

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS )  
COMMISSIONER OF EDUCATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-743PL  
 )  
BRYAN MAYS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on May 19, 2011, by video teleconference at sites in Tallahassee and Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Ron Weaver, Esquire  
Post Office Box 5675  
Douglasville, Georgia 30154

For Respondent: Bryan Mays, pro se  
207 Gardenia Avenue  
Fort Pierce, Florida 34982

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On December 13, 2010, Petitioner, Dr. Eric J. Smith, as Commissioner of Education, filed an Administrative Complaint against Respondent, Bryan Mays. The Administrative Complaint, which consists of six counts, alleges that Respondent committed various acts of misconduct during the 2009-2010 school year while employed as a music teacher with the St. Lucie County School District. Respondent timely requested a formal hearing to contest the allegations, and, on February 16, 2011, the matter was referred to the Division of Administrative Hearings.

During the May 19, 2011, Final Hearing, Petitioner presented the testimony of Susan Ranew, Assistant Superintendent of Human Resources for the St. Lucie County School District; Charlotte Tomblin, a teacher at Parkway Elementary in the St. Lucie School District; Jennifer Avellino, an assistant principal at Parkway Elementary; Ucola Barrett-Baxter, principal of Parkway Elementary; and students E.J.V., Y.G.H., W.F., and K.P. Petitioner introduced twelve exhibits into evidence, numbered 1-12. Respondent testified on his own behalf and introduced seven exhibits, numbered 1-7. With the undersigned's consent, Respondent late-filed four exhibits, numbered 8-11.<sup>1</sup>

The final hearing Transcript was filed with DOAH on June 15, 2011. Petitioner timely filed a Proposed Recommended

Order, which the undersigned has considered. Respondent did not submit a proposed recommended order.<sup>2</sup>

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

#### FINDINGS OF FACT

##### A. The Parties

1. Petitioner is the head of the Florida Department of Education, the state agency charged with the responsibility of investigating and prosecuting complaints of violations of section 1012.795, Florida Statutes, against teachers holding Florida educator's certificates.

2. Bryan Mays, Respondent in this proceeding, holds Florida Educator's Certificate 636531, covering the area of music, which is valid through June 30, 2011.

##### B. Background

3. At all times material to the allegations of this case, Respondent was employed as a music teacher in the St. Lucie County School District ("the district").

4. Respondent's employment with the district, which commenced in 1999, was initially uneventful. Beginning in 2006, however, Respondent began to amass a disciplinary history with the district, which included: letters of concern in May 2007 and May 2008; a reprimand for insubordination in May 2008; and

placement on unpaid status in January 2009, which continued for approximately three months.

5. With the aim of providing him with a fresh start, the district transferred Respondent from Manatee Elementary to Parkway Elementary beginning with the 2009-2010 school year. Unfortunately, and as detailed below, the evidence demonstrates that Respondent did not take advantage of this opportunity and engaged in improper classroom behavior.

C. The Instant Allegations

6. During the final hearing, Petitioner presented testimony from four children, each of whom was a member of Respondent's fifth-grade music class at Parkway Elementary during 2009-2010.

7. Collectively, the students' testimony establishes that Respondent, during music class, disparaged his pupils by calling them "stupid," "retarded," and "idiots." Respondent also told his students, at least once, that they would never get "real jobs" and would not amount to more than garbage collectors, or words to that effect.<sup>3</sup> On another occasion, Respondent yelled at student N. while standing approximately five to twelve inches from his face.

8. Not surprisingly, Respondent's behavior and insults were not well received by the testifying students. In particular, the comments made student E.J.V. "feel bad"; Y.G.H.

was both angered and saddened; W.F. felt "really sad [and] depressed"; and K.P. was "disturbed and upset."

9. Ultimately, Ms. Charlotte Tomblin, a reading and science teacher at Parkway Elementary, learned of the misconduct while leading a classroom discussion on the topic of bullying. Specifically, one of her students asked if it was acceptable for a teacher to call students "idiots." At that point, other students chimed in—some of whom were close to tears—and revealed Respondent's misconduct to Ms. Tomblin in greater detail. Ms. Tomblin promptly notified the administration of Parkway Elementary, at which point an investigation ensued.

10. The principal of Parkway Elementary (Ms. Ucola Barrett-Baxter) concluded, after interviewing some of Respondent's students and receiving complaints from parents regarding the inappropriate classroom comments, that Respondent's effectiveness was reduced to the point that he needed to be relieved of his duties. Shortly thereafter, the district removed Respondent from the classroom and notified him that it would move forward with termination proceedings. On March 9, 2010, Respondent resigned his position with the district.

D. Other Allegation - Halloween Film

11. Petitioner further alleges in the Administrative Complaint that Respondent intentionally violated the legal

rights of student Y.G.H. by not excusing her from the viewing of a film.

12. It is undisputed that in October 2009, Respondent presented a film to his class about Halloween music. Y.G.H., who "sometimes" considers herself a Jehovah's Witness,<sup>4</sup> advised Respondent that she did not want to watch the film due to her religious beliefs. Although Respondent continued to play the film and told Y.G.H. that she needed to pay attention, Y.G.H. put her head on her desk and either covered her eyes or went to sleep.

13. Respondent credibly testified during the final hearing that because the Halloween film was part of the music curriculum, he did not believe it was necessary, upon hearing Y.G.H.'s objection, to contact school administration or excuse the student from class. Respondent further testified:

A. It -- it was a musical activity . . . which was in the Silver Burdett book which -  
- and I showed the film in reference to the songs that were in the Silver Burdett book at the time, and there were lots of Halloween songs in the Silver Burdett books. And that's approved by the county, approved by the state.

Final Hearing Transcript, p. 145.

14. Petitioner adduced no evidence demonstrating that Respondent's playing of the film was improper,<sup>5</sup> nor did it prove

that Respondent intentionally violated any of Y.G.H.'s legal rights.

CONCLUSIONS OF LAW

A. Jurisdiction

15. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

16. This is a disciplinary proceeding against Respondent's license. Accordingly, Petitioner must prove the allegations in the Administrative Complaint by clear and convincing evidence.

Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

17. Clear and convincing evidence:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. The EPC's Authority to Discipline Teaching  
Certificates; The Charges Against Respondent

18. Section 1012.795(1), Florida Statutes, gives the Education Practices Commission the power to suspend or revoke the teaching certificate of any person, either for a set period of time or permanently, or to impose any penalty provided by law, if he or she is guilty of certain acts specified in the statute.

19. In Counts One, Two, and Three of the Administrative Complaint, Petitioner alleges that Respondent has committed the following violations of section 1012.795(1):

(c) Has proved to be incompetent to teach or to perform duties as an employee of the public school system or to teach in or to operate a private school.

\* \* \*

(g) Upon investigation, has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board.

\* \* \*

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

20. Petitioner further alleges, in Counts Four, Five, and Six of the Administrative Complaint, that Respondent has violated three Principles of Professional Conduct: Florida Administrative Code Rule 6B-1.006(3)(a), by failing to make



reasonable effort to protect students from conditions harmful to learning and/or their mental health; rule 6B-1.006(3)(e), by intentionally exposing one or more students to unnecessary embarrassment or disparagement; and rule 6B-1.006(3)(f), by intentionally denying or violating a student's legal rights.

21. Whether Respondent violated these statutes and rules, as charged, is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995).

D. Count One: Section 1012.795(1)(c)

22. In Count One of the administrative complaint, Petitioner contends that Respondent is in violation of section 1012.795(1)(c), which provides, in relevant part, that an educator may be disciplined if he or she "[h]as proved to be incompetent to teach or to perform duties as an employee of the public school system."

23. Although chapter 1012 contains no definition of "incompetent," the Education Practices Commission has defined "incompetency," by rule, for use by local school districts in taking action against instructional personnel:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert

witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on . . . evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

Fla. Admin. Code R. 6B-4.009(1).

24. Applying the foregoing definition to the instant case, Petitioner has failed to demonstrate that Respondent has been rendered incompetent to teach by either inefficiency or incapacity.

25. With respect to inefficiency, neither of the two applicable alternatives enumerated in rule 6B-4.009(1)(a) has been proven by clear and convincing evidence. In particular, there has been no showing that Respondent has repeatedly failed to perform the duties outlined in section 231.09, Florida

Statutes. Although Respondent failed to properly communicate with his class on multiple occasions, there is no evidence that his students were deprived of a minimal educational experience. On the contrary, all of the students who testified during the final hearing admitted that they learned about music while taking Respondent's class.

26. Turning to incapacity, "lack of emotional stability" is the only prong of rule 6B-4.009(1)(b) that could plausibly apply in this case. Respondent's behavior, while unquestionably improper, does not clearly and convincingly prove that Respondent was emotionally unstable to such a degree that he was rendered incompetent.

E. Count Two: Section 1012.795(1)(g)

27. Next, Petitioner alleges that Respondent is guilty of personal misconduct that seriously reduces his effectiveness as an employee of the school board, in violation of section 1012.795(1)(g).

28. As detailed in the findings of fact, Respondent's verbal mistreatment of his students resulted in parental complaints to the principal of Parkway Elementary, Ms. Barrett-Baxter, who ultimately concluded—after speaking with the students—that she no longer wanted Respondent at her school. A district investigation ensued, which culminated in Respondent's removal from Parkway Elementary and his resignation<sup>6</sup> as a school

board employee. These facts provide clear and convincing evidence that Respondent's behavior seriously reduced his effectiveness as a School Board employee, and as such, Respondent is guilty of Count Two. See, e.g., Castor v. Clarke, Case No. 92-6923, 1993 Fla. Div. Adm. Hear. LEXIS 5411 (Fla. DOAH Aug. 5, 1993) (concluding that teacher's use of disparaging and vulgar remarks toward students seriously reduced his effectiveness as a school board employee).

F. Count Three: Section 1012.795(1)(j)

29. Count Three charges Respondent with violating the Principles of Professional Conduct for the Education Profession, in violation of section 1012.795(1)(j). By virtue of the conclusions made below with respect to Counts Four and Five—in which the undersigned finds Respondent guilty of violating rule 6B-1.006(3)(a) and (3)(e)—Petitioner has proven Count Three by clear and convincing evidence.

G. Count Four: Rule 6B-1.006(3)(a)

30. In Count Four of the Administrative Complaint, Petitioner alleges that Respondent failed to protect students from conditions harmful to learning and/or their mental health, in violation of Florida Administrative Code Rule 6B-1.006(3)(a).

31. As discussed previously, Respondent directly insulted his students by calling them "retarded," "dumb," and "idiots," and, on at least one occasion, informed them that they would

never get "real jobs." Such comments, which adversely affected each of the students who testified during the final hearing, plainly constitute a violation of rule 6B-1.006(3) (a). See Horne v. West, Case No. 03-2272PL (Fla. DOAH Oct. 21, 2003) (concluding that teacher failed to protect students from conditions harmful to their mental health, in violation of rule 6B-1.006(3) (a), by referring to them as "fat" and "stupid"); Lee Cnty. Sch. Bd. v. Phillips, Case No. 02-1271, 2002 Fla. Div. Adm. Hear. LEXIS 1027 (Fla. DOAH Aug. 2, 2002) (finding violation of rule 6B-1.006(3) (a) where evidence demonstrated that teacher used derogatory terms toward his students, which included "stupid," "ignorant," and "no good"); Castor v. Rawls, Case No. 92-4489, 1993 Fla. Div. Adm. Hear. LEXIS 5166 (Fla. DOAH Feb. 26, 1993) (concluding educator violated rule 6B-1.006(3) (a) by calling her elementary students "stupid," "dumb," and telling them that they were "never going to be anything"); Dep't of Educ., Educ. Practices Comm'n v. Smith, Case No. 83-2024, 1983 Fla. Div. Adm. Hear. LEXIS 6235 (Fla. DOAH Sept. 30, 1983) (finding teacher failed to protect students from conditions harmful to learning by calling them names such as "dumb," "stupid," and "brainless").

H. Count Five: Rule 6B-1.006(3) (e)

32. Petitioner next alleges, in Count Five of the Administrative Complaint, that Respondent's derogatory comments

subjected them to unnecessary embarrassment or disparagement, in violation of rule 6B-1.006(3)(e). There is no question that students were disparaged by Respondent's inappropriate comments, as all of the testifying children revealed that they were saddened, upset, and/or angered by his behavior. Accordingly, Respondent is guilty of Count Five. See Horne v. Knight, Case No. 03-4096PL, 2004 Fla. Div. Adm. Hear. LEXIS 1736 (Fla. DOAH June 11, 2004) (finding violation of rule 6B-1.006(3)(e) where teacher belittled her fourth grade students during class by calling them, among other things, "slow," "stupid," "stupid idiots," and "babies"); Sch. Bd. of Palm Beach Cnty. v. Fereara, Case No. 86-066, 1986 Fla. Div. Adm. Hear. LEXIS 3610 (Fla. DOAH Aug. 11, 1986) (finding that teacher exposed his students to unnecessary embarrassment or disparagement by calling them derogatory names such as "jerk," "immature," and "stupid").

I. Count Six: Rule 6B-1.006(3)(f)

33. Finally, Petitioner contends that intentionally violated student Y.G.H.'s legal rights, contrary to rule 6B-1.006(3)(f), by refusing to excuse her from class during the playing of the Halloween video.

34. At the outset, it is critical to recognize that the presence of Halloween festivities and decorations in public schools is not unlawful under most circumstances. See Guyer v. Sch. Bd. of Alachua Cnty., 634 So. 2d 806 (Fla. 1st DCA 1994).

In Guyer, the evidence demonstrated that prior to and during Halloween, elementary schools in Alachua County were decorated with depictions of witches, brooms, and cauldrons. In addition, some teachers dressed up as witches by adorning black dresses and pointed hats. Id. at 806. Finding the behavior objectionable, a parent of several elementary students sued to permanently enjoin the school district from engaging in such future practices. In holding that the school board did not violate the establishment clauses of the constitutions of Florida or the United States, the court reasoned:

In the present case, there is no doubt that the Halloween festivities and decorations serve a secular purpose. According to the school principal, the costumes and decorations serve to make Halloween a fun day for students and serve an educational purpose by enriching their educational background and cultural awareness. The record also reflects that this cultural celebration enhances a sense of community. In addition, the Halloween festivities and decorations do not foster any excessive entanglement between government and religion. No evidence was offered to show that any one acted in furtherance of any religion and as such had any involvement whatsoever with the school Halloween celebration, nor was there any argument to that effect. Thus the question in this case boils down to whether the principal or primary effect of the celebration, including depictions of the symbols appellants object to, is the endorsement or promotion of religion. We are firmly convinced that it is not.

Id. at 808.

35. As in Guyer, it is apparent from Respondent's testimony—and there is no evidence to the contrary—that the Halloween film was intended to serve a secular, educational purpose. Accordingly, pursuant to the First District's holding in Guyer, Respondent's mere act of playing the movie was not unlawful.

36. The question remains, however, whether Respondent was legally obligated to either turn off the film or excuse Y.G.H from the lesson after the student informed him that she was a Jehovah's Witness. Assuming, arguendo, that the content of the film was incompatible with Y.G.H.'s religious beliefs, Petitioner has cited no specific authority (constitutional, statutory, case law, or otherwise) demonstrating that any legal right of the student was violated. See Broward Cnty. Sch. Bd. v. Deering, Case No. 05-2842, 2006 Fla. Div. Adm. Hear. LEXIS 367 (Fla. DOAH July 31, 2006) ("To demonstrate a violation of [rule 6B-1.006(3)(f)], [Petitioner] must establish, as an element of the offense, which legal right or rights were infringed upon by the accused teacher. Here, however, the School Board has neither proved nor even identified the legal rights allegedly at stake. For this reason alone, the offense was not established"); Crist v. Goldberg, Case No. 02-1371PL, 2002 Fla. Div. Adm. Hear. LEXIS 1361 (Fla. DOAH Dec. 6, 2002) ("Further, the undersigned agrees with Goldberg's



contention that the Commissioner failed to articulate clearly any legal rights(s) of students that Goldberg intentionally could have denied or violated under these circumstances") (emphasis added).

37. Even if a violation of Y.G.H.'s legal rights did occur, Petitioner failed to prove that Respondent acted with the necessary intent. See Fla. Admin. Code. R. 6B-1.006(3)(f) (providing that educators "shall not intentionally violate or deny a student's legal rights") (emphasis added); Horne v. Adams, 03-3165PL (Fla. DOAH June 11, 2004) ("Any legal right of M.S. which Mr. Adams may have violated or denied to M.S., was not intentionally violated or denied").

38. For these reasons, Respondent is not guilty of Count Six.

J. Penalty

39. In its Proposed Recommended Order, Petitioner requests a two-year suspension of Respondent's teaching certificate. In the undersigned's view, however, a suspension of that length is too harsh in light of Respondent's lack of prior discipline by the Education Practices Commission. Under the circumstances, the undersigned recommends a 60-day suspension of Respondent's certification, a penalty well within the disciplinary guidelines and consistent with punishments imposed in similar cases. See Fla. Admin. Code R. 6B-11.007(2)(f) (providing for a penalty

range of probation to revocation for personal conduct that seriously reduces effectiveness as a district school board employee); Crist v. Young, Case No. 02-0966PL, 2002 Fla. Div. Adm. Hear. LEXIS 1334 (Fla. DOAH Oct. 31, 2002) (imposing 60-day suspension based upon finding that educator's improper classroom behavior, which included gruff behavior toward students (e.g., "I hate these damn kids"), resulted in a serious reduction in effectiveness and violated rule 6B-1.006(3)(a) and (3)(e)), adopted in toto, February 14, 2003.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Education Practices Commission:

1. Finding that Respondent violated section 1012.795(1)(g) and (1)(j), Florida Statutes, as charged in Counts Two and Three of the Administrative Complaint.

2. Finding that Respondent violated rule 6B-1.006(3)(a) and (3)(e), as charged in Counts Four and Five.

3. Dismissing Counts One and Six of the Administrative Complaint.

4. Suspending Respondent's teaching certificate for 60 days.

DONE AND ENTERED this 28th day of June, 2011, in  
Tallahassee, Leon County, Florida.



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EDWARD T. BAUER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of June, 2011.

ENDNOTES

<sup>1</sup> Petitioner's objections to Respondent's late-filed exhibits are overruled.

<sup>2</sup> On May 25, 2011, Respondent submitted a letter to the undersigned requesting that he be found not guilty of each count charged in the Administrative Complaint. The undersigned has considered Respondent's correspondence in the preparation of this Recommended Order.

<sup>3</sup> Respondent does not deny that he used words such as "stupid" during class, but insists that the language was utilized as a corrective measure (i.e., "don't be stupid") as opposed to a direct insult (i.e., "you're stupid"). Finding the testimony of the children more credible on this point, the undersigned concludes that Respondent's use of words such as "stupid," "idiots," and "retarded" were employed as insults.

<sup>4</sup> Y.G.H. testified that her father (a Jehovah's Witness) and her mother (a Catholic) are living apart, and that she "sometimes" considers herself a Jehovah's Witness because she visits her father's residence. Final Hearing Transcript, p. 71.

<sup>5</sup> In its Proposed Recommended Order, Petitioner highlights Respondent's statement during cross-examination that he did not seek permission to play the video. However, Petitioner never demonstrated—either through Respondent's cross-examination testimony or any other evidence—that Respondent was required to obtain approval.

<sup>6</sup> In his May 25, 2011, correspondence to the undersigned, Respondent suggests that because he settled the termination action (with his resignation) brought against him by the St. Lucie County School District, the Commissioner of Education is barred from taking action against his teaching certificate. Respondent is mistaken, however, as it is well-settled that the doctrines of collateral estoppel and res judicata do not apply when two separate and distinct governmental units independently consider similar factual allegations, but for different purposes. Newberry v. Fla. Dep't of Law Enf., Crim. Just. Stds. & Training Comm'n, 585 So. 2d 500, 501 (Fla. 3d DCA 1991) (holding that Criminal Justice Standards and Training Commission was not prohibited from taking action against appellant's law enforcement certification, notwithstanding fact that appellant had prevailed at an administrative proceeding—brought by the Dade County School Board to terminate licensee's employment—that was based upon similar factual allegations; "[T]he doctrines of res judicata or estoppels by judgment are not applicable under the facts of the case where two separate and distinct governmental units independently considered similar factual allegations but for different purposes"); see also Todd v. Carroll, 347 So. 2d 618, 619 (Fla. 4th DCA 1977).

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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 must be filed with the agency that will issue the final order in this case.