

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST JOHNS COUNTY SCHOOL)
DISTRICT,)
)
Petitioner,)
)
vs.) Case No. 05-3084
)
KARA MORT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The formal hearing was conducted in St. Augustine, Florida, on November 29-30, 2005.

The appearances were as follows:

APPEARANCES

For Petitioner: Thomas J. Leek, Esquire
Kelly Parsons, Esquire
Cobb & Cole
Post Office Box 2491
Daytona Beach, Florida 32115-2491

For Respondent: Anthony D. Demma, Esquire
Meyer & Brooks, P.A.
Post Office Box 1547
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether Respondent's employment as a teacher should be terminated for just cause, as delineated in Section 1012.33(1)(a), Florida Statutes (2005).

PRELIMINARY STATEMENT

This cause arose upon service on the Respondent, Kara Mort, by a letter of July 12, 2005, of the recommendation that the Respondent be terminated or dismissed from her teaching position for alleging striking a student. The Superintendent of the St. Johns County School District, Joseph Joyner, recommended that the Board dismiss the Respondent and the Board subsequently voted to do so.

The Respondent elected to dispute the reasons for her dismissal and her dismissal itself, asserting that her behavior under the circumstances was reasonable and lawful when she was confronted with an altercation with a Nease High School Student on May 17, 2005. Because she requested a formal proceeding, the matter was referred to the Division of Administrative Hearings and the undersigned Administrative Law Judge for conduct of a formal proceeding and hearing.

The cause came on for formal hearing as noticed in St. Augustine, Florida. The Petitioner presented the testimony of five witnesses, one of which was on rebuttal, and one exhibit.

The Respondent presented the testimony of six witnesses, including the Respondent herself, and introduced five exhibits which were admitted into evidence. The proceedings were transcribed and the parties availed themselves of the right to submit proposed recommended orders after the filing of the transcript. Upon the grant of an extension to the proposed recommended order filing time, the Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Kara Mort (Dr. Mort) has worked in the field of education since 1969 and in her chosen field as a Special Education teacher from 2001 through May 2005 in St. Johns County, Florida. She earned a Bachelor's Degree in Art Education from the University of North Carolina in 1968; a Master's Degree in Emotionally Disturbed Student Education from the Peabody College of Vanderbilt University in 1969; a Ph.D. in Special Education and Administration and Supervision from the University of North Carolina in 1982; and a Juris Doctorate Degree from the University of Florida in 1989. She has been certified to teach in North and South Carolina, Georgia, and Florida and holds an active Florida teaching certificate in the areas of Art, Emotionally Disturbed, Learning Disabled, Mental Retardation, and Administration and Supervision. Her licensure

has never been subjected to any disciplinary action in any of the states in which she has had certification as an educator and the evidence reflects no prior employment discipline during her practice in the teaching profession.

2. Dr. Mort has been a National Board Certified Teacher since 2001, which allows her to earn a bonus of 10 percent of the statewide average teacher's salary for each year of employment in a full-time position in a Florida public school. National Board Certified Teachers in Florida can also earn another 10 percent of the statewide average teacher salary as a separate bonus in any year in which they perform a required amount of mentoring services to help other teachers improve their classroom skills. Dr. Mort earned both types of bonuses in each of her four full years of service as a teacher for the Petitioner School District, but was ineligible to receive either bonus for the 2005-2006 school year because of the termination action.

3. In April 2005, the St. Johns County School Board (Board) approved the Respondent for tenured teacher status under a professional services contract (PSC). Based upon her work in the 2004-2005 school year at Nease High School she received an outstanding performance evaluation. Principal Fred Cole offered praise of her relationships with her students and her leadership skills that year and she was selected by District officials to

attend a two-day leadership retreat as one of the District's "cadre of excellent teachers and educational leaders."

4. Dr. Mort had two classroom aides beginning with the 2004-2005 school year, Ms. Martha Lucas and Ms. Kathleen Tolx. Dr. Mort and the two aides were all new to Nease High School that year. Dr. Mort had been hired by the Principal of Nease High School, Robert Schiavone, to implement a new special education program. The program included students with significant learning disabilities and emotional disabilities. The curriculum was focused on basic level academic skills, as well as social, daily living, and employability skills.

5. Dr. Mort had eight or ten Special Education students in her class at any given time during her school day that year. The students were all mentally retarded to one degree or another, with most having other substantial deficits, physical or emotional, or sometimes both. One of the students, J.H., has a history of engaging in physical attacks upon teachers, staff, and parents, apparently often related to seizures. J.H. is a large student, being approximately 5'10" tall and between 180 and 190 pounds in weight. When he is agitated he displays great physical strength and agility and is difficult to restrain or control. He often attacks his caretakers for seemingly minor reasons or totally unpredictably. His attacks typically involve grabbing his caretakers' arms to claw and scratch at them. He

is extremely limited in his ability to communicate. His speech is very limited and the sign language he knows is imperfect and is best understood only by members of his family.

6. Ms. Lucas had been previously involved in J.H.'s education, when she was part of a summer school program in which he was enrolled in a prior school year. He attacked Ms. Lucas during that summer school program and made a similar attack upon Dr. Mort in the fall of 2004. After that attack on Dr. Mort in the fall of 2004, Ms. Lucas told Dr. Mort that she would not intervene if he became violent again, although she would continue to work with him on academic skills.

7. J.H. made significant progress during the 2004-2005 school year as to his academic and developmental progress. His attacks on others diminished in frequency. His parents were very pleased with Dr. Mort's program, her relationship with their son, and the manner in which she managed his conduct when he became violent. Jane H., J.H.'s mother, and her husband continue to feel the same way about Dr. Mort and her ability to work effectively with J.H. and other students, notwithstanding the May "striking incident" described below. They made those feelings known to the Superintendent of the School District as well as the School Board when the termination of Dr. Mort's employment was under consideration.

8. Dr. Mort and her staff and J.H.'s mother, Jane H., on some occasions are able to diminish the anger and violent conduct of J.H. by using certain techniques, such as threatening to call the school resource officer, a deputy sheriff, repeatedly making him aware that his conduct will not let him get his way; and persuading him to take his oral medication (Ativan) that tends to calm him down. His fits of anger and his attacks are unpredictable, however, as to when they occur, how long they will last, or how violent they may be.

9. During their discussions concerning J.H.'s progress and management during the 2004-2005 school year, Mr. and Mrs. H and Dr. Mort agreed that the Ativan should only be used sparingly because it tends to put J.H. to sleep, wasting the remainder of the school day after the medication is administered. Additionally, since the medication is given orally, J.H. must be willing to cooperate for it to be taken or administered in order to achieve its calmative effect. Because of this discussion and circumstance, Dr. Mort chose to use verbal techniques to calm J.H. down, when possible, without given him the medication. During those times when he remained agitated and aggressive he was likely to refuse to take the medication anyway. The Ativan was kept in the office area between the two adjoining Special Education classrooms, one of which was Dr. Mort's.

10. The District provides "walkie-talkie" communicators to teachers to enhance their ability to communicate with each other, the staff, and the school resource officer (SRO) during emergency situations. Ms. Binns kept two walkie-talkies in her classroom area next door to Dr. Mort's classroom. Dr. Mort and her classroom was not assigned a walkie-talkie because apparently the school did not have available the type that Dr. Mort requested.

11. During the 2004-2005 school year the Petitioner began training a few of its special education teachers in a new crisis intervention program known as PCM. Ms. Binns received the training in the first half of that school year and her aide, Ms. Zwolinski, received PCM training in April or May of that school year. The Respondent had requested the training, but was not scheduled to attend any of the 2004-2005 training sessions. PCM training was not provided to Ms. Lucas or Ms. Tolx during that year either.

12. The special floor mat that is required in order to use PCM restraint techniques was not present at Nease High School during the school year and the school did not yet have a full PCM team of three or more trained persons during that school year. PCM techniques are not authorized to be used in restraining students by persons not trained in PCM techniques.

The physical restraint methods used in PCM require two, three, or four PCM trained individuals.

13. On March 7, 2005, Dr. Mort suffered a serious injury to her left wrist and arm when another student, N.W., accidentally pushed her to the ground while trying to get past her. She fractured her wrist in trying to break her fall, hurt her tailbone, and hit her head on a cabinet. She was unable to use her left hand or arm during the remainder of the 2004-2005 school year. Her left hand remains substantially useless as of the date of the hearing. Although she was seriously injured, Dr. Mort had the presence of mind to remain calm and spoke kindly to N.W. in order to keep him from feeling guilty about causing her injury.

14. On May 17, 2005, J.H. was not feeling well. He apparently was upset about school personnel changes he had recently heard about involving the principal and assistant principal leaving the school at the end of that school year. He wanted to go home because he felt badly. He became very agitated when Dr. Mort told him she was unable to send him home because she was unable to contact his parents to come get him at that time. Over the course of that morning J.H. intermittently became upset, calmed down to the point where he would lie down for periods of time, only to become agitated again.

15. During the lunch period that day, shortly before noon, he again became angry and frustrated about his circumstances and acted out by throwing books and other objects off a classroom table and onto the floor, which caused a great deal of noise. Dr. Mort repeatedly told him in a stern tone that he would have to pick up the books before he could go home. Eventually, he did kneel down and begin picking up the books.

16. Ms. Zwolinski, Ms. Binns' aide, heard the books land on the floor and looked through the window between the classrooms to see what was happening. She entered Dr. Mort's room briefly through the hallway between the rooms and heard Dr. Mort twice ask Ms. Lucas to press the "panic button" to get help. This is a button by which help can be summoned from elsewhere on the campus during an emergency situation. Ms. Zwolinski saw Ms. Lucas push the emergency button after Dr. Mort's second, more agitated request. Ms. Zwolinski then returned to Ms. Binns' room to work with the students who were returning from lunch. During the event she observed, Ms. Zwolinski did not see Ms. Tolx in Dr. Mort's room nor did she see Ms. Tolx passing through Ms. Binns' room on the way to the adjoining room from the cafeteria. She never heard Ms. Tolx ask Dr. Mort if she needed help dealing with J.H.

17. Dr. Mort then went to a nearby table where student J.P. was seated. He was in the vicinity of where the books

landed. Dr. Mort was trying to be sure that he had not been hit or hurt by the flying books. In the meantime, J.H. stopped picking up the books and went to the day bed in the classroom. After sternly telling J.H. once again that he would not be able to go home until he picked up the books, Dr. Mort began to kneel down to help J.H. pick the books up. At that moment J.H. ran at Dr. Mort, and grabbed her arms as part of the first of three attacks over a period of the next few minutes.

18. Initially he grabbed Dr. Mort's arms and clawed at the lower parts of both arms. Dr. Mort stepped back and pulled away from J.H. slightly and then he grabbed her again and began clawing at her breast area with one hand and the upper part of her usable arm with his other hand. She continued to try to twist out of his grasp as best she could, managing to break free slightly from his hold. He then attacked more violently a third time resumed his clawing of Dr. Mort's upper arms and buried his head into her chest and began biting her breast. By the time of this third assault Dr. Mort moved back to a nearby table and was leaning back against it with her lower body. J.H.'s clawing and biting of her breast caused severe pain, during which Dr. Mort continued to plead for Ms. Lucas' assistance. Ms. Lucas was in the room during the attack and finally pushed the emergency button at some point to summon help from the administration. No help ever came. The attacks intensified and Dr. Mort continued

pleading for Ms. Lucas to help her. Ms. Lucas then retreated into Ms. Binns' classroom and got the walkie-talkie to try to summon the school resource officer. This was to no avail. The deputy, the SRO, never arrived.

19. Dr. Mort's severe pain continued as she tried unsuccessfully to fend J.H. off with her one functional arm and hand. She was very concerned that his severe biting would cause damage to her breast and nipple and made repeated efforts to verbally snap J.H. out of his trance-like state, to no avail. Seeing no sign of any help and being in severe pain, Dr. Mort testified that she "cupped" her good hand and struck firmly one time at J.H.'s upper shoulder. Dr. Mort hoped that a "cup-pop" type of blow would create noise that would snap J.H. out of his seizure like state and stop the attack.

20. Dr. Mort's one strike of J.H. coupled with her request for him to stop hurting her ultimately caused him to end his assault and he let go of her immediately thereafter.

21. The single blow, on or near J.H.'s left shoulder was administered in the hope by Dr. Mort that it would prevent further serious harm to her without harming him. She did not strike him out of anger, but as a means to defend herself and snap him out of his trance-like state and end the attack. J.H. suffered no injury or bruises with respect to the May 17th incident, although Dr. Mort certainly did. Moreover, J.H. was

never injured during the 2004-2005 school year, apart from occasional self-inflicted bite marks on his arms.

22. Both Ms. Tolx and Ms. Lucas maintained that Dr. Mort had slapped J.H. in the face with her open hand, rather than administering a "cup-pop strike" to J.H.'s shoulder. In fact, however, the competent, persuasive evidence shows that Ms. Tolx was in the lunchroom during the May 7, 2005, incident and did not even see the attack of J.H. upon Dr. Mort nor Dr. Mort's strike of J.H. Ms. Lucas could not clearly see what was occurring between Dr. Mort and J.H. because the room was somewhat dark, she was busy locating and trying to use the walkie-talkie in the next room and has poor vision. She generally tried to avoid dealing with J.H. when he became violent.

23. Ms. Tolx and Dr. Mort had been roommates for a few months in the Fall and Winter of 2004, because two hurricanes had rendered Dr. Mort's home temporarily unlivable. Ms. Tolx had angrily ordered Dr. Mort to leave her home one evening in January of 2005 for allegedly causing an argument between her and her 36-year-old developmentally disabled son that resulted in him leaving the house. Moreover, the relationship between Ms. Lucas and Dr. Mort was a strained one as well. Dr. Mort considered Ms. Lucas a poor employee and had previously told her so. Ms. Lucas and Dr. Mort had had a heated argument only a

week before the J.H. incident and Ms. Lucas believed that Dr. Mort planned to have her fired. Ms. Lucas sought a re-assignment at some point and no longer works for the school district.

24. It is determined that the testimony of Ms. Lucas and Ms. Tolx's under the above-found circumstances is not credible and persuasive. The testimony of Dr. Mort and Ms. Zwolinski is more credible. Consequently, Dr. Mort's testimony concerning the details of the incident involving the attack on her by J.H. is more credible and is accepted over that of Ms. Lucas and Ms. Tolx. Moreover, J.H. is a quite large, 190 pound student who is unpredictably aggressive and violent. If, indeed, Dr. Mort had slapped his face in an effort at self-defense and in trying to get him to end an acutely painful and injurious attack, it is deemed to have been reasonable force, undertaken in a last ditch effort at self-defense, to prevent further physical harm to herself, while causing the least possible harm to the student in trying to stop his attack. She did not strike J.H. in anger or as a means of retaliation for his hurting her. Under the circumstances found herein, based on persuasive, credible evidence, even more force than a slap to the face would have been reasonable.

25. The Department of Education has adopted guidelines to evaluate the reasonableness of incidents of force used by

teachers to prevent physical harm to themselves, school staff, or students. Those guidelines were adopted in 1997 by the Department of Education, as required by Section 1003.32(1)(j), Florida Statutes (2005). Given the circumstances with which Dr. Mort was confronted on May 17, 2005, her physical response to J.H.'s repeated and increasingly violent, painful, and injurious attacks was undertaken solely to prevent more serious injury to herself and to minimize injury to the student J.H. (in fact he was not injured at all). Such constituted reasonable force as authorized by Section 1003.32(1), Florida Statutes (2005), the referenced guidelines, as well as the applicable collective bargaining agreement.

26. Nothing Dr. Mort did on May 17, 2005, reduced her effectiveness as an employee of the School District. The testimony adduced from witnesses presented by the Petitioner, to the effect that there has been a loss of trust by parents, other teachers, and students in Dr. Mort, because of her striking J.H., and to the effect that she cannot in the future maintain a calm, positive, productive, and safe educational environment in her classroom and with staff and parents is deemed unpersuasive.

27. There is no persuasive evidence that other parents, some of whom testified, have found her to have lost her effectiveness as a teacher and an employee of the School District nor that parents have lost confidence and trust in

Dr. Mort as a teacher of their children. More credible and accepted is Dr. Mort's testimony and that of J.H.'s mother herself (and the other parent witnesses) who find that Dr. Mort has provided an effective, positive, productive, and loving educational environment for J.H. and other students. In fact, it is undisputed that Dr. Mort is academically well-qualified to teach exceptional students and the parents of the students in her classroom have characterized her as an effective teacher during her tenure at Nease High School. Additionally, Mr. Cole, who was responsible for evaluating her during the 2004-2005 school year, observed and found a healthy learning environment maintained by Dr. Mort. He gave her a very favorable formal evaluation for that year.

28. Dr. Mort's replacement for the 2005-2006 school year, Mr. Hill, did receive PCM training. That means that Nease High School now has a full PCM trained team of three individuals. In the fall of the 2005-2006 school year, Mr. Hill and Ms. Zowlinski responded to yet another physical encounter between J.H. and Ms. Tolx. They had to use an aggressive two-person PCM restraint technique to subdue J.H. In order to restrain J.H., who continued flailing and scratching at them during this occurrence, Mr. Hill and Ms. Zowlinski ultimately had to sit on him for an hour and ten minutes before calling the school resource officer to help end the encounter.

Ms. Zowlinski suffered a serious back injury as a result of this incident and restraint of J.H.

29. Because of the termination action, Dr. Mort lost a substantial amount of regular salary, supplemental pay, and bonus income she would have otherwise earned. Among those lost wages and bonuses are her previously-approved summer school pay, hospital/home bound salary for services she expected to provide that summer and into the next school year, and almost \$10,000.00 payable to her because of her National Board Teacher's certification status. Additionally, she could not attend, and was not paid for an approved two-day leadership retreat to which she had been invited. She has lost both leave and retirement-related credits and benefits and had to pay COBRA insurance premiums of over \$400.00 dollars per month to secure continued medical insurance coverage since October 1, 2005.

30. In summary, the above-found facts, based upon persuasive, credible testimony and evidence show that Dr. Mort employed reasonable force in her involvement in the incident of May 17, 2005.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

32. The Petitioner has the burden of proving by a preponderant evidence that it has just cause to terminate the Respondent's employment as a tenured classroom teacher. In order to do so it must show that Respondent, Dr. Mort, engaged in misconduct in office and engaged in acts of misconducts so serious as to impair her effectiveness as an employee of the School District.

33. In accordance with the provisions of Section 1003.32(1), Florida Statutes (2005), a Florida teacher has authority to use reasonable force to protect herself or others from injury, according to standards adopted by the State Board of Education. In accordance with Article VII B of the collective bargaining agreement, in evidence, of which the St. Johns County School District is a signatory, teachers employed by that School District have authority to use such legal force as is necessary to protect themselves from attack and to prevent bodily injury to themselves or others.

34. In consideration of the facts determined in this case and the application of the reasonable force guidelines of the Department of Education, State Board of Education, the physical contact with J.H. engaged in by Dr. Mort in the May 17, 2005, incident constitutes the employment of reasonable force. Thus, the Petitioner has not proven that Dr. Mort engaged in any actual misconduct. Therefore, it did not prove impairment of

her effectiveness as a District employee. In fact, and at law, the conduct engaged in by Dr. Mort did not constitute an impairment of her effectiveness as a District employee.

35. The Petitioner has accused the Respondent of misconduct in office because she allegedly struck J.H. Misconduct in office is defined at Florida Administrative Code Rule 6B-4.009(3) as constituting:

[A] violation of the Code of Ethics of the Education profession as adopted in Rule 6B-1.001, Florida Administrative Code, 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.

36. This definition of misconduct has been generally held to require proof of not only serious misconduct, but also of resulting, meaningful, impairment in the individual's level of classroom effectiveness. See e.g., McKinney v. Castor, 667 So. 2d 387, 389-390 (Fla. 1st DCA 1995); Tenbroeck v. Castor, 640 So. 2d 164, 168 (Fla. 1st DCA 1994); MacMillan v. Nassau County School Board, 629 So. 2d 226, 230 (Fla. 1st DCA 1993); Braddock v. School Board of Nassau County, 455 so. 2d 394, 396 (Fla. 1st DCA 1984).

I. Misconduct in Office

A. Whether the Striking of J.H. Constituted Lawful Reasonable Force

37. Section 1003.32, Florida Statutes (2005), delineates the authority and responsibilities of classroom teachers in creating and maintaining control and discipline in their classroom. Section 1003.32(1)(j), Florida Statutes, specifically authorizes teachers and other school personnel to "[u]se reasonable force, according to the standards adopted by the State Board of Education, to protect himself or herself or others from injury."

38. Recommended Reasonable Force Guidelines were approved by the State Board of Education in 1997 as a result of the work and recommendation of a committee formed by the Florida Department of Education. See Joint Exhibit 3 in evidence. Those recommendations set forth the types of situations which might require a teacher to exercise reasonable force, and Item E of the recommendations specifically includes instances where force may be needed to protect school personnel from harm or injury. The guidelines set forth parameters that should be applied to known facts to determine whether or not a particular use of force constitutes reasonable use of force. The factors to be considered are:

1. Severity of offenses.
2. Size and physical condition of participants
3. Patterns of behavior
4. Potential danger, physical and other.
5. Availability of assistance.

6. Actions taken prior to use of physical force.

39. The recommendation further defines reasonable force as "appropriate professional conduct including physical force as necessary to maintain a safe and orderly learning environment." The recommendations describe a safe environment as one in which persons are protected from injury or threat of injury. Although the State Board recommendations include no mathematical formulas to help assess how the various factors must be weighed and analyzed together, all the relevant factors taken from the guidelines applied to the subject situation demonstrate that Dr. Mort used reasonable force in the course of the May 17, 2005, incident.

40. There is no question that Dr. Mort was physically harmed and caused severe pain by J.H.'s attack at the time she struck him in an effort to defend herself and stop the ongoing assault. It is also undisputed that J.H. is a large, strong student, with a history of frequent, unpredictable attacks on teachers and staff in ways that can cause physical injury considering his large size and strength when he launches a violent assault. J.H.'s attack on Dr. Mort presented much more than a minimal risk of harm to Dr. Mort, particularly when one considers that she was unable to use her left hand and arm at all to protect herself due to a previous injury caused by another student.

41. Certain of the Petitioner's witnesses attempted to draw a parallel between J.H.'s May 17, 2005, attack on Dr. Mort with other less significant attacks on staff members that were stopped without the use of force. Dr. Mort's testimony concerning the intensity, severity, and pain inflicted by J.H.'s assault on her on May 17, 2005, is, however, more persuasive and credible as to what actually occurred on that occasion. The pictures of Dr. Mort's resulting injuries, depicted in Respondent's Exhibit Five in evidence, support her testimonial account of the intense, physically harmful, and painful attack. These pictures show that, at a minimum, J.H. had exceeded his typical practice of scratching the lower arms of those he attacked to far more damaging attempts to gouge at Dr. Mort's upper arms and to severely bite her breast and nipple. The testimony of J.H.'s mother concerning the unpredictability of the level of violence associated with her son's seizure-induced attacks further confirms that J.H. is easily capable of inflicting the type of severe injuries Dr. Mort described. Thus, factors two and three of the State Board Guidelines concerning reasonable force, as well as factor four justify a finding of reasonable force.

42. The Petitioner's position at hearing, beyond the rather curious contention that all physical force is inappropriate and unlawful, despite the existence of the State

Board's guidelines, quoted above (and indeed the above-cited statute), essentially involved raising the issue of what assistance might have been available to Dr. Mort and whether Dr. Mort took adequate and reasonable steps to obtain it to end the attack prior to striking J.H. Concerning this issue the avoidance methods described by the Petitioner's witnesses were all previously shown to be those which Dr. Mort had no opportunity or time to employ, (under the harried circumstances of the attack) nor the training or resources to have employed, under the set of circumstances that existed in the classroom at the time. Several witnesses testified concerning the use of walkie-talkies to obtain assistance from other parts of the campus, including that of the school resource officer. The record shows, however, that Dr. Mort had no walkie-talkie in her classroom. She had requested one but had not been issued one. This apparently was because she requested a different model from the standard walkie-talkie, such as that used in the adjoining classroom, and which non-standard type was apparently not on the school's "purchase list." Be that as it may, when Ms. Lucas finally and belatedly attempted to use the walkie-talkie in the neighboring classroom to summon help, no one responded. It is also true that Dr. Mort repeatedly asked Ms. Lucas to push the emergency button to summon help from the administration or the

School Resource Officer, but that Ms. Lucas was slow to respond. When she did press the emergency button no one responded.

43. The Petitioner also offered testimony concerning the availability of medication for J.H. which might have been effective in calming him. Both Dr. Mort and J.H.'s mother testified, however, that their plan throughout that year was to use that medication very sparingly, only when absolutely necessary. This is because it caused J.H. to go to sleep and effectively cancelled out any productive time in the classroom for the rest of the day when he took the medication. Moreover, J.H. often refused to take oral medications at a time when he was agitated. It is generally impossible to distinguish between J.H.'s permanent or temporary periods of calm. Therefore, before J.H. became violent on May 17, 2005, Dr. Mort reasonably believed that his periods of calm or resting indicated that the situation could be controlled that day without the use of the Ativan medication. Once the physical assault got under way, Dr. Mort had no opportunity to get to the medication which was kept in the office between the two classrooms, and certainly no hope of getting him to comply with taking the oral medication under his agitated, violent, seizure-dominated state.

44. Two special education officials, Ms. Chancey and Ms. Resnick, testified concerning the virtues of the recently adopted crisis management technique known as PCM, in controlling

situations such as J.H.'s attack. Dr. Mort did not use PCM methods to control J.H. or to help avert the need to strike him. However, to the extent these witnesses might imply that Dr. Mort was remiss in this regard, the evidence is undisputed in that Dr. Mort was never provided such training, even though she requested it, and that an untrained individual has no authority to use PCM techniques. Neither of Dr. Mort's aides had PCM training and a PCM team was not in place at the school in that school year. The restraint mat for PCM techniques did not arrive at Nease High School until the following school year.

45. In any event, no amount of training or resources would have helped Dr. Mort stop J.H.'s attacks by herself with the use of only one hand and it is undisputed (and deplorable) that Ms. Lucas offered no physical assistance. It is unrealistic to assume that Dr. Mort alone would have been able to prevent the incident with J.H. had she used the preliminary series of PCM de-escalation techniques, which she had not been trained to use. Such an assumption would be wholly inconsistent with the facts established by preponderant evidence concerning the unpredictable nature and severity of J.H.'s intermittent attacks on staff members. In fact, in the following school year, during one of the attacks, two PCM trained, able-bodied employees took more than an hour to restrain and control an attack by J.H.

46. A few of the Petitioner's witnesses testified that J.H. calms down at the mere mention of the name of the school resource officer. The record reveals, however, that it often takes the actual arrival of the school resource officer to calm J.H. down. At times that does not even prove effective. The preponderant evidence, however, establishes that verbal references to calling the school resource officer were made during the May 17, 2005, incident, which had no calming effect on J.H. In fact, Dr. Mort did all she could to seek paraprofessional and school administrator assistance and repeatedly tried to verbally de-escalate the situation during the short time she had to do so. Thus Factors 5 and 6 of the State Board guidelines, applied to these facts, support a finding of reasonable force by Dr. Mort.

47. Factor 1 of the State Board guidelines refers to the "severity of offenses." This factor refers to the extent of physical contact engaged in by the teacher. There is a factual dispute in the testimony as to whether Dr. Mort slapped J.H. in the face with her open hand or hit him with a cupped hand in the upper shoulder area to get him to focus on what he was doing and stop the attack. Either action in these painful, injurious, factual circumstances constitutes reasonable force. Indeed, additional force would have been reasonable under these circumstances.

48. There is no dispute that J.H. was not hurt and that the physical contact by Dr. Mort brought the incident to a swift conclusion. Dr. Mort also engaged in no contact with J.H. after he stopped his attack upon her. Regardless of the exact amount of the cupping of the hand that Dr. Mort used and the precise location of the strike, the preponderant, credible evidence leads to a conclusion that her purpose in striking him was only to do so in such a manner as to bring him out of his trance-like state and end his attack with the least amount of harm to her or to him. The preponderant credible evidence presented favors the Respondent as to each of the six reasonable force factors of the State Board of Education guidelines. It is thus concluded that Dr. Mort used reasonable force under these circumstances and thus did not engage in an act of misconduct in office. c.f. Packer v. Orange County School Board, 881 So. 2d 1204, (Fla. 5th DCA 2004).

B. Effectiveness as a Teacher

49. The Petitioner presented several witnesses who gave conclusory and somewhat self-serving testimony regarding their opinion that Dr. Mort had lost the ability to be an effective teacher because of fears and loss of trust that her conduct toward J.H. might have created among students, parents, and her colleagues. This testimony, however, is accorded little weight when contrasted with direct classroom observation-derived

testimonial and documentary evidence showing long-standing and ongoing effectiveness in her field. Moreover, if Dr. Mort engaged in no misconduct, as has been concluded and found above, then the issue of continued effectiveness is moot in any event.

50. Dr. Mort possesses impressive academic credentials and job experience in all matters related to special education curriculum, methodology, and instruction. She was evaluated near the end of her first year of Nease High School and found by Mr. Fred Cole who evaluated her, to have done a "great job" and to have demonstrated excellent educational leadership. Mr. Cole consistently observed a good learning environment in Dr. Mort's classroom during that school year. That was the same school year when the incident with J.H. occurred. The evaluation was dated April 13, 2005, approximately one month before the incident with J.H. There is no reason to conclude that Dr. Mort's single physical response in self-defense against a violent, injurious attack involving gouging, biting of her breast and nipple, etc. by a large Special Education student, with a history of attacking school staff, can be such serious conduct as to render Dr. Mort ineffective when she has been an otherwise outstanding teacher her entire career.

51. Any conclusion of serious misconduct or loss of effectiveness is rendered incredible in view of the clearly demonstrated fact that the single blow struck by Dr. Mort

(whether cupped hand or open hand; to the shoulder or to the face) ended the attack by J.H. without causing any harm to him.

52. Parents of three of Dr. Mort's eight full-time students in that 2004-2005 school year testified on behalf of the Respondent. Each of those parents was happy with the work Dr. Mort had done with their children, said positive things about Dr. Mort's job knowledge and performance and manner of interacting with students. They each specifically would welcome another opportunity to have Dr. Mort teach their child.

53. The most significant parental testimony came from Jane H. Jane H. testified extensively about the quality of Dr. Mort's instruction, the depth Dr. Mort's knowledge of her son's needs, and the level of Dr. Mort's commitment to J.H.'s progress inside and outside the classroom. Jane H. knows more about the nature of her son's developmental problems and history of violent behavior than anyone else. With full knowledge of the striking incident, she understands the necessity of Dr. Mort's conduct in that situation and has been in similar situations with her son. She respects Dr. Mort to this day, as does J.H. himself. In fact, and significantly, Jane H. testified that Dr. Mort was the first person to inform her of the May 17, 2005, encounter, later that same day. These parents who know their children's challenges best, and have had to deal with special education programs and teachers for many years, all

want Dr. Mort to continue teaching. Such testimony is considerably more credible, persuasive and probative of Dr. Mort's actual teaching effectiveness than is the non-observational, conclusory testimony adduced by the Petitioner.

54. The Petitioner simply failed to prove by preponderant persuasive evidence that the May 17, 2005, incident between Dr. Mort and J.H. could possibly justify a finding of misconduct nor that it was so serious as to impair her effectiveness as an employee of the District. Therefore, the burden to sustain a just cause reason for her termination has not been met.

C. Witness Credibility

55. Dr. Mort's testimony and that of Ms. Zwolinski is deemed more credible and persuasive than that of witnesses Ms. Lucas and Ms. Tolx. There is no question that J.H. physically attacked Dr. Mort, who subsequently struck J.H. in an effort to defend herself and stop the attack. There is a dispute beyond that concerning the severity of the attack, the sufficiency of attempts made by Dr. Mort to calm J.H. before striking him, the degree of assistance offered by Ms. Lucas, and the precise details of how Dr. Mort struck J.H. The Respondent maintains that Dr. Mort, as the closest observer of the events and the person who felt the pain of the attack and feared for her safety, provided the most competent, credible testimony about those disputed matters. The Respondent also presented

testimony from which it is reasonable to infer that both Ms. Lucas and Ms. Tolx harbored animosity towards Dr. Mort and ample evidence to support findings that Ms. Lucas did not see the events clearly and that Ms. Tolx was not present at all to observe the material events surrounding the attack itself.

56. Ms. Lucas claims she clearly saw Dr. Mort slap J.H. with an open hand, but later admitted that it was hard to see much in the dimly lit room and that she subsequently was distracted from the struggle between Dr. Mort and J.H. by her efforts to find the walkie-talkie in the adjoining room and contact the SRO. She also testified that Dr. Mort never asked for help, which is directly contrary to the testimony of Ms. Zwolinski and Dr. Mort, as well as the common sense inference one may draw that a teacher being gouged and bitten on the breast and nipple by a violent student would seek assistance from any other adult in the classroom.

57. Another negative impingement on the credibility of Ms. Lucas' testimony concerns her testimony that she was "very upset" when this incident occurred because she was so close to J.H. That testimony is directly contradicted by Jane H., J.H.'s mother. Further Ms. H.'s assessment of that relationship is consistent with Dr. Mort's testimony to the effect that Ms. Lucas did not like dealing with J.H. closely because she feared his history of attacking her and others. Whether a

function of confusion, bad memory or an attempt to distort the facts, Ms. Lucas is the only person who testified that these May 17th events took place around 2:00 p.m. All other witnesses place the events as occurring near the end of the lunch period from approximately 12:00 p.m. to 12:15 p.m.

58. In addition to these inconsistencies and errors is the fact that Ms. Lucas had had a significant argument with Dr. Mort only a week or two previously and apparently believed that Dr. Mort was intent upon getting her fired from her job. Ms. Lucas is simply not a credible witness and her testimony is not credited to the extent it is contrary to that of Dr. Mort and other witnesses.

59. Ms. Tolx's testimony is also discredited because the preponderant persuasive evidence shows that she was not in Dr. Mort's classroom during the attack or when Dr. Mort struck J.H. All other testimony places her in the cafeteria and even her own testimony shows that she was going back and forth from the cafeteria to the classroom and seeing only a small portion of the struggle between J.H. and Dr. Mort. Although Ms. Tolx claims to have walked back into the room just as Dr. Mort slapped J.H., the remainder of her testimony indicates she was in the room only briefly at the precise time, earlier, that Ms. Lucas was trying to push the emergency button. By every other account, including Ms. Zwolinski's, Ms. Lucas's, and

Dr. Mort's, that period of time actually occurred shortly after J.H. threw the books on the floor, and well before any physical contact between J.H. and Dr. Mort occurred.

60. Ms. Zwolinski had no reason to lie about Ms. Tolx, Ms. Lucas, or anyone else involved in the matter. She credibly testified that she did not see Ms. Tolx in the vicinity of the hallway entrance between the two classrooms at that time. Ms. Zwolinski also testified that she never heard Ms. Tolx ask Dr. Mort if she needed help, as Ms. Tolx claims to have done. She never saw Ms. Tolx walking through Ms. Binns classroom to get to Dr. Mort's classroom either.

61. Ms. Tolx might have a motive for being less than fully accurate in what she claims she saw occur in Dr. Mort's classroom because she had a major dispute with Dr. Mort several months earlier during that school year, described in the above findings of fact.

62. Ms. Tolx demonstrates a somewhat less than close acquaintanceship with truth and accuracy with regard to her testimony in other ways. For instance, she denied that J.H. had ever attacked her during the fall of 2005-2006, thereby causing Ms. Zwolinski and Mr. Hill to use PCM techniques to try to get J.H. under control. Ms. Zwolinski however, specifically described this incident and testified that she and Mr. Hill intervened because J.H. was attacking Ms. Tolx. Ms. Zwolinski

has good reason to recall that incident since she sustained a substantial back injury in the process. She and Mr. Hill apparently had to sit on J.H. for over an hour until they obtained other assistance in controlling J.H. Ms. Tolx also claimed to have 36-years experience with emotionally handicapped students and then had to admit, during voir dire, that she was not referring to her employment experience but simply to her dealings with her 36-year old handicapped son over such a period of time. She similarly attempted to enhance the basis for her knowledge of J.H.'s needs, condition, and idiosyncrasies by highlighting what was really a very limited several years experience with him while she was a "bus aide" from 2001-2004.

63. In view of these and other credibility deficits arising from the testimony from Ms. Lucas and Ms. Tolx, their testimony, to the extent it contradicts or is inconsistent with that of Ms. Zwolinski, Dr. Mort, and other witnesses, is not credited.

II. Remedy

64. Inasmuch as it has been determined that the Petitioner did not have just cause for the termination of Dr. Mort, Dr. Mort therefore should be reinstated in her position and should be made whole through the payment of all wages and benefits she would have received had she not been wrongfully

terminated. In Dr. Mort's case there are a number of items of lost pay and benefits which should be part of the remedy.

65. In addition to her right to recoup the regular wages she would have earned in the 2005-2006 school year had she not been terminated (including any pay increases she would have received this school year), Dr. Mort should be paid for the National Board Certification bonuses she would have received had she remained employed as a teacher in 2005-2006 and for the hospital/homebound services she was slated to provide in the summer of 2005 and into the 2005-2006 school year. She should also be paid for the hospital/homebound services for which she was not paid, but which services she provided during the 2004-2005 school year. She should also be paid for the summer school duties she had been approved to provide prior to the termination action, and for the May 2005 Learning Leadership Retreat she had been asked to attend and had planned to attend.

66. She has paid COBRA health insurance premiums of some \$422.00 per month since October 2005 to continue her medical care coverage, and all such COBRA payments should be reimbursed. Dr. Mort also would have accrued or had the opportunity to use additional leave during the 2005-2006 school year, and would have received uninterrupted Florida Retirement System service credit had she remained employed. As part of the remedy in this case, the District should take all steps necessary to restore

the leave and retirement credit Dr. Mort would have accrued but for this termination.

67. The Petitioner raised issues during the hearing regarding Dr. Mort's current workers' compensation status and employment limitations placed upon her by workers' compensation physicians since mid-September 2005. Dr. Mort testified that she has been receiving partial pay from the workers' compensation program since sometime in mid to late September 2005, when those physicians determined she could not return to her old job until her therapy was concluded and/or her work situation changed.

68. Upon reinstatement, Dr. Mort should receive full pay until a date her workers' compensation partial payments began. She should receive the difference between that partial pay and what her full pay would have been had she not been terminated, at least until such time as she finishes her physical therapy and knows definitely what teaching-related limitations, if any, remain. Since the hearing Dr. Mort has undergone physical therapy and more remains to be provided in an effort to increase her left arm function. Adopting such an approach to the issue of Dr. Mort's appropriate back pay would have the effect of truly making her whole, while also recognizing the impact of her workers' compensation situation on the employer's attempt to provide make-whole relief.

69. In summary, for the reasons found and concluded herein, the Petitioner has failed to meet its burden to prove by preponderant evidence that Dr. Mort engaged in any act of misconduct in office. Consequently, all charges should be dismissed and a final order be entered reinstating Dr. Mort to her employment position,

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the School Board of St. Johns County dismissing all charges and reinstating Dr. Mort to her employment position with the full range of regular and supplemental back-pay and reimbursement of all categories of lost benefits, as delineated above, as a "make-whole" remedy.

DONE AND ENTERED this 18th day of May, 2006, in
Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
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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.