

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,            )  
  )  
          Petitioner,                            )  
  )  
vs.    )    Case No. 09-2807  
  )  
BRIAN DUDA,                                    )  
  )  
          Respondent.                         )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

This case was heard, as previously scheduled, on September 29 through October 1, 2009, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, by Eleanor M. Hunter an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carmen M. Rodriguez, Esquire  
Carmen Rodriguez, P.A.  
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For Respondent: Melissa C. Mihok, Esquire  
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STATEMENT OF THE ISSUES

The issues are whether the conduct of the Respondent, an elementary school music teacher, justified a three-day

suspension without pay on February 26, 27, and 28, 2008; and whether Respondent should be terminated from employment for conduct that constitutes misconduct in office, immorality, and/or incapacity.

PRELIMINARY STATEMENT

On May 19, 2009, the Division of Administrative Hearings (DOAH) received a Petition for Formal Proceedings and an Administrative Complaint filed by Petitioner, and a Petition for Evidentiary Hearing filed by Respondent. Petitioner seeks to justify the suspension of Respondent and to terminate Respondent's employment as a classroom teacher. DOAH assigned an administrative law judge to conduct the hearing. The case was scheduled for hearing on August 12 through 14, 2009. Upon joint motion of the parties, the case was continued and rescheduled for September 15 through 17, 2009.

On September 1, 2009, Respondent filed a motion to strike portions of the Administrative Complaint for failure to comply with the filing and notice requirements included in the terms of the collective bargaining agreement (CBA). On September 4, 2009, Petitioner filed a response requesting denial of the motion to strike. Petitioner also requested a continuance because a Petition for Writ of Mandamus to contest the three-day suspension had been filed and was pending in the Circuit Court

for the Seventeenth Judicial Circuit, in and for Broward County. On September 4, 2009, the motion for continuance was denied.

On September 10, 2009, by Stipulation and Settlement Agreement, the parties agreed that the DOAH hearing properly included consideration of issues related to the three-day suspension, as well as the employment termination action; that Petitioner would amend the DOAH complaint accordingly; and that Respondent would dismiss the Circuit Court case. The Amended Complaint was filed on September 11, 2009.

On September 10, 2009, Petitioner filed Petitioner's Motion to Strike Issues, Witnesses, and Exhibits Listed by Respondent in the Pretrial Stipulation Which Were Not Disclosed by Respondent in the Course of Discovery, Based on Prejudice and Unfair Surprise, in an effort to exclude any evidence related to the CBA because those issues were not raised earlier. Petitioner also filed a Motion for Leave to Reopen Limited Discovery related to the CBA. A continuance was granted to allow additional discovery and the case was postponed until September 24, 25, and 28, 2009. After conflicts with the dates were resolved, the case was rescheduled and the hearing was held September 29, 30, and October 1, 2009.

Prior to the hearing, Respondent's Motion for Protective Order and, by special appearance, the Motion of Diane Watts to Quash Subpoena were filed alleging that conversations between

Ms. Watts, a union representative, and Respondent were privileged and confidential. The subpoena was not quashed and ruling was reserved to consider issues related to privilege and confidentiality depending on the questions posed to Ms. Watts.

Petitioner also filed, on September 25, 2009, a Motion for Sanctions for Obfuscation of Discovery and Notice of Newly Discovered (Undisclosed) Evidence. Notes that Respondent gave to an investigator reviewing charges against him by the Florida Department of Education (DOE), related to some of the same incidents that gave rise to the charges in this case were not disclosed during discovery. Respondent's Response to Petitioner's Motion for Sanctions and Motion for Sanctions Against Petitioner, filed on September 28, 2009, claimed Petitioner's motion was frivolous because the DOE case was based on information provided to DOE by Petitioner, and because Respondent is represented by different counsel in the DOE matter. In Petitioner's Response to Cross Motion for Sanctions and to Respondent's Assertions, on September 28, 2009, Petitioner noted that Respondent provided his notes to the DOE investigator in April 2009, not solely to his counsel in that case. The notes that were the subject of the motions for sanctions were not made available during the hearing. Ruling was reserved and a separate hearing on the motions for sanctions was scheduled and subsequently held on October 9, 2009. On

October 16, 2009, an Order Denying Motion[s] for Sanctions was issued.

At the hearing, Petitioner presented the testimony of the following witnesses, including minors and their parents, who are identified by their initials: E.V., mother of W.J.R.; W.J.R.; K.S., mother of M.S.; M.S.; Debbie Corriveau; S.R.; D.L.R., mother of D.B.; G.F., mother of C.F.; C.F.; Brian Duda; K.M.; Kate Treado; Cheryl Fogarty; Steven Briggs; Lynn Eaton; Christopher Falzone; Michael Corva; Tara Zdanowicz; D.W.; A.G.; and Donald Fitz. Petitioner's Exhibits 1-7, 11-16, 22, 23, 25, 26A and 27-32 were received into evidence.

Respondent presented the testimony of Dianne Watts and Brian Duda. Respondent's Exhibits 1, 2, and 4-6 were received into evidence. Joint Exhibit 1 was also received into evidence. The six-volume Transcript of the hearing was received October 20, 2009, and proposed recommended orders were filed November 6, 2009.

#### FINDINGS OF FACT

1. James F. Notter, Superintendent of Schools of Broward County, Florida, signed the Administrative Complaint in this case on behalf of Petitioner, Broward County School Board (Petitioner or the Board). The Board operates public schools within the Broward County School District (the District).

2. Respondent, Brian Duda, was employed as an elementary school teacher by Petitioner, Broward County School Board, and assigned to teach music at Sheridan Hills Elementary School during the 2007-2008 school year. Mr. Duda has taught school for a total of 29 years, 23 in Broward County. In addition to teaching music, Mr. Duda has been an elementary school classroom teacher.

3. When Mr. Duda started at Sheridan Hills, in the 2004-2005 school year, the principal was Christopher Pariso and the assistant principal was Deborah Freedman. Donald Fitz, who has been employed by the District since 1987, and for eight years before that in Pennsylvania, became the Sheridan Hills' principal in 2005, after Mr. Pariso retired.

4. After Mr. Fitz was named principal, he received a letter from Mr. Duda saying he would not be returning to Sheridan Hills the following year. Mr. Fitz discussed Mr. Duda with Mr. Pariso who told him that Mr. Duda had served a one-day suspension related to anger management issues. When he did not receive a transfer to another school, Mr. Duda notified Mr. Fitz that he would, in fact, be returning to Sheridan Hills the following school year.

5. Mr. Fitz and Ms. Freedman met with Mr. Duda and discussed his strength; he is an excellent music teacher; and his weakness, his need for anger management so that he is not

"burning bridges." Mr. Duda was to seek help from Ms. Freedman when he felt the need for relief from his classroom or any other school setting to control his anger. The following year, Ms. Freedman left and Tara Zdanowicz became the assistant principal at Sheridan Hills.

6. In a memorandum dated February 20, 2008, Mr. Duda was notified that the Board had approved Mr. Fitz' recommendation that he be suspended for three days. On April 11, 2009, Mr. Duda was notified, in the Administrative Complaint, that the Superintendent of Schools was recommending to the Board that his employment be terminated. In this proceeding, Mr. Duda challenged both actions.

7. In the Amended Administrative Complaint, dated September 11, 2009, the disciplinary actions are, in relevant part, alleged to be justified based on the following:

Specific Charges

The Petitioner, James F. Notter, alleges as follows:

A. Suspension

a. Respondent, Brian Duda, humiliated and embarrassed a first grade student, W.J.R., in front of other students and parents at a school holiday show during the 2007-2008 school year. Specifically, W.J.R. arrived for the holiday show with his Mother, Grandmother, Grandfather, as well as his sisters, and approached Mr. Duda to take his place for the show. In the presence of others, Mr. Duda began to yell at W.J.R. causing him to cry at which time his family

approached to see what was wrong. W.J.R.'s family then witnessed Mr. Duda continuing to yell at W.J.R. words to the effect that W.J.R. was banned from the holiday show and was supposed to have written in his journal and tell his parents that he was un-invited to the holiday show because he had acted despicable [sic]. Mr. Duda's actions embarrassed W.J.R. in front of his classmates and their parents. In this way, Mr. Duda violated his duty to protect students from conditions harmful to learning. W.J.R.'s mother took him and left the auditorium to prevent further humiliation and embarrassment to her son and family.

b. Mr. Duda has been repeatedly counseled about his conduct with students, school personnel and parents and to conform his behavior, but he has failed to abide by these lesser disciplinary and counseling measures. Just cause exists for the requested relief as Mr. Duda's behavior is inexcusable under the Code of Ethics of the Education Profession, Rule 6B-1.001, Florida Administrative Code, and the Principles of Professional Conduct for the Education Profession, Rule 6B-1.006, Florida Administrative Code. WHEREFORE, based upon the foregoing, the Petitioner, James F. Notter, Superintendent of Schools, requests that the three (3) day suspension of the Respondent, Brian Duda, be upheld based upon the foregoing facts and legal authority.

#### B. Termination

a. Respondent, Brian Duda, creates and maintains a hostile, offensive and threatening environment for his colleagues as well as his students through his inappropriate conduct and behavior. Mr. Duda has been counseled repeatedly to correct his behavior but, he has disregarded such directives and continues his conduct undaunted. He disregards directives and continues a pattern of conduct that is demeaning and frightening to students and



harassing and offensive to staff. Specifically, numerous colleagues, supervisors, students and parents complain that Mr. Duda makes offensive and harassing comments toward them. Mr. Duda's rude and hostile comments toward students would cause them to become visibly upset and create an environment which is not conducive to learning. Mr. Duda regularly exposes his students to ridicule and embarrassment. Mr. Duda's behavior prompted several student's [sic] parents to remove their children from Mr. Duda's class as a result of his actions. Examples [sic] of Mr. Duda's pattern of behavior is included herein.

b. Mr. Duda made offensive comments mocking the death of a student's father asserting "That's what happens to white trash and he got what he deserved".

c. Mr. Duda regularly exhibits rude and inappropriate behavior in class toward students. Mr. Duda told M.S. she was "bad just like your brother." When a student asked what "retarded" meant, Mr. Duda pointed to student S.R. and said she was "retarded". Michael Corva, S.R.'s teacher, found S.R. and several other students visibly upset after Mr. Duda's class as a result of such comments. Mr. Duda told B.O. to "shut up," and called A.G. "retarded" as well, simply because he didn't know the answer to a question. Additionally, Ms. Eaton witnessed Mr. Duda demean a fifth grade class by telling them that they should be in Pre-K or Kindergarten, or that they should be wearing diapers.

d. Mr. Duda was rude and demeaning to student M.S., when she simply told him it was her birthday. He responded "Well, that doesn't make you special. Sit down." Mr. Duda further demeaned her by then ordering her to sit alone in the back of the classroom. At the end of class, M.S. was discovered by another teacher sitting alone in the back of the room with her jacket over her head. M.S.'s parents subsequently

demanded their child be removed from Mr. Duda's class.

e. Mr. Duda threatened Tara Zdanowicz, Assistant Principal, upon being denied a letter of recommendation by responding "Okay, well if I'm here next year, things aren't going to be good. This is going on my list of things. I better not run into Mr. Fitz in Wilton Manors with my friends." Staff has further witnessed inappropriate interactions with Mr. Duda concerning his conduct, anger management and verbal statements which cause concern for the welfare of the staff and students. For example, Mr. Duda told staff that his friends had "heard enough and . . . if they ever saw Mr. Fitz out they'd kick his ass". Mr. Fitz is the school Principal.

f. Mr. Duda further embarrassed, humiliated, and demeaned a parent volunteer by telling her "Why don't you go get a job at Publix? At least they pay you there," while she was volunteering in another class. This parent subsequently removed her child, C.F., from Mr. Duda's class because Mr. Duda would be offensive to her, and she did not want her child exposed to this type of conduct at a crucial age. Mr. Duda's actions further made the student C.F. so frightened and uncomfortable that when Mr. Duda would walk into the library, C.F. would try to avoid an encounter with him by hiding.

g. Mr. Duda embarrassed and humiliated Steven Briggs, a seven year employee of the School Board, and Mary Harris, office manager and confidential secretary to the Principal of Sheridan Hills, by yelling at them prior to the start of the Christmas/holiday show saying "you people in the back. You adults. I don't want to hear anything out of you either." This comment drew the attention of everyone in the cafeteria whereby Mr. Briggs and Ms. Harris left and did not watch the show. Similarly, Mr. Duda yelled at and demeaned a teacher arriving with the class for a school show by

yelling in front of the whole school that "You are supposed to be here at 9:00. It is 9:02. I should not let you come to this concert."

h. Mr. Duda caused a coworker, Kathleen Treado, a twenty year employee, to cry upon yelling and berating her for inquiring as to what was wrong when she heard Mr. Duda yelling at the library clerk. Mr. Duda yelled to Ms. Treado "It's none of your business Kate Treado." Mr. Duda further humiliated and demeaned Ms. Eaton by stating, "You're off today. You're not taking your pills." Similarly, Mr. Duda stated to staff that Mrs. Fletcher, president of the Parent Teacher Association (PTA), ". . . is nothing but trailer trash, and so is Debbie Corriveau". Mr. Duda also told staff that other staff and parent volunteers at Sheridan Hills, were "white trailer trash".

i. Mr. Duda has also harassed Mabel Gutierrez-Sangal, a fifteen year paraprofessional at Sheridan Hills, with continuous comments to her about her clothes being inappropriate. Mr. Duda also threatened to kick her out of his class if she attempted to enter his classroom. Ms. Sangal felt threatened and uncomfortable and reported the incident to the Principal Donald Fitz. Mr. Duda further demeaned pre-k students, in front of Ms. Sangal, during lunch by stating "Okay little ones, Please eat your government lunch biscuit" while adding that they should not let Ms. Sangal eat their pizza. Mr. Duda was hostile and threatening toward Ms. Corriveau, by approaching her and sticking his finger an inch from her face and accusing her class of being loud. Rhonda Lane, an eleven year employee, witnessed this "highly inappropriate" interaction.

j. The School Board has taken lesser corrective measures by repeated counseling of Mr. Duda to correct and conform his behavior but he has failed to abide by such counseling and lesser disciplinary measures.

8. The conduct described, the Amended Administrative Complaint concluded, constitutes, in Count I, Misconduct in Office; Count II, Immorality; and Count III, Incapacity.

Collective Bargaining Agreement (CBA)

9. Record-keeping requirements and procedures for handling complaints against employees of the District are governed by a CBA negotiated between the Board and the Broward Teacher's Union (the Union). The CBA, in relevant part, provides:

E. Personnel File- Access and Security

1. Number of files: There shall be no more than two (2) personnel files maintained for each employee. The official file will be maintained at the district personnel office. In the event two (2) such files are maintained, one (1) shall be kept in the principal's or director's office at the school or other location where the employee is then employed. Each document placed into the employee's file maintained in the principal's or director's office shall be duplicated and the original transmitted to the district Personnel Office for inclusion within the employee's file maintained at the district Personnel Office  
. . . .

2. Entries log: Each personnel file shall contain a form titled "Log of Entries" to include all of the following information regarding certificates, commendations, assessment documents, disciplinary matter and complaints placed in the files: (1) a brief description of the time; (2) the date shown on the item; (3) the date the item was first placed in the file; and (4) the identification of the source of the item.

\* \* \*

4. Investigative File: The file established by the district as a result of any investigation of an employee is not one of the two personnel files listed above. Access to a file dealing with an investigation shall be in accordance with the provisions of Florida Statute 1012.31. If the preliminary investigation is concluded with . . . no disciplinary action taken or charges filed, then the district will ask the Department of State . . . for permission to destroy the . . . file.

5. Notification to employee: Items may not be placed in an employee's official personnel file unless the item has been made known to the employee, pursuant to the methodology described in Florida Statute 1012.31(2)(c) . . .

CBA, Article 18(E)(1), (2), (4), and (5).

10. The CBA also provides for handling complaints as follows:

Complaints on Employees: No action against an employee shall be taken on the basis of a complaint by a parent or student or other individual nor any notice of such action or complaint shall be included in the employee's personnel file, unless the matter is first reported to the employee in writing and the employee has had the opportunity to discuss the matter with his/her principal.

CBA, Article 18(B)(2).

11. At various times during the school year when teachers, parents, and students complained about Mr. Duda, Mr. Fitz would have them put their complaints in writing. He did not provide copies of the complaints to Mr. Duda but maintained them in a correspondence file. Respondent's position is that the "correspondence file" was a separate third "personnel file" maintained in violation of the terms

of the CBA, and that, as a consequence, no disciplinary action may be taken against Mr. Duda. That position ignores Article 18(E)(4) of the CBA that allows information to be collected in an investigative file.

12. Respondent also maintains that Mr. Fritz should have given him copies of the written complaints that he was collecting. Diane Watts, the field representative for the union who was assigned to assist Mr. Duda, agreed with Mr. Duda that employees should be notified of complaints immediately, although the CBA has no specific time limit. Ms. Watts confirmed that an employee does not have to be given copies of written complaints.

13. According to the requirements of the CBA, a principal or supervisor who gets a complaint about an employee should not put the complaint in the personnel file, but should keep it separate and forward it with a request for an investigation to the District's Special Investigative Unit (SIU). It is the SIU that notifies the employee in writing of the complaint and conducts the investigation, but the SIU is also not required to give the employee copies of the actual complaints or any written or recorded statements taken during the course of the investigation. With a union representative present, the employee has an opportunity to give his or her own statement.

14. At the conclusion of an SIU investigation, a written report summarizing allegations and statements must be provided to the employee, but again not the written complaints. The

employee, with a union representative, has another opportunity to appear, this time before the Professional Standards Committee. If further action is recommended, a pre-disciplinary conference allows the employee, with a union representative, to have additional input. Mr. Duda had both a union representative and an attorney present at a pre-disciplinary conference.

15. As confirmed, the CBA procedures were followed in Mr. Duda's case. She accompanied him throughout the process and never filed a grievance concerning the manner in which the matters were conducted.

16. Ms. Watts confirmed that it would have been a violation of the terms of the CBA if Mr. Fitz had placed complaints in Mr. Duda's personnel file before and during the investigation. She said the SIU process unfortunately can take an "awfully long time" meaning up to "over a year." In this case, Mr. Duda was removed from a teaching position and reassigned to a District office in August 2008, but the first Administrative Complaint to terminate his employment was not filed until April 2009.

17. There is only one exception to the requirement that complaints not be placed in the personnel file until the investigation has been completed: that is for minor matters that a principal may resolve internally with a letter of reprimand.

18. In each instance of discipline at issue here, Mr. Duda was notified in writing of the recommendations and reasons given to the Board by Mr. Fitz, who recommended suspension, and subsequently by the Superintendent, who recommended termination. There was no violation of the CBA in the procedures to impose discipline. Therefore, the CBA does not prohibit further consideration of the allegations in the Amended Administrative Complaint, based on the provisions related to personnel files and written notice. The additional requirement of an opportunity to discuss the matter with his principal was also met based, in large part, on the testimony of Mr. Duda himself. See, for example, Findings of Fact 24, 32, 43, 45, 49, and 50.

19. Mr. Fitz also kept an Entry Log in Mr. Duda's personnel file that Mr. Duda conceded was correct.

20. Mr. Fitz gave Mr. Duda "satisfactory" ratings on the Instructional Personnel Assessment System (IPAS) at the same time he was collecting complaints to refer to the SIU. He was instructed by Cathy Kirk, the District's Evaluation Coordinator, and Loreen Calhoun, of Employee Relations, not to address possible disciplinary issues in the IPAS, although he did write a comment about the need for anger management on one IPAS.



Amended Administrative Complaint Paragraph II.A.a.

21. On December 6, 2007, W.J.R. was a first grade student at Sheridan Hills. Based on his description of W.J.R.'s behavior earlier in the day as "despicable," Mr. Duda apparently told a substitute teacher for W.J.R.'s class to write in his agenda/planner for his parents to see that he was being excluded from the holiday show that night.

22. All parties agree that W.J.R. was humiliated, embarrassed and in tears. He had been excited that he was going to be in the holiday show, got all dressed up, and was accompanied by his mother, grandparents, and sisters. As they entered the music room, Mr. Duda yelled from the back of the room that W.J.R. should not be there. Mr. Duda testified that that the grandmother called him a "jackass."

23. W.J.R.'s parents and grandparents found Mr. Fitz and complained about Mr. Duda, and then left the school before the program. Mr. Fitz was concerned because Mr. Duda was "in one of those moods [and had previously] declined to follow through with the [spring] concert and . . . I had to get someone outside of our school to carry through for the rest of the spring concert rehearsal." To calm things down, Mr. Fitz asked the parent to come see him the next day. He also called Ms. Zdanovicz, the assistant principal, who was on her way to the school, to ask her to get there quickly to help calm Mr. Duda because she had a better relationship with him.

24. The following day Mr. Fitz met with the family of W.J.R. and received a written statement from his mother. Mr. Fitz also met with Mr. Duda concerning the incident. Mr. Duda testified unconvincingly that Mr. Fitz only discussed the incident by "briefly ask[ing] what happened . . . ." With Ms. Watts, Mr. Duda attended a pre-disciplinary conference on January 25, 2008.

25. Eight-year-old W.J.R. was "sad" when "[Mr. Duda] yelled at me and said I was not supposed to be there." Christopher Falzone, the after school program director, who was there to help with the concert, confirmed that Mr. Duda was eye-level with the child, as Mr. Duda said, but that he was very loud and angry. He was pounding his fists, and causing a scene in front of other children and parents.

26. In a memorandum dated January 31, 2008, Mr. Fitz notified Mr. Duda that he was recommending his suspension for three days without pay because:

". . . you lost your temper in front of students and parents while exhibiting conduct unbecoming a teacher. This is in violation of the Florida State Department of Education's Code of Ethics Rule 6B-1.001(2) that states, 'The Educator's primary concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.'"

27. Mr. Fitz found that Mr. Duda's conduct violated Florida Administrative Code Rule 6B-1.006(3)(c), which states "[an] [o]bligation to the student requires that the individual shall not

intentionally expose a student to unnecessary embarrassment or disparagement." The memorandum also advised Mr. Duda of his right to file a grievance and to schedule an informal discussion with a union representative present within 15 working days of the date of the memorandum. No grievance was filed and the Board approved the recommendation for suspension and provided written notice of that decision to Mr. Duda on February 20, 2008.

28. Based on Mr. Duda's behavior at the hearing, Mr. Fitz is credible in saying that Mr. Duda laughed and said that "his mother was going to make up the difference in pay" for the three days. The fact that Mr. Duda did not take seriously the inappropriateness of the manner in which he handled the incident with a first-grade child was reinforced by his insistence, at hearing, that he had the authority to exclude anyone he wished from the program.

29. The factual allegations in Paragraph II.A.a. of the Amended Administrative Complaint are proven.

Amended Administrative Complaint Paragraph II.B.b.

30. Lynn Eaton, a pool substitute teacher at Sheridan Hills, was sorry to hear that a father of three, including two who were students at Sheridan Hills, was killed in a boating accident. It was reported all over the news that the accident was alcohol-related. Mr. Duda said, "Oh, did you hear what happened to Mr. [B] drinking and being drunk and getting killed in a boating accident . . . That is what happens to white trash when they drink and drive a boat." After

attending the funeral, thinking about the comment over the weekend, and still being upset about it, Ms. Eaton reported the comment to Mr. Fitz and put her complaint in writing.

31. Mr. Duda testified that what he said was, "Thank God he did not get behind the wheel and kill an innocent person on the road." He denied calling Mr. [B] "white trash" or saying "he got what he deserved." Mr. Duda's testimony that he did not use the expression "white trash" is not credible due to evidence of other incidents when he reportedly used a similar expression about a PTO volunteer and another teacher. Giving him the benefit of the doubt and referring to Ms. Eaton's written statement, at the time of the incident, quoting Mr Duda, he said "that is what happens to white trash but he felt very sorry for the children." There is inadequate evidence to support a finding that he also said "he got what he deserved."

32. Mr. Duda conceded that he was confronted about the incident, when he said he and Ms. Eaton did not speak to each other for some time after that.

33. The factual allegations in Paragraph II.B.b. are proven, in part.

Amended Administrative Complaint Paragraph II.B.c. and II.B.d.

34. Mr. Duda acknowledged that he told student M.S. that she was "bad just like her brother" in front of her classmates. He berated M.S. for having a birthday crown or hat on her head. Saying she was not special, he made her take it off. Mr. Duda said he was

adhering to the school policy of no hats and believes that "floppy things" on the hat interfered with her music lesson, although what he interpreted as the strict no-hat rule is waived for birthdays and some children do wear Burger King cardboard crowns on their birthdays. When M.S.'s teacher came to get the class from music, M.S. was sitting in the back of the classroom crying with a hooded jacket over her head. Her mother said M.S. told her she felt uncomfortable with Mr. Duda and, as a result, she had M.S., a straight-A, gifted student, removed from music class.

35. Mr. Duda pointed at student S.R. and said, "speaking of retarded." K.M., another student in the class, heard Mr. Duda call S.R. "retarded" or "stupid" in the course of teaching a class about a musical term. Her testimony is consistent with that of S.R. and Mr. Duda that he was teaching about the musical term *ritardando*, which means to slow the tempo of music. He compared slow tempo to a slow mind, but denied that he made any reference to or stared at S.R. or any other student. Mr. Duda's demeanor at the hearing lends credence to the students' testimony.

36. The testimony of S.R. and K.M. was confirmed by that of S.R.'s classroom teacher, Michael Corva. S.R. and other students in his class informed him that Mr. Duda called S.R. "retard." He also saw that she obviously was upset when he picked up his class from music. The students told him that Mr. Duda was "mean" to them. Saying that she did not want to get anyone in trouble, specifically

not Mr. Duda, S.R. would not go to the office to report the incident, but Mr. Corva did in a written statement he gave to Mr. Fitz.

37. Student A.G. also was upset when Mr. Corva picked up his class. A.G. testified that Mr. Duda was explaining something like "retardo" and called some of the students retarded, including himself and S.R.

38. The evidence supports a conclusion that Mr. Duda, at a minimum, implied that S.R. and A.G. were retarded by the way he pointed or looked at them while teaching a lesson on the musical term *ritardando*.

39. No evidence was presented concerning the allegation in Paragraph II.B.c. that Mr. Duda told student B.O. to "shut up."

40. Ms. Eaton overheard Mr. Duda tell students that they should be in diapers. Mr. Duda denied ever telling students they belonged in diapers. Of the two, Ms. Eaton was by far the more credible witness.

41. With the exception of the allegations related to student B.O., the allegations of Paragraph II.B.c. and d. have been proven.

Amended Administrative Complaint Paragraph II.A.b. and II.B.a., e., and j.

42. After she came to Sheridan Hills in Mr. Fitz's second year as principal, Assistant Principal Zdanovicz was the person who, like

Ms. Freedman before her, was assigned to help Mr. Duda by relieving him whenever he felt he was losing his temper.

43. As Mr. Fitz counseled Mr. Duda repeatedly and, especially, after his three-day suspension, Mr. Duda refused to talk to Mr. Fitz and would only deal with Ms. Zdanovicz, although she made it clear to him that she was reporting their conversations to Mr. Fitz.

44. In June 2008, Mr. Duda was seeking a transfer to another school. He asked Ms. Zdanovicz to write a letter of recommendation for him. When she refused the request, Mr. Duda became agitated and started "ranting and raving" in an open area of the front office.

45. In one conversation that she had with Mr. Duda, Ms. Zdanovicz was concerned that he was making a threat on the life of Mr. Fitz. In his testimony, Mr. Duda confirmed that, referring to himself and his friends, he told Ms. Zdanovicz, "If we ever see that son of a bitch out in Wilton Manors, we would kick his fucking ass." Ms. Zdanovicz took it seriously, in part, because Mr. Fitz lives in Wilton Manors. Explaining why his friends were involved, Mr. Duda said it was because they heard him complain regularly about the way Mr. Fitz treated him. It is implausible, therefore, to conclude that, as Mr. Duda testified, he was not being advised regularly by his principal of complaints about his behavior.

46. Ms. Zandovicz testified, "Whatever the outcome of this I do fear for myself and Mr. Fitz and the other people at our school.

47. The allegations in Paragraph II.A.b. and II.B a., e., and j. have been proven.

Amended Administrative Complaint Paragraph II.B.a. and f.

48. Mr. Duda told G.F., a PTO parent volunteer, "Go get a job at Publix. At least they pay you there." When her child, C.F., was in third grade, C.F. began to complain of feeling ill on the days for music classes. When confronted by her mother, C.F. told her that Mr. Duda was mean to her and made her feel uncomfortable. At her mother's request, C.F. was taken out of music class. Kate Treado, the Sheridan Hills media specialist, reported that C.F. needed to be reassured about her safety after she noticed her hiding behind the stacks whenever Mr. Duda came in the media center.

49. Mr. Duda acknowledged making the comment about Publix, but said he was joking with G.F. and had no ill intent. Mrs. F. said she was offended but tried not to be confrontational. Claiming that he and Mrs. F. were friends and that he did not know why C.F. was removed from music class, Mr. Duda testified that he approached Mrs. F. and asked "what happened," and she said she did not want to talk to him. In response to accusations from M.S. and C.F. that he glared at them or otherwise intimidated them after they were removed from his class, Mr. Duda said, "No. There had been enough trouble when they were removed from my class. I have 623 other kids to worry about. If they don't want to be in music, fine." At another time, he conceded that he knew their removal from his class



reflected negatively on him. When asked, on cross-examination, "What trouble had there been relating to their removal?," Mr. Duda said, "I don't know what you are referring to. I don't recall saying that."

50. Another parent, D.L.R., asked to have her son, D.B., removed from music class. D.B. accused Mr. Duda of grabbing his shirt. After Mr. Fitz randomly chose children in the class to interview, he concluded there was no evidence to support D.B.'s claim and he told Mr. Duda, "[D]on't take it any further." In direct violation of that directive, Mr. Duda said D.B. came in with hoodie over his head, and he "professionally would not let a kid sit there curled up like that, afraid to look at me." So, he said "[D.B.], I'm not upset with you. I'm just disappointed." D.B. said "[Well, you did it." Mr. Duda responded, "Oh, Oh, we are not going there." He asked which children had been interviewed, and gave them rewards called "flip-its" for "telling the truth." Mr. Duda admits being advised that Mr. Fitz considered his behavior unacceptable, saying he "chewed" him out.

51. The allegations in Paragraphs II.B.a., d., and f. have been proven.

Amended Administrative Complaint Paragraph II.B.g.

52. Mr. Duda made comments in a cafetorium filled with children and parents attending one of the holiday programs, to chastise teachers in the back for having a "teacher conference going

on." He was speaking to Steven Briggs and Mary Harris who complained that the comments were directed at them. Mr. Duda claimed to be joking with and looking only at Debbie Corriveau. Mr. Briggs' testimony that Mr. Duda directed the comment to him and Ms. Harris is supported by a contemporaneously written statement dated 12/7/07.

53. Mr. Briggs also observed and reported that Mr. Duda chastised one teacher, in front of the entire assembly, for bringing her class in at 9:02 a.m. instead of 9:00 a.m, saying he should not let them attend. Media specialist, Kate Treado, confirmed that Mr. Duda got very tense about the time for performances, including often threatening to exclude children from performing, and once telling children and parents who had gathered early in the media center that they could not attend a performance that evening. Mr. Duda attributed this action to his concern for overcrowding.

54. The allegations in Paragraph II.B.g. of the Amended Administrative Complaint have been proven.

Amended Administrative Complaint Paragraph II.B.h

55. In September 2007, Cheryl Fogarty, a media clerk at Sheridan Hills, was verbally and loudly criticized by Mr. Duda for leaving bubbles in his laminating project and was in tears by the time he left the media center. Ms. Treado heard what was happening, walked in and said "good morning" to Mr. Duda. Although the media

clerk works under Ms. Treado's supervision, Mr. Duda told her what was going on with Ms. Fogarty was none of her business.

56. On another occasion, Mr. Duda became angry with Ms. Fogarty because he thought she was taking laminating projects out of order and that he reported that to the assistant principal. He said his work was on top at 7:00 a.m., but he saw other work on top of his at 7:30 a.m.

57. Mr. Duda agreed referred to Ms. Eaton regularly for years as a "lovable crazy old bat," sometimes asked if she took her medication or had "silly pills", and laughed at her silly clothes, but Ms. Eaton was not offended and said she did wear silly outfits to entertain the children. After she made the complaint about his comments regarding the death of the parent, Mr. B., however, their joking relationship ended and they stopped speaking for a while.

58. After school program director, Christopher Falzone, testified that Mr. Duda referred to another teacher and a parent as "white trash." Mr. Duda denied that he made the comments, but Mr. Falzone and Ms. Eaton are more credible with independent memories of Mr. Duda's having used the same expression on separate occasions.

59. Based on the evidence, it is found that the allegations in Paragraph II.B.h. are proven.

Amended Administrative Complaint Paragraph II.B.i.

60. There is no evidence to support the allegations concerning Mabel Gutierrez-Sangal.

61. Mr. Duda testified that he was upset that Ms. Corriveau's class was, in his opinion, too loud and that the noise was disturbing another teacher's class where he was helping proctor the FCAT administered in March 2008. Mr. Duda spoke to Ms. Corriveau about it and, because he thought she was being sarcastic when she said, "okay, Mr. Duda, okay," he turned back towards her to say it was not a joking matter and to chastise her further. Mr. Duda was rude, inappropriate, and he spoke to her as if he were reprimanding a bad child. After the incident, Ms. Corriveau told Mr. Duda she had never been spoken to that way in her life and avoided him.

Summary of Findings:

62. The terms of the CBA were not violated in the procedures that led to either the three-day suspension or he proposed termination of Mr. Duda. Disciplinary actions, if otherwise appropriate, are not barred by the terms of the C.B.A.

63. The factual allegations in Paragraphs II.A.a. and II.A.b. of the Amended Administrative Complaint, in support of the suspension, have been proven.

64. The factual allegations in Amended Administrative Complaint Paragraphs II.B.a., b. (in part), c. (in substantial part), d., e. (in substantial part), f., g., i. (in part), and j. have been proven.

## CONCLUSIONS OF LAW

65. DOAH has jurisdiction over the parties and subject matter in this case. §§ 1012.33, 120.569, and 120.57(1), Fla. Stat. (2009)

66. The School Board seeks to terminate Respondent's employment. This case does not involve the loss of a license or certification; therefore, the School Board has the burden of proving the allegations in its Amended Administrative Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Alien v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

67. The preponderance of the evidence standard requires proof by "the greater weight of the evidence." Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

68. Respondent was informed in writing of the specific charges against him and the rules he was alleged to have violated before any discipline was imposed, as required by the

CBA. See Jacker v. School Board of Dade County, 426 So. 2d. 1149 (Fla. 3d DCA 1983).

69. In support of the decision to suspend Mr. Duda, Mr. Fitz's memorandum dated January 31, 2008, cited two provisions of the Code of Ethics of the Education Profession in Florida. First, Florida Administrative Code Rule 6B-1.001(2), which is as follows:

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

70. Next, Mr. Fitz cited Florida Administrative Code Rule 6B-1.006(3)(e) that lists among others, "an [o]bligation to the student that requires that the individual [s]hall not intentionally expose a student to unnecessary embarrassment or disparagement."

71. Subsection 1012.33(6)(a), Florida Statutes (2009), provides that any member of the instructional staff may be suspended at any time during the term of the contract for just cause.

72. Subsection 1012.33(1)(a), Florida Statutes (2009), provides in relevant part:

(a) Each person employed as a member of the instruction staff in any district school system 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 not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency . . . . (Emphasis added)

73. The definition of misconduct in office, set forth in Florida Administrative Code Rule 6B-4.009(3), is as follows:

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.

74. Immorality is defined in Florida Administrative Code Rule 6B-4.009(2) as follows:

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

75. Incapacity in Florida Administrative Code Rule 6B-4.009(1)(b)(1) has one or more of the following characteristics:

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

76. As Mr. Fitz charged, Respondent lost his temper, failed to exercise the best professional judgment and unnecessarily embarrassed W.J.R. The violations of the Code of Ethics of Florida State Department of Education, Florida Administrative Code 6B-1.001(2) and 6B-1.006(3)(e), justified a three-day suspension without pay.

77. Counsel for Respondent argued that, although he has committed acts that might constitute misconduct in office by violating the Code of Ethics and Principles of Professional Conduct, the violations are not so severe as to impair his effectiveness. Respondent, by all accounts and past evaluations, has an excellent command of music. His intimidating, rude, and threatening behavior was so serious that the children who were removed from his class were deprived of any benefits from his teaching, and that impaired his effectiveness. His inability to maintain communication with parents, coworkers, and his principal reflects adversely on Respondent's effectiveness in the school system.

78. Cases involving immorality have also required a two-prong test. First, the conduct must be inconsistent with the standards of public conscience and good morals. See Marion County School Board v. Clark, 384 So. 2d 1307 (Fla. 5th DCA 1980) (teacher read a book with graphic and sexual context and used vulgar language with students); Winn v. Popescu, 2006, Fla.



Div. Adm. Hear. Lexis 408, DOAH Case No. 06-1620PL (R.O. 8/23/06; adopted in toto F.O. 1/17/07) (teacher cheated on certification examination); Lee County School Board v. Lewis, 2005, Fla. Div. Adm. Hear. Lexis 1348, DOAH Case No. 05-1450 (R.O. 10/31/05; F.O. 12/16/05) (teacher inappropriate nonconsensual touching of a student), and Adams v. State Professional Practice Council, 406 So. 2d 1170 (1981) (teacher possessed 52 marijuana plants).

79. While the second prong of the test, notorious conduct that impaired Respondent's service in the school community is met, the first is not. It cannot be concluded, therefore that his conduct showed a lack of good morals.

80. In Lee County School Board vs. Bergstressar, DOAH Case No. 09-2414 (R.O. 7/17/09, adopted in toto in F.O. 10/23/09), a school employee was terminated for displays of anger that caused his coworkers to avoid him, for telling a coworker to F\*\*\* off, and for saying he was going to kill the assistant principal. The atmosphere created by Mr. Duda and his threats are similar, constitute misconduct in office, and justify termination of his employment.

81. By his conduct with students, parents, coworkers and the administrators, Respondent created a hostile, intimidating, abusive, and offensive environment in direct violation of Florida Administrative Code Rule 6B-1.006(4). In so doing and

his behavior at the hearing, he demonstrated a lack of emotional stability and, therefore, an incapacity to perform as an elementary school teacher. Fla. Admn. Code Rule 6B-4.009(1)(b)(1). See School Board of Dade County v. Crumiel, 1985, Fla. Div. Adm. Hear. Lexis 5150, DOAH Case No. 85-3673 and 86-116 (R.O., F.O.) (elementary school teacher was hostile, upset, emotional and loud).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is RECOMMENDED that the School Board issue a final order upholding Respondent's suspension and terminating his employment with the School Board.

DONE AND ENTERED this 15th day of December, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
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this 15th day of December, 2009.

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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.