while the others were on the balcony) is, in the undersigned's view, considering the totality of the record evidence, more credible and persuasive than the exculpatory version to the contrary provided by Respondent, which was as follows:

. . . . I was telling [E. G.] that we had to go pick up my son.

As I was telling her that she was standing directly next to me. We are shoulder to shoulder, and we were looking at the people standing on the balcony. And I reached over to give her a goodbye hug across her shoulder.

As I reached over simultaneously she sort of leaned back and turned her back to me and fell with her head on my chest. When she did that my arm slid around, and my arm was placed right across her cleavage directly under her left breast. As I did that she took her left arm, and she kind of pat[ted] me on my arm that way, and it was very awkward.

I never hugged her like that before. She never turned her back to me and fell into my arm that way. I kind of froze, and it was very awkward. With my integrity I felt bad about that because I never touched her in that way. I make sure, working on the middle school level with students and hormones the way they are, that I stay away from that type of contact.

After that time I pulled my arm out kind of away. It was kind of like a quiet awkwardness. At the same [time] my brother and her [E. G.'s] mother and her friend [were] walking back into the room. So she was standing there. Like I said, it was very awkward. I kind of tugged her ear or something of that nature and sa[id] are you okay, what is wrong?

She was like, she said something like my dad does that or something like that. I think I asked her do I remind you of your dad, in a jesting way. It was like conversation such as that.

[7] Of these three (Ms. G., Odelia, and Mr. Whitest), only Mr. Whitest testified at the final hearing. It appears that, from his vantage point on the balcony, he did not see what his brother was doing to E. G. when they were alone in the living room.

[8] E. G. "always hugged [Respondent] goodbye" when they parted company. (It was not uncommon for Respondent to share a hug with his students.)

[9] For "three or four months" following the incident, E. G, saw a therapist to "help [her with her] problem." She has these "nightmares still, [but] not as often" as she used to.

[10] Although Ms. Jared was the first adult that E. G. told about the incident, E. G. had, before her conversation with Ms. Jared, discussed the incident with friends.

[11] The recording was received into evidence (as Petitioner's Exhibit 1) over Respondent's objection. While there are portions of the recording that are hard, if not impossible, to understand, they are not "so substantial as to deprive the remainder of [the recording of] relevance." See, e.g., McCoy v. State, 853 So. 2d 396, 404 (Fla. 2003)("A court's evaluation of partially inaudible recordings must be guided by the principle that an audiotape should be admitted into evidence unless the condition of the recording degrades its usefulness to such an extent that it makes the evidence misleading or irrelevant."); Jackson v. State, 979 So. 2d 1153, 1155 (Fla. 5th DCA 2008)("Partial inaudibility or unintelligibility of an audiotape, however, is not grounds for excluding the recording if the audible parts are relevant, authenticated, and otherwise properly admissible."); and Commerford v. State, 728 So. 2d 796, 798 (Fla. 4th DCA 1999)("The general rule regarding admissibility of partially inaudible tape recordings is that such recordings are admissible unless the inaudible and unintelligible portions are so substantial as to deprive the remainder of relevance. Partial inaudibility or unintelligibility is not a ground for excluding a recording if the audible parts are relevant, authenticated, and otherwise properly admissible. . . . We hold that the trial court did not abuse its discretion in admitting the tape. The tape clearly reveals sufficient relevant portions that were audible to justify its admission, including the portion where Commerford asks if the victim would like to have sex 'again.'")(citations

omitted). The recording of Respondent's conversation with E. G. is not only relevant, it constitutes compelling evidence of Respondent's guilt of the charge made in the Administrative Complaint that he inappropriately touched E. G.

[12] E. G. conveyed the same thought later in the conversation when she said, "I never expected you to touch me because not only were you my teacher you were someone I looked up to." Respondent's response to this comment was, "I know."

[13] M.S.'s sister, F., was a year ahead of M. S. in school. When M. S. was a fifth grader, F. was in Respondent's band class at Pines.

[14] Her school day ended at 2:35 p.m., approximately an hour before the Pines' students "g[ot] out."

[15] Ms. Larson is still the assistant band director at Pines. She has been in that position since the 2003-2004 school year. She "worked directly with [Respondent]" her first five years as Pines' assistant band director.

[16] Ms. Larson "walked in[to] [the band room] without knocking."

[17] Ms. Larson testified at the final hearing that she had no recollection of ever entering the band room and finding M. S. visiting with Respondent (although she admitted in her testimony to having some "confusion" and uncertainty as to what M. S. looked like as a 14-year-old). That Ms. Larson would have forgotten the incident by the time of the final hearing is not surprising given the passage of time (of approximately six years) since the incident and the relatively mundane nature, from Ms. Larson's perspective, of what she was a witness to: a student visiting with Respondent in the band room. Cf. United States v. Caraway, 516 F. Supp. 2d 1219, 1224 (D. Kan. 2007)("He understandably did not have a clear memory of the events of what would have been, for him, a mundane day over three years before his trial testimony."); and Borecki v. Eastern International Management Corp., 694 F. Supp. 47, 53 n.7 (D. N.J. 1988)("Indeed, if Tumulo's failure to recite the decisions discussed is due to an inability to remember them, it may indicate they were not major ones, but rather were more mundane in nature."). Contrastingly, what happened in the band room that day, from M. S.'s perspective, was an extraordinary and memorable event.

[18] Despite having her new phone number, Respondent never called M. S. after the incident.

[19] This finding of fact is based on M. S.'s hearing testimony, which, in the opinion of the undersigned, when viewed in light of the entire evidentiary record, is more believable than Respondent's hearing testimony that the incident described by M. S. never occurred.

[20] Notwithstanding her effort to put the incident out of her mind, she has not been able to do so. Still, six years later, she has nightmares about what happened.

[21] "Immorality" was added to the "non-exclusive list of sins" in Section 1012.33(1)(a), Florida Statutes, by Section 28 of Chapter 2008-108, Laws of Florida, effective July 1, 2008.

[22] Florida Administrative Code Rule 6B-4.009 "define[s]" the "basis for charges upon which dismissal action against instructional personnel may be pursued."

[23] "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993); see also School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1231 (Fla. 2009)("No one disputes that a school board is an 'agency' as that term is defined in the APA."); Volusia County School Board v. Volusia Homes Builders Association, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006)("[T]he School Board is an agency subject to the Administrative Procedure Act."); and Witgenstein v. School Board of Leon County, 347 So. 2d 1069, 1071 (Fla. 1st DCA 1977)("It was obviously the legislative intent to include local school districts within the operation of Chapter 120.").

[24] Where the district school board, through the collective bargaining process, has agreed to bear a more demanding standard, it must honor, and act in accordance with, its agreement. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); Hillsborough County Governmental Employees Association v. Hillsborough County

Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment . . . ."); and Palm Beach County School Board v. Auerbach, No. 96-3683, 1997 Fla. Div. Adm. Hear. LEXIS 5185 *13-14 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . . However, in this case, the district must comply with the terms of the collective bargaining agreement, which, as found in paragraph 27, above, requires the more stringent standard of proof: clear and convincing evidence.").

[25] "Persons having a pecuniary or proprietary interest in the outcome of litigation are not disqualified from testifying under the Florida Evidence Code," but their interest is a factor to be considered in evaluating the credibility of their testimony. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

[26] Even if it had been uncorroborated, however, E. G.'s testimony would have been sufficient to support a finding that Respondent had inappropriately touched her, as alleged in the Administrative Complaint. Cf. § 120.81(4)(a)("[I]n a proceeding against a licensed professional . . . [t]he testimony of the victim of the sexual misconduct need not be corroborated.").

[27] In making this determination, the undersigned has not overlooked that E. G. and M. S. may not have clearly recalled every detail of the incidents about which they testified. Compare with United States v. Price, No. 04-40035-SAC, 2004 U.S. Dist. LEXIS 17916 *6 (D. Kan. August 4, 2004)("The court finds that the testimony of the officers was generally consistent and persuasive. Although defendant's counsel pointed out many details which the officers did not recall, the omissions in the officers' testimony or their reports noted by the defendant involved insignificant details or innocent errors."); State v. Highman, Nos. 01-0733-CR and 01-0734-CR, 2001 WI App. 224, 2001 Wisc. App. LEXIS 860 *17 (Wis. App. August 23, 2001)("The details that the officer was not able to remember are not significant, and his inability to remember a few insignificant details does not undermine the reliability of the substance of his report and recollections."); and Carrington v. State, No. 09-96-247 CR, 1997 Tex. App. LEXIS 3381 *3 (Tex. App. June 25, 1997)("Appellant's brief challenges the officers' lack of recall

of insignificant details of the events surrounding the offense, notes minor discrepancies in the testimony, and criticizes the State's failure to conduct more extensive forensic testing. We find the evidence sufficient for any rational trier of fact to have found, beyond a reasonable doubt, that appellant committed the offense of delivery of a controlled substance as alleged in the application paragraph of the jury charge.").

[28] To the extent that the Administrative Complaint alleges that Respondent is also guilty of having been "convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude," the record evidence is insufficient to support such an allegation.

COPIES FURNISHED:

Paul D. Gibbs, Esquire
Carmen Rodriguez, Esquire
Law Offices of Carmen Rodriguez P. A.
15715 South Dixie Highway, Suite 411
Palmetto Bay, Florida 33157-1884

Steve Rossi, Esquire
Travis Stock, Esquire
Law Office of Steve Rossi, P.A.
Sole Building, Ground Floor, Suite 2
533 Northeast Third Avenue
Fort Lauderdale, Florida 33301

James F. Notter, Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

Honorable Dr. Eric J. Smith
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.