STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| ORANGE COUNTY SCHOOL BOARD, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 02-0214 |
| | ) | |
| NATHANIEL PACKER, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

## RECOMMENDED ORDER

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

## APPEARANCES

For Petitioner: Amanda J. Green, Esquire
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For Respondent: Toby Lev, Esquire
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## STATEMENT OF THE ISSUES

The issues presented are whether Respondent's contact with a student during a physical education class on November 14, 2001, violates the terms of previous directives and written

reprimands; and whether such conduct constitutes misconduct in office, gross insubordination, willful neglect of duty, or conduct unbecoming a public employee, within the meaning of Florida Administrative Code Rule 6B-4.009(3) and (4), for which Petitioner has just cause under Section 231.36(1)(a), Florida Statutes (2001), to dismiss Respondent from his position as a physical education teacher. (All references to statutes are to Florida Statutes (2001) unless otherwise stated. Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.)

## PRELIMINARY STATEMENT

On December 17, 2001, Petitioner advised Respondent that Petitioner intended to sever the Professional Services Contract with Respondent and to terminate Respondent from his employment with Petitioner. Respondent timely requested an administrative hearing.

At the hearing, Petitioner presented the testimony of six witnesses and submitted nine exhibits for admission into evidence. Respondent testified in his own behalf and presented the testimony of four witnesses. Respondent did not submit any exhibits. Respondent also stipulated that he had been disciplined previously over allegations that he confronted and touched students. The identity of the witnesses and exhibits,

and any rulings regarding each, are set forth in the Transcript of the hearing filed on September 30, 2002. The parties timely filed their respective Proposed Recommended Orders on October 10, 2002.

## FINDINGS OF FACT

1. The Orange County School Board (School Board) employed Respondent during the 2001-2002 school year as a physical education teacher, or "coach," at Westridge Middle School (Westridge), pursuant to Section 231.36 and a collective bargaining agreement between the School Board and the Orange County Classroom Teachers Association. Respondent had taught at Westridge in a similar capacity for approximately four or five years before the 2001-2002 school year.

2. On November 14, 2001, Respondent had finished roll call for his physical education class, and students in the class were "dressing out" inside the boys locker room. Another coach had given candy to some students in his class for good behavior. The coach gave Respondent some of the candy to reward students in Respondent's class for their good behavior.

3. Respondent began passing out candy to students in Respondent's class. R.S. was a student in the first coach’s class. R.S. approached Respondent and tried to take some candy from Respondent. Respondent refused to give any candy to R.S.,

explaining to R.S. that R.S. had already received candy from the other coach.

4. R.S. ignored Respondent's instructions and persisted in his attempt to take candy from Respondent. At that point, R.S. was a disruptive student. 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 candy. The group of students were also disruptive.

5. 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 nor agitated. The force that Respondent applied to R.S. caused R.S. to take a step or two backward into the adjacent lockers but did not injure R.S. or inflict pain on R.S. R.S. did not fall down.

6. Other students began taunting R.S. They called R.S. a "wussy" and yelled that R.S. had been beaten up by Respondent. R.S. began to cry and left the locker room to get Principal Lorenzo Phillips.

7. The school administration investigated the matter and, on November 27, 2001, relieved Respondent of his duties with pay. On December 17, 2001, Petitioner filed an Administrative

Complaint seeking to dismiss Respondent from his teaching position.

8. On November 14, 2001, Respondent faced a disruptive situation. It is undisputed that the situation in the locker room was a chaotic one that involved approximately 40 students in a cramped space. The risk of injury from students falling over each other or over benches in the locker room was great, and Respondent needed to restore order to a disruptive situation.

9. Section 232.27 authorizes Respondent to keep good order in the classroom or other places in which the teacher is in charge of students. Section 232.27(1)(i) authorizes Respondent to use reasonable force to protect himself or others from injury.

10. Respondent had statutory authority to use reasonable force to restore good order in the locker room on November 14, 2001, and to protect himself and others from injury during a chaotic and disruptive situation. The primary factual issue is whether the force used by Respondent for those lawful purposes was reasonable. Petitioner did not comply with the notice requirements in Section 120.57(1)(d) for similar fact evidence based on previous violations.

11. It is undisputed that the force employed by Respondent did not injure R.S. The only evidence that the force used by

Respondent was excessive is the testimony of the eyewitness students called by Petitioner. That testimony was inconsistent and less than credible and persuasive.

12. E.S. testified that "everybody started jumping on Coach Packer." E.S. did not see Respondent make contact with R.S. because E.S. really wasn't paying attention.

13. L.P. is a good friend of R.S. L.P. testified that the whole class crowded around Respondent and that Respondent jabbed R.S. with a closed fist from a distance of approximately six inches. However, R.S. did not lose his balance and was not in pain. Respondent is significantly larger and stronger than R.S.

14. E.M. first testified that he did not see Respondent make contact with R.S. but saw R.S. fall on the floor. E.M. later testified that he saw Respondent push R.S. in the side. E.M. testified that he was in the cafeteria at the time rather than in the locker room.

15. F.D. testified that Respondent merely touched R.S. and tried to calm him down. F.D. testified that Respondent applied no force to R.S.

16. R.S. testified that he had his hand in the candy held by Respondent and that Respondent pushed R.S. back. R.S. fell back into the locker behind him.

17. Respondent testified that he put an open hand on R.S. to separate from R.S. and that R.S. stepped back into the

locker. R.S. was approximately three feet away from the lockers behind him.

18. As the trier of fact and arbiter of credibility, the ALJ must resolve the evidential conflict regarding the degree of force employed by Respondent on November 14, 2001. Accordingly, the trier has carefully considered the substance of the testimony of the various witnesses, their respective demeanors, their possible biases, and determined the appropriate weight to be accorded to the testimony of each witness.

19. The force used by Respondent to gain control of the situation was reasonable, within the meaning of Section 232.27, and was not excessive. Respondent used reasonable force for a lawful purpose under Section 232.27.

20. The use of reasonable force for a lawful purpose did not violate 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 of Orange County, Florida shall immediately notify the Employee Relations Department . . . .

The force used by Respondent on November 14, 2001, was not abusive.

21. 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 use of reasonable force for a lawful purpose on November 14, 2001, does not violate the terms of the prior directives and reprimands.

22. 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." The reasonable force used by Respondent on November 14, 2001, for a lawful purpose complied with the express requirements of Petitioner's directive.

23. 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. R.S. ignored all verbal instructions from Respondent and persisted in his physical pursuit of candy leaving Respondent with little alternative but to physically separate from R.S.

24. The written directive issued on May 18, 1999, also requires Respondent to report any incident immediately to the administration. Respondent did not have time to report the incident to the administration. R.S. reported the incident immediately while Respondent was still responsible for his class. The administration immediately investigated the report from R.S.

25. 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 educational or lawful purpose may encourage the appearance or use of force.

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

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

27. 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 use of reasonable force on November 14, 2001, for a lawful purpose did not violate the directive dated May 18, 2000.

28. 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 now advising you that if there is another incident that rises to the level of a discipline. I may recommend your termination. . . .

The reasonable force used by Respondent on November 14, 2001, for a lawful purpose was not an "incident that rises to the level of a discipline."

29. The collective bargaining agreement between Petitioner and the Orange County Classroom Teachers Association applies in this case. Article XII of the collective bargaining agreement, entitled "Discipline," states at Section A1:

> An employee may be disciplined only for just cause, and discipline shall be imposed only for a violation of an expressed rule, an expressed order, an expressed policy or a reasonable expectation of management which should have been known to the employee.

30. The collective bargaining agreement at Article XII, Section A2, further states, in relevant part:

> Any teacher may be suspended or dismissed at any time during the year, provided the charges brought against him are based on . . . misconduct in office . . ., gross insubordination, [and] willful neglect of

> duty . . . in accordance with Florida Statutes.

31. Section 231.36(1)(a) applies to this proceeding. Section 231.36(1)(a) provides in part:

> Each person employed as a member of the instructional staff in any district school system . . . shall be entitled to and shall receive a written contract . . . [that] contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by the rule of the State Board of Education: misconduct in office . . . gross insubordination, [and] willful neglect of duty. . . .

32. The allegations in the Administrative Complaint are limited to misconduct in office, gross insubordination, willful neglect of duty, and conduct unbecoming a public employee. Rule 6B-4.009(3) defines misconduct in office, and Rule 6B-4.009(4) defines gross insubordination and willful neglect of duty. Case law is the only authority cited by Petitioner to define conduct unbecoming a public employee.

33. Rule 6B-4.009(3) defines misconduct in office 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.

34. The Code of Ethics of the Education Profession, as set forth in Rule 6B-1.001, in relevant part, requires that:

> [t]he educator values the worth and dignity of every person. . . [and] [t]he educator's primary professional concern will always be for the student.

35. The Principles of Professional Conduct for the Education Profession are contained at Rule 6B-1.006 and state in relevant part:

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

36. Rule 6B–4.009(4) defines "gross insubordination" and "willful neglect of duties" for instructional personnel. Gross insubordination and willful neglect of duty mean:

> a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

37. The use of reasonable force on November 14, 2001, for a lawful purpose did not constitute misconduct in office within

the meaning of Rules 6B-1.001, 6B-1.006, and 6B-4.009(3). Respondent's primary concern was for the safety of other students within the meaning of Rule 6B-1.001. Respondent made a reasonable effort to protect his students from conditions harmful to their physical health and safety within the meaning of Rule 6B-1.006. Respondent did not intentionally expose R.S. to unnecessary embarrassment or disparagement or intentionally violate the student's rights.

38. The use of reasonable force on November 14, 2001, for a lawful purpose did not constitute gross insubordination or willful neglect of duties within the meaning of Rule 6B-4.009(4). The use of such force did not violate the terms of any policy memorandum, prior directive, or written reprimand.

39. Conduct unbecoming a public employee is conduct that falls below a reasonable standard or conduct prescribed by the employer. The use of reasonable force on November 14, 2001, for a lawful purpose is not conduct unbecoming a public employee. If Petitioner were to have prohibited Respondent from using reasonable force for a lawful purpose, it would have been an unreasonable standard that violated Section 232.27.

40. The use of reasonable force on November 14, 2001, for a lawful purpose is not just cause within the meaning of Section 231.36(1)(a). The use of such force does not violate the terms of the collective bargaining agreement.

41. Respondent arguably may have used poor judgment in deciding to pass out candy in the locker room on November 14, 2001. His action may have precipitated the chaos in the locker room. However, the Administrative Complaint does not charge either Respondent or the other physical education teacher with poor judgment in passing out candy. The Administrative Complaint is limited to allegations that unreasonable force by Respondent constituted just cause for dismissing Respondent.

## CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the parties and subject matter of this case. Section 120.57(1) and 120.569. DOAH provided the parties with adequate notice of the administrative hearing.

43. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any proposed disciplinary action. McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990). Similar fact evidence of the prior use of unreasonable force by Respondent is not admissible to show Respondent's propensity to

use unreasonable force on November 14, 2001. Section 120.57(1)(d).

44. Petitioner failed to show by a preponderance of the evidence that the force used by Respondent on November 14, 2001, was unreasonable and undertaken for an unlawful purpose. The force used by Respondent was reasonable under the circumstances and undertaken for the lawful purpose of maintaining order and protecting the physical safety of other students. See School Board of Dade County v. Gary Temple, Case No. 83-1946, 1983 Fla. Div. Adm. Hear. LEXIS 6656 (DOAH 1983)(teacher has authority under Section 232.27 to utilize moderate and reasonable force to maintain control and order in the classroom); School Board of Dade County v. Black, Case No. 81-554, 1981 Fla. Div. Adm. Hear. LEXIS 4487 (DOAH 1981)(charges should be dismissed where evidence fails to show teacher used unreasonable force in dealing with disruptive student); Morgan v. Siebelts, Case No. 88-4697, 1989 Fla. Div. Adm. Hear. LEXIS 6366 (DOAH 1989)(grabbing a student's arm and tussling with him before placing the student in his seat was nothing more than use of reasonable physical force needed to maintain control and order in the classroom).

45. In the absence of a showing of unreasonable force and unlawful purpose, the actions of Respondent did not constitute misconduct in office, gross insubordination, willful neglect of

duty, or conduct unbecoming a public employee. Respondent did not violate the terms of the collective bargaining agreement, and Petitioner does not have just cause, within the meaning of Section 231.36(1)(a), to dismiss Respondent.

## RECOMMENDATION

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

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.

DONE AND ENTERED this 4th day of November, 2002, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.