

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 09-6513PL
)
MICHAEL ALLEN SIMMONS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 5, 2010, in Orlando, Florida, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward T. Bauer, Esquire
Brooks, LeBoeuf, Bennett,
Foster & Gwartney, P.A.
909 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Michael Allen Simmons, pro se
6004 Westgate Drive, Apartment 102
Orlando, Florida 32835

STATEMENT OF THE ISSUE

Whether it is appropriate for Petitioner to discipline Respondent's Florida educator's certificate for acts alleged in Petitioner's Administrative Complaint dated July 16, 2009.

PRELIMINARY STATEMENT

On July 16, 2009, Petitioner, Dr. Eric J. Smith, Commissioner of Education, filed an Administrative Complaint advising Respondent, Michael Allen Simmons, that he was seeking disciplinary sanctions against his Florida educator's certificate.

On September 10, 2009, Respondent requested an administrative hearing if a settlement was not reached. On November 25, 2009, Petitioner forwarded the case to the Division of Administrative Hearings for assignment of an Administrative Law Judge.

On November 25, 2009, an Initial Order was sent to both parties requesting, inter alia, mutually-convenient dates for the final hearing. Based on the response of the parties on December 3, 2009, the case was scheduled for final hearing on February 2, 2010, in Orlando, Florida. On January 28, 2010, Respondent requested a continuance, and on February 1, 2010, the case was rescheduled for March 5, 2010.

The hearing took place as scheduled on March 5, 2010. Petitioner presented four witnesses: Dr. Stephanie Shames, Michael Longmire, Rivers Lewis, and C.F. Petitioner submitted four exhibits that were received into evidence and marked Petitioner's Exhibits 1 through 4. At the hearing, Respondent

testified in his own behalf and had with him a conductor's baton.

The Transcript of Proceedings was filed on March 17, 2010. Both parties timely submitted Proposed Recommended Orders.

All statutory references are to Florida Statutes (2007), unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. Respondent holds Florida Professional Educator's Certificate No. 1045332, covering the area of music, which is valid through June 30, 2011. At the time of the incident alleged in the Administrative Complaint, he was employed as a band teacher at Memorial Middle School, Orlando, Florida.

2. Petitioner is the head of the state agency responsible for certifying and regulating public school teachers in Florida.

3. On December 12, 2007, Respondent, pursuant to his teaching responsibility, was conducting the seventh-grade band ensemble which was performing in the school cafeteria. Apparently, this is where the band class meets.

4. C.F., a sixth-grade band student, was in the cafeteria as a part of the class. Students who were not actively performing had been instructed to remain quiet, to read music, to be courteous and not to distract the performing ensemble.

5. Notwithstanding the admonition to remain quiet, C.F. became "bored" and began "banging" rhythmically on a lunch table.

6. Initially, Respondent attempted to get C.F.'s attention. Another student also attempted to stop C.F. Respondent moved across the cafeteria as he continued to conduct the ensemble, reached out and "tapped" C.F. on the wrist/forearm with a conductor's baton "to get his attention," and instructed him by facial expressions to stop banging on the table.

7. A conductor's baton is approximately eight inches long, has a cork end that allows it to be grasped between the thumb and forefinger, and is smaller in circumference than a pencil. It looks similar to a small knitting needle, only shorter.

8. When the ensemble concluded the musical selection it was performing, Respondent returned his attention to C.F. who began arguing with him. Respondent told C.F. to remove himself from the cafeteria and stand in the hallway.

9. Instead of standing in the hallway as instructed, C.F. went to the assistant principal, Mr. Campbell, and complained that Respondent had struck him.

10. Mr. Campbell called Mr. Longmire, the sixth-grade dean of men, to his office, and Mr. Longmire observed a small red mark on C.F.'s arm.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57, Fla. Stat. (2009); Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

12. Section 1012.795, Florida Statutes (2009), reads, in pertinent part, as follows:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or a public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to ten years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:

* * *

(j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education rules.

13. Florida Administrative Code Rule 6B-1.006 states, in pertinent part, as follows:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(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.

14. Because Respondent's Florida educator's certificate is at risk of being sanctioned, Petitioner bears the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The definition of clear and convincing evidence is

found in the case of Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

15. Because the statute and rules providing grounds for disciplining Respondent's Florida educator's certificate are penal in nature, they must be construed in favor of Respondent. Rosario v. Burke, 605 So. 2d 523 (Fla. 2d DCA 1992); Lester v. Department of Professional Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977).

16. Petitioner has failed to prove by "clear and convincing evidence" that Respondent violated the Principles of Professional Conduct for the Education Profession in Florida in that he failed 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." The evidence clearly suggests that Respondent was simply attempting to gain the attention of a disruptive student by tapping his hand/wrist with the conductor's baton.

17. It is also alleged that Respondent violated the Principles of Professional Conduct for the Education Profession in Florida in that he "intentionally expose[d] a student to unnecessary embarrassment or disparagement." While it is not hard to imagine that a student would be embarrassed by being asked to leave the classroom, based on the evidence presented, removing the student appears to be an appropriate remedy for

the disruption caused by the student and arguing with a teacher. Petitioner has failed to prove that Respondent violated Florida Administrative Code Rule 6B-1.006(3)(e) by "clear and convincing" evidence.

RECOMMENDATION

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

RECOMMENDED that Respondent, Michael Allen Simmons, be found not guilty of the violations alleged in the Administrative Complaint and that no disciplinary action be taken.

DONE AND ENTERED this 29th day of April, 2010, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 29th day of April, 2010.

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.