

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-1505TTS

BEVERLY HOWARD,

Respondent.

_____ /

RECOMMENDED ORDER

On August 27 and 28, 2013, a duly-noticed hearing was held in Jacksonville, Florida, before F. Scott Boyd, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rita Mairs, Esquire
Katy A. Harris, Esquire
City of Jacksonville
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

For Respondent: David A. Hertz, Esquire
Duval Teachers United
1601 Atlantic Boulevard
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

Whether Respondent's employment as a teacher by the Duval County School Board should be terminated for the reasons

specified in the Notice of Termination of Employment Contract and Immediate Suspension without Pay dated March 27, 2013.

PRELIMINARY STATEMENT

The Duval County Superintendent of Schools sent a Notice of Termination of Employment Contract and Immediate Suspension without Pay to Respondent on or about March 27, 2013, advising her of the alleged grounds for termination, and of her right to an administrative hearing. On April 8, 2013, Respondent requested an administrative hearing. The matter was referred to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge on April 25, 2013. After a continuance, the case was scheduled for final hearing on August 27 and 28, 2013.

The parties entered into a stipulation, which was accepted at hearing, and facts contained therein have been included among the Findings of Fact below. Petitioner presented the testimony of 12 witnesses, including former supervisors, parents, and students, and offered Exhibits P-1 through P-19, which were admitted into evidence. Respondent testified on her own behalf and did not offer any exhibits.

The three-volume transcript of the hearing was filed at DOAH on September 12, 2013. A Joint Motion for Extension of Time to File Proposed Recommended Orders was filed on September 18, 2013. This Motion was granted and the deadline

was extended to September 30, 2013. Petitioner filed a Proposed Recommended Order late, and it was not considered. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. The Duval County School Board (School Board) is charged with the responsibility to operate, control, and supervise all free public schools within the School District of Duval County, Florida.

2. Ms. Beverly L. Howard has been employed by the Duval County School Board as a classroom teacher for over 32 years. She went to Paxton Senior High School and then to Florida A & M University, graduating with a bachelor of science degree in elementary education.

3. The School Board seeks to terminate Ms. Howard's employment. Her substantial interests are affected by this intended action.

4. Ms. Howard has a history of past misconduct and disciplinary action. While teaching at Hyde Grove Elementary School in 1992, Ms. Howard received three memoranda from Principal Theresa Stahlman concerning her interactions with parents and students and her teaching performance. Among other comments, Ms. Stahlman noted that Ms. Howard needed significant improvement to "show sensitivity to student needs by maintaining a positive school environment." Ms. Stahlman testified that

Ms. Howard exhibited a "very loud punitive behavior management style" and that she wanted to help Ms. Howard improve. A note at the end of one memorandum indicates that Ms. Howard had said that she did not need cadre assistance and that she would request assistance if she needed it. A note on another memorandum indicates that Ms. Howard refused to sign it.

5. Ms. Howard testified at hearing that the things Ms. Stahlman wrote in the three memoranda were lies. Ms. Howard said that Ms. Stahlman was a racist and was prejudiced.

6. Ms. Stahlman gave Ms. Howard an unsatisfactory evaluation. The next year, Ms. Howard got an option to go to another school.

7. On March 8, 1995, a conference was held between Ms. Howard, a parent of one of her students, and Principal Debbie Sapp. The student had alleged that Ms. Howard had pushed her down. Principle Sapp noted in a memorandum that Ms. Howard "vehemently denied this, in an extremely rude and unprofessional manner" and said that she would never put her hands on a student. Principal Sapp advised Ms. Howard that being argumentative and defensive with parents was unacceptable and only made bad situations worse.

8. On March 10, 1995, Principal Sapp was making morning classroom checks when she overheard Ms. Howard repeatedly yell at a student, "Get out of my classroom." Ms. Howard's final comment

was "Get out before I throw you out." Principal Sapp then entered the classroom and saw a student standing at her desk, about to leave. Ms. Howard said that the student had been misbehaving all morning. Principal Sapp told the students that she did not expect teachers to yell at them or threaten them and admonished them to behave. In a memorandum to Ms. Howard, Principal Sapp wrote that Ms. Howard needed to work on controlling her temper, noted that Ms. Howard's classroom was frequently in disarray, and stated that yelling at students and threatening them was inappropriate behavior that only made things worse.

9. Ms. Howard testified at hearing that when Ms. Sapp came down the hall and heard a teacher yelling, Ms. Sapp never came face-to-face with her, and that it could have been the voice of another teacher which Ms. Sapp heard.

10. On May 27, 2003, the Office of Professional Standards investigated a complaint from a student's parent that Ms. Howard had grabbed the student by the arm, choked him, and caused him to vomit. The student said that Ms. Howard dug her fingernails into his arm when he got up to retrieve a paper that another boy had taken from his desk. He said that her nails were hurting him, so he began hitting Ms. Howard. He then said that she put her hand around his throat and made him choke. He said he felt sick and threw up. Ms. Howard denied the accusation. She

stated that the student was in a fight with a female student in her class and that she separated them. She said she asked the female student to sit down and attempted to gain control of the male student. Ms. Howard showed the investigator a scratch on her thumb that she said was made by the student. She stated that after she assisted the student to his desk he began gagging and attempting to vomit. She said that only saliva came up and she asked him to go to the bathroom to clean himself up. The investigation was closed as "unable to prove or disprove."

11. The Office of Professional Standards investigated allegations of unprofessional conduct against Ms. Howard on April 28, 2004. The mother of student T.J. had left a message with Ms. Howard to call her to talk about scratches on T.J.'s arm. Ms. Howard called the mother at her workplace, University of Florida Jacksonville Physicians. The mother asked Ms. Howard if she knew where the scratches came from, and Ms. Howard said they came from an incident in the library. The mother could then hear Ms. Howard asking T.J. and another girl in her class about what had happened. The other girl said that T.J. had done things to cause the incident. Ms. Howard immediately relayed to the mother that the incident had been T.J.'s fault.

12. The mother became upset, realizing that Ms. Howard had not been present and yet was completely accepting the other girl's version of what had happened. The mother then told

Ms. Howard that this was not right and that she would go to see the principal. Ms. Howard told the mother that she could talk to whomever she wanted to, and then put the phone down as if intending to disconnect the call, but the mother could still hear what was going on in the classroom. Ms. Howard said, "Class, isn't T.J. a nasty little girl?" The class responded, "Yes, ma'am." The mother heard Ms. Howard say, "Class, don't I send home paperwork?" The children responded, "Yes, ma'am." The mother could hear T.J. trying to ask Ms. Howard a question, and Ms. Howard saying, "Go sit your behind down."

13. At this point the mother became angry that Ms. Howard was verbally abusing her child in front of the other children. She asked her "lead" at her workplace to continue to monitor the call. She immediately left, and drove directly to the school to talk to the principal, Ms. Blackshear.

14. The investigator received statements from the mother's lead and several co-workers which contained additional statements Ms. Howard made to the students. Ms. Howard said:

[T.J.] get out of my face, you can go home and tell your mama all of those lies. Yeah, she is probably going to want to have a conference with Ms. Blackshear. Go ahead and get out of my face with your nasty disrespectful face. Ms. [T.J.] sit down, I have already told your mama that you will be retained in the second grade. You want to be all that, well I can be more.

15. The investigator determined that the phone number shown on the workplace caller ID feature was the number of Ms. Howard's cell phone.

16. When interviewed by the Office of Professional Standards, Ms. Howard denied making the above comments regarding T.J. She stated that T.J. had been a problem all year and that the student's mother "got an attitude" with her. Ms. Howard did admit she placed a "shelter kid," who was a juvenile inmate, outside of her classroom without supervision "for a few minutes." She stated that everyone in the school knew it was a bad class, but she was being blamed. Ms. Howard testified at hearing that the lead and co-workers of T.J.'s mother were lying when they made statements about her interactions with the students in her classroom. She said she put the phone in her purse, and the purse in her desk drawer, and that no one could have heard any conversations in the classroom.

17. Student T.J. was then reassigned from Ms. Howard's class.

18. At hearing, T.J. testified that when she was in Ms. Howard's third-grade class, she "got her card flipped to pink" on a daily basis (this color indicating the worst conduct). She admitted that she deserved this sometimes, but not all the time. She testified that she remembered that Ms. Howard used to pinch her arm when she was "in trouble." T.J. remembered that

Ms. Howard called her names, saying she was nasty, disrespectful, and in need of home training, in front of the other students. She testified that she had problems in Ms. Howard's class because she needed to go to the bathroom frequently and Ms. Howard would only let her go once a day. She would sometimes wet her pants. She then would have to wait until she was allowed to go to the office to call her mother to get clean clothing.

19. On May 17, 2004, the Duval County School Board administered discipline to Ms. Howard for her interactions with her class as reported by T.J.'s mother and her co-workers. She was issued a written reprimand, suspended for five days without pay, and required to attend an anger management session. Ms. Howard was informed that she had been given the opportunity of constructive discipline instead of a reduction of pay or dismissal to afford her progressive discipline, and that any further improper conduct on Ms. Howard's part would subject her to more severe disciplinary action. The written reprimand set forth Florida Administrative Code Rule 6B-1.006(3)(a) in its entirety, with its requirement that she "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." Ms. Howard signed a Receipt and Acknowledgement that she received a copy of the reprimand.

20. On September 6, 2012, shortly after the start of the 2012-2013 school year, Louis Sheffield Elementary School held an open-house night. Ms. Lindsey Connor, assistant principle at the school, credibly testified to Ms. Howard's response to a parent's assertion that Ms. Howard had refused to allow her son, T.S., to go to the bathroom and that he had wet his pants in her class. Ms. Howard said to the mother of T.S., "What seems to be the problem?" in a harsh tone. After some discussion, Ms. Howard said something to the effect of: "Your son is a liar. He lies. He doesn't need to be in my classroom anymore."

21. Ms. Howard denied that she ever told the mother of T.S. that her child was a liar. She stated that that would have been unprofessional. Ms. Howard testified that Ms. Connor's statement that this had happened was a lie and that Ms. Connor was always taking the parents' side. Ms. Howard testified that she never prevented a child from going to the bathroom and that T.S. just wet himself.

22. Ms. Conner received numerous complaints about Ms. Howard from parents of Ms. Howard's kindergarten students. Ms. Connor received six requests from parents to remove their children from Ms. Howard's class. Ms. Connor testified that this was an unusually high number of requests and that she was concerned.

23. J.F. was a student in Ms. Howard's kindergarten class who exhibited behavioral problems. She would do acrobatic flips in the classroom and would tie her shoelaces to the chairs. She appeared to be hyper-active and would fall out of her chair when she was at her seat. J.F. would go all around Ms. Howard's classroom and did not listen to Ms. Howard. She would back-talk Ms. Howard and showed her no respect. J.F. was frightened of Ms. Howard and often cried. Ms. Howard testified that she wanted to get specialized treatment or placement for J.F. but that the parents would not agree.

24. In response to a complaint from the parents of J.F., Ms. Connor asked Ms. Howard to prepare a chart on which stickers could be placed to document J.F.'s progress in school. Ms. Connor asked Ms. Howard to bring the chart to a meeting to discuss how to help J.F. advance. Ms. Howard did not bring anything to the meeting and said nothing about how she might be able to help J.F.

25. The mother of W.B. testified that her son was in Ms. Howard's kindergarten class and that he loved Ms. Howard as a teacher. On one occasion in Ms. Howard's classroom, W.B.'s mother observed Ms. Howard pull J.F. by the arm over to her when J.F. had gotten into trouble. The mother stated that J.F. appeared scared and she would not have liked Ms. Howard to do that to her child.

26. In response to a call from the parent of C.B., a student in Ms. Howard's class, Ms. Connor suspected that Ms. Howard may have hit one or more of her kindergarten students with a book. In a discussion with the Professional Standards office, Ms. Connor was told that she should investigate, advise the teacher, and contact the Department of Children and Families. Ms. Connor conducted interviews with students assigned to Ms. Howard's class in the presence of a witness and took notes as to what the students told her. She testified that she brought the students into her office individually, that they didn't know beforehand what she was going to talk to them about, and that they had no opportunity to collaborate or coordinate their statements.

27. After conducting interviews with the children, Ms. Connor advised Ms. Howard of an allegation that Ms. Howard struck J.F. on multiple occasions with a book. Ms. Howard responded that she would not provide a written statement because she had never hit a student.

28. Ms. Connor notified the Department of Children and Families. The report and testimony of the child protective investigator indicated that J.F. was open, happy, and smiling during the "non-threatening" portions of the interview, but the investigator testified that when asked about Ms. Howard's class, J.F. became nervous, chewed on the ends of her clothes, began to

fidget, and asked if Ms. Howard was going to know what J.F. was saying. The investigator interviewed several students in the class. The report indicated that J.F. was free of suspicious marks or bruises. When the investigator interviewed Ms. Howard, she denied ever hitting J.F. with a book or slamming her down in her seat when J.F. was misbehaving. Ms. Howard indicated that she was close to retirement and would not hit a child.

29. Student J.F. testified at hearing that she did not like Ms. Howard as her kindergarten teacher because Ms. Howard "did not want to be nice to me." She testified that Ms. Howard "hurt me." She testified that Ms. Howard "hit me on the leg with a book." She testified that Ms. Howard hit her with the book because Ms. Howard had told her to get down on the carpet. She held up five fingers when asked how many times Ms. Howard had hit her. During cross-examination, she testified that she had been hit five times in succession on a single occasion. On redirect, she testified that she had been hit on five separate days.

30. Student K.D., aged six, testified that J.F. did bad things in Ms. Howard's class. He testified that J.F. put her head in her shirt. He testified that the class would sit on the carpet every day for a little while. He testified that sometimes J.F. would stay on the carpet when she was supposed to go to her seat. He said that J.F. got spanked on her back by Ms. Howard with a book. He testified that Ms. Howard hit her on more than

one day, and when asked how many days, said "sixteen." He did not know how he knew it was 16 days. He later testified that Ms. Howard hit her "sixteen times every day."

31. The father of student J.C.M. testified that he transferred J.C.M. from a Montessori school to Louis Sheffield Elementary because his wife was going to have another baby and that school was closer to their home, which would mean a shorter drive for her. The first day that J.C.M. went to Ms. Howard's class was February 11, 2013. The parents immediately began receiving "agenda notes" from Ms. Howard saying that J.C.M. was not behaving well. The father testified that J.C.M. did not want to go back to Ms. Howard's class the next few days and would cry when they dropped him off. The father testified that since J.C.M. had never been a discipline problem and had done well at his prior school, he sent a note in after the second day to schedule a conference with Ms. Howard. The father testified that on the second or third day, J.C.M. came home complaining that his arm hurt, but when questioned as to what had happened, J.C.M. gave different stories. First he said a lady had grabbed his arm in the classroom. When asked "What lady?" J.C.M. said that it was a friend, another student. Later, he said that the injury had happened on the playground. Still later, he said that the injury was caused by his grandfather. The father was confused by these different answers. When the parents received no response

to the request to meet with Ms. Howard, the parents went to the school and met with Ms. Connor, who advised them that Ms. Howard was no longer in the classroom, but she did not tell them why. Since J.C.M. now had a new teacher, his parents did not ask that he be moved to another class.

32. Student J.C.M., aged six, testified that he had been moved into Louis Sheffield Elementary in the middle of the school year and only had Ms. Howard as his teacher for a few days. J.C.M. testified that on one of those days, "I was in the door and then I -- I didn't kicked it. I didn't kicked it, I touched it with my feet." He testified that Ms. Howard grabbed him and put him by her desk or table and that his "arm hurted for a little bit -- a little bit long." He testified that he saw Ms. Howard hit J.F. on the head with a book because she was not writing when she was supposed to be writing. He testified that on a later day Ms. Howard also hit him on the head with a book when he was on the rug, but he forgot if he was supposed to be on the rug or not.

33. Ms. Howard testified at hearing that she never put her hands on any of the students. She did not know why the children would say that she had, except that they had been coerced to say it. She testified that she had been under a doctor's care and that she had had back surgery and that her medical condition affected her ability to lift or throw items. She testified she

could not bend over or lift heavy objects because it probably would have torn her sutures. She testified that she had been under a doctor's care since January 30 and that it took her until February 14, the day she was reassigned, to recover. She testified that not only was it not in her character to hit a child, she was physically incapable of doing so at the time.

34. The testimony of Ms. Connor that the kindergarten children had no opportunity to coordinate their statements and that they did not even know in advance why she wanted to talk to them is credited. Ms. Connor's notes as to what each child told her supplement and corroborate the testimony of the children later at hearing. Although the direct testimony as to Ms. Howard's actions all came from these young children, they were capable of observing and recollecting what happened in their kindergarten class and capable of relating those facts at hearing. Their responses to questions at hearing showed that the children had a moral sense of the obligation to tell the truth. There was no objection from Respondent as to the children's competency, and they were competent to testify. These young children's accounts of events were sufficiently credible and corroborative to prove that Respondent struck J.F. with a book on multiple occasions. There was credible testimony that J.F. was struck on her legs with a book when she would not get down on the carpet as she was supposed to, was struck on her

back with a book when she would not get up off of the carpet as she was supposed to, and was struck on the head with a book when she would not write as she was supposed to. These physical contacts took place in front of other students. While the exact number of times she was struck was not clear, the testimony that it was deliberately done and was constantly repeated is credited.

35. Ms. Sonita Young is the chief human resource officer of Duval County Schools. She reviewed Ms. Howard's personnel file in making her recommendation to the Superintendent that Ms. Howard be suspended without pay pending termination. Ms. Howard's employment record, including both performance issues and disciplinary issues, was considered in determining the appropriate recommendation to be made to the Superintendent and ultimately to the Board.

36. A Notice of Termination of Employment Contract and Immediate Suspension without Pay from her position as a kindergarten teacher at Louis Sheffield Elementary was presented to Ms. Howard on March 27, 2013. The Notice alleged that Respondent had violated certain provisions of the Code of Ethics, contained in Florida Administrative Code Rule 6A-10.080, and a Principle of Professional Conduct for the Education Profession in Florida, contained in rule 6A-10.081.

37. Ms. Howard challenged the grounds for her termination and sought a hearing before an administrative law judge with the Division of Administrative Hearings.

38. The rules cited above were adopted by the State Board of Education and relate to the public schools or the public school system. Rule 6A-10.081 was renumbered, but is substantively identical to the rule cited to Ms. Howard earlier in her May 17, 2004, Written Reprimand. Ms. Howard was well aware of her responsibility to protect students from conditions harmful to learning or to students' mental or physical health or safety, because she had previously been disciplined for failing to do so.

39. Ms. Howard's actions in striking J.F. with a book failed to protect her students from conditions harmful to their mental and physical health and safety in violation of rule 6A-10.081.

40. Ms. Howard's constantly repeated actions in striking J.F. constitute persistent violation of the rule and are cause to terminate her employment as a teacher.

41. Ms. Howard's deliberate actions in striking J.F. constitute willful refusal to obey the rule and are cause to terminate her employment as a teacher.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings (DOAH) has jurisdiction over the subject matter and parties in this case, pursuant to section 5 of the Duval County Teacher Tenure Act (Tenure Act), chapter 21197, Laws of Florida (1941). Consistent with the Tenure Act, and pursuant to section 120.65(11), Florida Statutes (2012), the Duval County School Board has contracted with DOAH to conduct these hearings.

43. Petitioner seeks to terminate Respondent's employment, which does not involve the loss of a license or certification; therefore, Petitioner has the burden of proving the allegations in its Notice of Termination of Employment Contract and Immediate Suspension without Pay by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

44. Respondent has standing entitling her to a hearing under the Duval County Teacher Tenure Act.

Applicable Law

45. The Tenure Act was enacted into law in 1941. It has occasionally been amended over the years through special act. Chapters 70-671, 72-576, 84-425, and 89-489, Laws of Florida,

have no relevance to this case, but section 2 of chapter 81-372, Laws of Florida, amended section 5 of the Tenure Act to make chapter 120 procedures applicable.^{1/} See Denson v. Sang, 491 So. 2d 288, 289 (Fla. 1st DCA 1986).

46. Chapter 98-468, Laws of Florida, did not directly amend the Tenure Act, but must also be considered. It provided in pertinent part:

Notwithstanding any special act that applies to Duval County, sections 231.29 and 231.36, Florida Statutes, as amended by chapter 97-310, Laws of Florida, apply to school district personnel in Duval County; however, persons employed continuously by the district school board of Duval County before July 1, 1998, may retain all rights that they have under chapter 21197, Laws of Florida, 1941, as amended.

Pursuant to this Special Law, school district personnel in Duval County are generally subject to sections 231.29 and 231.36. However, individuals continuously employed prior to July 1, 1998, were "grandfathered in," and for them, rights afforded under the Tenure Act continue to apply.

47. The evidence shows that Respondent has been continuously employed as a teacher with the Duval County School Board for over 32 years. She has completed her period of probation. Petitioner's actions to terminate Respondent must therefore comply with applicable provisions of the Tenure Act. Altee v. Duval County Sch. Bd., 990 So. 2d 1124, 1125 n.1 (Fla.

1st DCA 2008) (quoting section 3 of the Tenure Act to note that a tenured teacher "shall not be discharged or demoted except for one or more of the causes specified in Section 4 of this Act").

48. The Tenure Act comports with procedural due process requirements. Norman v. Duval Cnty Sch. Bd., 361 F. Supp. 1167, 1169-1171 (M.D. Fla. 1973).

49. The Tenure Act takes precedence over provisions of general law on the same subject. See Alford v. Duval Cnty. Sch. Bd., 324 So. 2d 174, 177 (Fla. 1st DCA 1975); Muldrow v. Bd of Pub. Inst., 189 So. 2d 414, 415 (Fla. 1st DCA 1966); Harley v. Bd. of Pub. Inst., 103 So. 2d 111, 112 (Fla. 1958).

Charges and Specifications

50. The Notice of Termination of Employment Contract and Immediate Suspension without Pay alleges that Respondent has violated certain provisions of the Code of Ethics, contained in rule 6A-10.080, and a Principle of Professional Conduct for the Education Profession in Florida, contained in rule 6A-10.081.

51. The Notice goes on to allege that Respondent's conduct falls within the definition of "cause" provided in section 1012.33. But as discussed above, the provisions of section 1012.33 must give way to similar provisions on the same subject contained in the Tenure Act.

52. Respondent was not specifically charged with a violation of the Tenure Act. Although the specifications in the Notice of Termination are technically deficient for this reason, it is well-settled that an administrative complaint need not be cast with that degree of technical nicety required in a criminal prosecution. Libby Investigations v. Dep't of State, Div. of Licensing, 685 So. 2d 69 (Fla. 1st DCA 1996). An administrative complaint must only state the acts complained of with sufficient specificity to allow an applicant a fair chance to prepare a defense. Davis v. Dep't of Prof'l Reg., 457 So. 2d 1074 (Fla. 1st DCA 1984). The specifications certainly might have been crafted with more legal precision, but the alleged conduct of Respondent for which Petitioner seeks termination and identification of the rules allegedly violated are clear. At hearing, Respondent expressly disclaimed any prejudice from the errors in the specifications set forth in the Notice of Termination, and no prejudice is found.

Violation of Laws or Regulations

53. Section 4 of the Tenure Act provides in pertinent part:

Section 4. Causes for the discharge or the demotion of a teacher shall be:

* * *

(b) Persistent violation of or willful refusal to obey the laws of the State of Florida or regulations adopted by authority of law, relating to the public schools or the public school system.

54. Pursuant to section 1001.02, the State Board of Education has authority to adopt rules to improve the state system of public education.

55. The State Board of Education has adopted rule 6A-10.080, entitled Code of Ethics of the Education Profession in Florida, which provides:^{2/}

(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.

56. The State Board of Education has also adopted rule 6A-10.081, entitled Principles of Professional Conduct for the

Education Profession in Florida, which provides in relevant part:

(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.

57. It has been noted that the precepts set forth in the Ethics Code are "so general and so obviously aspirational as to be of little practical use in defining normative behavior." Miami-Dade Cnty. Sch. Bd. v. Brenes, Case No. 06-1758 (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007). Attention should therefore be directed toward any violation of the Principles of Professional Conduct for the Education Profession in Florida, because violations of one of these specific Principles would necessarily also violate the more general and aspirational Code of Ethics.

58. Although the direct testimony as to Respondent's actions all came from young children, these accounts were sufficiently credible to prove that Respondent took physical actions against a kindergarten student, striking her with a book on multiple occasions. These contacts took place in front of other students. Protection of the physical and mental health and safety of the students entrusted to their care is perhaps the most fundamental duty of instructional personnel in the

public schools. It is axiomatic that the duty of a teacher to protect students from conditions "harmful to their mental and physical health or safety" is completely breached when it is the "protecting" teacher who resorts to physical acts against her students in the presence of her other students.

59. Numerous cases involving school boards or the Educational Practices Commission have found physical acts against students to constitute violations of the rule setting forth this Principle, then numbered differently. Duval Cnty. Sch. Bd. v. Hunter, Case No. 12-2080TTS (Fla. DOAH Oct. 3, 2012; Duval Cnty. Sch. Bd. Nov. 15, 2012) (teacher's actions shoving student against wall with foot and slamming him against the wall were violations of rule 6B-1.006(3)(a)); Duval Cnty. Sch. Bd. v. Brown, Case No. 11-1040 (Fla. DOAH Sept. 12, 2011; Duval Cnty. Sch. Bd. Nov. 16, 2011) (striking of student in hallway by teacher was violation of rule 6B-1.006(3)(a)); Castor v. Likins, Case No. 93-0045 (Fla. DOAH Sept. 23, 1993; Comm'n of Educ. Oct. 6, 1995) (teacher's act of grabbing student by the feet and pulling him from under the teacher's desk which resulted in injury was violation of rule 6B-1.006(3)(a)); Sch. Bd. of Dade Cnty. v. Glansberg, Case No. 91-6338 (Fla. DOAH July 17, 1992, Sch. Bd. of Dade Cnty. Aug. 25, 1992) (striking student with piece of wood on buttocks in forceful manner in anger and frustration was violation of rule 6B-1.006(3)(a)). Respondent's

act of hitting kindergarten-aged children in her classroom clearly violates this Principle of Professional Conduct for the Education Profession in Florida.

60. Petitioner proved by a preponderance of the evidence that Respondent violated rule 6A-10.081(3)(a), as well as the Code of Ethics set forth in rule 6A-10.080(1), (2), and (3). These are rules relating to public schools and the public school system which have been adopted by the State Board of Education under statutory authority.

Persistent Violation or Willful Refusal to Obey

61. However, under the Tenure Act, as quoted earlier, Petitioner must show not only that Respondent violated a rule relating to public schools, but that there were "persistent" violations of it, or that there was a "willful" refusal to obey it. "Persistent" is defined as "persisting, especially in spite of opposition or obstacles; persevering; lasting or enduring tenaciously; constantly repeated; continued." See, e.g., Random House Dictionary, Random House, Inc. (2013), referenced online at <http://dictionary.reference.com/browse/persistent>; American Heritage Dictionary of the English Language, 5th ed. (2011), at www.ahdictionary.com/word/search.html?q=persistent; Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/persistence>.

62. The Florida courts have concluded that "willful" means that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." Metro. Dade Cnty. v. Dep't of Env'tl. Prot., 714 So. 2d 512, 516 (Fla. 3d DCA 1998) (citing Thunderbird Drive-In Theatre, Inc. v. Reed, 571 So. 2d 1341, 1344 (Fla. 4th DCA 1990) (willful "requires intent and purpose that the act or condition take place")), rev. denied, 577 So. 2d 1328 (Fla. 1991). The definition in Black's Law Dictionary is similar: "[p]roceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious." Black's Law Dictionary Free 2d Ed. and the Law Dictionary, at <http://thelawdictionary.org/willful/>.

63. There is scant Florida precedent involving the Tenure Act's disciplinary standard of "persistent violation" of regulations or "willful refusal to obey" regulations, because this language is something of an anomaly in Florida law today. Very similar language has served as a standard for discharge of school personnel in at least three other states, however.

64. In California, a permanent employee may be dismissed for "[p]ersistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education

or by the governing board of the school district employing him or her.” Cal. Ed. Code § 44932(a)(7) (2013). Under this California law, four acts involving physical contact with students, if supported by the evidence, were deemed sufficient to constitute persistent violation of or refusal to obey school laws and regulations: shoving a male student during a fire drill; taking a male student by the arms, shaking him, and pushing a desk at him; intentionally pushing a male student against a classroom wall; and kicking a female student in the knee. Tarquin v. Comm’n on Prof’l Competence, 84 Cal. App. 3d 251, 261 (Cal. App. 2d Dist. 1978).

65. Pennsylvania law similarly establishes “persistent and willful violation of or failure to comply with school laws of this Commonwealth (including official directives and established policy of the board of directors)” as grounds for termination. 24 P.S. § 11-1122. The Pennsylvania Supreme Court has held that persistency exists when a violation occurs either as a series of individual incidents or as one incident carried on for a substantial period of time, even when prior discipline has been administered for a portion of the conduct. Gobla v. Bd. of Sch. Dir. of Crestwood Sch. Dist., 51 Pa. Commw. 539, 414 A.2d 772 (1980). The administration of corporal punishment to students on two occasions and the isolation of two students without proper supervision on a third occasion were held to constitute

persistent and willful violation of applicable school laws and regulations. Harris v. Commw. Sec. of Ed., 29 Pa. Commw. 625, 628-629 (Pa. Commw. Ct. 1977).

66. The Supreme Court of Missouri has come to similar conclusions under that state's statute, providing that an indefinite contract with a permanent teacher may be terminated for "[w]illful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him."

§ 168.114 R.S. Mo. In Board of Education v. Shank, 542 S.W.2d 779, 782 (Mo. 1976), the court was presented with findings that a teacher had slapped a male student in one incident, slapped three males students in the face in a second incident, and struck a male student about his buttocks in a third incident. It was undisputed that the teacher had been specifically advised of a published regulation that permitted corporate punishment only as a last resort and only when witnessed by another adult. The court concluded:

"Willful" has been defined as "done deliberately; not accidental or without purpose; intentional" and "persistent" as "continuing in a course of action without regard to opposition." Webster's Third New International Dictionary. Certainly it may reasonably be concluded that respondent intended to do the acts heretofore recited and that such acts were not accidental. The board could also reasonably have concluded that the repeated incidents indicate a

stubborn continuance of conduct which was in opposition both to the regulation itself and the admonitions of the principal and superintendent.

Bd. of Ed. v. Shank at 782. See also Clark v. Bd. of Dir., 915 S.W.2d 766, 775 (Mo. Ct. App. 1996) (under Teacher Tenure Act, either persistent violations or a single willful violation warrants termination); Shepard v. South Harrison R-II Sch. Dist., 718 S.W.2d 195, 197-198 (Mo. Ct. App. 1986) (teacher with 36 years tenure who struck two students in violation of regulation was not entitled to warning letter before termination of her contract on grounds of willful or persistent violation of regulations).

67. The evidence that Respondent's actions in violation of applicable rules were both persistent and willful is convincing. While the testimony of the students differed as to certain details, the testimony was convincing that the same young girl was a victim and that Respondent hit her with a book on numerous occasions. The evidence was sufficient to show that this physical and emotional abuse was not a single isolated incident, but rather was an action that was constantly repeated over time. Respondent's violation of the State Board of Education rules was persistent within the meaning of the Duval County Teacher Tenure Act.

68. It is undisputed that Respondent was well aware of the rule requiring that she make reasonable effort to protect her students from conditions harmful to their mental or physical health or safety. The text of the rule was set out in full in her earlier written reprimand and she acknowledged receipt of it. Respondent having previously been disciplined for violation of this rule, deliberately striking a kindergarten-aged child on numerous occasions with a book clearly constituted willful refusal to obey it.

69. Petitioner proved that Respondent persistently violated regulations adopted by authority of law relating to the public schools. Petitioner also proved that Respondent willfully refused to obey these regulations. Either of these constitutes cause for discharge pursuant to the Duval County Teacher Tenure Act.

Progressive Discipline

70. Article V. D. 1 of the Collective Bargaining Agreement applicable to Respondent's employment, entitled Progressive Discipline Policy, provides in relevant part as follows:

The following progressive steps must be followed in administering discipline, it being understood, however, that some more severe acts of misconduct may warrant circumventing the established procedure.

- a. Verbal Reprimand
 - 1. No written conference summary is placed in personnel file
 - 2. Employees must be told that a verbal reprimand initiates the discipline process
- b. Written Reprimand
- c. Suspension without Pay
- d. Termination

71. Respondent received a five-day suspension without pay in August 2004 for conduct in violation of rules 6B-1.006(3) (a) and (e). As Respondent stipulated at hearing, and as shown above, termination is a possible next step in progressive discipline.

Termination of Employment

72. In full consideration of Respondent's long teaching career, but also of the pattern of her past conduct, prior disciplinary actions during that time, and the escalating nature of her conduct, it is concluded that her persistent violation of, and willful refusal to obey, regulations adopted by authority of law relating to the public schools or the public school system warrant Respondent's discharge from employment by the Duval County School Board.

RECOMMENDATION

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

That the Duval County School Board enter a final order terminating the employment of Beverly L. Howard.

DONE AND ENTERED this 15th day of October, 2013, in Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of October, 2013.

ENDNOTES

^{1/} Section 120.72 provides that references to chapter 120 or portions of it include all subsequent amendments unless expressly provided otherwise.

^{2/} All rules cited here were transferred and renumbered in the Florida Administrative Code on January 11, 2013, but were not substantively changed.

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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.