11-14-02

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March 28, 2003

AP

BY HAND DELIVERY

02-0214
DSM-Closed

Frank Kruppenbacher, Esq.
Orange County Public Schools
335 W. Amelia Street
Orlando, Florida 32801-1127

Re: Nathaniel Packer and Orange County School Board
Client-Matter No. 006734/0016

Dear Mr. Kruppenbacher:

Enclosed please find the proposed Final Order in the above referenced matter. The Final Order consists to two (2) documents which explains in detail why the School Board rejected and/or modified the ALJ's recommended Findings of Fact and Conclusions of Law. This Final Order should be signed by the appropriate School Board member.

The second document is the integrated Final Order which contains the Findings of Fact and Conclusions of Law without any commentary. This documents should be signed and attached to the first document.

The combined documents should then be filed with the agency clerk and a copy of the Final Order should be forwarded to the DOAH at the address indicated on the Final Order within fifteen (15) days of the filing with the agency clerk.

I spoke to Mr. Lev and he indicated that he did not want to review the Final Order before I forwarded it to the School Board.

Please do not hesitate to contact me if you have any questions about this matter.

Sincerely,

James G. Brown

JGB/vo
Enclosure
cc: Tobe M. Lev, Esq.
Orlando:55458.1

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DIVISION OF ADMINISTRATIVE HEARINGS

BEFORE THE ORANGE COUNTY SCHOOL BOARD

ORANGE COUNTY SCHOOL BOARD

Petitioner,

Case No.: 02-0214

v.

NATHANIEL PACKER

Respondent.

_____/

FINAL ORDER

PRELIMINARY STATEMENT

On September 4, 2002, Administrative Law Judge ("ALJ") Daniel Manry conducted the administrative hearing of this case in Orlando, Florida on behalf of the Division of Administrative Hearings (DOAH).

On November 4, 2002, the ALJ issued a Recommended Order in which he recommended that the School Board enter a Final Order finding Respondent not guilty of the acts and omissions alleged in the Administrative Complaint and reinstating Respondent to his teaching position.

On November 19, 2002, Petitioner filed Exceptions to the ALJ's Recommended Order pursuant to Florida Administrative Code Rule 28 - 106.217(1).

On December 4, 2002, Respondent filed his Response to Exceptions pursuant to Florida Administrative Code Rule 28 – 106.217(2).

On February 7, 2003, Petitioner filed a Memorandum in Support of Its Exceptions to the ALJ's Recommended Order with the Orange County School Board. On that same date, Respondent filed a Reply to School Board's Memorandum In Support of Its Exceptions with the School Board.

On February 11, 2003, five (5) members of the School Board held a hearing in this case. Counsel for Petitioner and Respondent were each allowed ten (10) minutes for argument. The School Board has considered the oral arguments, the Memorandum In Support of Exceptions, the Reply to the Memorandum and the entire record[1] in this case and hereby enters its Final Order terminating Respondent's employment with Petitioner.

STANDARD OF REVIEW

The School Board's standard of review of the ALJ's Recommended Order in this case is governed by Section 120.57(1)(l), Fla. Stat. which states:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions or law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the

[1] References to the transcript of the administrative hearing before the ALJ will be designated (T-page number).

> findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.

Competent substantial evidence is such evidence as a reasonable person would accept as adequate to support a conclusion. Agrico Chemical Company v. State of Florida Department of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1st DCA 1978, cert. den., 376 So.2d 74 (Fla. 1979). Moreover, any inferences drawn by the ALJ from the evidence must be permissible and reasonable. Goss v. District School Board of St. Johns County, 601 So.2d 1232, 1234 (Fla. 5th DCA 1992).

The School Board is not required to defer to the ALJ's Conclusions of Law and is free to disregard the ALJ's Conclusions of Law. Pillsbury v. State of Florida Department of Health and Rehabilitation Services, 744 So2d 1040, 1041 (Fla. 2nd DCA 1999). If a matter is infused with overriding policy considerations, the issue should be left to the discretion of the agency. Id at 1042.

FINDINGS OF FACT

1. The School Board adopts and incorporates ALJ's Finding of Fact No. 1 into this Final Order.

2. The School Board adopts and incorporates the ALJ's Finding of Fact No. 2 into this Final Order.

3. The School Board adopts and incorporates the ALJ's Finding of Fact No. 3 into this Final Order.

4. The School Board modifies the ALJ's Finding of Fact No. 4 to read as follows:

> R.S. ignored Respondent's instructions and persisted in his attempt to take candy from Respondent. Respondent told R.S. to "back off" but R.S. persisted. R.S. put his hands on Respondent's hands and in the candy in an attempt to reach the candy. At the same time a group of students rushed toward Respondent to receive the candy.

The School Board has modified the ALJ's Finding of Fact No. 4 to delete any finding that R.S. or the other students were disruptive. Neither Respondent (T – 110-125) nor anyone else testified that R.S. or the students were disruptive. The ALJ's Finding of Fact in this regard is not supported by competent substantial evidence.

5. The School Board modifies the ALJ's Finding of Fact No. 5 to read as follows:

> Respondent tried to separate himself from R.S. at the same time that Respondent backed away from the onrushing group of students. Respondent touched R.S. on the shoulder with an open hand and pushed R.S. away from Respondent. Respondent was neither angry or agitated. The force that Respondent applied to R.S. caused R.S. to fall backwards into a locker where he hit his back on a combination lock. R.S. testified that "It hurt". Respondent testified that he was wrong for touching R.S. but denied trying to hurt R.S.

The School Board has modified the ALJ's Finding of Fact No. 5 to delete the ALJ's finding that R.S. was not injured or had pain inflicted upon him because it is not

supported by competent substantial evidence and is directly contrary to R.S.'s testimony that it hurt. (T - 75). The School Board has made an additional finding that Respondent admitted that he was wrong for touching R.S. and that Respondent was not trying to hurt R.S. because Respondent testified to this fact (T – 120).

6. The School Board adopts and incorporates the ALJ's Finding of Fact No. 6 into this Final Order.

7. The School Board adopts and incorporates the ALJ's Finding of Fact No. 7 into this Final order.

8. The School Board rejects the ALJ's Finding of Fact No. 8 in its entirety because it is not supported by competent substantial evidence. There is no record testimony that the risk of injury was great or that Respondent needed to restore order to a disruptive situation. (T-110-125).

9. The School Board adopts and incorporates the ALJ's Finding of Fact No. 9 as its Finding of Fact No. 8 in this Final Order.

10. The School Board rejects the ALJ's Finding of Fact No. 10 in its entirety and substitutes the following as Finding of Fact No. 9 in this Final Order.

> Section 232.27 does not apply to the November 14, 2001 situation because Respondent never testified that he needed to restore order or that he feared injury to himself or others. The primary factual issue is whether Respondent touched/pushed R.S. contrary to prior directives and reprimands.

The School Board has rejected the ALJ's Finding of Fact No. 10 because it is not supported by competent substantial evidence.

11. The School Board modifies the ALJ's Finding of Fact No. 11 to read as follows:

> The testimony of eyewitness students called by Petitioner differed greatly as to what happened between Respondent and R.S.

and adopts the modified finding as Finding of Fact No. 10 in this Final Order. The School Board has modified the ALJ's Finding of Fact No. 11 to delete the ALJ's finding that it is undisputed that the force employed by Respondent did not injure R.S. because it is not supported by competent substantial evidence and is directly contrary to R.S.'s testimony that it hurt. (T - 75). The School Board has further modified the ALJ's Finding of Fact to more accurately describe the nature of the students' testimony.

12. The School Board adopts and incorporates ALJ's finding of Fact No. 12 as its Finding of Fact No. 11 in this Final Order.

13. The School Board adopts and incorporates the ALJ's Finding of Fact No. 13 as its Finding of Fact No. 12 in this Final Order.

14. The School Board adopts and incorporates the ALJ's Finding of Fact No. 14 as its Finding of Fact No. 13 in this Final Order.

15. The School Board adopts and incorporates the ALJ's Finding of Fact No. 15 as its Finding of Fact No. 14 in this Final Order.

16. The School Board rejects the ALJ's Finding of Fact No. 16 in its entirety because it is not supported by competent substantial evidence. The School Board substitutes the following as Finding of Fact No. 15 in this Final Order.

> R.S. testified that Respondent punched him in the chest and that he fell into a locker. (T – 74, 75, 79, 80).

17. The School Board rejects the ALJ's Finding of Fact No. 17 in its entirety because it is not supported by competent substantial evidence. The School Board substitutes the following as Finding of Fact No. 16 in this Final Order.

> Respondent testified that he put his hands on R.S.'s shoulders; used a little bit of force and that R.S. fell backwards into a locker (T – 120, 121, 122).

18. The School Board rejects the ALJ's Finding of Fact No. 18 in its entirety because it is not supported by competent substantial evidence and improperly phrases the issue as one of degree of force rather than whether a touching/pushing occurred contrary to prior directives and reprimands. The School Board substitutes the following as Finding of Fact No. 17 in this Final Order.

> The ALJ's credibility findings are entitled to deference. However, this case does not turn on credibility findings about what the witnesses saw because both Respondent and R.S. testified that Respondent touched/pushed R.S. and that R.S. fell into a locker. Moreover, Respondent testified that he was wrong for touching R.S.

19. The School Board rejects the ALJ's Finding of Fact No. 19 in its entirety because it is not supported by competent substantial evidence and improperly phrases the issue as one involving reasonable use of force under Fla. Stat. 232.27 rather than whether a touching/pushing occurred contrary to prior directives and reprimands. The School Board substitutes the following as Finding of Fact No. 18 in this Final Order.

> The issue is whether Respondent touched/pushed R.S. in violation of prior directives and reprimands.

> The School Board finds that such a touching/pushing occurred in violation of prior directives and reprimands. Respondent's testimony that he was wrong for touching R.S. is an admission that he acted in violation of prior directives and reprimands.

20. The School Board modifies the ALJ's Finding of Fact No. 20 to read as follows as Finding of Fact No. 19 in this Final Order.

> The touching/pushing of R.S. by Respondent on November 14, 2001 violated Management Directive A-4, entitled "Physical, Emotional or Sexual Abuse of Students or Sexual Harassment of Adults by Employees of the School Board of Orange County, Florida." Management Directive A-4 states in pertinent part:
>
> > No students of the Orange County Public Schools should be subjected to physical, emotional, or sexual abuse by an employee. Therefore, any principal, administrator, or work location supervisor who observes or receives a complaint that a student has been physically, emotionally, or sexually abused by an employee of the School Board or Orange County, Florida shall immediately notify the Employee Relations Department. . . .

The School Board has modified the ALJ's Finding of Fact No. 20 to delete the ALJ's finding that the use of reasonable force for a lawful purpose did not violate the Management Directive and that the force used by Respondent on November 14, 2001 was not abusive because this finding is not supported by competent substantial evidence.

21. The School Board modifies the ALJ's Finding of Fact No. 21 to read as follows as Finding of Fact No. 20 in this Final Order.

> Prior to November 14, 2001, Petitioner had issued three directives and two written reprimands to Respondent for touching students and failing to exercise reasonable care. Respondent did not challenge any of those disciplinary actions. Respondent's touching/pushing of R.S. on November 14, 2001 violates the terms of the prior directives and reprimands.

The School Board has modified the ALJ's Finding of Fact No. 21 to delete the ALJ's Finding that Respondent's use of reasonable force for a lawful purpose on November 14, 2001 does not violate the terms of the prior directives and reprimands because it is not supported by competent substantial evidence. The School Board has added a sentence in Finding of Fact No. 20 to reflect that respondent's touching/pushing violates the terms of prior directives and reprimands.

22. The School Board modifies the ALJ's Finding of Fact No. 22 to read as follows as Finding of Fact No. 21 in this Final Order.

> Petitioner issued the first written directive to Respondent on May 18, 1999. The directive instructs Respondent to avoid touching students "except as absolutely necessary to effect a reasonable and lawful purpose." Respondent's touching/pushing of R.S. on November 14, 2001 was not absolutely necessary to effect a reasonable and lawful purpose and therefore violated the May 18, 1999 written directive.

The School Board has modified the ALJ's Finding of Fact No. 22 to delete the ALJ's finding that the reasonable force used by Respondent on November 14, 2001 for a lawful purpose complied with the express requirements of Petitioner's directive because it is not supported by competent substantial evidence. The School Board has added a sentence in

Finding of Fact No. 21 to reflect that Respondent's touching/pushing was not necessary to effect a reasonable and lawful purpose and violated the May 18, 1999 written directive.

23. The School Board modifies the ALJ's Finding of Fact No. 23 to read as follows as Finding of Fact No. 22 in this Final Order.

> The written directive issued on May 18, 1999, also prohibits Respondent from verbally intimidating a student. Respondent's instruction for R.S. to "back off" did not verbally intimidate R.S. because R.S. ignored verbal instructions from Respondent and persisted in his physical pursuit of candy.

The School Board has modified the ALJ's Finding of Fact No. 23 to delete the following phrase which is not supported by competent substantial evidence:

> . . . . leaving Respondent with little alternative but to physically separate from R.S.

24. The School Board adopts and incorporates the ALJ's Finding of Fact No. 24 as Finding of Fact No. 23 in this Final Order.

25. The School Board modifies the ALJ's Finding of Fact No. 25 to read as follows as Finding of Fact No. 24 in this Final Order.

> On October 13, 1999, Petitioner issued another directive to Respondent after a physical confrontation between Respondent and two students. The directive was identical to the first directive except that it added:
>
> > Touching a student in a manner that serves no education or lawful purpose may encourage the appearance or use of force.
>
> The touching/pushing of R.S. by Respondent on November 14, 2001 violated the October 13, 1999 directive.

The School Board has modified the ALJ's Finding of Fact No. 25 to delete the following sentence which is not supported by competent substantial evidence:

> On November 14, 2001, Respondent used reasonable force for a lawful purpose and did not violate the directive issued on October 13, 1999.

The School Board has added a sentence to Finding of Fact No. 25 to reflect that the touching/pushing by Respondent violated the October 13, 1999 directive.

26. The School Board modifies the ALJ's Finding of Fact No. 26 to read as follows as Finding of Fact No. 25 in this Final Order.

> On October 13, 1999, Petitioner also issued a written reprimand to Respondent, dated October 7, 1999. The written reprimand is effective for five years and states in part:
>
> > On October 6, 1999, a meeting was held to discuss allegations of misconduct on your part. In that meeting we discussed two physical confrontations that took place between you and your students. In he first case you admitted thumping a student's chest in an incident. In the second incident you admitted to stepping on a student's foot to stop him from running, but could not recall how the student received a scratch on his neck.
> >
> > I am especially concerned about your conduct because you were clearly in violation of directives issued to you in the past. For this reason, this written reprimand is being issued along with a separate letter of directives. I am advising that if there is another confirmed complaint of a similar nature, a recommendation may be made to terminate your employment. The touching/pushing of R.S. by Respondent

> on November 14, 2001 was a confirmed complaint of a similar nature which violated the October 7, 1999 written reprimand.

The School Board has modified the ALJ's Finding of Fact No. 26 to delete the following sentence which is not supported by competent substantial evidence.

> The use of reasonable force on November 14, 2001 for a lawful purpose is not a "confirmed complaint of a similar nature" with the meaning of the written reprimand and dated October 7, 1999.

The School Board has added a sentence to Finding of Fact No. 25 to reflect that Respondent's touching/pushing was a confirmed complaint of a similar nature which violated the October 7, 1999 written reprimand.

27. The School Board modifies the ALJ's Finding of Fact No. 27 to read as follows as Finding of Fact No. 26 in this Final Order.

> On May 19, 2000 Petitioner issued another directive to Respondent dated May 18, 2000. The directive addressed negligent conduct by Respondent. The wording of the directive was almost identical to the two previous directives issued to Respondent. For reasons similar to those previously stated, the touching/pushing of R.S. by Respondent on November 14, 2001 violated the May 18, 2000 directive.

The School Board has modified the ALJ's Finding of Fact No. 27 to delete the following sentence which is not supported by competent substantial evidence.

> For reasons similar to those previously stated, the use of reasonable force on November 14, 2001, for a lawful purpose did not violate the directive dated May 18, 2000.

The School Board has added a sentence to Finding of Fact No. 26 to reflect that the touching/pushing by Respondent violated the May 18, 2000 reprimand.

28. The School Board modifies the ALJ's Finding of Fact No. 28 to read as follows as Finding of Fact No. 27 in this Final Order.

> On May 19, 2000, Petitioner issued a written reprimand to Respondent dated May 18, 2000. The written reprimand is effective for five years and states in part:
>
> > This letter shall serve as a summary of our meeting on May 15, 2000, and as a letter of reprimand. In that meeting we discussed an incident in which two students fell to the ground while participating in an activity. You neglected those students in that you failed to determine if they were injured. Furthermore, your disregard was evident in a statement you made to another student when you told the student to "kick them up."
> >
> > It is my conclusion that you were negligent by failing to exercise reasonable care, and that you failed to appropriately perform your duties. I am especially concerned because this is not the first time I have had to issue directives or a reprimand regarding your conduct. I am not advising you that if there is another incident that rises to the level of a discipline. I may recommend your termination . . . .
>
> The touching/pushing of R.S. by Respondent on November 14, 2001 was "an incident of a discipline" which violated the May 18, 2000 written reprimand.

The School Board has modified the ALJ's Finding of Fact No. 28 to delete the following sentence which is not supported by competent substantial evidence.

> The reasonable force used by Respondent on November 14, 201, for a lawful purpose was not an "incident that rises to the level of a discipline."

The School Board has added a sentence to Finding of Fact No. 27 to reflect that the touching/pushing by Respondent was an incident of discipline which violated the may 18, 2000 written reprimand.

29. The School Board adopts and incorporates the ALJ's Finding of Fact No. 29 as Finding of Fact No. 28 in this Final Order.

30. The School Board adopts and incorporates the ALJ's Finding of Fact No. 30 as Finding of Fact No 29 in this Final Order.

31. The School Board adopts and incorporates the ALJ's Finding of Fact No. 31 as Finding of Fact No. 30 in this Final order.

32. The School Board adopts and incorporates the ALJ's Finding of Fact No. 32 as Finding of Fact No. 31 in this Final Order.

33. The School Board adopts and incorporates the ALJ's Finding of Fact No. 33 as Finding of Fact No. 32 in this Final Order.

34. The School Board adopts and incorporates the ALJ's Finding of Fact. No. 34 as Finding of Fact No. 33 in this Final Order.

35. The School Board adopts and incorporates the ALJ's Finding of Fact No. 35 as Finding of Fact No. 34 in this Final Order.

36. The School Board adopts and incorporates the ALJ's Finding of Fact No. 36 as Finding of Fact No. 35 in this Final Order.

37. The School Board rejects the ALJ's Finding of Fact No. 37 in its entirety because it is not supported by competent substantial evidence and improperly phrases the issue as one involving the reasonable use of force rather than whether a touching/pushing occurred contrary to prior directives and reprimands. The School Board substitutes the following as Finding of Fact No. 36 in this Final Order.

> Respondent's actions on November 14, 2001 constituted misconduct in office because by touching/pushing R.S., Respondent showed no concern for R.S. or R.S.'s safety and evinced a total disregard for R.S.'s mental and/or physical health and safety. Respondent's actions on November 14, 2001 also impaired his effectiveness as a teacher because his actions were witnessed by numerous students.

38. The School Board rejects the ALJ's Finding of Fact No. 38 in its entirety because it is not supported by competent substantial evidence and improperly phrases the issue as one involving the reasonable use of force rather than whether a touching/pushing occurred contrary to prior directives and reprimands. The School Board substitutes the following as Finding of Fact No. 37 in this Final Order.

> Respondent's actions on November 14, 2001 constituted gross insubordination and neglect of duty. Respondent's actions in touching/pushing R.S. violated Petitioner's Management Directive A-4 in that Respondent subjected R.S. to physical and emotional abuse. Respondent's actions on November 14, 2001 also violated prior written directives and reprimands which warned Respondent to avoid touching students except as absolutely necessary to effect a reasonable and

lawful purpose. The prior written directives and reprimands were direct orders to Respondent which were reasonable in nature and given by someone with the proper authority. Respondent's actions on November 14, 2001 subjected R.S. to embarrassment.

39. The School Board rejects the ALJ's Finding of Fact No. 39 in its entirety because it is not supported by competent substantial evidence and improperly phrases the issue as one involving the reasonable use of force rather than whether a touching/pushing occurred contrary to prior directives and reprimands. The School Board substitutes the following as Finding of Fact No. 38 in this Final Order.

> Conduct unbecoming a public employee is conduct that falls below a reasonable standard or conduct prescribed by the employer. Touching/pushing a student is unprofessional and disrespectful of the student. Such actions endanger the health, safety and welfare of students. R.S. fell backwards into a locker and was then subjected to ridicule by fellow students. Respondent's conduct falls below the reasonable standard of conduct that the Petitioner has prescribed and has a right to expect from an employee.

40. The School Board rejects the ALJ's Finding of Fact No. 40 in its entirety because it is not supported by competent substantial evidence and improperly phrases the issue as one involving the reasonable use of force rather than whether a touching/pushing occurred contrary to prior directives and reprimands. The School Board substitutes the following as Finding of Fact No. 39 in this Final Order.

> Just cause exists to terminate Respondent from his employment pursuant to Section 231.36(1)(a) Fla. Stat. Respondent's actions in touching/pushing R.S. on November 14, 2001 were improper, unprofessional and involved misconduct, gross

> insubordination and willful neglect of duty. Respondent's conduct violated the terms of the collective bargaining agreement between Petitioner and the Orange County Classroom Teachers Association.

41. The School Board adopts and incorporates the ALJ's Finding of Facts No. 41 with the exception of the last sentence as Finding of Fact No. 40 in this Final Order. The last sentence of the ALJ's Finding of Fact No. 41 is not supported by competent substantial evidence because the Administrative Complaint does not allege that Respondent used unreasonable force.

CONCLUSIONS OF LAW

42. The School Board adopts and incorporates the ALJ's Conclusions of Law No. 42 as the Conclusion of Law No. 41 in this Final Order.

43. The School Board adopts and incorporates the ALJ's Conclusions of Law No. 43 as the Conclusion of Law No. 42 in this Final Order.

44. The School Board rejects the ALJ's Conclusion of Law No. 44 in its entirety because it is an unreasonable and erroneous conclusion which ignores the policy considerations presented in this case, namely that the School Board has the ultimate responsibility for the safety of its students and has the authority as well as the duty to remove from its payroll a teacher who has a demonstrated history of improper physical contact and touching of students. Given Respondent's admission that he was wrong to touch/push R.S., the School Board would be negligent if it failed to terminate Respondent. Accordingly, the School Board substitutes the following Conclusion of Law as Conclusion of Law No. 43 in this Final Order.

> Gross insubordination may arise from a single act which constitutes a violation of a previously given order to refrain from identified conduct. Johnson v. School Board of Dade County, Florida, 578 So.2d 387 (Fla. 3d DCA 1991). Gross insubordination may also arise from a single act of disrespect for the authority of supervisors. Jacker v. School Board of Dade County, 426 S.2d 1149 (Fla. 3d DCA 1983). This is exactly what occurred in this case. Respondent violated at least three previous direct orders to avoid touching students except as absolutely necessary to effect a reasonable and unlawful purpose. In doing so, Respondent was guilty of gross insubordination per Johnson.

The above Conclusion of Law is more reasonable that the ALJ's rejected Conclusion of Law No. 44, because it more properly reflects the policy concerns of the School Board for the safety and well being of its students.

45. The School Board adopts the following Conclusion of Law as its Conclusion of Law No. 44 in this Final Order.

> Respondent's conduct on November 14, 2001 also constituted willful neglect of duty because the definition of willful neglect of duty under Florida Administration Code Rule 6B-4.009(4) is the same as gross insubordination.

The above Conclusion of Law is more reasonable than the ALJ's rejected Conclusion of Law No. 44, because it more properly reflects the policy concerns of the School Board for the safety and well being of its students.

46. The School Board adopts the following Conclusion of Law as its Conclusion of Law No. 45 in this Final Order.

> Respondent's actions on November 14, 2001 constituted misconduct in office because by touching/pushing R.S., Respondent demonstrated

> no regard for the dignity of R.S. as a student and exposed R.S. to actions which were or could have been harmful to R.S.'s mental and/or physical health or safety. Because the incident of November 14, 2001 was in front of and witnessed by a number of students; R.S. was intentionally exposed to unnecessary embarrassment. The public nature of the November 14, 2001 incident was so serious as to impair Respondent's effectiveness in the school system. School Board of Dade County v. Dileo, 1990 WL 749341 (Fla. Div. Admin. Hrgs.).

The above Conclusion of Law is more reasonable than the ALJ's rejected Conclusion of Law No. 44, because it more properly reflects the policy concerns of the School Board for the safety and well being of its students.

47. The School Board adopts the following Conclusion of Law as its Conclusion of Law No. 46 in this Final Order.

> Conduct unbecoming a public employee is also grounds for termination of employment. Seminole County Board of County Commissioners v. Long, 422 So.2d 938, 940 (Fla. 5th DCA 1982). Conduct unbecoming a public employee is conduct that falls below a reasonable standard of conduct prescribed by the employers. Id.

The above Conclusion of Law is more reasonable that the ALJ's rejected Conclusion of Law No. 44, , because it more properly reflects the policy concerns of the School Board for the safety and well being of its students.

48. The School Board adopts the following Conclusion of Law as its Conclusion of Law No. 47 in this Final Order.

> Just cause for discipline exists when the acts or conduct of an employee involve misconduct and are rationally and logically related to the employee's job duties. Just cause is not limited to items

> enumerated in a list of offensive conduct in applicable rules or the collective bargaining agreement. Dietz v. Lee County School Board, 647 So.2d 217 (Fla. 2d DCA 1994). Respondent's prior acts of misconduct may be considered in determining the existence of just cause for termination. C.F. Industries, Inc. v. Long, 364 So.2d 864 (Fla. 2d DCA 1978); Johnson, 578 So.2d at 387.

The above Conclusion of Law is more reasonable than the ALJ's rejected Conclusion of Law No. 44, because it more properly reflects the policy concerns of the School Board for the safety and well being of its students.

49. The School Board adopts the following Conclusion of Law as its Conclusion of Law No. 48 in this Final Order.

> Respondent's actions on November 14, 2001 constituted conduct unbecoming a public employee and, as such, satisfied the just cause standard for termination in Section 231.36(1)(a), Florida Statutes and Petitioner's collective bargaining agreement. Dietz, supra. Respondent's actions on November 14, 2001 were the latest in series of physical confrontations with students.

The above Conclusion of Law is more reasonable than the ALJ's rejected Conclusion of Law No. 44, because it more properly reflects the policy concerns of the School Board for the safety and well being of its students.

50. The School Board rejects the ALJ's Conclusion of Law No. 45 in its entirety because it is an unreasonable and erroneous conclusion which ignores the policy considerations presented in this case, i.e., the School Board's responsibility for the safety of its students. The School Board substitutes the following Conclusion of Law as Conclusion of Law No. 49 in this Final Order.

> The actions of Respondent on November 14, 2001 constituted misconduct in office, gross insubordination, willful neglect of duty, conduct unbecoming a public employee and just cause to terminate Respondent's employment under the applicable collective bargaining agreement and Section 231.36(1)(a), Fla. Stat.

The above Conclusion of Law is more reasonable than the ALJ's rejected Conclusion of Law No. 45, because it more properly reflects the policy concerns of the School Board for the safety and well being of its students.

The School Board rejects the ALJ's recommendation that Respondent be reinstated and hereby terminates Respondent's employment. Attached is an integrated Final Order which incorporates the School Board's Findings of Fact Nos. 1-40 and the School Board's Conclusion of Law Nos. 41-49.

DONE AND ORDERED this 1st day of April, 2003 in Orlando, Orange County, Florida.

The School Board of Orange County

By: Judge "Pete" Crow

Member Shea dissents and would adopt the ALJ's Recommended Order.

Filed with the Clerk of the School Board of Orange County this 2nd day of March, 2003.

Copies Furnished:

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