

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-3859TTS

MICHAEL GREEN,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 18 and 19, 2013, in Jacksonville, Florida, before Lawrence P. Stevenson, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kelly Hebden Papa, Esquire
Gaby Young, Esquire
Office of the General Counsel
City Hall, St. James Building
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

For Respondent: Tishia Anita Dunham, Esquire
500 Trinity Lane North, Unit 7209
St. Petersburg, Florida 33716

STATEMENT OF THE ISSUE

The issue is whether Petitioner, the Duval County School Board, may terminate Respondent's employment as an instructional employee based upon the conduct alleged in the letter titled

"Notice of Termination of Employment Contract and Immediate Suspension Without Pay" (the "Notice") from Superintendent of Schools Nikolai P. Vitti to Respondent dated August 30, 2013.

PRELIMINARY STATEMENT

On or about August 30, 2013, Respondent Michael Green received a copy of the Notice, which set forth the following allegations in support thereof, in relevant part:

On 8/28/13, you entered the gymnasium and observed a female student cursing and shouting at a teacher. You approached the student and asked her to exit the gymnasium in an effort to calm her down. The student continued to shout and use profanity before exiting the gymnasium. Upon reviewing the surveillance video, you were observed placing your hand on the student's shoulder as she walked toward the opposite wall. You walked toward the student and stood face to face with her. The student pushed you in your chest area with both hands. You responded by striking the student in the face. Next, the student swung at you and you responded by striking her with a fist directly in the face. This resulted in injury to her face.

You were subsequently arrested by the Jacksonville Sheriff's Office for Child Abuse, a felony, in violation of Florida Statutes 827.03(1)(a).

Your conduct is in direct violation of the below regulation(s) relating to the public school system.

Specifically, the following portions of the **Code of Ethics** were violated:

6A-10.080(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.

6A-10.080 (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.

6A-10.080 (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.

Additionally, your conduct violates the following **Principle of Professional Conduct**:

6A-10.081 (3) (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.

Further, this conduct also falls within the definition of "cause" as provided in section 1012.33(1)(a), Florida Statutes. 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.

The Notice informed Mr. Green of his right to a formal hearing to contest the factual allegations recited in the

Notice, and, should he invoke his right to a formal hearing, that the Duval County School Board (the "School Board") would act to suspend him from employment without pay as of September 4, 2013, pursuant to section 1012.33, Florida Statutes. On September 9, 2013, Mr. Green timely invoked his right to a formal hearing via a letter from his counsel to Dr. Vitti.

On October 4, 2013, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge and the conduct of a formal hearing. The matter was scheduled for final hearing on December 18 and 19, 2013, on which dates it was convened and completed.

At the hearing, the School Board presented the testimony of Javonne Johnson, a security guard at Eugene J. Butler Middle School ("Butler Middle School"), where Mr. Green taught and where the incident in question occurred; Detective Don Schoenfeld of the Duval County Public School Police Department ("DCPSPD"); Maurice Nesmith, principal of Butler Middle School; Chief David Coffman of the DCPSPD; and Sonita Young, chief human resources officer for the School Board. The School Board's Exhibits 1 through 20 were admitted into evidence by stipulation of the parties. Respondent testified on his own behalf and presented the testimony of Brittany Rose Knadle, a teacher at

Butler Middle School; Ellis McSwain, Jr., a BEST Academy site coach at Dupont Middle School and friend of Mr. Green; and Khristopher Henderson, a school improvement specialist with the Department of Education and a friend of Mr. Green. Respondent's Exhibits 1, 2 and 6 were admitted into evidence by stipulation.

The three-volume Transcript of the hearing was filed at DOAH on January 14, 2014. The parties' Proposed Recommended Orders were filed on January 22, 2014.

FINDINGS OF FACT

1. Respondent Michael Green has been employed by the School Board as a teacher since 2004. He is a certified instructional employee covered by the Duval County Teacher Tenure Act, chapter 21197, Laws of Florida (1941), as amended ("Tenure Act") and the Collective Bargaining Agreement ("CBA") between Duval Teachers United and the School Board for 2008-2011. At the time of the events at issue in this proceeding, Mr. Green was assigned to Butler Middle School as a health and physical education teacher and athletic director.

2. At the time of the incident in question, which was at the beginning of the 2013-2014 school year, S.J. was a 14-year-old girl who was a student at Butler Middle School. She was starting her second year in the seventh grade. Based on the security video that was admitted into evidence, S.J. was very large for her age, nearly the size of Mr. Green.

3. Principal Maurice Nesmith knew S.J. and characterized her as one of the worst of the 588 students at Butler Middle School. S.J. had a documented history of disciplinary problems for threats and acts of violence and for verbal and physical aggression toward other students, staff, teachers, and even administrators at Butler Middle School. Mr. Nesmith frequently received complaints from teachers, administrators and staff that S.J. was rude, disrespectful, defiant, and resistant to instruction.

4. School security guard Javonne Johnson testified that he was familiar with S.J. and frequently had to deal with her because she would be outside of her assigned classroom without permission. Mr. Johnson stated that it was hard to make S.J. calm down when she was agitated.

5. On January 30, 2013, S.J. caused what Mr. Nesmith's Discipline Incident report termed "a major disruption" in the Butler Middle School cafeteria. S.J. was angered when a smaller male student snitched on her for throwing food. She commenced hitting the child in the head. She punched him several times before a security guard and assistant principal could intervene. S.J. then proceeded to fight the adults until they managed to corral her into Mr. Nesmith's office. According to Mr. Nesmith's report, S.J. stated to him that "she didn't give a fuck, she don't care about this shit." Officer Frederick

Robinson of the DCPSPD submitted a written statement confirming that S.J. told the adults, "I don't give a fuck about nobody, I don't give a fuck about the police," and "No one is going to tell me what the fuck to do or say."

6. As a result of this incident, and many before it, Mr. Nesmith referred S.J. to an alternative school for the remainder of the 2012-2013 school year.

7. Mr. Nesmith testified that when S.J. returned to Butler Middle School for the 2013-2014 school year there was no change in her behavior. Though she was not disciplined for her role in the incident with Mr. Green, S.J.'s return to Butler Middle School was nonetheless short-lived. By early October 2013, S.J. had again been referred to an alternative school because of repeated incidents, including one in which she threatened to kill another student ("I got bullets for your ass").

8. The School Board placed into evidence video taken by security cameras in the gym and in the hallway outside the gym. There is no sound on the videos. Visual aspects of the findings as to events in the gym and in the hallway on the morning of August 28, 2013, are mostly based on the security video. Findings as to what was said in the gym and in the hallway that morning are based on the credible testimony of witnesses.

9. Brittany Knadle is a first-year physical education teacher assigned to Butler Middle School. On August 28, 2013,

she taught a large physical education class of approximately 60 students during first period in the school's gymnasium. S.J. was enrolled in Ms. Knadle's first period class. Although it was only the second week of school, Ms. Knadle was already having problems with S.J.'s truculence and had complained to Mr. Nesmith about S.J.'s behavior in her class.

10. On August 28, 2013, S.J. was disrupting Ms. Knadle's class, wandering through the lines of students who in the security video appear to be lackadaisically performing calisthenics on the gym floor. Mr. Green entered the gymnasium in his capacity as athletic director to ask Ms. Knadle about coaching a sport. Ms. Knadle agreed to coach softball.

11. Mr. Green testified that Ms. Knadle told him that she was having problems with S.J.'s refusal to follow directions. Mr. Green advised her to make S.J. stand against the wall and to give her a grade of zero for the day for nonparticipation in the class activity. Mr. Green stated that he had never met S.J. prior to August 28, 2013, but that he had heard about her physical assault on an administrator and had heard she was rude, disruptive, and disrespectful to authority figures.

12. Mr. Green left the gym but returned a short time later with a form for Ms. Knadle to sign regarding the softball coaching position. Mr. Green observed S.J. continuing her disruptive behavior, wandering around the gym, walking through

student lines and not participating in class. Mr. Green believed she was creating a safety hazard for the other students. He instructed S.J. to gather her belongings because he was taking her to the dean's office.

13. S.J. slowly strolled to the spot on the gym floor where her backpack lay. She stood over the backpack and then rummaged through it for several seconds. She then picked up the backpack and walked toward Mr. Green to exit the gym.

14. Mr. Green testified that while S.J. had been belligerent and cursing during the entire incident, she appeared even more irate, threatening and confident after picking up her bag, saying to him and Ms. Knadle, "You all are going to make me fuck one of you up."

15. The security video shows S.J. and Mr. Green exiting the gym and into the school hallway. Mr. Green places his hand on S.J.'s shoulder. She walks straight across the hallway to the opposite wall. S.J. turns to face Mr. Green and drops her backpack. Mr. Green moves to within inches of S.J., very nearly nose to nose.

16. At this point, S.J. pushes Mr. Green away with both hands. Mr. Green responds with a right hand strike to S.J.'s face. The blow appears to be a glancing one. S.J.'s head snaps to the right but she quickly recovers and moves toward Mr. Green with her arms flailing. Mr. Green backs up a step or two,

braces himself with his right foot, draws back his right hand into a fist, then pushes off the right foot to deliver a full-force punch to S.J.'s face.

17. S.J.'s head snaps violently back to the right and she staggers backward into the wall. Remarkably, S.J. once again shakes off the blow and again charges forward toward Mr. Green. At this point, Mr. Green wraps S.J. in his arms and takes her down to the floor. He holds her down for a few seconds until security arrives to take over.

18. Mr. Johnson was the guard who took over and restrained S.J. He tried to calm her but she continued to yell and scream, cursing and threatening Mr. Green, saying she was going to "kick his ass." Mr. Johnson noted no marks on S.J.'s face and refused to believe S.J.'s repeated statements that Mr. Green "hit a girl . . . he hit me in my face."

19. Officer Robinson of the DCPSPD handcuffed S.J. and placed her in the back of his patrol car to await arrest. Mr. Nesmith, who was visiting an upstairs classroom, was called via walkie-talkie and informed that Officer Robinson needed him. Mr. Nesmith came down immediately and spoke to Officer Robinson at his patrol car. Officer Robinson told Mr. Nesmith that he was arresting S.J. for battery on a School Board employee, and explained what happened in the hallway. Mr. Nesmith told Officer Robinson that there was a security camera in that

hallway. They had a security guard wait outside with S.J. while they went inside to view the security video with Mr. Green, who had been waiting in Mr. Nesmith's office.

20. The three men reviewed the video. Mr. Nesmith testified that when he saw the video, he dropped his head and asked Mr. Green, "What were you doing?"^{1/} Mr. Nesmith immediately contacted the School Board's professional standards office and his region chief to report the incident. He then took Mr. Green to the principal's conference room and instructed him to write a statement.

21. The statement that Mr. Green wrote in Mr. Nesmith's conference room read as follows:

I, Michael Green, entered the gymnasium to speak with Coach Knadle. At the time [S.J.] a student in Coach Knadle's class was causing a disruption. The student was standing walking through the students cursing as they were sitting in roll call on the floor. [S.J.] was asked to get her books so I could escort her to the office to settle down. She began cursing loud causing a seen [sic] as she walked out of the gymnasium. I then stopped her in the hallway to keep her from cursing loud disrupting the learning environment. As she stopped in the hall she continued to curse and yell at me, saying fuck you, you ain't nobody. I told her to quiet down and she pushed me. Then she started to swing at me. In my defense I tried to stop her arms from hitting me. I tried to keep her at a distance. She stopped for second [sic] then she started to attack me again. I then had to take her to the ground to keep her from attacking me.

22. It is notable that this statement makes no mention of the fact that Mr. Green struck S.J. in the face twice during the altercation. Mr. Green would later contend that he feared S.J. had a weapon when she attacked him, but he made no mention of such a fear in this statement, written within two hours after the incident.

23. Mr. Green was taken into custody by DCPSPD for suspected child abuse. He was interviewed by Detective Don Schoenfeld, who had reviewed the security video. Mr. Green told Detective Schoenfeld that he did not remember hitting S.J. After the interview, Detective Schoenfeld had Mr. Green write a statement.^{2/} Mr. Green's statement to Detective Schoenfeld read as follows:

I Michael Green entered the gymnasium^{3/} to speak with another teacher. The teacher was having difficulty getting the student to follow directions. The student began to walk around and throughout the other students causing a safety issue. The student was asked to gather her belongings so that I could escort her out of the gymnasium and to the office where she could calm down. The student began to curse using all kinds of profanity as she exited the gymnasium. Once entering the hallway the student continued to talk loud and curse causing a comotion [sic]. I approached the student to keep her from running and acting wild and crazy. She pushed me with both hands. She continued to curse and threaten me saying "fuck you," "you ain't nobody," "what's up." I then tried to keep her at a distance. She began to swing and punch at me. I then tried to subdue her to keep her

from causing harm to me and herself. Once I got her to the ground I called for security to assist the situation.

24. As in his earlier statement, Mr. Green here makes no mention of the most notable aspect of the incident: that he struck a seventh grade student twice in the face with his fist. He also makes no mention of any concern that S.J. might have had a weapon.

25. Mr. Green was arrested and spent the night in jail.^{4/} He was charged with child abuse but the state attorney later dropped the criminal charges.

26. Upon his release from jail, on August 29, 2013, Mr. Green was informed by Mr. Nesmith that he was to report immediately to the School Board's Consolidated Services Warehouse/Teacher Supply Depot at Bulls Bay until further notice.

27. On or about August 30, 2013, Mr. Green received the Notice, which informed him of the charges against him and of his right to contest those charges. The Notice stated that if Mr. Green chose to exercise his right to a hearing, he would be suspended without pay as of September 4, 2013, and that this suspension would be acted upon by the School Board at its meeting on September 3, 2013.

28. On September 3, 2013, Mr. Green sent an email to Superintendent of Schools Nikolai P. Vitti that read as

follows:^{5/}

Dear Dr. Vitti,

I am writing you this letter with the deepest concern of my character. First, I would like you to know that by no means am I an evil person or even a child abuser, I am far from what has been perceived of me due to the situation at Eugene Butler. I love and care about my students and I am very sorry for what happened but in all honesty I was defending myself. Please take a few minutes from your busy schedule to read this letter and consider me for reinstatement of my job.

I entered the gym that particular day to get a signature from a coach because I proudly serve as the Athletic Director. As I was getting the signature the young lady who works in PE with me was having trouble controlling her class, she asked me to intervene and assist her. She is a first year teacher, small statute young white female who is presently teaching some students that are academically and behavioral challenged. This situation is rough on a first year teacher. I was able to calm her class down and get them in their roll lines but this one particular student continued to curse and disrupt the learning environment. This student was just getting back from Grand Park Alternative School this year. I was aware of her past and her behavioral problems so I asked her why she can't follow instructions. I told her to report to the Dean's office, still using abusive language she told me "Fuck You" over and over and continued to say "you ain't nobody". She walked to get her bag and gather her belongings. I saw her reach inside a bag she was carrying. I asked her to get out the gym because at that time I felt the other students were in danger and this student was causing a serious uproar. Before leaving the gym she said "y'all

mother fuckers always trying me!" She continued to curse and got animated walking to the door. When she left the gym I followed her out at a cautious distance and instead of heading to the Dean office she was headed in the opposite direction to the front office. I told her she was headed the wrong way and this is when I stepped in front of her. I was trying to calm her down and keep her from causing a commotion in the hallway and keep her from walking to the front office. Then she raised her hands and pushed me saying "what's up" in a threatening manner. Honestly it happened so fast sir until I was in defense mode because I knew what she had done to other staff members and the idea of her possessing a knife really scared me. It was a situation that I have never been in before and I panicked. The student became combative in an instance and I really didn't know how to handle the situation. She came at me swinging and saying "what's up, what's up." I was backing up trying not to let her get to me because I thought she could have had a weapon. She continued to attack me moving in my direction. When I realized she didn't have a weapon I took her to the ground calling for security. Once I had her on the ground she continued to kick and try to break away. The entire time she continued to curse and saying "I'm gonna fuck you up", "I'm gonna kill you. Security arrived and she continued to say "let me go so me and this mother fucker can fight." Again, I have never been in a situation such as this one. I feel truly sorry that this happened. Since the incident I haven't been able to sleep and I have become depressed over the fear of my career being put in jeopardy. I have over ten plus years of service with Duval County and I have never been involved with anything such as this situation. In closing this letter, I am currently enrolled in graduate school with only three more classes to go and I am majoring in Educational Leadership. I really have hopes

and dreams of being a leader one day in this wonderful district but I am praying that you have mercy on me for this situation and consider the circumstance and not to think that I am a child abuser but only I was defending myself from a violent student. I love my job and I really want to continue my career in Duval County. Please consider me for reinstatement, I am sorry for what happened and I am so willing to attend any training or workshops that the district provides to help teachers in these situations.

29. This email again fails to admit in a straightforward manner that Mr. Green punched S.J. in the face. In this email, his third written description of the events in the hallway on August 28, Mr. Green for the first time states that he feared S.J. had a weapon, presumably a knife that she had pulled out of her bag while gathering her belongings in the gym.

30. In the email, Mr. Green also states that he believed he was protecting the other students in the gym class from "danger" and that S.J. was causing a "serious uproar" in the gym. The security video shows that the other students were more or less ignoring S.J. as she wandered in and out of the lines and around the gym.^{6/}

31. In her testimony, Ms. Knadle disagreed that the class was out of control. She stated that the students were loud and were talking over her, and she agreed that Mr. Green was able to calm the students down by speaking to them.

32. Six of seven School Board members were present at the September 3, 2013, meeting at which Mr. Green's case was considered. The vote to suspend Mr. Green without pay and to terminate his employment with the Duval County School Board was unanimous.

33. In his testimony at the hearing, Mr. Green complained that he had never received training on how to deal with violent students. Sonita Young, the School Board's chief human resource officer, testified that the School Board offers training in proper restraint techniques to all teachers who specialize in working with students with behavioral disorders and to other teachers on an as needed basis. As a general education teacher, Mr. Green was not an obvious candidate for such training.

34. Ms. Young testified that the training needs of a school are generally determined by the principal. Mr. Nesmith testified regarding "CHAMPS" training in classroom management techniques that all new teachers at Butler Middle School are required to attend. Mr. Nesmith did not require Mr. Green to take this training because there were no apparent deficiencies in Mr. Green's classroom management.

35. Most tellingly, Mr. Nesmith testified that "teachers know not to punch a student." A teacher lacking training may face situations in which he must improvise a method of restraining an out-of-control student, but there is no excuse

for such improvisation to descend to a fistfight with a middle school student.

36. Mr. Johnson, the security guard, testified that when he is confronted by a physically aggressive student, "I just wrap them up, put my arms around them to keep them from being able to strike me or hurt themselves. If they continue to be aggressive, I put them on the floor and restrain them there." This common sense approach is exactly how Mr. Green resolved the situation with S.J., but only after twice punching her. It is disingenuous for Mr. Green to contend that he required specialized training to know not to draw back his fist and strike a 14-year-old student in the face.

37. Mr. Green explained the inconsistency of his statements by asserting that he was so stunned by the rapidity of events on the morning of August 28 that he was "out of it." Mr. Johnson testified that Mr. Green seemed "somewhat bewildered . . . like he couldn't believe what had just happened." Mr. Green testified that at the time he wrote his first statement, he honestly believed he had not struck S.J., despite having seen the security video. Mr. Green's testimony on this point is not credible. His written statements were clearly efforts to minimize his own actions and cast all blame for the incident on S.J.

38. Mr. Green testified that he feared S.J. had pulled a knife out of her bag because of her increased confidence and belligerence after rummaging through her bag prior to leaving the gym with Mr. Green. He further testified that his punches were a desperate attempt to keep S.J. away from him in case she was wielding a weapon. Once he was sure that she was unarmed, he wrapped her up and took her to the ground.

39. Mr. Green's testimony on this point is undercut by his behavior prior to the first blow being struck. After S.J. backed up against the wall, Mr. Green moved in close, nearly nose to nose with S.J. He testified that this is a technique he learned from watching another teacher deal with angry students. Mr. Green moves in close while speaking calmly to the student, forcing the student to look him in the eye, feel safe, and calm down.

40. Mr. Green's explanation of this technique was not entirely credible. The psychological rationale of standing extremely close in order to calm a student is not readily apparent. On the security video, Mr. Green's moving in on S.J. appears more an effort to employ his bulk to intimidate the student than to calm her. Even if Mr. Green's explanation of his motive were credited, his action had the opposite of its intended effect. There is little question that his invasion of

S.J.'s personal space was the proximate cause of her pushing him away, which started the fight.

41. In any event, Mr. Green's willingness to closely approach S.J., with his arms at his sides, belies his later assertion that he feared the child was holding a knife. His apprehension of a weapon appears to be an explanation concocted after the fact to explain why he chose to punch S.J. rather than restrain her.

42. Mr. Green's defense pointed out that no witness to the aftermath of the incident noted any marks, bruises, discoloration or severe injury to S.J.'s face. The fact that there were no marks on S.J.'s face was a matter of fortuity and no thanks to Mr. Green. This defense also overlooks the potential psychological harm to the child. S.J. was handcuffed, arrested, and placed in a patrol car because the adults did not believe that Mr. Green had punched her and Mr. Green himself would not own up to his actions.

43. Much testimony was presented as to Mr. Green's character, his genuine concern for students and their respect for him, and his lack of any prior disciplinary history. All of this testimony has been considered and fully credited.

44. Much evidence was presented as to S.J.'s obstreperousness, her foul manner of speaking, her complete disregard for authority, and her perpetual verbal and physical

aggression toward other students, staff and faculty of Butler Middle School. This evidence has likewise been considered and fully credited.

45. However, even if it is stipulated that Mr. Green is an exemplary human being, a fine teacher and coach with an unblemished record, and a dedicated employee of the School Board, and it is further stipulated that S.J. was the worst student ever to darken the corridors of Butler Middle School and was in fact asking for what she got on August 28, 2013, there would be no excuse or rationalization sufficient to lessen the impact of Mr. Green's actions on that date. When confronted with a large and aggressive student, Mr. Green's instinct was to do exactly the wrong thing and punch her in the face. He compounded the harm by equivocating as to his actions even after seeing video evidence of what he had done.

46. Mr. Green's instinctive reaction during this incident could not help but effect the way he is viewed by his peers in the teaching profession and by the students who are entrusted to his care. His judgment and honesty are in question, at best. His effectiveness in the classrooms and the gymnasium of Butler Middle School has been irreparably impaired. In light of his spotless disciplinary record up to the time of the incident, the School Board could have considered transferring Mr. Green to another school to give him a chance to salvage his career.

However, given the ferocity of the events depicted in the security video, the decision to terminate Mr. Green's employment is entirely understandable. The evidence fully supports the School Board's preliminary decision to terminate Mr. Green's employment.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 1012.33(6)(a), Florida Statutes.⁷

48. The School Board has the burden to establish by a preponderance of the evidence the grounds for disciplining Mr. Green. See, e.g., McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); 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).

49. Under the Tenure Act, Mr. Green is a tenured teacher whose employment can be terminated only for "cause." Section 4 of the Tenure Act provides that causes for the discharge of a teacher include immoral character or conduct, persistent violation of or willful refusal to obey state law or regulations

relating to public schools, inexcusable failure to discharge one's duties of employment, and dishonesty while employed.

50. Article V.D.1 of the CBA, the Progressive Discipline Policy, provides as follows, in relevant part:

[T]he 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

51. Mr. Green meets the definition of "instructional personnel" set forth in section 1012.01(2), Florida Statutes. The School Board has the authority to suspend or terminate instructional staff pursuant to sections 1012.22(1)(f) and 1012.33(6)(a).

52. The standard for termination of instructional personnel is "just cause," pursuant to section 1012.33(1)(a).^{8/}

53. Section 1012.33(1)(a) provides, in pertinent part:

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, two consecutive annual performance evaluation ratings of unsatisfactory under section 1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under section 1012.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under section 1012.34, 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.

54. The School Board in this case has not cited a specific aspect of the statutory "just cause" definition as the basis for Mr. Green's termination. However, the facts alleged in the Notice would, if proven, amount to "misconduct in office" constituting just cause to terminate his employment.

55. Florida Administrative Code Rule 6A-5.056(2) provides:

(2) "Misconduct in Office" means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

56. The Notice alleged that Mr. Green violated the Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6A-10.080,^{9/} which provides as follows:

(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.

57. The Notice also alleged that Mr. Green violated Principles of Professional Conduct for the Education Profession in Florida, Florida Administrative Code Rule 6A-10.081,^{10/} which provides as follows 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.

58. The text of rule 6A-5.056 set forth in Conclusion of Law 55, supra, took effect on July 8, 2012. Prior to the 2012 amendments, this rule and its predecessor, rule 6B-4.009, defined "misconduct in office" as consisting of a violation "so serious as to impair the individual's effectiveness in the school system." A body of appellate case law arose that applied this standard. See, e.g., Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355-356 (Fla. 2d DCA 2009). Case law further established that impairment may be proven by direct evidence or may be inferred from the nature of the violation itself. Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000).

59. The corresponding language in the current version of rule 6A-5.056(2)(e) is "Behavior that reduces the teacher's ability . . . to effectively perform duties." It could be argued that a "reduction" in effectiveness sets a lower standard for proving misconduct in office than "impairment" of effectiveness. However, it is not necessary to settle the issue in this case because Mr. Green's conduct meets the arguably higher standard of "impairment."

60. The evidence established that Mr. Green punched a female middle school student in the face twice within a matter

of seconds after she pushed him. Despite the provocation, it cannot be said that Mr. Green reacted in anything but an overwhelmingly inappropriate manner. He directly caused physical harm to S.J. and failed to prevent the subsequent psychological harm of the child's arrest. It is doubtful that the students at Butler Middle School could ever again view Mr. Green as a responsible adult authority figure. Mr. Green's actions undermined the confidence of his superiors.

61. Mr. Green contended that the School Board was at fault for failing to train him on how to respond when attacked. No teacher should require CHAMPS or other specialized training to know that it is inappropriate to punch a student in the face with a closed fist regardless of the provocation.

62. There is no question in this case that Mr. Green failed to exercise the best professional judgment. Mr. Green did not make a reasonable effort to protect the student from conditions harmful to the student's mental health and safety.

63. Mr. Green committed misconduct in office by violating Florida Administrative Code Rules 6A-10.080(1), (2), and (3), and 6A-10.081(3)(a) in a manner so serious as to impair his effectiveness in the school system.

64. Mr. Green contends that the School Board erred in not applying the Progressive Discipline Policy of the CBA in this case. It was undisputed that this was the first disciplinary

action of any kind taken against Mr. Green during his employment with the School Board. However, the Progressive Discipline Policy expressly provides that "severe acts of misconduct may warrant circumventing the established procedure." The School Board met the burden of demonstrating that Mr. Green's actions warranted his immediate suspension without pay and termination of his employment for just cause.

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 Michael A. Green as an instructional employee of the School Board.

DONE AND ENTERED this 27th day of June, 2014, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of June, 2014.

ENDNOTES

^{1/} The incident was especially galling to Mr. Nesmith because he had personally recruited Mr. Green to take the position of physical education and health teacher at Butler Middle School at the start of the 2012-2013 school year.

^{2/} Detective Schoenfeld testified that, at the time, he was unaware that Mr. Green had already given a statement to Mr. Nesmith.

^{3/} Mr. Green consistently misspelled the word as "gynasium." The text has been corrected for ease of reading.

^{4/} The statement in the Notice notwithstanding, the arrest was made by the DCPSPD, not by the Jacksonville Sheriff's Office.

Detective Schoenfeld had recommended that the DCPSPD consult with the state attorney's office prior to making an arrest because S.J.'s volatility in the situation made sustaining a criminal charge against Mr. Green problematic. Detective Schoenfeld was overruled by Chief David Coffman, who testified that he believed there was no question that probable cause for an arrest was established by the security video and the seriousness of the events shown therein.

^{5/} The email has been reproduced verbatim, including grammatical and spelling errors. A separate textual indication for each error would have made the email difficult to read.

^{6/} Mr. Green's successive written statements steadily inflated the threat posed by S.J. In the first statement, Mr. Green wrote that she was causing a "disruption." In the second statement, S.J.'s actions were creating a "safety issue" for the other students. In the email to Mr. Vitti, the threat had escalated to a "danger" and a "serious uproar."

^{7/} Unless otherwise indicated, references to the Florida Statutes are to the 2013 edition.

^{8/} The CBA, which was entered as the School Board's Exhibit 16, provides at Article V.C. that employees may be "suspended without pay only for just cause and only by action of the School Board." Article V.D.7 provides that an employee "may be suspended without pay only for just cause and only by action of the School Board." Though the agreement appears to be silent as

to the standard for termination, it stands to reason that "just cause" would be required for the ultimate sanction as well as for the quoted lesser penalties.

^{9/} Rule 6B-1.001 has been renumbered as 6A-10.080 without change to the substance of the rule. Rule 6A-5.056(2)(a) has not been amended to reflect this renumbering.

^{10/} Rule 6B-1.006 has been renumbered as 6A-10.081 without change to the substance of the rule. Rule 6A-5.056(2)(a) has not been amended to reflect this renumbering.

COPIES FURNISHED:

Tishia Anita Dunham, Esquire
1087 Lake Forest Boulevard
Jacksonville, Florida 32208

Kelly Hebden Papa, Esquire
Office of General Counsel
Suite 480
117 West Duval Street
Jacksonville, Florida 32202

Sonita Young, Esquire
5419 Grand Cayman Road
Jacksonville, Florida 32226-2297

Dr. Nikolai P. Vitti
Superintendent of Duval County Schools
Duval County Public Schools
1707 Prudential Drive
Jacksonville, Florida 32207

Matthew Carson, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Pam Stewart, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.