

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOM GALLAGHER, as Commissioner)
of Education,)
)
Petitioner,)
)
vs.) Case No. 02-2016PL
)
GREGORY SCHMIDT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on October 30 and 31, 2002, and February 4 and 5, 2003, in Miami, Florida.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
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For Respondent: Leslie A. Meek, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Gregory Schmidt, committed the offenses alleged in a Second Amended Administrative Complaint issued by Petitioner, and dated September 6, 2002, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated November 21, 2000, then Florida Commissioner of Education, Tom Gallagher (hereinafter referred to as the "Commissioner"), charged Gregory Schmidt with having violated certain of the statutory and rule provisions governing the conduct of teachers in Florida's public schools. Mr. Schmidt timely disputed the factual allegations in the Administrative Complaint by executing an Election of Rights form in which he elected the "Settlement Option." By selecting the Settlement Option, Mr. Schmidt elected to attempt to negotiate a settlement of the charges against him and, if that effort failed, an "Informal" hearing on the charges.

In a letter dated April 19, 2000, counsel for Mr. Schmidt requested removal of Mr. Schmidt's case from the April 26, 2002, informal hearing agenda of the Education Practices Commission and the referral of the matter to the Division of Administrative Hearings for a formal hearing.

By letter dated May 7, 2002, Mr. Schmidt's request for a formal hearing was forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an evidentiary hearing pursuant to Section 231.262(5), Florida Statutes. The matter was designated DOAH Case No. 02-02016PL and was assigned to the undersigned.

By Notice of Hearing entered May 31, 2002, the final hearing of this case was scheduled to commence July 25, 2002. By Order Granting Continuance and Re-Scheduling Hearing, the final hearing was re-scheduled for September 26 and 27, 2002, at the request of the Commissioner, who suggested that, due to additional information, the Administrative Complaint would have to be amended.

Although it was represented in the Commissioner's Motion for Continuance that a copy of an amended administrative complaint was attached to the Motion, it was not, and, in fact, the amended administrative complaint has never been filed or approved by this forum. Nevertheless, on September 6, 2002, the Commissioner filed a Motion to File Second Amended Administrative Complaint. A Second Amended Administrative Complaint was attached to the Motion. Over objection of Mr. Schmidt, the Motion to File Second Amended Administrative Complaint was accepted by an Order entered September 17, 2002.

By Order Granting Continuance and Re-Scheduling Hearing, the final hearing was re-scheduled for October 30 and 31, 2002, at the request of Mr. Schmidt because of ongoing discovery disputes between the parties.

Prior to the commencement of the final hearing, the parties filed unilateral pre-hearing statements. The parties stipulated to two facts, which have been included in this Recommended Order.

At the commencement of the final hearing on October 30, 2002, the parties continued to argue about the disclosure of information which Mr. Schmidt opined was protected by the psychotherapist-patient privilege. Due to this continuing dispute, Mr. Schmidt requested a continuance of the hearing. This request was denied, but, in an abundance of caution, it was ordered that the Commissioner would proceed to present his case-in-chief, except as to the allegations of paragraph 6 of the Second Amended Administrative Complaint, that the remainder of the hearing would be continued to a later date, and that, in the interim, the parties would be given an opportunity to further address the question of privilege raised by Mr. Schmidt. Petitioner presented his case-in-chief on October 30 and 31, 2002, and the hearing was continued to February 4 and 5, 2003.

The parties were given until December 13, 2002, to file memoranda in support of their respective positions concerning

Mr. Schmidt's psychotherapist-patient privilege. The due date was extended, at the request of Mr. Schmidt. Both parties filed a memorandum of law discussing the issue. On January 2, 2003, an Order was entered addressing the issue and informing the parties that specific rulings would be entered only as evidence which Mr. Schmidt objected to as subject to the psychotherapist-patient privilege was offered in evidence.

When the hearing reconvened on February 4, 2003, the Commissioner was given an opportunity to present evidence in his case-in-chief as to paragraph 6 of the Second Amended Administrative Complaint and Mr. Schmidt was given an opportunity to respond to the Commissioner's case. On February 5, 2003, Mr. Schmidt represented that one of his witnesses, Donald A. Hans, was unable to appear to testify due to illness. Without objection, Mr. Schmidt was granted leave to take Mr. Hans' deposition and late-file a transcript of his testimony. The Commissioner was informed that he would be allowed to late-file rebuttal evidence to Mr. Hans' testimony.

At the portion of the final hearing conducted on October 30 and 31, 2002, the Commissioner presented the testimony of Lisa Vance, A. C., J. C., B. B., Annette Burris-Williams, David Diamond, Joan Sutter, Jayne Greenberg, Victor Hernandez, M. G. and his mother, Ms. M. G., and Mr. Schmidt. The Commissioner also presented the deposition testimony of Mr. Schmidt

(Petitioner's Exhibit 23), and the deposition testimony of Debra Dove (Petitioner's Exhibit 22). On February 4, 2003, the Commissioner concluded his case with the testimony of Carter Wiggins. Mr. Schmidt presented the testimony of Johnny Oliver and he testified in his own behalf.

The Commissioner offered 23 exhibits for identification as "Petitioner's" exhibits. Petitioner's Exhibits 4, 5, 10, and 21 were not offered. Petitioner's Exhibits 1 through 3, 6, 7, 9, 11 through 20, and 22 through 23 were accepted into evidence. A ruling on Petitioner's Composite Exhibit 8 was reserved. The Commissioner did not provide the exhibit at hearing or with his proposed order and, therefore, Petitioner's Composite Exhibit 8 is hereby rejected. Respondent's Exhibits 1 through 9 were also admitted.

Mr. Hans' deposition was taken on February 14, 2003. On February 21, 2003, the Commissioner filed a Motion to Use Deposition Transcript of Marck Giordani in Rebuttal, or in the Alternative, Petitioner's Motion to Re-Open Case. This Motion was objected to by Mr. Schmidt. By Order entered March 7, 2003, the parties were informed that Mr. Giordani's transcript would be reviewed and, if Mr. Giordani's testimony was in fact rebuttal evidence, it would be admitted; if not rebuttal, the transcript would be rejected. The Commissioner has not,

however, filed a transcript of Mr. Giordani's deposition testimony.

On March 17, 2003, Mr. Schmidt filed the transcript of the deposition testimony of Mr. Hans. The transcript has been marked as Respondent's Exhibit 10 and is hereby accepted into evidence.

By Notice of Filing of Transcript issued March 19, 2003, the parties were informed that the final volumes of the Transcript of the final hearing had been filed on March 18, 2003. The parties, pursuant to agreement, therefore, were informed that they had until April 7, 2003, to file proposed recommended orders. On April 7, 2003, the Commissioner filed a Motion to Extend Time to File Proposed Recommended Order. In the Motion, the Commissioner requested a ten-day extension. The Motion was granted. Both parties filed proposed orders on April 17, 2003. The post-hearing submittals of the parties have been fully considered.

On May 13, 2003, a Motion to Withdraw was filed by counsel for Respondent. The Motion is hereby granted.

FINDINGS OF FACT

1. The Department of Education, which the Commissioner is the head of, is the state agency charged with the responsibility to investigate and prosecute complaints of violations of Section 231.2615, Florida Statutes (2001), against teachers holding

Florida educator's certificates. Sections 20.15 and 231.262, Florida Statutes.

2. The Education Practices Commission (hereinafter referred to as the "EPC"), is charged with the responsibility of imposing discipline for any violation proscribed in Section 231.2615(1), Florida Statutes. Section 231.2615(1), Florida Statutes.

3. Gregory Schmidt holds Florida Educator's Certificate No. 609739, valid through June 30, 2003, covering the area of Physical Education. At the times material to this proceeding, Mr. Schmidt was employed by Miami-Dade County Public Schools (hereinafter referred to as "M-D Public Schools").

4. Since March 1987 Mr. Schmidt has been a "teacher on special assignment" participating as a swimming instructor in the "Learn-to-Swim Program." The Learn-to-Swim Program is part of the Division of Life Skills and Special Projects of M-D Public Schools. As its name suggests, the Program is intended to assist students in the M-D Public Schools to learn how to swim. The Executive Director of the Division of Life Skills and Special Projects at all times relevant to this proceeding was Dr. Jayne W. Greenberg. Dr. Greenberg was the immediate supervisor of Mr. Schmidt's and the other teachers in the Learn-to-Swim Program at the times relevant to this proceeding.

A. Mr. Schmidt's May 6, 1999, Confrontation with Lisa Vance.

5. On May 6, 1999, Mr. Schmidt was teaching swimming classes to students from Jose Marti Middle School at Bucky Dent Pool, located in Hialeah, Miami-Dade County, Florida.

6. In addition to Mr. Schmidt, Lisa Vance and David Diamond, Learn to Swim Program teachers, were also conducting classes at Bucky Dent Pool on May 6, 1999. Each teacher was located at a separate "teaching station" in the pool, with Ms. Vance's teaching station located between Mr. Schmidt's and Mr. Diamond's.

7. Ms. Vance had returned to teaching on that day, after a brief absence due to illness. When she arrived that morning she was made aware that the swimming instructors had been told by someone¹ in administration that female students were to wear t-shirts over their swim suits, in and out of the pool.

8. Ms. Vance's last class of the day consisted of approximately ten female students who were lined up along the edge of the pool. Ms. Vance, despite having been informed of the t-shirt policy, had instructed her students to remove their t-shirts while in the pool and they had complied. Ms. Vance elected not to follow the policy due to safety concerns for her students, safety concerns shared by Dr. Greenberg.

9. While Ms. Vance was teaching her class, Mr. Schmidt walked to the pool deck where Ms. Vance was located and told her that it was the policy that female students were required to wear t-shirts over their swim suits at all times. Ms. Vance responded, saying something to the effect that she would talk to him later and that she would discuss the matter with the principal, and Mr. Schmidt turned and walked away.² Although Mr. Diamond, who was approximately 25 yards away from Ms. Vance and Mr. Schmidt, was aware that Ms. Vance and Mr. Schmidt were talking to one another, the tone of their voices was not loud enough for him to understand what they were saying.

10. Ms. Vance was annoyed with Mr. Schmidt for interrupting her class to remind her of the t-shirt policy. She was also annoyed that Mr. Schmidt was attempting to tell her what to do and acting "as though he was in charge."

11. When her class ended, Ms. Vance, still annoyed, went into the pool office where she found Mr. Schmidt and Mr. Diamond sitting. Ms. Vance walked up to Mr. Schmidt, who remained seated, and told him that what he had said to her was unprofessional and that he was not to disturb her again while she was teaching. Although Ms. Vance did not raise her voice, it was obvious from her demeanor that she was angry with Mr. Schmidt.

12. In response to Ms. Vance's comments, Mr. Schmidt asked her whether she was going to throw a clip board at him, despite the fact that she was not holding a clip board. In response to Mr. Schmidt's comment, Ms. Vance replied, "No, I don't want to" or words to that effect.³ Mr. Schmidt did not, as he testified at hearing, say to Ms. Vance words to the effect that "If you hit me like you did Manny Hahn, I'll defend myself."

13. Ms. Vance turned to begin gathering up her belongings. As she did, Mr. Schmidt, who was still sitting with Mr. Diamond, told her, "I'll kick your ass, you fucking bitch." Ms. Vance finished gathering her belongings and left the building without responding to this threat. After Ms. Vance left, Mr. Diamond admonished Mr. Schmidt for his "unprofessional" comment.

14. Mr. Schmidt suggested at hearing and in Respondent's Recommended Order that he was intimidated or threatened by Ms. Vance and that he made his unprofessional statement in order to dissuade her from attempting to harm him. In particular, he testified that he was afraid that Ms. Vance would throw a clip board at him. His testimony in this regard was not persuasive. The suggestion that Ms. Vance had approached him in a "threatening manner," that she was "screaming and ranting and raving" at Mr. Schmidt, and "telling him that she was going to have him fired; and that she was going to call the police, the School Board and Dr. Greenberg" is not supported by the

evidence. Mr. Schmidt, given his gender and size (six feet one inch tall and weighing 210 pounds), the fact that Mr. Diamond was present, and the nature of Ms. Vance's comments and actions, simply had no reasonable basis to be concerned in anyway for his safety.

15. Ms. Vance was reasonably upset and concerned for her physical safety because of Mr. Schmidt's threat that he would "kick [her] ass." Therefore, Ms. Vance asked Mr. Diamond to assist her avoid being alone with Mr. Schmidt in the future. Despite her concern for her safety, Ms. Vance did not immediately report the incident to Dr. Greenberg in the hope that Mr. Schmidt would apologize and the incident could be forgotten. This did not occur. Therefore, in a letter dated June 10, 1999, Ms. Vance asked Dr. Greenberg that, upon her next assignment, she not be "teamed with Greg Schmidt." In support of her request, she related the May 6, 1999, incident to Dr. Greenberg. Mr. Diamond also signed the request as a "witness."

16. In response to Ms. Vance's June 10, 1999, letter, Dr. Greenberg caused an investigation to be conducted about the incident. After an investigation by the Office of Professional Standards of M-D Public Schools, a conference-for-the-record was held with Mr. Schmidt on November 2, 1999. The conference-for-the-record was conducted by Sharon D. Jackson, the District

Director of the Office of Professional Standards and was attended by Mr. Schmidt, Dr. Greenberg, Lilia Garcia, District Director of the Division of Life Skills, and Dia Falco and Steve Goldman, representatives of the United Teachers of Dade.

17. Mr. Schmidt was suspended as a teacher for 30 days by M-D Public Schools as a result of the May 6, 1999, incident with Ms. Vance and other events not relevant to this proceeding.

18. At some time during the school year following the May 6, 1999, incident and after an investigation of the matter had been commenced, Mr. Schmidt telephoned Ms. Vance and apologized to her.

19. The evidence failed to prove, as alleged in the Second Amended Administrative Complaint, that Mr. Schmidt "attempted to file a lawsuit" against Ms. Vance or Mr. Diamond "because they [had]reported his behavior to school authorities."

20. Although Mr. Schmidt's threat to Ms. Vance was unprofessional and improper, the evidence in this case failed to prove clearly and convincingly that his conduct constituted "gross immorality" or an act of "moral turpitude."

B. Mr. Schmidt's Threatening Comment About David Diamond.

21. During the fall of 2000 Mr. Schmidt was working with Jo Ann Sutter, who was also employed in the Learn to Swim Program as a paraprofessional swim instructor. Ms. Sutter had known Mr. Schmidt for 15 to 16 years.

22. Between September 5, 2000, and October 24, 2000, Mr. Schmidt made a number of comments to Ms. Sutter about Mr. Diamond's involvement or lack thereof in the May 6, 1999, incident with Ms. Vance. Among other things, Mr. Schmidt told Ms. Sutter that an investigation of the incident had been instituted, that Mr. Diamond was not present during the incident and, therefore, was lying about what he had heard.⁴

23. Among the comments Mr. Schmidt made to Ms. Sutter was that "if he got fired, David Diamond was dead."⁵ The comment was made in a serious tone and without any sign that Mr. Schmidt was kidding. Mr. Schmidt's threat, therefore, worried Ms. Sutter and, after thinking about it a few days, she went to Mr. Diamond to report the threatening statement.⁶

24. Given his relationship to Ms. Sutter, it cannot be concluded that Mr. Schmidt wanted or expected Ms. Sutter to relate any of the comments he made about Mr. Diamond, including his comment about Mr. Diamond being "dead" if Mr. Schmidt lost his job, to anyone, including Mr. Diamond. It is more likely than not, that Mr. Schmidt trusted that Ms. Sutter would not repeat his comments. Therefore, the evidence failed to prove that Mr. Schmidt's threatening language was intended to "interfere with [Mr. Schmidt's] colleagues exercise of political or civil rights and responsibilities" or that it was made as a "reprisal against any individual who has reported an allegation

of a violation of the Florida School Code or State Board of Education Rules"

25. Mr. Diamond reported that Ms. Sutter had told him that Mr. Schmidt had made a threatening statement and, on October 30, 2000, he gave a written statement concerning what Ms. Sutter had told him to Dr. Greenberg.

26. Although Mr. Schmidt's comment about Mr. Diamond was unprofessional and improper, the evidence in this case failed to prove clearly and convincingly that his conduct constituted "gross immorality" or an act of "moral turpitude."

C. Mr. Schmidt's Use of Excessive Force.

27. In January 2002 M. G. was an 11-year-old male, sixth grade student, attending Parkway Middle Community School. M. G. stood approximately five feet, two inches tall and weighed between 70 and 100 pounds.

28. On January 24, 2002, M. G. attended a physical education class which was taught by Mr. Schmidt. M. G. had first met Mr. Schmidt the day before.

29. During the class, some of the students were throwing rocks. Although the students were not throwing the rocks at one another, one of the rocks, thrown by M. Gi., one of M. G.'s classmates, struck M. G. on the leg. M. G. walked over to where M. Gi. was standing and asked if he had thrown the rock that had

struck him. M. Gi. answered "yes." M. G. then asked M. Gi to apologize, but M. Gi. refused.

30. M. G., angered by M. Gi.'s refusal to apologize, shoved M. Gi. There then ensued a shoving match between the two boys. Neither of the boys, both of whom were rather slight in stature, actually threw a punch.

31. Before the shoving match could escalate, Mr. Schmidt intervened. He first put an arm around M. Gi.'s neck, from behind him (commonly referred to as a "choke hold"),⁷ forced one of M. Gi.'s arms behind his back, and forcefully pushed M. Gi. onto the concrete pavement in a sitting position.

32. After placing M. Gi. on the ground, Mr. Schmidt turned his attention to M. G., who continued to jump and prance around. Both boys, still angry, continued to taunt each other verbally, but Mr. Schmidt stood between them.

33. Mr. Schmidt told M. G. to sit down and when M. G. did not comply, Mr. Schmidt, as he had with M. Gi., grabbed M. G. from behind in a choke hold,⁸ forced one of M. G.'s arms behind his back, and forcefully pushed M. G., who was resisting Mr. Schmidt's efforts to get M. G. to sit on the ground, face first onto the concrete pavement.

34. After hitting the pavement, M. G. attempted to get up but Mr. Schmidt prevented him from doing so by placing a hand on the back of M. G.'s head with enough force that the left side of

his face was forced onto the concrete. M. G., who began to cry, continued to struggle until Mr. Schmidt released him.

35. As Mr. Schmidt released M. G.'s head and allowed M. G. to get up, Annette Burris-Williams⁹, a teacher at Parkway Middle Community School, came to see what had happened. She witnessed M. G. get up and proceed to walk hurriedly away from Mr. Schmidt and in her direction. M. G. was crying and bleeding from the lip. She stopped M. G. until security personnel, who had also arrived as Mr. Schmidt released M. G. from the ground, took M. G. away. As Mr. Schmidt, who had been following M. G., came up to her, Ms. Burris-Williams asked Mr. Schmidt what had happened, to which Mr. Schmidt matter-of-factly, callously, and inaccurately replied: "He swung at me. He got what he deserved."

36. As a result of Mr. Schmidt's actions, M. G. suffered abrasions to his forehead, primarily on the left side, and his left shoulder, a bruise on the area around his left cheek bone, and a laceration to his bottom lip, which required stitches to close.

37. The incident was subsequently investigated and Mr. Schmidt was arrested and charged with child abuse. These charges were still pending at the commencement of the final hearing.

38. The force used by Mr. Schmidt to subdue M. G. was excessive and unnecessary. M. G. could have easily been subdued by Mr. Schmidt, who was significantly larger and stronger than M. G., had M. G. required subduing, with much less force. M. G., however, although still angry and excited, did not require subduing. He was not making any real asserted effort to get to M. Gi., because Mr. Schmidt barred his path by his mere presence, he did not initiate any contact with Mr. Schmidt, and he did not swing his fist at Mr. Schmidt or at M. Gi. M. G. merely made the mistake of not following Mr. Schmidt's directive to immediately sit down.

39. Mr. Schmidt's actions, under the circumstances, of placing M. G. in a choke hold, twisting his arm behind his back, pushing him to the ground, and pushing his face into the concrete were inconsistent with the policies of the M-D Public Schools concerning how to intervene in a fight.

40. Mr. Schmidt's actions, which caused physical injuries to M. G., exposed him to unnecessary embarrassment or disparagement, and failed to protect him from conditions harmful to M. G.'s physical safety, constituted "gross immorality" and acts of "moral turpitude."

41. The evidence failed to prove clearly and convincingly, however, that Mr. Schmidt acted under "color of authority of the laws of the State of Florida" to violate M. G.'s "legal rights."

D. Mr. Schmidt's March 4, 2002, Anger Management Group Meeting.

42. Pursuant to a Settlement Agreement entered into by Mr. Schmidt and accepted by the EPC, described in further detail, infra, Mr. Schmidt was participating in the Recovery Network Program (hereinafter referred to as the "RNP") during March of 2002. As part of his participation in the RNP, Mr. Schmidt attended an anger management group meeting (hereinafter referred to as the "Group Session") on or about March 4, 2002. The Group Session was conducted by Carter Wiggins, a clinical social worker, who had been approved at that time to provide services to individuals participating in the RNP.

43. During the March 4, 2002, Group Session, Mr. Schmidt, who owns a .38 caliber revolver, told Mr. Wiggins, "I have a gun." As a result of this statement, Mr. Wiggins, out of concern for the safety of the participants in the Group Session, dismissed the meeting. He also dialed Mr. Schmidt's home telephone number and spoke to someone who identified himself as Mr. Schmidt's roommate. Mr. Wiggins asked the "roommate" whether Mr. Schmidt had any guns, to which the roommate said either "No" or "I don't know."

44. When Mr. Schmidt arrived home after this incident, he took his revolver out of his desk and gave it to Joe Milligan,

his roommate. He then asked Mr. Milligan to telephone Mr. Wiggins and tell him that Mr. Schmidt had complied with Mr. Wiggins' request that he turn his gun over to his roommate. Mr. Milligan complied with Mr. Schmidt's request.

45. Mr. Wiggins spoke with Deborah Dove about the events of March 4, 2002, on March 5, 2002. Ms. Dove made the following contemporaneous note in the RNP Educator Activity Log concerning what Ms. Wiggins told her during the conversation:

TC from Carter Wiggins; last night at anger group Greg had two guns on Him [sic] and was angry. . . . Last night he had two Guns [sic] on him and appeared explosive. When told Mr. Wiggins was Going [sic] to call police, he indicated there would be a shoot out; he also Stated [sic] there was a sense of hopelessness because he was going to lose Everything [sic]; he ran out of the group. Mr. Wiggins called his home and his Roommate [sic] was able to get the guns from him. Mr. Wiggins and He [sic] called Dr. Kahn today and he will call RNP tomorrow. I spoke to Carter At [sic] 4:15 PM and again at 4:28 PM. . . .

Although it is clear that Ms. Dove accurately reported what Mr. Wiggins reported to her on March 5, 2002, the evidence failed to prove clearly and convincingly that these hearsay statements are accurate. Indeed, Mr. Wiggins specifically repudiated almost all of Ms. Dove's account of his conversation with her and no other evidence was presented to prove this hearsay evidence.

46. A counseling session to discuss the March 4, 2002, incident with Mr. Schmidt was scheduled by Mr. Wiggins for March 7, 2002. Mr. Wiggins scheduled the meeting because he felt the need to discuss whether Mr. Schmidt required additional therapy as a result of what had happened on March 4, 2002. On or about March 8, 2002, after Mr. Schmidt had missed the March 7, 2002, counseling session, Mr. Wiggins sent a letter to Mr. Schmidt requesting that Mr. Schmidt contact his office. Mr. Wiggins ultimately referred Mr. Schmidt to a psychiatrist because of the March 4, 2002, incident.

47. On June 5, 2002, Mr. Wiggins wrote to Ms. Dove and informed her of the following:

The purpose of this correspondence is to update you regarding Mr. Greg Schmidt's behavior on March 4th, 2002, when during the group session, he made none specific threatening remarks. This concern has been clinically and appropriately addressed during the course of the treatment.

48. The evidence failed to prove clearly and convincingly that Mr. Schmidt appeared at the Group Session on March 4, 2002, in an angry emotional state, that he had two handguns (or even one), that he was advised by Mr. Wiggins or anyone else that the police would be called, that Mr. Schmidt threatened a "shoot out" if the police were called, that one or more persons felt threatened or fearful for their person as a result of

Mr. Schmidt's actions that evening, or that, after leaving the session, Mr. Schmidt was "disarmed."

49. While Mr. Wiggins did eventually reluctantly admit at hearing that Mr. Schmidt said "I have a gun," he evaded all efforts of the Commissioner to elicit any further information about the circumstances surrounding this statement or the context in which it was made. As a consequence, the evidence does not clearly and convincingly prove what Mr. Schmidt meant by his comment.¹⁰ Without proof of the circumstances surrounding the statement or the context in which it was made, any number of meanings can be attributed to the statement, including that Mr. Schmidt meant to threaten Mr. Wiggins or someone else at the Group Session or that he was simply relating a fact, that he indeed does have a gun, albeit, one that was tucked safely in a desk at his residence when he made the statement. Although Mr. Wiggins' reactions in response to Mr. Schmidt's statement may indicate that the comment was meant as a threat or at least a possible threat, Mr. Wiggins refused to provide evidence to support such a conclusion clearly and convincingly. Consequently, any conclusion about what Mr. Schmidt meant when he said, "I have a gun," would be based upon mere speculation and not clear and convincing evidence.

E. Previous Disciplinary Action.

50. On or about October 7, 1999, an Administrative Complaint was issued against Mr. Schmidt. In pertinent part, the October 7, 1999, Administrative Complaint alleged the following factual basis for taking disciplinary action against Mr. Schmidt's teaching certificate:

3. On or about October 23, 1997, Respondent made inappropriate threatening and abusive remarks toward one of his students Z.H. Respondent called the student a "Black Bitch" and a "Punk" and asked him to take a swing so he, the Respondent, could knock him out.

51. On or about January 7, 2000, Mr. Schmidt agreed to and did execute a Settlement Agreement resolving the charges of the October 7, 1999, Administrative Complaint. Although the Settlement Agreement provides specifically that Mr. Schmidt, by entering into the Settlement Agreement, "neither admits or denies . . . the allegations set forth in the Petitioner's Administrative Complaint . . . ", Mr. Schmidt agreed to the following disciplinary actions:

. . . .

4. The Respondent agrees to accept a letter of reprimand, a copy of which shall be placed in his certification file with the Department of Education, and a copy of which shall be placed in his personnel file with the employing school district.

5. The Respondent agrees, within sixty days of issuance of the Final Order accepting this settlement agreement . . . to undergo such

evaluation relating to issues cited in the Administrative Complaint, as determined by the Recovery Network Program to be appropriate, to submit to said evaluation by a qualified provider approved by the Recovery Network Program, and undergo any counseling or treatment as may be prescribed by said professional. The Respondent shall provide the EPC with written verification of successful completion of the evaluation and any recommended treatment.

6. The Respondent agrees that he shall be placed on probation for a period of 2 years, commencing upon the issuance of the Final Order by the Education Practices Commission [EPC] accepting this settlement agreement if the Respondent is currently employed as an educator in Florida. . . . In the event that the Respondent's employment in the teaching profession is interrupted for any reason prior to the expiration of the probationary period, the probationary period shall be tolled until such time as the Respondent resumes employment as an educator in Florida. As conditions of probation, the Respondent shall:

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(e) violate no law and shall fully comply with all district school board regulations, school rules and State Board of Education Rule 6B-1.006; and,

(f) satisfactorily perform his assigned duties in a competent, professional manner.

52. Waiving the statutory procedures of Section 231.2615(6), Florida Statutes (formerly number Section 231.28(6), Florida Statutes (1999)), for disciplining an educator's teaching certificate for a violation of the terms of

the educator's probation, Mr. Schmidt, in executing the Settlement Agreement, agreed to the following:

7. In the event the Respondent fails to comply with each condition of probation set forth herein, the Respondent agrees that the Petitioner shall be authorized to file an Administrative Complaint for sanctions up to and including the revocation of his teaching certificate based upon the violation of the terms of this agreement.

53. On or about March 10, 2000, the EPC issued a Final Order in the case of Tom Gallagher, as Commissioner of Education vs. Gregory Schmidt, EPC Case No. 99-0335-RT, at a meeting on February 25, 2000, accepting the Settlement Agreement.

54. Pursuant to the Settlement Agreement, Mr. Schmidt's two-year probation period began to run March 10, 2000, and ended on March 10, 2002.

55. In the Second Amended Administrative Complaint filed in this case, it is alleged that Mr. Schmidt violated his probation and, thus, the terms of the Settlement Agreement, "by committing the acts described [in the Second Amended Administrative Complaint]."

56. The incidents involving Ms. Lance described in Section A, supra, took place before Mr. Schmidt was placed on probation and, therefore, do not support the allegation that he violated the terms of his probation.

57. The incident involving Mr. Diamond described in Section B, supra, took place during September or October 2000, and therefore, occurred during the probation period. Mr. Schmidt's comment concerning Mr. Diamond, however, did not constitute a violation of the "law" or "district school board regulations," "school rules," or "State Board of Education Rule 6B-1.006."

58. The incidents involving M. G. described in Section C, supra, took place on January 24, 2002, and, therefore, occurred during the probationary period. To the extent those incidents have been determined to be violations of "district school board regulations, school rules and State Board of Education Rule 6B-1.006," Mr. Schmidt violated the terms of his probation.

59. Finally, the incidents alleged to have occurred during the Group Session on March 4, 2002, described in Section D, supra, while occurring during the probation period, have not been proved to constitute a violation of "district school board regulations, school rules and State Board of Education Rule 6B-1.006."

G. Mr. Schmidt's Effectiveness as an Employee of the M-D Public Schools.

60. The evidence failed to prove clearly and convincingly that any of Mr. Schmidt's actions with Ms. Vance or Mr. Diamond

constitutes conduct "which seriously reduces his effectiveness as an employee of the school board."¹¹

61. The evidence also failed to prove clearly and convincingly that Mr. Schmidt's violation of the terms of his probation constituted conduct "which seriously reduces his effectiveness as an employee of the school board."

62. Mr. Schmidt's mistreatment of M. G., however, does constitute conduct "which seriously reduces his effectiveness as an employee of the school board."

CONCLUSIONS OF LAW

A. Jurisdiction.

63. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

B. Burden and Standard of Proof.

64. In the Second Amended Administrative Complaint, the Commissioner has sought, among other penalties, the revocation or suspension of Mr. Schmidt's teaching certificate. Therefore, the Commissioner has the burden of proving the allegations in the Second Amended Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510

So. 2d 292 (Fla. 1987); and McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995).

65. Clear and Convincing evidence has been defined as evidence which:

requires 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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).

66. The grounds proven in support of the Commissioner's assertion that Mr. Schmidt's teaching certificate should be revoked or suspended must be those specifically alleged in the Second Amended Administrative Complaint. See, e.g., Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2nd DCA 1984).

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

67. Section 231.28(1), Florida Statutes (1999), and Section 231.2615(1), Florida Statutes (2000), give the EPC 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, and the state sets out the bases for the imposition of such penalties.

68. The Commissioner has alleged in the Second Amended Administrative Complaint that Respondent has committed five separate statutory violations and eight separate rule violations, discussed in greater detail, infra. The statutory violations which the Commissioner has alleged Mr. Schmidt violated are Section 231.28(1)(c), Florida Statutes (Count 1), Section 231.29(1)(f), Florida Statutes (Count 2), Section 231.28(1)(i), Florida Statutes (Count 3), Section 231.2615(1)(j), Florida Statutes (count 4), and Section 231.2615(1)(k), Florida Statutes (Count 5).¹² The rule violations alleged by the Commissioner are Rules 6B-1.006(3)(a), (e) and (f), and 6B-1.006(5)(c), (d), (f), (l), and (o), Florida Administrative Code.

69. In support of the alleged statutory and rule violations, the Commissioner has alleged essentially four separate and distinct factual bases to discipline Mr. Schmidt's teaching certificate: (a) the events surrounding Mr. Schmidt's inappropriate comment to Ms. Vance and the subsequent threatening comment concerning Mr. Diamond; (b) Mr. Schmidt's treatment of M. G.; (c) Mr. Schmidt's actions at the Group

Session; and (d) whether these actions violated the terms of his probation with the EPC.

70. Although the Commissioner has identified the acts which Mr. Schmidt alleged committed and the offenses which the Commissioner believes were committed, the Commissioner has not given any indication, either in the Second Amended Administrative Complaint or the Commissioner's proposed order which of the four separate factual events correspond to which statutory and/or rule violations. The undersigned has, therefore, been left to "guess" exactly which statutory and/or rule violations the Commissioner believes that Mr. Schmidt's actions, proven by clear and convincing evidence, constitute. If there was even a remote possibility that a proven act constituted an alleged statutory or rule violation, that possibility has been considered, but not necessarily discussed in this Recommended Order.

71. The acts alleged in the Second Amended Administrative Complaint which the Commissioner has proved be clear and convincing evidence that Mr. Schmidt committed include the following:

a. On or about May 6, 1999, Mr. Schmidt, without reasonable cause, engaged in a verbal dispute with Ms. Vance and threatened her by saying, "I'll kick your ass, you fucking bitch," causing her to fear for her physical safety;

b. During October 2000, Mr. Schmidt made a threatening remark concerning Mr. Diamond. That remark, however, was not made to Mr. Diamond and was not intended to be repeated to Mr. Diamond;

c. On January 24, 2002, Mr. Schmidt willfully and intentionally placed M. G., who was 11 years of age, in a choke hold, held one of M. G.'s arms behind his back, and shoved him to the concrete pavement where he then held M. G.'s face causing severe personal injuries to M. G. Mr. Schmidt was arrested and charged with child abuse;

d. Except for the comment made by Mr. Schmidt on May 6, 1999, the acts which have been proved by clear and convincing evidence took place while Mr. Schmidt was on probation with the EPC.

72. The other acts alleged in the Second Amended Administrative Complaint were not proved by clear and convincing evidence.

D. Gross Immorality and Acts Involving Moral Turpitude.

73. In Count 1 of the Second Amended Administrative Complaint, the Commissioner has alleged that Mr. Schmidt violated Section 231.2615(1)(c), Florida Statutes, which provides that a teacher may be disciplined if he or she "[h]as been guilty of gross immorality or an act involving moral turpitude."

74. The terms "gross immorality" and "an act involving moral turpitude" are not defined in Chapter 231, Florida Statutes. See Sherburne v. School Board of Suwannee County, 455 So. 2d 1057 (Fla. 1st DCA 1984). Rule 6B-4.009, Florida Administrative Code, which applies to dismissal actions initiated by school boards against instructional personnel, does, however, provide guidance as to the meaning of the terms as they are used in Section 231.2615, Florida Statutes. See Castor v. Lawless, 1992 WL 880829 *10 (EPC Final Order 1992).

75. Rule 6B-4.009(2), Florida Administrative Code, defines "immorality" as follows:

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

76. "Gross immorality" has been defined by the courts as misconduct that is more egregious than mere "immorality":

The term "gross" in conjunction with "immorality" has heretofore been found to mean "immorality which involves an act of misconduct that is serious, rather than minor in nature, and which constitutes a flagrant disregard of proper moral standards." Education Practices Commission v. Knox, 3 FALR 1373-A (Department of Education 1981).

Frank T. Brogan v. Eston Mansfield, DOAH Case No. 96-0286 (EPC Final Order 1996).

77. Rule 6B-4.009(6), Florida Administrative Code, defines "moral turpitude" as follows:

Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

78. The court in State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (1933), observed that moral turpitude

involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. . . . It has also been defined as anything done contrary to justice, honesty, principle, or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated.

79. In determining whether any teacher is guilty of gross immorality or an act involving moral turpitude in violation of

Section 231.2615(1)(c), Florida Statutes, it must be remembered that "[b]y virtue of their leadership capacity, teachers are traditionally held to a high moral standard in a community."

Adams v. Professional Practices Council, 406 So. 2d 1170, 1171 (Fla. 1st DCA 1981).

80. Only one of the acts which the Commissioner has proved by clear and convincing evidence in this case rises to level of gross immorality or moral turpitude: Mr. Schmidt's use of excessive force with M. G. Mr. Schmidt has, therefore, violated Section 231.2615(1)(c), Florida Statutes, based upon the factual allegations of paragraph 4 of the Second Amended Administrative Complaint.¹³

81. The other acts alleged in the Second Administrative Complaint which have been proven, such as Mr. Schmidt's comment to Ms. Vance, his comment concerning Mr. Diamond, and the violations of his probation do not constitute a "flagrant disregard of proper moral standards" of something done "contrary to justice, honesty, principle, or good morals."

E. Mr. Schmidt's Effectiveness as an Employee of the School Board.

82. In Count 2 of the Second Amended Administrative Complaint, the Commissioner has alleged that Mr. Schmidt violated Section 231.2615(1)(f), Florida Statutes, which provides that a teacher may be disciplined if he or she "has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board."

83. It has been held that the Commissioner must present clear and convincing proof that a teacher has lost his or her

effectiveness in order to find that the teacher is in violation of Section 231.2615(1)(f), Florida Statutes. In McNeill v. Pinellas County School Board, 678 So. 2d 476, 478 (Fla. 2d DCA 1996), the court held that the school board had failed to meet its burden of proving a teacher's "impaired effectiveness" with respect to a charge of immorality when

testimony offered by school officials to establish impaired effectiveness was unsupported by "specific information from students, parents, or coworkers" Two citizens testified as to why McNeill should be dismissed; however both were unable to provide specific information regarding the actual impact of McNeill's conduct on Pinellas County students.

84. It has also been held that it may be concluded that a teacher has lost his or her effectiveness without such specific proof where the "personal conduct" in which the teacher engaged is of such nature that it "must have impaired [the teacher's] effectiveness." Summer v. School Board of Marion County, 666 So. 2d 175 (Fla. 5th DCA 1995). Cf. Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000) (Misconduct of Purvis, who "lied under oath and resisted arrest" rose to a "level of misconduct which would support the inference that Purvis' effectiveness as a teacher had been impaired.").

85. The only act which the Commissioner has proved Mr. Schdmit is guilty of which is so egregious that it "must have impaired [Mr. Schmidt's] effectiveness" was his use of

excessive force with M. G. Based upon his conduct with M. G., it is concluded that Mr. Schmidt has violated Section 231.2615(1)(f), Florida Statutes.

86. The other acts alleged in the Second Administrative Complaint which have been proven are, however, not so egregious as to give rise to any inference that Mr. Schmidt lost his effectiveness as a teacher. This conclusion is supported by the fact that he was suspended, rather than being fired, by the M-D Public Schools for his conduct with Ms. Vance and Mr. Diamond, and Dr. Greenberg ultimately testified that Mr. Schmidt had lost his effectiveness to participate in the Learn-to-Swim Program, rather than as an employee of the school board.

F. Violation of the Principles of Conduct for the Education Profession.

87. In Count 3 of the Second Amended Administrative Complaint, the Commissioner has alleged that Mr. Schmidt violated Section 231.2615(1)(i), Florida Statutes, which provides that a teacher may be disciplined if he or she "[h]as violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules."

88. The Principles of Professional Conduct for the Education Profession are found in Chapter 6B-1.006, Florida Administrative Code. The particular principles which the

Commissioner has alleged that Mr. Schmidt violated are found in Counts 6 through 13, which if proven, would constitute the alleged violation of Section 231.2615(1)(i), Florida States. Those principles and the conclusions as to whether Mr. Schmidt violated them are as follows:

(a) Count 6: Rule 6B-1.006(3)(a), Florida Administrative Code, which provides that a teacher has an obligation to the student to "make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety." Only one of the acts which the Commissioner has proved by clear and convincing evidence in this case violated this principle: Mr. Schmidt's use of excessive force with M. G. Mr. Schmidt failed to protect M. G. from conditions harmful to his mental and physical health and safety. Mr. Schmidt has, therefore, in violating Rule 6B-1.006(3)(a), Florida Administrative Code, has, consequently, violated Section 231.2615(1)(i), Florida Statutes.

(b) Count 7: Rule 6B-1.006(3)(e), Florida Administrative Code, which provides that a teacher has the obligation to the student to "not intentionally expose a student to unnecessary embarrassment or disparagement." Only one of the acts which the Commissioner has proved by clear and convincing evidence in this case violated this principle: Mr. Schmidt's use of excessive force with M. G. Mr. Schmidt intentionally exposed M. G. to

unnecessary embarrassment. Mr. Schmidt has, therefore, in violating Rule 6B-1.006(3)(e), Florida Administrative Code, has, consequently, violated Section 231.2615(1)(i), Florida Statutes.

(c) Count 8: Rule 6B-1.006(3)f), Florida Administrative Code, which provides that a teacher has the obligation to the student to "not intentionally violate or deny a student's legal rights." The evidence failed to prove that Mr. Schdmit violated this principle. While his treatment of M. G. was uncalled for, it did nothing to violate M. G.'s "legal rights."

(d) Count 9: Rule 6B-1.006(5)(c), Florida Administrative Code, which provides that a teacher "[s]hall not interfere with a colleague's exercise of political or civil rights and responsibilities." The evidence failed to prove that Mr. Schmidt violated this principle.

(e) Count 10: Rule 6B-1.006(5)(d), Florida Administrative Code, which provides that a teacher:

[s]hall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination. (Emphasis added).

The evidence proved that Mr. Schmidt's comment to Ms. Vance and her resulting reasonable reaction thereto, violated this

principle. By making his harassing statement to Ms. Vance, Mr. Schmidt created a hostile and intimidating environment which Ms. Vance sought to be free of. Mr. Schmidt has, therefore, in violating Rule 6B-1.006(5)(d), Florida Administrative Code, has, consequently, violated Section 231.2615(1)(i), Florida Statutes

(f) Count 11: Rule 6B-1.006(5)(f), Florida Administrative Code, which provides that a teacher "[s]hall not use coercive means or promise special treatment to influence professional judgments of colleagues." The acts which the Commissioner proved in this case do not support a finding that Mr. Schmidt used coercion to influence professional judgements of his colleagues. While he made a threatening comment about Mr. Diamond, that comment was not actually made to Mr. Diamond and, but for Ms. Sutton's informing Mr. Diamond about the comment, Mr. Diamond would not have known it had been made. The Commissioner failed to prove that Mr. Schmidt violated this principle.

(g) Count 12: Rule 6B-1.006(5)(n), Florida Administrative Code, which provides that a teacher "[s]hall seek no reprisal against any individual who has reported any allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes." While the Commissioner proved that Mr. Schmidt made a threatening comment about Mr. Diamond, the evidence failed to prove that

Mr. Schmidt made the threat to Mr. Diamond or that he intended that Mr. Diamond ever learn about the comment. More importantly, the evidence failed to prove that Mr. Schmidt indeed did or even intended to take any action against Mr. Diamond. The Commissioner, therefore, failed to prove that Mr. Schmidt sought any reprisal against anyone.

(h) Count 13: Rule 6B-1.006(5)(o), Florida Administrative Code, which provides that a teacher "[s]hall comply with the conditions of an order of the Education Practices Commission imposing probation, imposing a fine, or restricting the authorized scope of practice." By his treatment of M. G. and, to a lesser extent, Ms. Vance it has been concluded in this Recommended Order that Mr. Schmidt has committed some of the violations of statutes and rules alleged in the Second Amended Administrative Complaint. Therefore, Mr. Schmidt has violated the terms of his probation. Mr. Schmidt has, therefore, violated Rule 6B-1.006(5)(o), Florida Administrative Code, and, consequently, Section 231.2615(1)(i), Florida Statutes.

89. In Count 4 of the Second Amended Administrative Complaint, the Commissioner has alleged that Mr. Schmidt violated Section 231.2615(1)(j), Florida Statutes, which provides that a teacher may be disciplined if he or she "has otherwise violated the provisions of law, the penalty for which is the revocation of the teaching certificate." But for the

violations of law proved in this case, the evidence has failed to prove that Mr. Schmidt "otherwise" violated any other provision of law.

90. In Count 5 of the Second Amended Administrative Complaint, the Commissioner has alleged that Mr. Schmidt violated Section 231.2615(1)(k), Florida Statutes, which provides that a teacher may be disciplined if he or she "[h]as violated any order of the Education Practices Commission." Mr. Schmidt violated this provision for the same reason that it has been concluded that he violated Rule 6B-1.006(5)(o), Florida Administrative Code, discussed in paragraph 88(h) of this Recommended Order.

G. Penalty.

91. Having proved by clear and convincing evidence that Mr. Schmidt committed some of the violations alleged in the Second Amended Administrative Complaint, Section 231.2615(1), Florida Statutes, authorizes punitive action against Mr. Schmidt's teaching certificate. In determining what punitive action the EPC should take, it is necessary to consult Rule 6B-11.007, Florida Administrative Code, which contains the disciplinary guidelines adopted by the EPC. Cf. Williams v. Department of Transportation, 531 So. 2d 994 (Fla. 1st DCA 1988)(An agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

92. After carefully considering the facts of this case in light of the provisions of Rule 6B-11.007, Florida Administrative Code, including the "aggravating and mitigating factors" of Rule 6B-11.007(3), Florida Administrative Code, Mr. Schmidt's mistreatment of M. G., especially in violation of the terms of his probation, warrant the revocation of his teaching certificate.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Gregory Schmidt has violated Section 231.2615(1)(c), (f), (i), and (k), Florida Statutes, and Rule 1.006(3)(a) and (e), and 1.006(5)(d), and (o), Florida Administrative Code, and permanently revoking his Florida Educator's Certificate.

DONE AND ENTERED this 16th day of May, 2003, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2003.

ENDNOTES

^{1/} There was evidence to suggest that it was the "principal", presumably from Jose Marti Middle School, that established the policy. There was also hearsay evidence that the policy had been established by a Gina Covone, a "Department Head." The weight of the evidence, however, failed to establish who precisely established the policy.

^{2/} The evidence failed to prove that Ms. Vance "responded to Respondent's statement by yelling expletives" as suggested in Respondent's Proposed Recommended Order. The evidence also failed to prove that Ms. Vance "yelled comments which referred to gender equity . . . that the policy was illegal and . . . that she was going to have the Respondent fired." Proposed finding of fact 9, Respondent's Proposed Recommended Order.

^{3/} Mr. Schmidt's comment about throwing a clip board at him was a reference to an incident which had taken place between Ms. Vance, Manny Hahn, and Donald Hans. Mr. Schmidt testified at the final hearing, and it has been argued in Respondent's Proposed Recommended Order, that because of what had allegedly happened during that incident, Mr. Schmidt was afraid that Ms. Vance was going to hit him with a clip board. As found in Finding of Fact 14, Mr. Schmidt's testimony was not persuasive.

It is also concluded that what actually transpired between Ms. Vance, Mr. Hahn, and Mr. Hans is not relevant to this proceeding. If Mr. Schmidt's testimony that he was afraid of Ms. Vance due to that incident were credible, which it is not, all that would be relevant about the incident and others that Mr. Schmidt alluded to at hearing, is Mr. Schmidt's understanding or beliefs about those incidents. Since his understanding and beliefs about the incident were based solely on what he had been told, what actually transpired is not relevant.

^{4/} The statements made by Mr. Schmidt were made directly to Ms. Sutter and Ms. Sutter testified credibly at hearing as to what she heard Mr. Schmidt say. Most of the relevant statements which Ms. Sutter heard and testified about at hearing do not constitute "hearsay."

"Hearsay" is defined in Section 90.801, Florida Statutes, as "a statement [an oral or written assertion], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[Emphasis added]. Using a simple example, if "A" testifies that he heard "B" yell "fire," A's testimony about what he heard B yell would be hearsay only if it were offered to prove that there actually was a fire. If offered to prove that, in response to hearing B yell "fire," A ran from the building, it is not hearsay. Mr. Schmidt's comments to Ms. Sutter were not offered to prove the truth of his statements, but only that he made them. His comments, as testified to at hearing by Ms. Sutter, were not, hearsay.

^{5/} The Second Amended Administrative Complaint alleges that Mr. Schmidt "threatened to 'kill' David Diamond, who was present during the [May 6, 1999] dispute and corroborated the statements of Ms Vance." In order to prove this allegation, it is not necessary that the Commissioner prove that Mr. Schmidt indeed meant to kill Mr. Diamond; it is only necessary that the Commissioner prove that Mr. Schmidt made the threat. Ms. Sutter is the only witness that actually heard Mr. Schmidt make the threat. Her testimony was not offered to prove the truth of Mr. Schmidt's threat, just that he made it, as alleged. Ms. Sutter's testimony concerning what Mr. Schmidt said in this regard is not, therefore, hearsay.

^{6/} To finish the point, Mr. Diamond's testimony about what Ms. Sutter told him about Mr. Schmidt's threat is indeed hearsay. The truth of the factual allegation in the Second Amended Administrative Complaint, however, does not depend in any way on what Mr. Diamond knew or believed. All that is required was proof that Mr. Schmidt uttered the statement and Ms. Sutter presented that proof through her testimony.

^{7/} The evidence failed to prove that Mr. Schmidt was actually choking M. Gi.

^{8/} Again, the evidence failed to prove that Mr. Schmidt was actually choking M. G.

^{9/} Ms. Burris-Williams, who married subsequent to the events of January 24, 2002, was known as Ms. Burris at the time of the incident.

¹⁰/ In his deposition, Petitioner's Exhibit 23, Mr. Schmidt gave an explanation for why he made this statement. That explanation defies logic and is rejected as lacking truthfulness.

¹¹/ Dr. Greenberg did testify that Mr. Schmidt had lost his effectiveness as a teacher, but her opinion was based upon an accumulation of acts and was not limited to his threat to Ms. Vance or to the actions alleged in the Second Amended Administrative Complaint which have been proved. Dr. Greenberg also testified, when asked if she felt "he could remain in his capacity as an employee with the Dade County School Board," that "My request was that he be moved out of the learn to swim program." Transcript, Volume 1, Page 235, Lines 2 through 6.

¹²/ Although Section 231.28(1), Florida Statutes, was renumbered in the 2000 Florida Statutes as Section 231.2615(1), no change in the substance of the deeds proscribed in the sections was made. In order to avoid confusion in this Recommended Order, all further references will be to Section 231.2615(1), Florida Statutes (2000).

¹³/ The fact that Mr. Schmidt was "arrested and charge with child abuse" does not, however, constitute gross immorality or an act involving moral turpitude.

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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.