STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS COMMISSIONER OF EDUCATION, Petitioner, vs. WILLIE C. GREEN, Respondent.	)	Case No. 08-6357PL

RECOMMENDED ORDER

On April 27, 2009, a duly-noticed hearing was held in Tallahassee, Florida, before Administrative Law Judge Lisa Shearer Nelson assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward T. Bauer, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent committed the acts alleged in the Administrative Complaint and if so, what penalties should be imposed?

PRELIMINARY STATEMENT

On July 24, 2008, Dr. Eric Smith as Commissioner of Education filed an Administrative Complaint against Respondent, Willie C. Green, alleging violations of Section 1012.795(1)(c) and (i), Florida Statutes (2006), and Florida Administrative Code Rule 6B-1.006(3)(a). Respondent disputed allegations of material fact and requested a hearing pursuant to Section 120.57(1), Florida Statutes. On December 19, 2008, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On January 16, 2009, a Notice of Hearing issued scheduling the case for March 31 and April 1, 2009. At the request of the Respondent, the matter was rescheduled for April 27-28, 2009. At hearing, Petitioner presented the testimony of Dr. Sonja Bridges, Joseph Barnes, Marshae´ Best, T.M.,[1/] and Shernikki Gunn. Petitioner's Exhibits 1-4 were admitted into evidence. One of Petitioner's witnesses, James Love, did not appear despite service of a subpoena, and the record was left open for Petitioner to attempt enforcement of the subpoena in circuit court. Respondent testified on his own behalf and presented the testimony of Annette Baker, James Brown, Rosetta Smith, Wendell Gamble, K.W., Frances Harrell, Renee Presha, Brenda Holt, Erica Farmer, Edgar Griffin, and Reginald Cunningham. Respondent's Composite Exhibit 1 and Exhibit 2 were admitted. Although

scheduled for two days, the parties were able to finish in one day.

On May 8, 2009, Petitioner filed a Status Report consistent with a post-hearing Order issued April 29, 2009, indicating that Petitioner would not be seeking enforcement of the subpoena against James Love and that the case could be decided on the existing record.

The proceedings were recorded and the three-volume Transcript was filed with the Division on May 15, 2009. At the request of the parties, the deadline for submission of proposed recommended orders was extended until June 15, 2009. Both submissions were timely filed and have been carefully considered in the preparation of this Recommended Order.

Absent a statement to the contrary, all references to the Florida Statutes shall be to the 2006 codification, which was in effect at the time of the incidents at issue in this case.

FINDINGS OF FACT

1. Petitioner is the head of the state agency responsible for certifying and regulating public school teachers in the State of Florida.

2. At all times relevant to these proceedings, Respondent is licensed in the fields of English (grades 6 through 12) and English to Speakers of Other Languages. His Florida Educator's Certificate Number is 416928.

3. Respondent has been employed by the Gadsden County School District in educational positions since 1976. He has worked both as a teacher and an administrator. At the time of the events alleged in the Administrative Complaint, Respondent was the principal at Carter Parramore Academy (Carter Parramore) in the Gadsden County School District.

4. Respondent has a disciplinary history. On November 15, 2000, a Final Order was entered by the Education Practices Commission incorporating a settlement agreement whereby Respondent neither admitted nor denied the allegations brought against him, and the Commission imposed a reprimand; suspended his license for the periods July 1-30, 1999, and July 1-30, 2000; and placed Respondent on probation for a period of one year.

5. Carter Parramore is an alternative public school for students who are either one or two years behind academically or who cannot function in a traditional high school setting. Many of the students have a history of behavioral and discipline problems, and a significant number have been the subject of delinquency proceedings. Carter Parramore has been referred to as a "last chance" school.

6. Carter Parramore not only has a school resource officer assigned to it, but has at least two security guards as well. Fights are not uncommon at the school, and on several occasions prior to February 2007, pepper spray was used by law enforcement or the school security guards to break up a fight. No witnesses

indicted that any controversy had arisen as a result of the prior use of pepper spray.

7. Gadsden County School District has a policy dealing with the use of reasonable force. Policy 5.31, adopted September 15, 2002, includes the following provisions:

> (1) Maintaining a safe and orderly learning environment is an important responsibility for all educators. A variety of strategies are available to maintain discipline and encourage appropriate and responsible behavior. Staff response to problem student behavior shall always be proportional to the nature and extent of the disruption, conflict or problem.
>
> (2) The use of reasonable force shall be permitted by staff to protect a student from the following conditions.
>
> (a) Conditions harmful or injurious to the student, other students, a staff member or other school personnel.
>
> (b) Conditions harmful to the student's physical health.
>
> (c) Conditions harmful to the student's mental health.
>
> (d) Conditions that create a harmful or unsafe condition.
>
> (e) Conditions that create serious harm to learning or the learning environment.
>
> (3) Physical force shall be used only when it appears that other alternatives are not feasible.
>
> (4) A staff member's decision to use or not use physical force, shall be based upon the following factors. The level of force used shall also be determined by these factors:

(a) The seriousness or severity of the situation.

(b) The potential danger to the student, other students or self.

(c) Patterns of participants' behaviors and potential for volatility.

(d) The size and physical conditions of the participants.

(e) Availability of other intervention strategies.

(f) Other actions already attempted.

(g) The availability of assistance.

(5) The use of reasonable force shall not be excessive, cruel or unusual in nature. The use of pepper spray and other chemical agents shall be permitted only by trained law enforcement officers in critical situations. . . . (Emphasis added.)

8. Although testimony was presented indicating that a notebook containing school board policies was provided for every school, no evidence was produced indicating that the policy had been provided to Respondent or to the office manager for Carter Parramore. No teacher, security officer or law enforcement officer was aware of the policy, and no training on the use of reasonable force had been provided to administrators or staff at the school.

9. The Administrative Complaint concerns two incidents alleging that Respondent inappropriately used pepper spray at Carter Parramore.

10. The first incident occurred on February 22, 2007, and involved a fight between two girls, B.M. and T.M.

11. B.M. was described as being loud, aggressive, and a "pretty rough character." She had been suspended several times and brought weapons on campus both before and after the incident in question.

12. T.M. was described as "mouthy," and could be a handful when with the wrong group of people.

13. At the end of the school day February 22, 2007, the two girls had "words" over a perceived slight that occurred earlier in the day. The girls yelled at each other, exchanged threats and profanities, and B.M. challenged T.M. to leave campus to fight. T.M. refused.

14. B.M. left campus only to return shortly thereafter. At this point, the girls began to yell at each other again and a crowd began to gather, urging the girls to fight. They began to throw punches at each other and pull each other's hair. As the girls fought, the crowd of students grew larger and louder. The estimates indicated a crowd of perhaps 40-60 students. When the fight began, School Resource Officer Barnes was sitting in his vehicle, about fifty yards away, talking to Reginald Young, the Safety and Security Officer for the School District, who was also in his vehicle in the parking lot. Neither man was close enough to the girls to be of realistic assistance.

15. Dr. Green was in his office when the commotion started. When he left his office to see what was causing the disturbance, two security guards had separated the students. Respondent spoke to the girls, directed T.M. to follow him to the office and indicated that she would be suspended for fighting. One of the security guards was still holding B.M. The more credible evidence presented indicates that Respondent did not, as alleged, instruct the security guards to "let them go" and "let them fight."

16. As Respondent headed to the office with T.M., B.M. broke free from the security guard and started fighting with T.M. again. As the altercation recommenced, Respondent found himself between the two girls fighting each other, and surrounded by a crowd of students egging them on. Respondent used his personal pepper spray on the girls, and they stopped fighting immediately. A teacher took T.M. into a restroom to wash off the pepper spray. Office Barnes arrived and took B.M. to an outside water faucet to do the same.

17. There was no credible evidence that Dr. Green continued to spray T.M. as she ran from the scene.

18. Dr. Green had a reasonable fear that B.M. might have a weapon, and had a reasonable fear that, given the growing crowd, the fight would spread beyond the two students B.M. and T.M.

19. Following the fight, Respondent spoke to teachers and students to determine what caused the fight, and learned that

B.M. had been the aggressor. As a result, Respondent decided to rescind his earlier decision to suspend T.M.

20. T.M. sought medical attention after being sprayed with the pepper spray. Her mother picked her up from school and took her to an urgent care center where she was treated and given some ointment.

21. The second incident occurred February 23, 2007. The student involved, K.D., was a 16-year-old male who was described as an often violent trouble-maker who was on criminal probation at the time of the incident.

22. On February 23, 2007, a fight between K.D. and another male student broke out in Ms. Farmer's classroom at Carter Parramore. Ms. Farmer called for a security guard but neither a security guard nor Officer Barnes was in the vicinity. Ms. Farmer called the office and Dr. Green came to assist her.

23. Upon his arrival at the classroom, Dr. Green directed the boys to stop fighting and they complied. Security Officer Johnson arrived, and Respondent directed him to take K.D. to the office. Johnson placed K.D. in handcuffs and took him to the office. During this time, K.D. continued to shout profanities and threatened to kill a female student, K.W., over whom the boys fought. He also threatened to kill teachers and other students.

24. During the altercation, other students had entered the hallway to watch the commotion. Respondent directed the students to return to their classrooms, hoping to avoid an escalation of

violence from the original fight. As order was being restored, K.D. came running back down the hallway, threatening again to kill K.W. and others. Another teacher, Mr. Bradley, attempted to speak with K.D. and calm him down. K.D. reacted by hitting Mr. Bradley and continuing down the hallway yelling his threats to kill K.W.

25. By the time K.D. got to Respondent, he was totally out of control. He kicked Respondent and continued to threaten K.W. Respondent sprayed K.D. with pepper spray one time, at which time K.D. fell to the ground. Officer Johnson came and again handcuffed K.D., and turned him over to the custody of Officer Barnes.

26. At the time that Respondent used the pepper spray on K.D., he had evaded the custody of a security officer who had handcuffed him previously, had hit a teacher and was continuing to threaten students and teachers at the school. There was no credible evidence presented to indicate that any law enforcement or security officers were in the vicinity to address K.D.'s behavior. Given his violent history and his active threats to the people around him, Respondent reasonably believed that use of the pepper spray was necessary to stop the immediate problem and prevent escalation of a dangerous situation.

27. There was significant evidence devoted to whether the pepper spray used by Respondent was "law enforcement grade" or the type a person can buy over the counter for personal

protection. While Petitioner contends that use of law enforcement grade pepper spray by someone who is not a member of law enforcement is prohibited by law, it did not provide, at hearing or in its proposed recommended order, any citation to a statute or regulation to support this assertion. Moreover, the grade of pepper spray is not a determinative factor in this case. The issue is whether the use of any type of pepper spray could be justified.

28. The Gadsden County School District did not take disciplinary action against Respondent for either incident. Respondent continued to work as principal of Carter Parramore through the rest of the school year and then for the 2007-2008 year. For the 2007-2008 school year, his evaluation reflects that he was considered to be "very effective" in all categories.

29. During Respondent's tenure at Carter Parramore, as many as twenty students graduated in a school year. At the time of this hearing, for the 2008-2009 school year, Carter Parramore had one student eligible to graduate.

CONCLUSIONS OF LAW

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

31. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to revoke Respondent's

professional teaching certificate. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Sterne & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

32. Clear and convincing evidence:

> requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

33. Section 1012.795(1), Florida Statutes, gives the Education Practices Commission the power to suspend or revoke the teaching certificate of any person, or to impose any penalty provided by law, if he or she is guilty of certain specified acts.

34. The Administrative Complaint alleges the following facts:

> 3. Respondent has a history of inappropriate discipline of students. On or about November 11, 2000, the Education Practices Commission issued a Final Order accepting a Settlement Agreement between Respondent and the Department of Education the underlying allegations of which included inappropriate discipline of students.

> 4. On or about February 23, 2007, Respondent intervened when T.M., a fifteen-year-old, female student, and B.M., a thirteen-year-old student, became involved in an altercation. In an attempt to break up the fight, Respondent, in violation of district policy, sprayed both girls and a School Resource Office [sic] with excessive amounts of pepper spray. Respondent continued to spray T.M. as she ran from the scene. At all times during the altercation, a law enforcement officer, who had access to pepper spray, was present. T.M. required medical attention subsequent to the incident.
>
> 5. On or about February 24, 2007, Respondent sprayed K.D. a sixteen-year-old, male student, with excessive amounts of pepper spray in an attempt to gain control of K.D. Respondent continued to spray K.D. even after he had become compliant and fallen to the ground. Present during this time was a law enforcement officer with access to pepper spray.

35. Clear and convincing evidence was presented to demonstrate that on or about November 11, 2000, a Final Order was entered by the Education Practices Commission imposing discipline against Respondent pursuant to a Settlement Agreement. Clear and convincing evidence was also presented to establish that on February 22, 2007, Respondent intervened to break up a fight between two girls, T.M. and B.M., and that in violation of district policy, Respondent sprayed both girls with pepper spray, causing T.M. to seek medical attention after the incident. Similarly, clear and convincing evidence was presented to demonstrate that on February 23, 2009, Respondent sprayed student K.D. with pepper spray in an attempt to gain control of the young man.

36. However, the evidence presented at hearing did not substantiate the allegations that Respondent has a history of inappropriate discipline of students, or that the prior discipline against him involved inappropriate discipline of students. While clearly the allegations, which were neither admitted nor denied, alleged inappropriate contact with students, there is no indication that the contact was in an effort to discipline them. Moreover, in light of the fact that in the Settlement Agreement approved in the Final Order, Respondent neither admitted nor denied the allegations of the Amended Administrative Complaint, the Final Order simply establishes prior discipline, not the basis for that discipline.

37. With respect to the February 22, 2007, incident, the evidence was not clear and convincing that Respondent sprayed the girls with excessive amounts of pepper spray or that Respondent continued to spray T.M. as she ran from the scene. Nor does the evidence support the allegation that a law enforcement officer with access to pepper spray was present or that Respondent sprayed a security officer. The security guard, Mr. Gamble, testified that he had his own pepper spray out and considered using it, and could not be sure whether Respondent sprayed him accidentally or whether his own pepper spray discharged. He also testified, consistent with the testimony of all but one teacher, that Respondent acted appropriately in light of the situation presented.

38. Moreover, the overwhelming evidence presented indicates that Officer Barnes was too far away from the fight to be of realistic assistance. When the altercation started, Officer Barnes was sitting in his vehicle some fifty yards away. While he had exited his vehicle and was approaching the scene, he was still much too far away to stop the fight or prevent the escalation of the disturbance.

39. Similarly, the evidence was not clear and convincing that Respondent sprayed K.D. with an excessive amount of spray, or that he continued to spray K.D. after he had become compliant. Nor was there a law enforcement officer with access to pepper spray present at the time K.D. came running down the hall, struck Mr. Bradley and continued to threaten another student.

40. The Administrative Complaint alleges in Counts One and Two that Respondent's conduct violates Subsections 1012.795(1)(c) and (i), Florida Statutes, which provide:

> (1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for a period of time not to exceed 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of a person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for a period of time not to exceed 10 years, with reinstatement subject to the provisions of subsection (4);

may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the teacher certificate, upon order of the court, of any person found to have a delinquent child support obligation; or may impose any other penalty provided by law, provided it can be shown that the person:

* * *

(c) Has been guilty of gross immorality or an act involving moral turpitude.

* * *

(i) Has violated the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education Rules.

41. Count Three of the Administrative Complaint also alleges a violation of Florida Administrative Code Rule 6B-1.006(3)(a), which provides:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties provided by law.

(3) Obligation to the student requires that the individual:
(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

42. Immorality and moral turpitude are both defined in Florida Administrative Code Rule 6B-4.009:

> (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.
>
> * * *
>
> (6) Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties; which, according to accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

43. Moral turpitude has also been defined by the Supreme Court of Florida as "anything done contrary to justice, honesty, principle, or good morals, although it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated." State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 146 So. 660, 661 (1933).

44. As the Department of Education has defined moral turpitude in terms of criminal behavior, no further examination of the facts are necessary to determine that the actions here do not constitute acts of moral turpitude. No criminal behavior is alleged or proven. Neither do the acts proven justify the conclusion that Respondent committed an act of gross immorality.

Here, Respondent used pepper spray to subdue students who presented a danger to themselves and those around them. Several witnesses testified that Respondent acted appropriately given the situations presented. While clearly the use of pepper spray was not authorized and in fact was prohibited by School District policy, the evidence did not demonstrate that the policy at issue had been distributed to the school personnel it governed or that Respondent even knew of its existence. The School District did not discipline Respondent over either incident, notwithstanding that it was the district's policy that was violated. Moreover, the year following the two incidents in question, Respondent received an evaluation in which he was rated "very effective" in all areas. Clearly, these incidents did not impair his effectiveness within the school district. Count One has not been established in this case.

45. Whether a violation of Count Two has been proven depends on whether the rule violation alleged in Count Three has been established. Petitioner cites to two cases, Gallagher v. Powell, DOAH Case Nos. 97-5828 & 98-2387 (Recommended Order 1999) and Crist v. Swanson, DOAH Case No. 03-0178 (Recommended Order 2003), as support for a conclusion that Respondent's actions constitute the failure to make a reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety. In Gallagher v. Powell, the teacher hit a student with a cane in

retaliation of the student's forceful opening of a door that hit the teacher's foot, post-surgery. In Crist v. Swanson, the offensive conduct involved taunting a football player at halftime and throwing a helmet in the direction of a player and accidentally hitting one of them, in an effort to motivate a football team. Neither case dealt with students who were actively fighting or threatening to kill others in the vicinity.

46. In order to determine whether Rule 6B-1.006(3)(a) has been violated, one must consider not only the safety of the actors, T.M., B.M. and K.D., but also the safety of the other students present. With respect to the first incident, one of the students had a history of bringing weapons to school and had left campus only to return for the express purpose of fighting. A large crowd was gathering, at the end of the school day, encouraging a fight. The girls had already broken away from the security officers and law enforcement was too far away to assist. Under these circumstances, while not condoning the use of pepper spray, it was reasonable for the principal to use whatever means he had available to protect all of the students from harm. While T.M. suffered some discomfort as a result of the pepper spray, Respondent's actions served to protect her from further, more serious, injury.

47. With respect to the second incident, the student involved had already escaped the custody of a security guard and had hit a teacher. He was actively threatening bodily harm to

another student, was on probation, and had a history of violence. Once again, law enforcement was not there to handle the situation. Respondent's actions served to protect others in the vicinity and to contain a dangerous situation. Under these very unique circumstances, Respondent's actions do not constitute a violation of Rule 6B-1.006(3)(a).

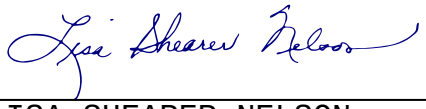
RECOMMENDATION

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

RECOMMENDED:

That the Education Practices Commission enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 14th day of July, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 2009.

ENDNOTE

[1]1/ Students who testified in this proceeding are identified by their initials.

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.