STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | | |
|---|---|---|
| BROWARD COUNTY SCHOOL BOARD, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 10-0629 |
| | ) | |
| ALEXANDRA KRALIK, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RECOMMENDED ORDER

Administrative Law Judge Eleanor M. Hunter held a final hearing in this case by video teleconference between sites in Lauderdale Lakes and Tallahassee, on June 1 and 2, 2010, and August 18, 2010.

APPEARENCES

For Petitioner: Steve Rossi, Esquire
Travis Stock, Esquire
Law Offices of Steve Rossi, P.A.
533 Northeast 3rd Avenue, Suite 2
Fort Lauderdale, Florida 33301

For Respondent: Mark A. Emanuele, Esquire
Greg McDermott, Esquire
Panza, Maurer & Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, Florida 33308

PRELIMINARY STATEMENT

In an Administrative Complaint dated January 8, 2010, the Superintendent of Broward County Schools gave notice of his

intent to recommend that the Broward County School Board terminate the employment of a teacher, Alexandra Kralik. In a letter dated January 25, 2010, Kralik timely requested an administrative hearing. The request was referred to the Division of Administrative Hearings (DOAH) on February 9, 2010. The case was assigned to Administrative Law Judge John G. Van Laningham who set the case for hearing on April 2, 2010. On March 8, 2010, the parties filed a Joint Motion to Reset Final Hearing and the case was re-scheduled for June 1, 2010.

During the course of the proceedings, Judge Van Laningham ruled on a number of motions as follows: (1) denied the School Board's Emergency Motion for Protective Order that sought to exclude Kralik from the depositions of three 5-year-old children; (2) denied without prejudice the School Board's Emergency Motion to File Return of Service Under Seal; (3) denied Kralik's Motion to Appoint a Special Master To Rule on a Motion in Limine; and (4) denied without prejudice Kralik's Motion in Limine seeking to exclude information on past allegations, investigations, and discipline.

The case was transferred to Administrative Law Judge Patricia M. Hart in the regular course of DOAH procedures. On May 26, 2010, the School Board filed an Emergency Motion for Protective Order seeking to have Kralik observe the testimony of one child by closed circuit television rather than have her

present in the hearing room. Judge Hart determined that an evidentiary hearing on the Motion was necessary and should be held immediately before the final hearing commenced.

When Judge Hart became ill, the case was transferred to the undersigned to conduct the final hearing. When the final hearing began on June 1, 2010, the School Board presented evidence in support of its Motion for Protective Order. That evidence included an affidavit signed by the mother of the alleged child victim (marked as Motion Hearing Exhibit A); the mother's testimony, which contradicted some of the statements in the affidavit;[1] and the testimony of the alleged victim, Q.P. Following the evidentiary hearing, the Emergency Motion for Protective Order was denied.

The hearing was not concluded on June 1, 2010, and was continued on June 2, 2010, but again it was not concluded. The case was scheduled to continue on June 30, 2010. After the parties filed a Joint Motion for Continuance, the case was re-scheduled for and completed on August 18, 2010.

At the hearing, the School Board presented the testimony of Q.P., Q.P.'s mother, D.L., Principal Davida Johnson of A. C. Perry Elementary School, Assistant Principal Laferne McLean-Cross, Curriculum Specialist Kristi Burdick, Investigator Edna Pollack, and Investigator Craig Kowalski. Petitioner's Exhibits 1, 2, 4, 5, 9, 16, 17, 19, 21A, 25-27, 29-32, and 34-38 were

received in evidence either during or after the hearing. Respondent testified on her own behalf and offered no exhibits.

The Transcript of the proceedings held in June was filed July 12, 2010. Proposed Recommended Orders were filed October 11, 2010. Through an apparent oversight, the Transcript of the proceedings held on August 18, 2010, was not filed at DOAH until October 29, 2010.

On August 17, 2010, Respondent's Motion to Exclude Deposition Transcripts of Minor Witnesses and Respondent's Motion to Exclude William's Rule Evidence were filed. Petitioner's Responses to the motions were filed August 24, 2010, and additional arguments were included in the proposed recommended orders. Unless otherwise indicated, all references to Florida Statutes in this Order are to the 2010 publication.

The Motion to Exclude Deposition Transcripts of Minor Witnesses is granted, except for those prior statements by Q.P. that are consistent with her testimony that was challenged on cross-examination as a recent fabrication.[2] The Motion to Exclude William's Rule Evidence is denied.[3]

## FINDINGS OF FACT

1. Alexandra Kralik ("Respondent" or "Kralik") has taught in schools operated by the Broward County School Board for 22 years. During the 2009-2010 school year, she was assigned to

teach kindergarten at A. C. Perry Elementary School where she had taught since the 2004-2005 school year.

2. In September 2009, Q.P., a five-year-old, started kindergarten at A. C. Perry in a class taught by a different teacher. After a week of testing, Q.P. was re-assigned to Kralik's class when students were grouped by ability.

3. Q.P. was having problems adjusting to kindergarten and was crying for her mother every day during the first weeks of school.

4. Kralik tried a number of strategies to get Q.P. to stop crying. She tried having her mother sit with her, but Q.P. ran out the door after her mother when she tried to leave. Kralik had the reading specialist sit with Q.P., but that did not help.

5. One day during Q.P.'s second week in her class, Kralik put what she called a "queen-of-the-no-criers" crown on Q.P.'s head, but Q.P. still did not stop crying.

6. At 8:15 a.m. that day, Kralik took her class to music. When she picked them up at 8:45 a.m., the students were supposed to return to the classroom and sit on the carpet for a lesson.

7. Kralik said Q.P. did not sit on the carpet, but instead sat in a chair at her table. Kralik testified in her deposition that "I said okay, as long as she was not crying, it was fine. She could sit at her table, no problem."

8. Q.P. kept crying and got louder, disrupting the class while Kralik tried to teach. Kralik said she told the children to ignore Q.P., but the other children were calling her "stupid" and "crybaby." Kralik swore that she did not touch Q.P.

9. Kralik called the office twice to get a staff person to come assist her with Q.P. She found their slow response frustrating. It took at least thirty minutes before a computer specialist came and removed Q.P. from the class.

10. In the meantime, Kralik said Q.P. got angry about something, took the crown off, and tore it up, as she was getting more upset and crying louder. Kralik denied taking the crown away from Q.P. In notes of Kralik's statement the day after the incident, Kralik is reported to have asked Q.P. for the crown and then tried to take it from Q.P., which caused Q.P. to start screaming.

11. Q.P. returned to her class at approximately 1:15 p.m., the same day. According to Kralik, Q.P. was no longer crying, but she was mad about something. Kralik testified that she did not know why, but for no apparent reason, Q.P. said, "I'm going to tell my mom." Kralik said she stayed away from Q.P., and did not interact with her because she wanted to avoid having any more disciplinary issues like the ones she has had in the past.

12. Q.P. testified that sometime that same day, Kralik called her "cry baby" and "stupid." In notes taken by one of

the people who investigated the incident, Kralik was quoted as having said that Q.P. was crying when she returned that afternoon and that Kralik said to Q.P. that it was stupid for her to sit there crying rather than cutting up magazines and having fun. Q.P. demonstrated how she said Kralik hit her arm and said it hurt her. She also testified that Kralik pushed her on the ground, but later said it was an accident.

13. After a break in the hearing for lunch, Q.P. was cross-examined. She repeated her earlier testimony and said "[S]he pushed me on the ground . . . ." She called me 'cry baby.' She called me 'stupid.' Q.P. also testified that she was mad when Kralik took the crown away from her. That information was elicited by Kralik's counsel on cross-examination as presumably an explanation for Q.P.'s claims, although Kralik denied taking the crown away from her.

14. For the first time, on cross-examination, Q.P. added, "She pulled me--she pulled me and put me at the back table." Q.P. said she was put at the back table because she was crying. Q.P. also testified that during lunch, despite the rule of sequestration having been invoked and explained to her mother, her mother talked to her about Kralik's pulling her arm and seating her at the back table as if to put her in timeout. Kralik denied having a timeout in her room, although timeout is listed as a kindergarten consequence in the A. C. Perry School

Guidelines for Behavior. Kralik's denial is not credible. Notes on her interview the day after reflected that Kralik said she used the students' seats for timeout.

15. On redirect, Q.P. said while they were at lunch, her Mother only told her "talk to that lady" (meaning the undersigned) but not anything else. Her mother was questioned, in an evidentiary hearing on a motion to strike Q.P.'s testimony, and denied having said anything to her during lunch other than "talk to that lady." Q.P.'s references to being pushed to sit down at a table appear in her deposition and in notes taken by the assistant principal on September 3, 2009. The claims of recent fabrication of her testimony and of her incompetence as a witness are, therefore, rejected.[4]

16. D.L. is six years old and he was also in Kralik's kindergarten class. He remembers Kralik calling Q.P. a "big baby." According to D.L., Kralik pulled Q.P.'s arm but not hard. He said it was the other children, not Kralik, who called Q.P. "cry baby." D.L. said Q.P. was placed at the end of the line and got no treats because of her crying.

17. D.L. remembered that Kralik gave Q.P. a crown, but believed it was for her birthday. D.L. did not remember Kralik's taking the crown away from Q.P.

18. On the afternoon of September 2, 2009, Q.P.'s mother complained to Davida Johnson, the principal at A. C. Perry, that Kralik had hit Q.P. and had called her derogatory names.

19. Johnson assigned Assistant Principal Laferne McLean-Cross and Curriculum Specialist Kristi Burdick to investigate and determine if there was any validity to the complaint. After talking to Q.P, her mother, several students in the class, and Kralik, McLean-Cross and Burdick advised Johnson that there was some corroboration of Q.P.'s complaint of excessive physical contact that amounted to physical force. Physical force is only permitted if there is a medical emergency, or if students have placed themselves or others in imminent danger.

20. Kralik was ordered removed from A. C. Perry on September 4, 2009, and Johnson submitted a Personnel Investigation Request to the School Board's Professional Standards and Special Investigative Unit (SIU). The request was prompted not only by the the information Johnson received from McLean-Cross and Burdick, but also based on Johnson's history of disciplinary actions against Kralik for similar acts as the ones alleged by Q.P.

Johnson's Prior Incidents with Kralik

21. On April 6, 2006, Johnson issued Kralik a written reprimand because "you put your hands on a student in a rough manner." Kralik was accused of pulling a student out of line

and pushing her. Kralik claimed to have only said something to the student, not touched the student, who was in another teacher's class, and only because she overheard the student threatening another student.

22. On December 4, 2007, Johnson issued a Written Reprimand Regarding Insubordination, citing the prior written reprimand after "a parent of another child in your class room informed me this year that you 'grabbed' her daughter's arm too tight[ly] causing her discomfort and you held her behind the neck forcing her to look at something on the floor." Kralik claimed to have only touched the student on the shoulder and told her to look at the floor because the child had colored on the floor with her crayons.

23. On March 2, 2009, and March 4, 2009, Johnson was notified by the Execptional Student Education specialist that, while she was working with children in Kralik's classroom, she observed Kralik "inappropriately put [her] hands on student[s]" by grabbing and pulling them. Kralik testified that she did not recall that there were two separate reports, but only one. In that incident, Kralik said she was separating students who were fighting. On March 16, 2009, Johnson recommended that Kralik be suspended for three days without pay. The suspension did not go into effect and was pending when the issues arose with Q. P.

24. On March 23, 2009, Johnson referred Kralik to the Employee Assistance Program.

SIU, PSC, and the Superintendent's Actions

25. After receiving Johnson's request, the SIU conducted its own investigation and forwarded its report to the Professional Standards Committee (PSC). The PSC held a pre-disciplinary meeting and, on December 2, 2009, recommended terminating Kralik's employment. The Superintendent agreed to make the same recommendation to the School Board and filed the Administrative Complaint in this case. The charges against Kralik are that her conduct with Q.P. constitutes misconduct in office,[5] immorality,[6] and incapacity.[7]

26. In addition to the incidents at A. C. Perry that Johnson had considered, the SIU, PSC, and later, the Superintendent, had access to and considered Kralik's entire disciplinary history.

Incidents Prior to Employment at A. C. Perry

27. On March 11, 1998, at Dania Elementary School, Kralik was charged with "inappropriate discipline of a student" when a child in her class received lacerations and bruises when his face hit a counter. Kralik said the child moved too quickly and hit his own face on the counter. She entered into a Disciplinary Action & General Release Agreement. The Agreement provided, in relevant part, that Kralik was suspended without

pay from April 24, 1998 through June 30, 1999, that the suspension will remain on her disciplinary record, and that "an official written reprimand will be placed in [Kralik's] file regarding the charges contained in the Administrative Complaint."

28. While a teacher at Bethune Elementary, on October 24, 2002, Kralik was alleged to have "grabbed [a student's] arms, picked her up and shoved her to the concrete sidewalk to make her sit down." Kralik said the child got out of class early, came to the bus loop, and got upset when Kralik told her she could not leave early. Kralik and the School Board entered into a Disciplinary Action & General Release Agreement that (1) she would be suspended without pay for twenty days; (2) that the Agreement would constitute a written reprimand; (3) "that this is 'last chance' agreement and that any further disciplinary proceedings can and will result in termination." Kralik was also placed on probation for two years.

ULTIMATE FINDINGS OF FACT

29. Kralik's denial that she was culpable in any of the past incidents that resulted in discipline is not credible. Kralik's denial that she touched Q.P. is not credible given the testimony of Q.P. and D.L.

30. The evidence is, however, insufficient to determine exactly what Kralik did to Q.P. other than calling her some kind

of "baby," as described in Findings of Fact 7 through 17. That factual evidence is also insufficient to prove that her touching Q.P. constituted physical force that was rough, hard, or inappropriate.

31. Based on the failure of the School Board's proof to establish the truth of the mother's allegations, it is determined therefore, that Kralik is not guilty of the offenses of misconduct in office, immorality, and incapacity as charged in the Administrative Complaint.

CONCLUSIONS OF LAW

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

33. The School Board seeks to terminate Respondent's employment. In order to do so, the School Board must prove by a preponderance of the evidence that Respondent committed the violations as charged in the Administrative Complaint, and that the proposed punishment is appropriate. 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).

34. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Black's Law Dictionary 1201 (7th ed. 1999). 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)).

35. The charges in the Administrative Complaint are the only ones that are properly under consideration as grounds for termination. See Miami-Dade School Board v. Dolz, Case No. 09-4029, Fla. Div. Admin. Hrg. (R.O. 10/23/09; F.O. 2/18/10); citing Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); and Willner v. Department of Professional Regulation, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

36. Whether Kralik should be terminated depends on the specific allegations that, on September 2, 2009, she called Q.P. "stupid" or "crybaby," and pushed, pulled, and/or grabbed her in an inappropriate manner. The violations charged in the

Administrative Complaint relate only to that one incident. Reference is made to "having been counseled and disciplined in the past," but a pattern of behavior was not charged or proven as the basis for termination.[8]

37. The charges against Kralik necessarily fail, as a matter of fact. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law.`

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 dismissing the charges brought against Kralik in this proceeding.

DONE AND ENTERED this 6th day of December, 2010, in Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of December, 2010.

ENDNOTES

1. The affidavit stated that Q.P. started having nightmares after her deposition was taken with Kralik present in the room. Q.P.'s Mother testified that Q.P. was having nightmares before the day of the deposition.

2. See § 90.801(2)(b); Gardner v. State, 480 So.2d 91, 93 (Fla. 1985); Jackson v. State, 498 So.2d 906, 909 (Fla. 1986). See also Wise v. State, 546 So. 2d 1068; 1989 Fla. App. LEXIS 3119 (R.O. May 31, 1989) ([A six-year-old's,] prior consistent statements [to her mother] were erroneously presented before defense counsel presented any evidence from which the jury could infer that the appellant was contending that [the child] was improperly influenced, had a motive to falsely accuse the appellant, or had recently fabricated any part of her expected testimony.); and Bianchi v. State, 528 So. 2d 1309 (Fla. 2nd DCA 1988) (It would appear that Section 90.801(2)(b) envisions the cross-examiner attempting to show improper influence, motive, or recent fabrication on the part of the testifying witness. Then, after that occurs, the prior consistent statement could be introduced through that witness on redirect examination or a subsequent witness to show the consistency of the testifying witnesses' statements. C. Ehrhardt, Florida Evidence § 611.2 (2d ed. 1984)).

3. Respondent relied on Section 90.401 (defining relevant evidence as tending to prove or disprove a material fact); 90.403 (excluding relevant evidence if the danger of unfair prejudice substantially outweighs probative value); and 90.404, Florida Statutes, and 120.57(1)(d), Florida Statutes, ([S]similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.) Respondent conceded that "just cause" for discipline includes consideration of progressive discipline.

4. The ore tenus Motions to Strike for violation of the rule of sequestration and due to the incompetence of the witness were denied. (If, in fact, the witness is unable to testify because of age, then Florida Rule of Civil Procedure 1.330(3) would allow all of her deposition testimony to be received in evidence, which Respondent also has opposed.) Cf. Department of Health and Rehabilitative Services v. D. H., Case No. 91-1392,

1991 Fla. Div. Adm. Hear. LEXIS 6654 (R.O. May 21, 1991) (Petitioner called S.J., who is three years old. After brief examination by the Hearing Officer, S.J. was determined not competent to testify due to age.) See also Charles W. Ehrhardt, Florida Evidence § 601.1 (2010 ed.) In Florida, whether a child witness is competent to testify is based on "his or her intelligence, rather than his or her age and in addition, whether the child possesses a sense of obligation to tell the truth." Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988); Bell v. State, 93 So. 2d 575, 577 (Fla. 1957). Q.P.'s ability to testify was limited only by her five-year-old vocabulary, and her understandable impatience with the process, having been asked some of the same questions during a motion hearing, on direct examination, and on cross-examination. She was intelligent enough to notice that the attorneys were able to stop talking when they announced the end of their questioning, so she also told the undersigned, "I don't have no more questions."

5. Florida Administrative Code Rule 6B-4.009(3) provides that:

> 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.

6. Florida Administrative Code Rule 6B-4.009(2) is 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.

7. 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.

8. Compare, e.g., Polk County School Board v. Lindemann, Case No. 01-2508, 2001 Fla. Div. Adm. Hear. LEXIS 3154 (R.O. October 26, 2001).

COPIES FURNISHED:

Mr. James F. Notter, Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Eric J. Smith
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Mark A. Emanuele, Esquire
Panza, Maurer & Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, Florida 33308

Steve Rossi, Esquire
Travis Stock, Esquire
Law Offices of Steve Rossi, P.A.
533 Northeast 3rd Avenue, Suite 2
Fort Lauderdale, Florida 33301

## 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.