

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 10-0628
)
PAUL KUSHCH,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 25, 2010, by video teleconference with connecting sites in Lauderdale Lakes and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eugene K. Pettis, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent should be suspended, with or without pay, and terminated from employment with Petitioner for the offenses set forth in the Administrative Complaint.

PRELIMINARY STATEMENT

On January 8, 2010, the Broward County School Board (School Board) issued an Administrative Complaint (AC) against Paul Kushch, an instructional employee, for incompetence (inefficiency), immorality, misconduct in office, and gross insubordination, violating Section 1012.33(1)(a), (4)(c), and (6)(b), Florida Statutes, and Florida Administrative Code Rules 6B-1.001, 6B-1.006, and 6B-4.009. On February 2, 2010, the School Board approved the AC and the recommendation from the Superintendent of Schools for the termination of Mr. Kushch's employment. Mr. Kushch challenged the School Board's action and the allegations in the AC and requested a hearing. On February 9, 2010, this matter was referred to the Division of Administrative Hearings.

The parties waived the 60-day hearing requirement set forth in Section 1012.33(3)(f)(4), Florida Statutes. Prior to hearing, a Joint Pre-Hearing Stipulation was filed, which included, among other things, stipulated facts. At hearing, the School Board presented the testimony of three witnesses and

entered 37 exhibits (Petitioner's Exhibits numbered 1 through 37) into evidence. Mr. Kushch testified in his own behalf and entered four exhibits (Respondent's Exhibits numbered 1 through 4) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on June 23, 2010. Subsequently, the parties jointly requested and were granted an extension of time to file their post-hearing submissions. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Kushch has been employed with the School Board since around September 1999.

2. No dispute exists that, at all times material hereto, Mr. Kushch was an instructional employee with the School Board.

3. In September 1999, upon employment with the School Board, Mr. Kushch signed an acknowledgment that he had read The Code of Ethics of the Education Profession and The Principles of Professional Conduct for the Education Profession in Florida; that he accepted the obligation and responsibility placed upon

him; and that he recognized his rights as a member of the education profession in Florida.

4. For the 2008-2009 school year, Mr. Kushch was employed as a science teacher at Coconut Creek High School.

5. Before coming to Coconut Creek, Mr. Kushch's teaching experience was as a teacher in middle school; he had not taught in a high school setting. In middle school, he saw himself as not using traditional methods in teaching, but as providing an atmosphere for students to learn; and he carried this teaching philosophy with him to high school at Coconut Creek.

6. In the fall of 2008, Coconut Creek's football team, which was 99 percent African American, was in the play-offs. In October 2008, Mr. Kushch, who is white, was allowed by the team's coach to give a motivational speech; he had previously given motivational speeches to the players. However, during his speech, Mr. Kushch used racially discriminatory words and profanity, including "nigger" and "fucked in the ass." The football coach and some of the players complained to Coconut Creek's administration.

7. Mr. Kushch wrote a letter of apology to the football coach for the remarks that he had made.

8. On October 30, 2008, the Intern/Assistant Principal, Missy Jones, held a meeting with Mr. Kushch regarding the racially discriminatory words and profanity that he had used

during his speech. Additionally, among other things, Ms. Jones discussed with him what was expected of him in the future regarding his behavior:

[T]o speak professionally at all times on campus and at any school-related activities.

[T]o be respectful of all students and strive to make them feel accepted and comfortable.

[T]o limit all classroom discussions to the curriculum assigned.

9. At the hearing, Mr. Kushch admitted to using the racially discriminatory words and profanity during his speech and that they were inappropriate.

10. No further incidents, involving racially discriminatory words or profanity, occurred.

11. Later, in the 2008-2009 school year, Mr. Kushch was involved in several other incidents.

12. In the spring of 2009, a talent show, scheduled for April 15, 2009, was being organized at Coconut Creek. The coordinator of the talent show was Larry James, a teacher. Mr. James encouraged both students and faculty to participate. All participants were required to audition before they were accepted in the talent show and Mr. James was conducting all auditions. A notice, regarding the audition requirement, was sent through Coconut Creek's email system.

13. Mr. Kushch planned to participate in the talent show and had arranged a dance skit and rap song on science. Due to miscommunication, he did not audition and was, therefore, excluded from the talent show.

14. Mr. Kushch was upset that he was excluded. He sent numerous emails to Mr. James regarding his exclusion from the talent show. Mr. James did not respond to the numerous emails.

15. Also, after the talent show, around April 28, 2009, Mr. Kushch confronted Mr. James after school at cheerleader practice and in the presence of students regarding his exclusion from the talent show. Mr. Kushch became angry and aggressive towards Mr. James, who removed himself from the situation, fearful that the situation might escalate. Mr. James sought out administration in the main office and located Ms. Jones, who calmed him (Mr. James) down.

16. Additionally, in April 2009, Coconut Creek's Security Specialist, Christine Ferguson, observed Mr. Kushch in the guidance office engaging in inappropriate behavior. Ms. Ferguson was at the door to the guidance secretary's office when she heard loud voices coming from the guidance counselor's cubicle. She observed Mr. Kushch and another male, who was a parent, yelling loudly at one another. Also, another staff person and a student were in the cubicle. Ms. Ferguson was

compelled to ask Mr. Kushch to leave the guidance office, and he did.

17. At hearing, Mr. Kushch admitted that he was "speaking loudly" in the guidance office.

18. Ms. Jones considered Mr. Kushch's behavior and conduct with his co-workers to be adversarial and confrontational. Concerned with his behavior and conduct, she decided to refer him to the School Board's Employee Assistance Program (EAP), which is designed to assist employees.

19. On May 8, 2009, Ms. Jones held a meeting with Mr. Kushch and discussed with him, among other things, his adversarial and confrontational behavior and conduct with his co-workers. She also discussed with Mr. Kushch the need for him to follow the curriculum in that he was deviating from the biology lesson plan, e.g., he engaged the students in a research assignment designed to determine why Coconut Creek was designated an "F" school. At that time, Ms. Jones referred Mr. Kushch to the EAP, with both of them signing the referral. During the discussion, at no time did Mr. Kushch appear to be upset or confrontational. At the end of the meeting, the two of them shook hands, and Ms. Jones directed Mr. Kushch to return to his classroom in that the school's bell had rung, and Mr. Kushch complied.

20. However, when Mr. Kushch returned to his classroom, his behavior in the classroom upset his students. One of the students believed that Mr. Kushch stated that he was going to blow-up the school; the student reported it to Ms. Ferguson. Additionally, some of the students reported to Ms. Ferguson that Mr. Kushch told the students to get "your asses inside [the classroom]" and "your asses are mine"; referred to a student as a "git," which is a gangster in training; and referenced students acting "as babies . . . sucking on their momma's tits." Also, some of the students reported that they became upset and angry and left the classroom.

21. At hearing, Mr. Kushch admitted using the phrases "your asses inside [the classroom]"; "your asses are mine"; "git"; and "as babies . . . sucking on their momma's tits." Furthermore, he admitted that his use of the phrases and his behavior with the students were inappropriate, could be perceived as unprofessional, and were unprofessional.

22. At hearing, Mr. Kushch denied stating that was going to blow-up the school. The more convincing evidence is that he did not make the statement.

23. Having been notified of the alleged behavior and conduct of Mr. Kushch, Ms. Jones immediately requested an investigation of Mr. Kushch by the Special Investigative Unit (SIU) of the Professional Standards Committee (PSC) for creating

a hostile environment and inappropriate behavior. Additionally, she wanted and requested his removal from the classroom.

24. By Notice of Investigation dated May 8, 2009, Joe Melita, the Executive Director of PSC and SIU, notified Mr. Kushch, among other things, about the investigation being conducted by the SIU.

25. Further, by letter dated May 8, 2009, Mr. Melita notified Mr. Kushch, among other things, that he was placed on administrative leave and reassigned to Materials Logistics.

26. After the investigation, the PSC found probable cause that Mr. Kushch had engaged in misconduct and created an offensive or hostile work environment and recommended termination of Mr. Kushch from his employment.

27. A pre-disciplinary conference was subsequently held with Mr. Kushch.

28. After the pre-disciplinary conference, the Superintendent recommended the suspension, without pay, of Mr. Kushch pending a final determination by the School Board on his termination from employment.

29. On February 2, the School Board approved the termination of Mr. Kushch's employment with it. Mr. Kushch timely challenged the School Board's action.

30. No criminal charges were brought against Mr. Kushch regarding the incident at Coconut Creek on May 8, 2009.

31. No prior disciplinary action has been taken against Mr. Kushch.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2010).

33. No dispute exists that the School Board has the burden of proof to show by a preponderance of the evidence that Mr. Kushch should be terminated. McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

34. Section 1012.01, Florida Statutes (2009), provides in pertinent part:

(2) INSTRUCTIONAL PERSONNEL.--
"Instructional personnel" means any K-12 staff member whose function includes the provision of direct instructional services to students. Instructional personnel also includes K-12 personnel whose functions provide direct support in the learning process of students. Included in the classification of instructional personnel are the following K-12 personnel:

(a) Classroom teachers.--Classroom teachers are staff members assigned the professional activity of instructing students in courses in classroom situations, including basic instruction, exceptional student education, career education, and adult education, including substitute teachers.

35. As an instructional employee, Mr. Kushch is charged with incompetence (inefficiency), immorality, misconduct in office, and gross insubordination, violating Section 1012.33(1) (a), (4) (c), and (6) (b), Florida Statutes, and Florida Administrative Code Rules 6B-1.001, 6B-1.006, and 6B-4.009.

36. Section 1012.33, Florida Statutes (2009), titled "Contracts with instructional staff, supervisors, and school principals," provides 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: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

* * *

(4) (a) An employee who had continuing contract status prior to July 1, 1984
. . . .

* * *

(c) Any member of the district administrative or supervisory staff and any

member of the instructional staff, including any school principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against an employee of the district school board, the district school board may suspend such person without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid. In cases of suspension by the district school board or by the district school superintendent, the district school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full membership of the district school board and the employee is discharged, his or her contract of employment shall be canceled. Any decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided the appeal is filed within 30 days after the decision of the district school board.

* * *

(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:

1. A direct hearing conducted by the district school board within 60 days after receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of ss. 120.569 and 120.57. A majority vote of the membership of the district school board shall be required to sustain the district school superintendent'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; or

2. A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. 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.

Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided such appeal is filed

within 30 days after the decision of the district school board.

(b) Any member of the district administrative or supervisory staff, including any principal but excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or being convicted or found guilty of, or entering a plea of guilty, regardless of adjudication of guilt, any crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against an employee of the district school board, the district school board may suspend the employee without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid. In cases of suspension by the district school board or by the district school superintendent, the district school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full membership of the district school board and the employee is discharged, his or her contract of employment shall be canceled. Any decision adverse to the employee may be appealed by him or her pursuant to s. 120.68, provided such appeal is filed within 30 days after the decision of the district school board.
(emphasis added)

37. The School Board failed to establish that Mr. Kushch was under a continuing contract and, therefore, Section

1012.33(4)(c), Florida Statutes, is not applicable. Hence, the School Board failed to demonstrate a violation of Section 1012.33(4)(c), Florida Statutes.

38. Because Mr. Kushch is not a member of the administrative or supervisory staff, Section 1012.33(6)(b), Florida Statutes, is not applicable. Hence, the School Board failed to demonstrate a violation of Section 1012.33(6)(b), Florida Statutes.

39. Florida Administrative Code Rule 6B-1.001, titled "Code of Ethics of the Education Profession in Florida," provides:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(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.

(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.

40. Florida Administrative Code Rule 6B-1.006, titled "Principles of Professional Conduct for the Education Profession in Florida," provides in pertinent part:

(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 as 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.

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

* * *

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

* * *

(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.

41. Florida Administrative Code Rule 6B-4.009, titled "Criteria for Suspension and Dismissal," provides in pertinent part:

(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 relate 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 relate 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.

(4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

42. The School Board failed to establish that Mr. Kushch was incompetent as to inefficiency. The evidence failed to demonstrate that Mr. Kushch repeatedly failed to perform duties prescribed by law or repeatedly failed to communicate with and relate to the children in the classroom, to such an extent that the students were deprived of minimum educational experience. Hence, the School Board failed to demonstrate by a preponderance of the evidence that Mr. Kushch violated Section 1012.33(1)(a), Florida Statutes, and Florida Administrative Code Rule 6B-4.009(1)(a).¹

43. The School Board failed to establish that Mr. Kushch's conduct constituted immorality. Furthermore, the School Board did not argue in its post-hearing submission that his conduct constituted immorality. Hence, the School failed to demonstrate by a preponderance of the evidence that Mr. Kushch violated Section 1012.33(1)(a), Florida Statutes, and Florida Administrative Code Rule 6B-4.009(2).

44. The School Board established that Mr. Kushch committed misconduct in office, so serious as to impair his effectiveness in the school system. The evidence demonstrated that he violated Florida Administrative Code Rules 6B-1.001 and 6B-1.006, regarding the students, to the extent that his conduct impaired his effectiveness in the school system. Fla. Admin. Code R. 6B-1.001 and 6B-1.006(3)(a), (e), and (g). Hence, the School Board demonstrated by a preponderance of the evidence that Mr. Kushch committed misconduct in office, so serious as to impair his effectiveness in the school system, violating Section 1012.33(1)(a), Florida Statutes, and Florida Administrative Code Rules 6B-1.001, 6B-1.006, and 6B-4.009(3).

45. The School Board established that Mr. Kushch committed gross insubordination. Insubordination has been characterized as "generally . . . persistent, willful or overt defiance of authority Inherent in a finding of insubordination, however, is a finding that the orders given were within the

authority of the person giving them.” McAllister v. Florida Career Service Commission, 383 So. 2d 940, 941 (Fla. 1st DCA 1980), citing Muldrow v. Board of Public Instruction of Duval County, 189 So. 2d 414, 415 (Fla. 1st DCA 1966).

46. The evidence demonstrates that Ms. Jones had the proper authority to give Mr. Kushch a direct order. On October 30, 2008, Ms. Jones directed Mr. Kushch to engage in appropriate, respectful, and professional behavior at all times and to limit his classroom discussions to the assigned curriculum. The evidence demonstrates that the directive was reasonable. Further, the evidence demonstrates that he nevertheless continued to engage in behavior that was inappropriate, disrespectful, and unprofessional toward students and co-workers and that he continued to give his students assignments that were not on the assigned curriculum. Hence, the School Board demonstrated by a preponderance of the evidence that Mr. Kushch committed gross insubordination, violating Section 1012.33(1)(a), Florida Statutes, and Florida Administrative Code Rule 6B-4.009(4).

47. The School Board's Policy 4.9, titled "Disciplinary Guidelines," provides in pertinent part:

I. Disciplinary Guidelines

(a) It is the intent of the School Board to treat all employees on a fair and equitable

basis in the administration of disciplinary measures.

(b) Discipline is a corrective rather than a punitive measure. In dealing with deficiencies in employee work performance or conduct, progressive discipline shall be administered, except in situations where immediate steps must be taken to ensure student/staff safety. Progressive discipline may include, but is not limited to, informal discussion, oral warning, written warning, written reprimand, enrollment in professional skills enhancement programs, suspension without pay, demotion, change in contract status or termination of employment.

(c) There are certain acts of misconduct, however, which are so offensive as to render an employee as no longer employable. The only appropriate disciplinary measure in these cases (See Section II, Category A) is termination of the employment

(d) The severity of the misconduct in each case, together with relevant circumstances (III (c)), will determine what step in the range of progressive discipline is followed. A more severe discipline measure will be used when it is in the best interest of the students or the community

(e) The District expects each employee, instructional and non-instructional, to be in conformance, both in and out of the work place, with all laws . . . State Board Rules, all School Board policies, rules, and regulations.

II Disciplinary Action
(Category A)
Offense

* * *

(Category B)
Offense

* * *

(m) Any violation of The Code of Ethics of the Education Professional in the State of Florida-State Board of Education
Administrative Rule 6B-1.00

Penalty--Reprimand/Dismissal

* * *

(p) Insubordination, which is defined as a continuing or intentional failure to obey a direct order, reasonable in nature and given by and with proper authority

Penalty--Reprimand/Dismissal

* * *

III Other Considerations

(a) Failure to include a particular act or type of conduct in either category does not preclude the Superintendent or the School Board from disciplining an employee for such omitted act or conduct if it otherwise constitutes just cause for disciplinary action.

(b) This list in Category A and B is illustrative and not meant to be exhaustive. The Superintendent and School Board reserve the right to impose disciplinary measures, up to and including termination of employment, for any offense, act or conduct which constitutes just cause for disciplinary action or which violates any School Board rule, regulation, state or federal law, as well as the Code of Ethics and Principles of Professional Conduct

(c) The following circumstances are illustrative and not meant to be exhaustive and may be considered when determining the appropriate penalty within a penalty (III[sic] Category B) range:

1. The severity of the offense

* * *

3. Impact on students, educational process and/or community

4. The number of repetitions of the offenses and length of time between offenses

* * *

6. Employment history

* * *

8. The deterrent effect of the discipline imposed

9. Any effort of rehabilitation by the employee

* * *

11. Attempts by the employee to correct or stop the misconduct

* * *

16. Length of employment

* * *

18. Any relevant mitigating or aggravating factors under the circumstance

48. The School Board suggests a penalty of termination.

Mr. Kushch suggests that, if he is determined to have committed any offenses, termination is too harsh.

49. The undersigned is persuaded that termination is too harsh a penalty under the circumstances presented in the instant case. Mr. Kushch agreed to participate in the EAP, which the undersigned considers a decision by him that he needed help with his behavior and conduct with the students and with his co-workers. Even though he agreed to the EAP, he did not have an opportunity to begin the EAP due to his conduct in the classroom immediately after he agreed to the EAP. Also, throughout his employment with the School Board, Mr. Kushch has had no other disciplinary action taken against him under the disciplinary guidelines. Additionally, no evidence was presented that he was unable to teach the subject matter for which he was employed. Under the circumstances of the instant case, a penalty of suspension without pay and enrollment in professional skills enhancement programs is more appropriate.

RECOMMENDATION

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

RECOMMENDED that the Broward County School Board enter a final order suspending Paul Kusch for six months and requiring his enrollment in professional skills enhancement programs.

DONE AND ENTERED this 1st day of October 2010, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of October, 2010.

ENDNOTE

^{1/} This Administrative Law Judge is not persuaded by Mr. Kushch's argument that the School Board failed to establish that he was incompetent by way of inefficiency on the basis that the School Board failed to present "testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education." Fla. Admin. Code R. 6B-4.009(1)(a). Florida Administrative Code Rule 6B-4.009(1)(a) provides that such testimony "may" be presented in establishing "an authoritative decision in an individual case." This Administrative Law Judge determines that no such testimony is required in the instant case.

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.