

**Via Certified Mail**

December 17, 2013

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

Honorable R. Bruce McKibben  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060


Re: Duval County School Board (DCSB) vs. Donna James  
DOAH Case No.: 13-1515TTS

Honorable R. Bruce McKibben:

The Duval County School Board has reviewed the complete record in DOAH case number 13-1515TTS. Following a Hearing on November 8, 2013, the Board issued the attached Final Order.

If you have any questions regarding this matter, please do not hesitate to contact me.

Respectfully,

  
Brian K. McDuffie, Esq.  
Executive Director, Policy and Compliance

Attachments: Final Order  
Petitioner's Exceptions  
Respondent's Response to Exceptions

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STATE OF FLORIDA  
DUVAL COUNTY SCHOOL BOARD

In Re: Dismissal of Instructional Employee

FILED

DUVAL COUNTY SCHOOL BOARD

2013 DEC 18 PM 12 19

DOAH Case No.: 13-1515TTS

Petitioner,

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

v.

**DONNA JAMES,**

Respondent.

**FINAL ORDER**

This matter came to be heard by the School Board of Duval County, Florida, ("School Board") on November 8, 2013, on the exceptions filed on behalf of the Petitioner through the Superintendent of Duval County Public Schools, Nikolai P. Vitti, Ed.D., regarding the Recommended Order issued by Administrative Law Judge R. Bruce McKibben on July 23, 2013. The Recommended Order by Judge McKibben recommended that the Petitioner dismiss all charges and rescind the termination of the employment contract of Donna James. Having reviewed the complete record and heard argument of counsel and being fully advised in the premises, it is hereby ORDERED AND ADJUDGED by the School Board as follows:

**FACTS**

On March 25, 2013, Dr. Nikolai P. Vitti, Superintendent of Duval County Public Schools, issued to Respondent Donna James, a teacher at Southside Estates Elementary School in Jacksonville, Florida, a Notice of Termination of Employment Contract and Immediate Suspension Without Pay ("Notice of Termination"). The termination was based on an incident that reportedly occurred in Ms. James's kindergarten classroom on

March 1, 2013, when students reported that they witnessed two of their classmates engaging in a sexual act (touching and oral sex), as well as prior incidents and discipline concerning Ms. James's failure to supervise her students.

As a result of the March 1, 2013 incident, combined with several other incidents of inadequate supervision described below, Ms. Sonita Young, Chief Human Resources Officer for District, recommended termination to the Superintendent on March 26, 2013. [P-3, T 213, T 222]. Ms. James was terminated for failing to adequately supervise her students, resulting in violations of the Code of Ethics, Rule 6A-10.080(2)&(3), F.A.C., and Principle of Professional Conduct, Rule 6A-10.081(3)(a), F.A.C. She was terminated for cause under s. 1012.33(1)(a), Florida Statutes.

Respondent challenged her termination and, at her request, the above-styled case was opened and a hearing was held by the Honorable R. Bruce McKibben, an Administrative Law Judge ("ALJ") assigned by the State of Florida's Division of Administrative Hearings ("DOAH"). The ALJ is charged with determining whether: (a) the charges in the Notice of Termination are supported by competent and substantial evidence; and (b) the termination complied with due process and other protections afforded to Respondent under the Duval County Teacher Tenure Act, Laws of Florida, Chapter 21197 (1941) ("Tenure Act"), Chapter 120 of the Florida Statutes, and the Collective Bargaining Agreement between the School District and Duval Teachers United.

The DOAH hearing took place on July 1 and 2, 2013, and both parties were represented by legal counsel. Throughout the hearing, the ALJ took evidence and heard sworn testimony of several witnesses. In light of the testimonial and documentary

evidence, the argument of counsel, and the proposed recommended order of Petitioner<sup>1</sup>, the ALJ issued an Order on July 23, 2013, which recommended that:

“a final order be entered by Petitioner, Duval County School Board, dismissing all charges and rescinding the termination of the employment contract of Donna James for the reasons set forth above.” Recommended Order, p. 19.

Both parties filed exceptions to the Recommended Order,<sup>2</sup> and the parties thereafter appeared at a hearing before this Board on November 8, 2013, each side giving a ten (10) minute presentation before answering questions from School Board members.

### **EXCEPTIONS**

Petitioner’s exception to paragraphs 5, 6 and 21 of the Recommended Order are denied as the findings in those paragraphs are supported by competent substantial evidence. *See Abram v. Seminole County School Board*, 73 So. 3d 285, 294 (Fla. 5th DCA 2011) (holding that if there is competent substantial evidence in the record to support the ALJ’s findings of fact, the agency may not reject them, modify them, substitute its findings, or make new findings). Petitioner’s exceptions to paragraphs 40, 44, 45 and 46 of the Recommended Order, however, are accepted.

The School Board takes exception to the statement in the conclusions of law, paragraph 40 of the Recommended Order, that “[t]he evidence presented at final hearing falls woefully short” of establishing a pattern of inadequate supervision on the part of Ms. James. Recommended Order, p. 17. The ALJ based this conclusion on his finding that there was “no competent, substantial evidence” that Ms. James failed to supervise her

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<sup>1</sup> Respondent did not submit a proposed recommended order, as the ALJ issued his Recommended Order prior to the due date for submittal of such proposed orders.

<sup>2</sup> Petitioner filed exceptions 1-7 on August 6, 2013. Exceptions 1-3 are to the ALJ’s Findings of Fact, while exceptions 4-7 are to his Conclusions of Law. Respondent did not file formal exceptions to the Recommended Order, but by letter of August 6, 2013, requested that the Board accept the ALJ’s Recommended Order, grant reinstatement and award back pay. In light of this Final Order, Respondent’s request is rejected.

students on the playground or when allowing an extended day student to board the bus. *Id.* He then stated that there was “no credible evidence” that Ms. James failed to adequately supervise her students on March 1, 2013, when a sexual incident occurred in her kindergarten classroom. *Id.*

These statements are improper and wholly belied by the record. The School Board should not have been given the burden of proof as to past disciplinary incidents, particularly when none were ever challenged or explained at the time and none were at issue in the final termination hearing.

In any event, there was an abundance of evidence showing a pattern of inadequate supervision incidents committed by Ms. James. In December 2010, the Department of Children and Families (DCF) investigated an incident where a student was stabbed repeatedly with a pencil in Ms. James’s classroom during a fight while she reportedly was out of the classroom. [P-1]. Ms. James does not deny that this incident occurred. [T 298, T 347].

On March 13, 2012, Ms. James received a verbal reprimand (Step I of the discipline process under the collective bargaining agreement) from Principal Sutton for failing to adequately supervise her students when she left at least one student on the playground. [P-1]. She also did not deny this incident. [T 347].

On November 14, 2012, Ms. James then received a written reprimand for again failing to adequately supervise her students when she permitted a student in her kindergarten class, who was supposed to be in the afterschool “extended day” program, to instead board a school bus. [P-1, P-4, T 39]. This written reprimand followed strict protocol and was warranted because it was Ms. James’s responsibility to ensure that all of her students were checked into their end-of-the-day destinations safely. [T 193-194, T

198]. Ms. James did not challenge or otherwise clarify any of her past discipline, or submit any written explanation as provided in her collective bargaining agreement. [P-16, P-4, T 45]. Ms. James admitted at the final hearing that these incidents occurred. [T 193-194, 198, 347, 352, 356-57].

Similarly, Ms. James admitted to the terrible incident that occurred on March 1, 2013, that she did not see it even though she was in the classroom, and that she had no reason not to believe the student witnesses to the sexual incident. [T 341-345, 357-358]. The School Board disagrees with the ALJ's legal conclusion that the evidence of a pattern of inadequate supervision fell "woefully short" and that there was no competent, substantial evidence to support past discipline. Clearly, Ms. James displayed a pattern of inadequately supervising her students.

The School Board takes exception to the conclusions of law in paragraph 44 of the Recommended Order stating that the sexual incident of March 1, 2013 was "not, ipso facto," grounds for termination due to inadequate supervision. Recommended Order, p. 18. This was not, as the ALJ suggests, an "individual action by a single student" that could not be prevented. *Id.* Instead, the School Board was well within its discretion to decide, as it did, that the March 1, 2013, incident was serious and warranted termination. [T2 226-227, 232]. Testimony and evidence also showed that, while some kindergarten students could not recall the number of times or when exactly other incidents occurred, there were other incidents of sexual touching in Ms. James's classroom while she was present. [Petitioner's Exhibit 9, admitted without objection]

Ms. Sonita Young, Chief of Human Resources, testified at the hearing that due to the severe nature of the March 1, 2013 incident, along with other incidents, the recommendation was made to bypass Step III (suspension) of the discipline process. This

bypass is permitted by the collective bargaining agreement. [T 221-222]. Ms. Young stated that the nature and severity of the March 1, 2013 incident made it, even in isolation, grounds for termination. [T 232]. This was a discretionary call by the School Board and it should be entitled to some deference for its discretionary decision. This serious incident alone warranted termination.

The School Board takes exception to the ALJ's "conclusion of law" in paragraph 45 of the Recommended Order that "[t]he evidence, taken as a whole, demonstrated that Ms. James was falsely accused of failing to properly supervise her students." Recommended Order, p. 19. While the ALJ may have disagreed with the level of responsibility and discipline as to the incidents in question, as well as past discipline and incidents, there was absolutely no evidence presented to show that Ms. James was "falsely accused" of anything. Both Principal Sutton and the School Board were fair and followed protocol in their investigations, as stated by Principal Sutton, Zayna Harb, Beverly Walker and Sonita Young at the final hearing. Even Ms. James herself admitted that while she felt Principal Sutton should have talked more to her, there was no other specific reason to think that Principal Sutton was unfair or "falsely accusing" Ms. James of anything, or that Principal Sutton fabricated any incident. [T. 352, 356-359]. This "falsely accused" conclusion is inappropriate opinion which is unsupported by the record evidence.

Lastly, the School Board takes exception to the "conclusion of law" in paragraph 46 of the Recommended Order that the School Board's conclusions regarding violations of the Code of Ethics and Principle of Professional Conduct were "mere conjecture and based on fallacious premises." Recommended Order, p. 19. Again, this statement is inappropriate opinion which is not supported by the record.

According to the Notice of Termination, the specific “cause” for Respondent’s dismissal was her violations of Rule 6A-10.080(2)&(3), F.A.C. (the Code of Ethics), and Rule 6A-10.081(3)(a), F.A.C. (the Principles of Professional Conduct), as well as s. 1012.33(1)(a), Florida Statutes. Rule 6A-10.080(2), F.A.C., states that “an educator’s primary professional concern will always be for the student and for the development of the student’s potential, ...” and therefore the educator must “strive for professional growth” and “seek to exercise the best professional judgment and integrity.” Subsection (3) of the same rule requires an educator to be “[a]ware of the importance of maintaining the respect and confidence of one’s colleagues, of students, of parents, and of other members of the community,” and must “[strive] to achieve and sustain the highest degree of ethical conduct.” Rule 6A-10.081(3)(a), F.A.C. (Principles of Professional Conduct) further states that an educator “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.”

Administrative Law Judges and Courts have concluded that any conduct which violates the Code of Ethics supports dismissal. *See Alachua County School Bd. v. Casey A. Carlisle*, 2007 WL 418691, \*6-7 (Fla.Div.Admin.Hrgs. 2007), DOAH Case No. 06-3812); *Duval County School Bd. v. Trawick*, 19 F.A.L.R. 4087 (1997); *Spurlin v. School Bd. of Sarasota County*, 520 So. 2d 294 (Fla. 2d DCA 1988) (stating that “seven deadly sins” enumerated in statute apply to suspension or dismissal of personnel under contract). Moreover, conduct which breaches the trust and confidence placed in a teacher raises an inference of impairment. *See Miami-Dade County School Bd. v. Michael Spivey*, 2007 WL 631122, \*10 (Fla.Div.Admin.Hrgs. 2007).



“Just cause” includes, but is not limited to, misconduct in office, incompetency, and willful neglect of duty. *See* s. 1012.33(1)(a), Florida Statutes. Based on the evidence presented at the hearing, all three of these grounds for cause are present to support this termination. Professional incompetence can manifest itself through failure to employ appropriate disciplinary techniques suitable to the particular situation. *See* Turlington v. Reaves, 9 F.A.L.R. 1371 (1986); *see also* Turlington v. Walker, 9 F.A.L.R. 2305 (1987) (reasoning that inability to control the behavior of disruptive students within the class constituted incompetence); Department of Education v. Ferrara, 10 F.A.L.R. 5766 (1987) (finding that inability to handle discipline problems revealed teacher incompetence). It can also include failure to create and maintain a classroom environment conducive to learning. *See* Turlington v. Walker, 9 F.A.L.R. 2305 (1987); Castor v. Perry, 9 F.A.L.R. 2305 (1987). Most importantly for this matter, failure to maintain proper supervision of students in the classroom is incompetence. *See* Turlington v. Walker, 9 F.A.L.R. 2302 (1987); *see also* Department of Education v. Ferrara, 10 F.A.L.R. 5766 (1987); Castor v. Perry, 9 F.A.L.R. 5291 (1987) (reasoning that “off task” students supported finding of professional incompetence).

Upon an independent examination of the entire record in this matter, the Board hereby accepts the ALJ’s Findings of Fact, but modifies and rejects the ALJ’s Conclusions of Law to the extent stated herein, and rejects the recommendation to rescind Respondent’s termination of employment. In addition to those reasons discussed above, the Board’s decision is grounded on the gravity of the charges against Respondent and the ALJ’s failure to supply a meaningful reason for rejecting the discipline in this matter.

Ms. James’s history shows a clear pattern of inadequate supervision of students under her care. There is substantial, competent evidence in the record to support

Petitioner's decision to terminate the employment of Respondent for just cause based on incompetence and a willful neglect of duty. The Petitioner has established by a preponderance of the evidence that it appropriately terminated Ms. James, even based on the March 1, 2013 sexual incident alone.

Ms. James's failure to supervise classroom behavior, promote student growth, promote an environment of respect, and ensure the safety of students both in and out of the classroom violated her duties under the Code of Ethics and Principles of Professional Conduct, and constituted "cause" as defined by s. 1012.33(1)(a), Florida Statutes (misconduct in office, incompetency, and willful neglect of duty). These students were five and six-year-olds under Ms. James's direct care and responsibility, and she was ultimately charged with ensuring their safety and well-being. She failed in this most basic responsibility.

The Board may increase the ALJ's recommended penalty if it: (a) reviews the complete record, (b) states in its final order particular reasons for doing so, and (c) supports its reasoning via citations to the record. *See* s. 120.57(1)(1) Florida Statutes; *see also* Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990) (upholding school board order which accepted ALJ's findings of fact and conclusions of law but increased the recommended penalty to termination). In fact, boards and agencies are to be accorded great discretion in determining appropriate levels of discipline for individuals under their authority. *See* Department of Professional Regulation v. Bernal, 531 So. 2d 967, 968 (Fla. 1988); *see also* Criminal Justice Standards and Training Commission v. Bradley, 596 So. 2d 661, 663 (Fla. 1992) (making clear that reviewing courts must defer to the disciplinary decisions of boards and agencies because they are "responsible for developing [disciplinary] policy" in their given professional fields).

**WHEREFORE**, the Board therefore modifies the ALJ's Recommended Order as stated herein, and in light of the foregoing, it is **ORDERED and ADJUDGED** that:

1. Administrative Law Judge R. Bruce McKibben's Findings of Fact are accepted, and Petitioner's exceptions 1, 2, and 3 to the ALJ's Findings of Fact, are rejected.

2. The ALJ's Conclusions of Law are hereby rejected and modified to the extent stated herein, and Petitioner's exceptions 4, 5, 6 and 7 to the Conclusions of Law are accepted. The ALJ's recommendation to dismiss all charges and rescind the Notice of Termination is rejected.

3. Respondent's employment with Duval County Public Schools is hereby **TERMINATED** for cause.

**DONE AND ENTERED THIS** 16th day of December, 2013.

**THE SCHOOL BOARD OF DUVAL COUNTY,  
FLORIDA**

  
Becki Couch, Chairman

  
School Board Clerk

**APPEAL OF FINAL ORDER**

This Order may be appealed by filing two copies of a Notice of Appeal accompanied by a filing fee, as provided in §120.68, Florida Statutes and Fla.R.App.P 9.100(b) and (c) within (30) days of the rendition of this Final Order

**Copies to:**

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