STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-2943
	)	
THOMAS PAYNE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On May 21, 2009, a duly-noticed hearing was held by means of video teleconferencing with sites in Tallahassee and Jacksonville, Florida, before Lisa Shearer Nelson, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ernst Mueller, Esquire
Senior Deputy General Counsel
Office of General Counsel
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Jacksonville, Florida 32202

For Respondent: David A. Hertz, Esquire
General Counsel
Duval Teachers United
1601 Atlantic Boulevard
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STATEMENT OF THE ISSUES

The issues to be decided are whether Respondent committed the acts alleged in the Administrative Complaint; and whether those acts provide just cause for termination of his teaching contract?

PRELIMINARY STATEMENT

On June 11, 2007, the Duval County School Board (School Board) notified Respondent, Thomas Payne, that he was suspended immediately without pay and that his employment contract would be terminated. The School Board's actions were based on the allegation that Mr. Payne had been arrested for threatening to kill a School Board employee, thereby providing cause for termination. The Notice of Termination of Employment Contract and Immediate Suspension Without Pay (Notice of Termination) asserts that Mr. Payne's conduct violates Section 1012.795(1)(b),(f) and (i), Florida Statutes (2006), and Florida Administrative Code Rules 6B-1.001(3) and 6B-1.006(5)(d). Respondent disputed the allegations in the June 11, 2007, letter and requested an administrative hearing. On July 2, 2007, the case was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

The final hearing was originally scheduled for October 24-25, 2007. However, because of related criminal proceedings, the parties requested that the formal hearing be delayed until the criminal proceedings could be resolved. At a result, the matter was rescheduled a number of times and placed in abeyance until resolution of the criminal proceedings was accomplished. Ultimately, the matter was rescheduled for May 21, 2009, and proceeded as scheduled.

At hearing, the School Board presented the testimony of John Williams, Kelly Coker-Daniel, and Vicki Reynolds. The School Board also proffered the testimony of Beth Ann Wombaugh, subject to argument in the parties' proposed recommended orders as to whether Ms. Wombaugh's testimony was barred by the psycho-therapist privilege in Section 90.503, Florida Statutes (2008). After consideration of the issue, which will be discussed in the Conclusions of Law below, Ms. Wombaugh's testimony is admissible and has been considered in this proceeding. Respondent testified on his own behalf and presented the testimony of Dale Howard and Dr. Michael Zalewa. Joint Exhibits 1, 2(a), 2(b), 3, 4, 4(a), and 5-14 were admitted.

The proceedings were recorded and a Transcript was filed with the Division June 5, 2009. By agreement of the parties, the deadline for submitting proposed recommended orders was extended to June 22, 2009. Respondent filed his Proposed Recommended Order on June 22, 2009. Petitioner requested an additional day for filing its proposed order, which Respondent did not oppose. Petitioner's Proposed Recommended Order was filed June 23, 2009, and a Corrected Proposed Recommended Order filed June 24, 2009. Both parties' submissions have been carefully considered in the preparation of this Recommended Order.

Unless otherwise indicated, all references to Florida Statutes are to the 2006 codification.

FINDINGS OF FACT

1. From July 1, 2000, to the present, Respondent has held Florida Teachers Certificate number 83970. From 2000-2004, he taught at Highlands Middle School, and from 2004 until May 2007, he taught at Darnell Cookman Middle School. Because of the allegations giving rise to these proceedings, Respondent is not teaching in the Duval County School System at this time.

2. John Williams is the Director of Professional Standards for the District and has held that position since 2002. In that capacity, he coordinates the handling of disciplinary investigations and actions relating to professional staff for the Duval County School District.

3. In January 2004, Respondent was teaching at Highlands Middle School. While assigned to that location, a female student accused him of inappropriate sexual contact on two different occasions. Upon receipt of the complaint, and consistent with District policy, Respondent was removed from the classroom and assigned to Bull's Bay, the District's Consolidated Services Center, from February 17, 2004, to April 30, 2004. However, he elected to use vacation time for part of this period, and worked at the facility for the other part.

4. At the end of the investigation, it was determined that there was insufficient evidence to prove or disprove the allegations, and Respondent was so notified on April 6, 2004. Although not immediately returned to the classroom, at the

principal's request, Respondent returned to teach at Highlands Middle School before being transferred to Darnell Cookman.

5. John Williams had little to do with the investigation of Respondent. He met with him, either in person or telephonically, to discuss the assignment to Bull's Bay. He also notified Respondent of the results of the investigation and, at the request of the School Board, arranged for an Independent Psychiatric Evaluation to be performed in April 2004 in order to determine fitness for duty before Respondent returned to the classroom.[1/] Mr. Williams had little or no other contact with Respondent. However, to Respondent, apparently Mr. Williams represented the School District's actions against him.

6. After Respondent was transferred to Darnell Cookman Middle School, he developed an attendance problem. On February 20, 2007, Kelly Coker-Daniel, the principal at Darnell Cookman, sent Respondent a memorandum that included the following:

> Please be advised by way of this correspondence that your attendance is at a less than satisfactory level. Your continued rate of absences is having a deleterious impact on the quality and continuity of the education program you are to provide.
>
> Since 11/3/2006, you have been absent 20 days on Leave With Out Pay. 6 of these absences have occurred on either a Monday or a Friday. At this time I am advising you that your continued absenteeism will result in a recommendation for disciplinary action.
>
> F.S. 1012.61, Sick Leave, provides for the requiring of a certificate of illness from a

> licensed physician or from the county health officer. Be advised that from this point forward, for all future absences, you are directed to bring a statement from your attending physician identifying the date of treatment, the nature of your illness and the prognosis for future problems as it would impact your attendance.
>
> Additionally, as of 11/3/06, you have exhausted your available balance of sick leave. F.S. 1012.67, Absence without leave, states, "Any district Board employee who is willfully absent from duty without leave shall forfeit compensation for the time of such absence, and his employment shall be subject to termination by the School Board.
>
> Your failure or refusal to follow the procedures identified above will result in a recommendation for disciplinary action up to and including termination of your teaching contract.

7. According to Ms. Coker-Daniel, no further warning was warranted and no request for disciplinary action was ever made. John Williams had no knowledge of or involvement in Respondent's attendance issues.

8. Beginning in August 2006 and until May 1, 2007, Respondent was a patient of Beth Wombaugh, a mental health counselor licensed pursuant to Chapter 491, Florida Statutes. He consulted with Ms. Wombaugh to deal with a variety of issues, including post-traumatic stress disorder, stemming in part from the trauma of the accusation in 2004. Respondent was referred to Ms. Wombaugh by Dr. Raul Soto Acosta.

9. When he began his patient relationship with Ms. Wombaugh on August 2, 2006, Respondent was asked to sign an information

form entitled "Privacy of Information Policies" that described those circumstances under which patient information could be disclosed. The form included the following information:

> It is my policy not to release any information about a client without a signed release of information except in certain emergency situations or exceptions in which the client information can be disclosed to others without written consent. Some of these situations are noted below, and there may be other provisions provided by legal requirements.
>
> Duty to Warn and Protect
>
> When a client discloses intentions or a plan to harm another person or persons, the health care professional is required to warn the intended victim and report this information to legal authorities. In cases in which the client discloses or implies a plan for suicide, the health care professional is required to notify legal authorities and make reasonable attempts to notify the family of the client. I must and will abide by this requirement.
>
> Public Safety
>
> Health records may be released for the public interest and safety for public health activities, judicial and administrative hearings, law enforcement purposes, serious threats to public safety, essential government functions, military, and when complying with worker's compensation laws.

10. Respondent signed the form below the statement, "I understand the limits of confidentiality, privacy policies, my rights, and their meanings and ramifications." He also signed a Release of Information Form on November 19, 2007, indicating that

his entire record, except progress notes, could be used for "Other," for which it was specified "court evidence purposes."

11. Sometime in November 2006, Respondent called Mr. Wombaugh and expressed anger related to John Williams. At that time, Ms. Wombaugh encouraged him to contract with her for safety. In other words, she encouraged him to agree not to do anything to harm Mr. Williams, and if he had any further thoughts of harming Mr. Williams, he was to call her. If he could not get in touch with her, he was to call 9-1-1 and seek help. Respondent agreed to do so and came to see Ms. Wombaugh, at which time he was able to calm down and look at things differently. He again contracted for safety and the issue of anger against Mr. Williams seemed to be resolved.

12. Sometime in April 2007, however, Respondent was injured in a car accident. As a result, he was experiencing significant discomfort. On May 1, 2007, he attended a session with Ms. Wombaugh and appeared to be in pain, to the extent that he was required to lay down on her couch during his counseling session. Ms. Wombaugh encouraged him to take some time off and deal with his injuries.

13. Respondent explained that he could not take any additional leave, because he had already taken more than his employment contract allowed. Ms. Wombaugh suggested he speak to the principal about the issue, given his level of pain. She testified that Respondent told her that because he was in

violation of his contract, they could fire him, and if he got fired, he was going to kill Mr. Williams. Ms. Wombaugh tried to discuss the consequences of doing so, and asked him to commit to not harming Mr. Williams several times during the session, but he refused. According to Ms. Wombaugh, his response was, "Contract with you not to -- not to harm the guy who messed up my life? No." Ms. Wombaugh also advised him that she would have to report this threat, which would most likely result in his losing his job, and he stated, "You got to do what you got to do."

14. With respect to the consequences of making a threat to Mr. Williams, Ms. Wombaugh also testified as follows:

> Q. Well would you just address that aspect of it for me as -- just tell us once more what you told him was going to happen --
>
> A. Uh-huh.
>
> Q. --if he did not go ahead and agree to contract with you or agree with you?
>
> A. I told him that I would have to call the police. I told him that -- you know, that even if Mr. Williams down the line is murdered, that they'll always suspect him because that'll be on file and that he would most certainly lose his job; because I couldn't imagine that the school board would continue to allow him to teach at that school, having made the threat.
>
> Q. And at least up to that point, nobody had heard about the threat, to your knowledge, except you; right?
>
> A. Correct.
>
> Q. I asked him again, you know, "There's no way that I can get you to commit?"

> And he said, "No. And I -- and he said, "Well, its in your hands."
> And I said, "You know, Tom, it's really not in my hands; it's in your hands, if you would just, you know, just commit to safety."
> And he refused. And I asked him to take care of himself and he left our session.

(Transcript at 73-74).

15. Respondent's appointment with Ms. Wombaugh began at 4:00 p.m., and lasted a little over an hour. She had another appointment immediately after Respondent's. After the conclusion of her appointments for the day, at approximately 7:45 p.m., she finished her notes from the sessions, and then received a call from Respondent because he had forgotten to pay for his counseling session. She told him he could pay the next time. She did not broach the subject of contracting for safety during the phone call because he had stated several times already that he would not do so.

16. After speaking with Respondent, Ms. Wombaugh attempted to contact John Williams at the Duval County School District, but given the time of day, the offices were closed. She considered the threat against Mr. Williams to be a conditional threat, i.e., a threat of action that would occur only if Respondent was fired. Because it was after school hours and he could not be fired that day, she did not consider it to be an "imminent" threat or the basis for Baker Act proceedings. However, she considered the threat to be serious and testified that Respondent indicated he had the means to carry out the threat.

17. When she could not reach Mr. Williams by telephone, Ms. Wombaugh called the Jacksonville Sheriff's Office, who referred her to the School District Police. She spoke with Lieutenant Burton later that evening and to a member of the Jacksonville Sheriff's Office the next day.

18. Mr. Williams was notified of the threat at about one o'clock in the morning and advised not to go to work the next day. Mr. Williams ultimately elected to attend work, and was provided an armed escort. The School District has taken measures to insure that access to Mr. Williams' office area is restricted.

19. Respondent was arrested on May 2, 2007, in connection with the threat against Mr. Williams, and charged with corruption by threat of a public servant, in violation of Section 838.021(1)(a), Florida Statutes, a felony. Information regarding the threat and the arrest was carried on the local news and the local newspaper. The School District's Office of Human Resources received a number of phone calls and e-mails regarding the matter, which was widely discussed. Ultimately, on December 23, 2008, the charge against Respondent was reduced to a charge of threatening physical harm to the person or property of another, in violation of Section 614.120, Jacksonville Municipal Code. On February 11, 2009, Respondent entered a Deferred Prosecution Agreement wherein prosecution was deferred for a period of twelve months conditioned on Respondent's refraining from violating any criminal law; notifying the State Attorney's office of any change

of address; and Respondent's agreement not to have any direct or indirect contact with John Williams, with the exception of work or employment related contact. Contrary to Respondent's assertions, the Deferred Prosecution Agreement did not dismiss the charges against him upon its execution.

20. Respondent categorically denies ever threatening John Williams. He claims that he was unhappy with Ms. Wombaugh's counseling and was upset with her because he felt he knew more about post-traumatic stress disorder than she did, and felt he was making no progress. Respondent claims that during the counseling session on May 1, Ms. Wombaugh made a comment to the effect that he needed to learn to get past the events that occurred in 2004, and that he told her how frustrated he was. He thought he hurt her feelings, but said that there were no raised voices, and he could not think of any real motive for her to claim he threatened Mr. Williams. His testimony at trial, which is not credited, differs from his reported response at the time he was arrested, when he said that he lost his temper during the session but did not remember making a threat to kill Mr. Williams.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569, 120.57(1), and 1012.33(6)(a)2., Florida Statutes (2008).

22. Section 1012.33, Florida Statutes, provides the authority for the School District to suspend or terminate Respondent's contract, and states in pertinent part:

> (1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.
>
> * * *
>
> (6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. If the employee wishes to contest the charges, the employee must, within 15 days after receipt of the written notice, submit a written request for a hearing. Such hearing shall be conducted at the district school board's election in accordance with one of the following procedures:
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> * * *
>
> 2. A hearing conducted by an administrative law judge assigned by the Division of

> Administrative Hearings of the Department of Management Services. . . . The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

See also § 1012.22(1)(f), Fla. Stat.

23. The School District is required to prove the allegations against Respondent by a preponderance of the evidence. Cropsey v. School Board of Manatee County, 2009 Fla. App. LEXIS 3957, *9, 34 Fla. L. Weekly D879 (Fla. 2d DCA May 1, 2009); Dileo v. School Board of Dade County, 569 So. 883, 884 (Fla. 3d DCA 1990).

24. Florida Administrative Code Rule 6B-4.009 defines by rule, as required by Section 1012.33(1), those terms that trigger the School District's authority to suspend or terminate a teacher's contract, including the following:

> (1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:
> (a) Inefficiency: (1) repeated failure to perform duties prescribed by law (2) repeated failure on the part of a teacher to

> communicate with and related to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and related to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.
>
> * * *
>
> (2) 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.
>
> (3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

25. The Notice of Termination provided to Respondent, alleges violations of Section 1012.795, Florida Statutes, and provisions of the Florida Administrative Code which Petitioner alleges amount to cause for termination. Specifically, the Notice of Termination alleges violations of Section 1012.795(1)(b)(incompetence to teach or to perform duties as an employee of the public school system); Section 1012.795(1)(f)(having been found guilty of personal conduct which seriously reduces the person's effectiveness as an employee of

the school district); Section 1012.(1)(i)(violating the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education Rules); and violations of Florida Administrative Code Rules 6B-1.001(3) and 6B-1.006(5)(d). These two rules provide as follows:

> 6B1.001 Code of Ethics of the Education Profession in Florida.
>
> * * *
>
> (3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.
>
> 6B-1.006 Principles of Professional Conduct for the Education Profession in Florida.
>
> * * *
>
> (5) Obligation to the profession of education requires that the individual:
>
> * * *
>
> (d) Shall 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.

26. As a threshold matter, pivotal to the findings of fact made in this Recommended Order is the determination that Ms. Wombaugh's testimony regarding Respondent's statements to her

in a counseling session are admissible as an exception to the psychotherapist privilege provided in Section 90.503, Florida Statutes (2008). This decision requires an examination of not only the evidentiary privilege contained in Chapter 90, Florida Statutes, but the exceptions to the privilege contained elsewhere in the law.

27. Section 90.503 provides in pertinent part:

> (2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.
>
> (3) The privilege may be claimed by:
>
> (a) The patient or the patient's attorney on the patient's behalf.
>
> (b) A guardian or conservator of the patient.
>
> (c) The personal representative of a deceased patient.
>
> (d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.
>
> (4) There is no privilege under this section:
>
> (a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the

> psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
>
> (b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.
>
> (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

28. The confidentiality of communications to psychotherapists is also addressed in Sections 456.059 and 491.0147, Florida Statutes (2008). Section 456.059, which by its terms relates to psychiatrists as opposed to professionals licensed pursuant to Chapters 490 or 491, provides as follows:

> Communications confidential; exceptions.-- Communications between a patient and a psychiatrist, as defined in 394.455, shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s.456.057. Notwithstanding any other provision of this section or s.90.503, where:
>
> (1) A patient is engaged in a treatment relationship with a psychiatrist;
> (2) Such patient has made an actual threat to physically harm an identifiable victim or victims; and
> (3) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not in the near future the patient will carry out that threat, the psychiatrist may disclose patient communications to the extent necessary to

> warn any potential victim or to communicate the threat to a law enforcement agency. No civil or criminal action shall be instituted, and there shall be no liability on account of disclosure of otherwise confidential communications by a psychiatrist in disclosing a threat pursuant to this section.

29. Similarly, Section 491.0147, Florida Statutes, which applies to licensed mental health counselors, provides:

> Confidentiality and privileged communications.-- Any communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential. This secrecy may be waived under the following conditions:
>
> (1) When the person licensed or certified under this chapter is a party defendant to a civil, criminal or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.
>
> (2) When the patient or client agrees to the waiver, in writing, or, when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.
>
> (3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed or certified under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

30. Section 456.059, Florida Statutes, was analyzed by the Fifth District Court of Appeal in Guerrier v. State of Florida, 811 So. 2d 852 (Fla. 5th DCA 2002). In Guerrier, the defendant was arrested for aggravated stalking in connection with his continued and persistent pursuit of a former girlfriend. While

in jail, he obtained counseling from a jail psychiatrist and during his counseling sessions, made threats to kill the girlfriend and himself. The psychiatrist determined that Guerrier had the ability to carry out his threats and had his nurse call the former girlfriend to warn her about the threat. He was also allowed to testify in the criminal proceedings against Guerrier about the threats.

31. The Fifth District determined that it was permissible to allow the psychiatrist, the nurse and the victim to testify about the threat and the warning. In doing so, the court discussed at length the scope of evidentiary privileges, noting "the precept that privileged communications are an exception to the rule that all relevant evidence is admissible." 811 So. 2d at 854. The court reasoned that the reason for the common law rule of disclosure is no less significant when the Legislature considers adoption of a privilege, and the dangerous patient exception to the privilege in Section 456.059 is not subject to the same strict statutory construction as the privilege itself.

32. The Guerrier court recognized that the language of Section 456.059 did not specifically provide that the psychiatrist may testify regarding the threat in any subsequent trial where the patient is prosecuted for crimes against the victim. The court focused on the intent behind enacting Section 456.059, i.e., the goal of providing protection to the victim. The Court stated:

> By enacting section 456.059, the Legislature has expressed its conclusion that the need for full disclosure by the patient to the psychiatrist is outweighed by the need to protect the victim from harm by a dangerous patient. The Legislature has thus returned to the common law preference for disclosure of relevant testimony to the extent necessary to fully protect the victim, which includes allowing the psychiatrist to testify in trial proceedings wherein the patient is prosecuted for the commission of a crime against the victim. Therefore, we conclude that the application of the narrow interpretation advanced by the Defendant would thwart the intent of the Legislature in enacting section 456.059. It would render an absurd result if this court were to hold that the psychiatrist, who reports pursuant to the statute, is prevented from testifying in the trial of the patient who is alleged to have committed a crime against the victim in accordance with the threat previously made. See Florida Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999).

811 So. 2d at 856.

33. The same rationale applies with respect to Section 491.0147. At least one court has recognized that the two provisions are similar in import and serve the same function. Green v. Ross, 691 So. 2d 542 (Fla. 2d DCA 1997)(comparing Section 491.0147 to Section 455.2415, which was subsequently renumbered as 456.059). The Legislature has also provided a duty-to-warn exemption from confidentiality for psychologists licensed pursuant to Chapter 490, Florida Statutes. § 490.0147, Fla. Stat. (2008). Given the Legislature's efforts to insure that confidentiality is limited for all three licensure

categories of health care professionals providing psychotherapy services, it would be an illogical result to allow the testimony of psychiatrists but not other health care professionals to whom a dangerous patient may confide.

34. Respondent argues that the Guerrier decision only allows the testimony in a criminal prosecution, as opposed to a proceeding such as this one, where the School District seeks to remove Respondent from his teaching position. However, the Court's summary of its holding requires a different conclusion:

> The balance shifts, however, when a patient communicates a threat that the treating psychiatrist perceives as likely to occur. Because such communications do not create a net benefit to the public that warrants application of the privilege, the rationale that underpins the privilege vanishes, or, at least, significantly diminishes in force. Thus, to the extent of the parameters of the dangerous patient exception, we have traveled full circle to the common law rationale that favors access to relevant and probative evidence. Thus, in turn, favors application of the dangerous patient exception to allow the psychiatrist's testimony in court proceedings when the victim of the threat has become the victim of crime. (Emphasis supplied.)

35. Here, allowing the mental health professional to testify serves a similar purpose as allowing the testimony in a criminal proceeding. The victim of the threat is a school official. The Respondent is a teacher in the same school district. The School District is seeking to take action that serves to protect not only the actual victim of the threat, but

to take preventive action for the protection of all of those the School District is mandated to serve.

36. The undersigned is also mindful of different standards governing the admissibility of evidence in administrative proceedings. As stated in Department of Business Regulation, Division of Alcoholic Beverages v. Malio's, Inc., DOAH Case No. 85-1434 (Recommended Order Oct. 24, 1985),

> Section 120.57(1) proceedings are not judicial proceedings; agencies are not courts. The strict exclusionary rules of evidence common to jury trials and courts do not apply to APA hearings. See DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957); Kasha v. Department of Legal Affairs, 375 So. 2d 43 (Fla. 3d DCA 1979); 5 C. EHRHARDT, FLORIDA EVIDENCE, Section 103.1 (1977)("the strict rules of evidence, and therefore the [Evidence] Code, are inapplicable in . . . administrative proceedings held under Chapter 120 . . . .").
>
> 21. Rather, the rules of evidence applicable to APA proceedings are codified in Section 120.58(1)(a) [now Section 120.569(2)(g)]:
>
> > Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. . .

37. Finally, it must be noted that, as noted in finding of fact numbers 9-10, Respondent was notified in advance that Ms. Wombaugh had a duty-to-warn policy she would follow, and he acknowledged in writing that he understood the policy and its

ramifications. She reiterated that warning during the session. He also signed a release form, for some reason, indicating that records could be released for court purposes. Under these circumstances the testimony of Beth Wombaugh is admissible.

38. Further, the testimony of Ms. Wombaugh is also the more credible evidence presented. Ms. Wombaugh gains nothing by her testimony. Indeed, she provided the testimony at some risk to her reputation as a counselor and, should she have abused the duty to warn, subjected herself to possible disciplinary action. Indeed, she refused to testify unless ordered to do so. Her testimony is consistent and straightforward.

39. While Respondent tried to undermine Ms. Wombaugh's credibility by pointing to the length of time between the therapy session and the first call to the police and to Mr. Williams, that time period, under the facts of this case, is reasonable. The threat, while determined to be serious, was conditional, i.e., dependent upon Respondent losing his job. Similarly, the defendant in Guerrier was actually in jail at the time of the threat. Given that the School District offices were closed by the time Respondent left Ms. Wombaugh's office, there was no realistic threat of his losing his job that same day. She acted promptly upon finishing her patient load for the day and finishing her session notes. Her actions served to alert the appropriate authorities before it was possible for the condition upon which the threat was based to be carried out. That there

was a three-hour delay between the session and the phone call was not significant under the unique facts of this case.

40. Likewise, the fact that she did not reintroduce the subject of the threat when Respondent called to ask about payment did not diminish the credibility of her testimony. It appeared, taking into account the testimony of both individuals, that the phone call was short. As she stated, Respondent was adamant in his position during the session. Raising the subject again would have served little purpose, and may have even heightened the urgency for Respondent to take action against Mr. Williams.

41. Respondent, on the other hand, was less credible. His expectations with respect to leave, for example (expecting the School District to reinstate the leave he chose to take during the 2004 investigation), were unrealistic. His recollection of the counseling session involved a detailed list of things discussed, including his dissatisfaction with Wombaugh's counseling methods and his opinion that he knew more about post-traumatic stress disorder than she did, based upon his unwillingness to move past the trauma of the 2004 investigation against him. He tended to place responsibility and blame on others while minimizing any role his own actions might have. His statements were self-serving and simply not credible.

42. The Administrative Complaint charges Respondent with violating Section 1012.795(1)(b), by having been proven to be incompetent to teach or perform duties as an employee of the

public school system. Given the definition of incompetency provided in Florida Administrative Code Rule 6B-4.009(1) and the method of determining incompetency encompassed in the rule, this violation has not been proven in this case. None of the evidence presented has dealt with teaching deficiencies demonstrated by Respondent in the classroom. Therefore, a violation of Section 1012.795(1)(b) should not serve as a basis for terminating Respondent's contract.

43. The Administrative Complaint also charges Respondent with violating Section 1012.795(1)(f), by having been found guilty of personal conduct which seriously reduces the person's effectiveness as an employee of the school district. The impairment contemplated under this provision may be demonstrated by direct evidence or may be inferred from the conduct itself. Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000); Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000). In this case, news of the threat against Mr. Williams was publicized in both print and television media. The School District received calls and e-mails in response to the publicity, and testimony was offered to the effect that Respondent lost the respect of students, community members, parents, and teachers, and that it would not be appropriate to place him in a classroom alone with children. Given the nature of the threat, and the irrationality of it, this conclusion drawn

by school officials is a reasonable one. The School District has demonstrated a violation of Section 1012.795(1)(f).

44. The Administrative Complaint also alleges a violation of Section 1012.795(1)(i), which depends upon whether violations of Florida Administrative Code Rules 6B-1.001 and 6B-1.006 have been proven. Florida Administrative Code Rule 6B-1.001 requires Respondent to strive to achieve and sustain the highest degree of ethical conduct. Almost by definition, threatening to kill a school official is a violation of any ethical standard. Teachers are individuals to whom children are entrusted during the day to receive instruction and guidance. Threatening another school official breeds fear and distrust, and distracts from any semblance of a learning environment.

45. Similarly, Rule 6B-1.006 prohibits an instructor from engaging 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." Measures had to be taken to restrict access to Mr. Williams, but there was no evidence presented that providing the armed escort or other extra protections for Mr. Williams actually interfered with his performance, work responsibilities or the orderly processes of education. However, making a death threat against a school official certainly creates an intimidating environment for the

target of the threat, and affects the tenor of the environment in the School District as a whole.

46. By proving violations of Florida Administrative Code Rules 6B-1.001 and 6B-1.006, Petitioner has demonstrated violations of Section 1012.795(1)(i), Florida Statutes. These violations, coupled with the violation of Section 1012.795(1)(f), amount to just cause for termination of Respondent's contract as an instructor for the Duval County School District, as contemplated by Section 1012.33(1), Florida Statutes, and Florida Administrative Code Rule 6B-4.009(3).

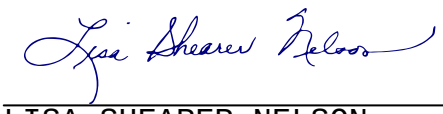
RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered finding Respondent has violated Sections 1012.795(1)(f) and (i), Florida Statutes, and Florida Administrative Code Rules 6B-1.001(3) and 6B-1.006(5)(d); that such violations provide just cause for termination pursuant to Section 1012.33(1), Florida Statutes; and terminating Respondent's contract with the School District.

DONE AND ENTERED this 29th day of July, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of July, 2009.

ENDNOTE

[1/] The psychiatrist concluded that Respondent currently had no acute symptoms and could return to teaching.

COPIES FURNISHED:

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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.