STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 14-2465

DEMETRIUS FELTON,

Respondent.
_____/

RECOMMENDED ORDER

On August 13, 2014, a final administrative hearing in this case was held by video teleconference with sites in Tallahassee and Fort Myers, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire
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For Respondent: Robert J. Coleman, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has just cause to terminate Respondent's employment.

PRELIMINARY STATEMENT

By letter dated April 11, 2014, Respondent, Demetrius Felton (Respondent or Mr. Felton), was notified that a recommendation would be made for the termination of his employment. A Petition for Termination (Petition) issued on April 22, 2014, set forth the factual allegations and charges on which the proposed action is based, and gave notice to Respondent of his right to an administrative hearing.

Respondent timely requested an administrative hearing and on May 22, 2014, the Lee County School Board (Petitioner or School Board) referred the matter to the Division of Administrative Hearings for assignment of an administrative law judge to conduct the hearing requested by Respondent.

In consultation with the parties, the final hearing was set for August 13, 2014, by video teleconference. The hearing proceeded as scheduled.

Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation in which they agreed to several facts. The parties' stipulated facts are incorporated in the Findings of Fact below.

At hearing, Petitioner presented the testimony of Andrew Brown, Taunya Blue, and Toni McMillian. Petitioner's Exhibits 1 through 17 were admitted in evidence; Petitioner's Exhibits 5 through 12 were admitted subject to the limitation for using hearsay evidence for which no qualifying exception was

established. See § 120.57(1)(c), Fla. Stat. (2014)[1/] and Fla. Admin. Code R. 28-106.213(3).

Respondent testified on his own behalf and also presented the testimony of Kevin Weigand. Respondent's Exhibits 1 through 3, part of 4,[2/] and 5 were admitted in evidence.

The two-volume Transcript of the hearing was filed on September 9, 2014. Both parties timely filed proposed recommended orders (PROs) by the deadline of September 19, 2014, and they have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner is responsible for hiring, overseeing, and terminating employees in the school district.

2. Since February 15, 2012, Respondent has been employed by Petitioner as a "helping teacher," also known as an education paraprofessional, at the district's Royal Palm Exceptional School Center (Royal Palm). Respondent is assigned as a "helping teacher" to the physical education (PE) teacher, Kevin Weigand.

3. As an education paraprofessional, Respondent is an education support employee as defined in section 1012.40, Florida Statutes. Respondent is a member of the Support Personnel Association of Lee County (SPALC). Both Petitioner and Respondent are governed by the collective bargaining agreement between Petitioner and SPALC.

4. Royal Palm provides special education to students with disabilities identified in their Individualized Education Plans (IEPs). All of the Royal Palm students have IEPs; the majority of the students are assigned there because of behavioral issues they exhibited when attending a regular school. PE teacher Kevin Weigand described the Royal Palm student population as "mandated to attend Royal Palm for an acting-out type of behavior, a lot of physical aggression, verbal aggression." Helping teacher Taunya Blue confirmed this description, characterizing the Royal Palm students as "disrespectful" with "anger issues."

5. The impetus for Petitioner's proposed action at issue in this case was an incident that occurred in the Royal Palm gymnasium/cafeteria on March 26, 2014, during which Respondent had physical contact with a seventh-grade male student, J.B.[3/]

6. The physical altercation is depicted on a video recording shot from one of two video surveillance cameras that are at opposite ends of the gym. The aftermath of the physical altercation, in which Respondent and the student engaged in a continuing verbal exchange while adult staff interceded and attempted to separate J.B. and Respondent, can also be seen in large part on the two camera recordings, although at times the scenes of interest shift out of view. The video clips from the two surveillance cameras are on a DVD in evidence and were viewed

and discussed by several witnesses at the hearing.[4/] The recordings are video only; there is no audio recording.

7. The altercation occurred near the end of the school day's last period when the seventh-graders had PE. Respondent was on the gym's basketball court with a few students, including J.B., a 13-year-old who is large for his age. Respondent, who played basketball in high school and college, is quite a bit larger than J.B.; Respondent is 6'7", and a fit 225 pounds.

8. The video depicts the students shooting baskets or playing basketball in a disorganized fashion. Respondent approached J.B. as if to play defense. Suddenly, J.B. ran off the court and Respondent chased him. Respondent pushed J.B., and then more forcefully shoved J.B. up against a wall. With both hands, Respondent grabbed J.B. by his clothing (shirt or sweatshirt), below his neck. Respondent got very near J.B., literally in his face. After just a second or two, Respondent let go and started to walk away. The scene just described was recorded from camera nine, and the video sequence runs from about 13:54:30 to 13:54:37 on the video time tracker.

9. Also in the gym at the time of the altercation, along the same wall where Respondent momentarily pinned J.B., were a few "helping teachers" who had been sitting in chairs and chatting. At some point, the custodial staff appeared, getting ready to clean the floors. Mr. Weigand was not in the gym when

the physical altercation occurred, because he had taken several students to the bathroom.

10. By the time Respondent let go of J.B., the other staff in the gym who saw the altercation or heard the commotion approached J.B. and Respondent. Ms. Blue, a helping teacher, saw Respondent push J.B. up against the wall, and she approached Respondent to urge him to walk away and to keep him from going back to J.B. Mr. Weigand, who heard yelling just as he was returning to the gym from the bathroom, hurried over to J.B. and tried to get him to walk away and leave the gym.

11. During the sequence when Mr. Weigand and Ms. Blue got in between J.B. and Respondent, Respondent and J.B. appeared to be engaged in a heated exchange of words, an impression confirmed by the witnesses. The video depicts Respondent taking a few steps away from J.B. several times, but then turning around and going back to where J.B. was being led away by Mr. Weigand. Respondent appeared to be directing angry words towards J.B., while Ms. Blue had her arm up towards Respondent's chest as if to persuade him to back away. Respondent's anger was evident from the fact that he alternated between gesturing wildly with his hands and clenching his fists.

12. After Respondent's initial physical confrontation with J.B., there was no more physical contact, and J.B. was not injured in the physical altercation.

13. After the physical confrontation, Respondent's verbal barrage directed towards J.B. was delivered in a "challenging," aggressive tone, according to Mr. Weigand. Mr. Weigand explained that Respondent was challenging J.B. to make a move toward Respondent. On J.B.'s part, although he talked back to Respondent, it was not in the same "challenging" tone. Mr. Weigand credibly described J.B. as appearing to be in shock and taken aback by what happened. Before the end of the encounter, J.B. was crying.

14. During the heated exchange between Respondent and J.B., one of the custodial staff radioed for a school resource officer. The officer escorted J.B. out of the gym. After J.B. was gone, and the other students and staff had left, Respondent was left with Mr. Weigand in the gym, along with the custodial staff who began mopping the floor. Respondent appeared to be pacing and continued to gesture and speak with an angry expression.

15. The surveillance recorded video only; there is no audio recording. As to who said what to whom, the evidence was in dispute, although within the range of possibilities as to what may have been said, it does not really matter.

16. Respondent admitted that when he suddenly took off after J.B., shoved him up against the wall, grabbed him, and got in his face, he had "lost his cool." He was hot; he was angry; and what he did was a hot-headed act.

17. Respondent offered conflicting explanations as to what provoked him to lose his cool. One possible explanation is Respondent's claim that J.B. made a profane comment about Respondent's wife: "Well your wife likes my [slang for private part]." Two weeks after the incident, while watching the video of the incident at his pre-determination hearing on April 10, 2014, Respondent stated that J.B. made that profane comment at 13:54:29 on the video time tracker, the second before Respondent took off after J.B., pushed him up against the wall, grabbed him, and got in his face. Respondent admitted at the pre-determination conference that he was very upset by this comment, and was yelling at J.B.: "Why would you try me like that? Why would you say something to me like that? . . . [H]onestly, I'm not going to lie, I was very upset with him." Respondent did not think; he was just driven by anger to react. Respondent said that he did not even realize that he had shoved and grabbed J.B. until he saw the undeniable video evidence.

18. Contrary to Respondent's admission that J.B. caused him to lose his cool by making an offensive remark about Respondent's wife, at hearing Respondent said that the comment about his wife is not what made Respondent charge after J.B. When asked what J.B. did or said to trigger Respondent's sudden angry reaction, at first Respondent referred vaguely to his attempt to talk to J.B. over a period of time, and that J.B. was threatening another

student, and then that J.B. was talking "junk" to him, such as that J.B. was going to hit him in his face if Respondent tried to play defense on J.B. Respondent summarized in equally vague fashion: "But the main thing was about the whole threatening situation." Later, Respondent claimed that the reason he charged after J.B. and the reason he was upset was because he was unable to get through to J.B., and also because J.B. "was still going on with the threats of violence." Still later, Respondent said that he did not mean to push J.B. up against the wall, and that when he pushed him, he was just trying to get his attention, to talk to him. Respondent's shifting explanation casts doubt on all parts of the explanation, particularly the attempt to suggest that Respondent was responding to any kind of threat.

19. At the pre-determination hearing, Respondent said that it was not until after the physical altercation, when he was speaking angrily to J.B. and others were trying to separate them, that J.B. first said that he was going to hit Respondent if Respondent did not get out of J.B.'s face. That version was corroborated by a witness. If such a comment was made, it was made after Respondent shoved J.B. and pinned him against the wall. Moreover, if J.B. made such a comment, at most it would have been a conditional threat; the way to obviate that threat would have been to get out of J.B.'s face.

20. The greater weight of credible evidence established that after Respondent's initial physical confrontation, the incident turned into an unpleasant heated exchange, but no more. Indeed, although Mr. Weigand and Ms. Blue were separating J.B. and Respondent while they continued their verbal exchange, all witnesses conceded that if J.B. had wanted to go after Respondent, he could have easily gotten by Mr. Weigand, and if Respondent had wanted to go after J.B., he could have easily gotten by Ms. Blue.

21. The heated verbal exchange continued for about five minutes. It was a heated exchange that went on longer than it should have because the adult participant in the exchange did not act like an adult, much less like an education paraprofessional. As all witnesses testifying at hearing agreed, Respondent could have and should have de-escalated the situation by walking away.

22. Respondent offered absolutely no legitimate justification for engaging in the physical altercation with J.B., or for continuing with an angry verbal barrage. Any suggestion that Respondent's actions were defensible as a way to get a student's attention for dialog about the student's inappropriate behavior or inappropriate comments is rejected. The alternate suggestion that Respondent's actions were understandable because of J.B.'s alleged provocative comment about Respondent's wife is

also rejected. Even if J.B. made the comment attributed to him, Respondent cannot allow himself to react the way he did.

23. Respondent admitted that when he charged and grabbed J.B., J.B. was not a threat to him. Respondent also acknowledged that "hands on students" must be the last resort after every attempt is made to de-escalate a situation with words, as he and his colleagues are regularly trained. Despite Respondent's training, he responded with anger and engaged in uncalled-for physical contact with a student who was admittedly no threat.

24. At hearing, Respondent acknowledged that he acted inappropriately, saying that he regrets his actions. However, Respondent's acknowledgement was undermined by his explanation of how he would handle the situation differently if it arose again: "I probably would have grabbed him, maybe, but probably not the pushing part. The grabbing was initially to get his attention."

25. In his short time at Royal Palm, Respondent had good evaluations. Mr. Weigand spoke of the good working relationship they had, which he described as a partnership. Yet Mr. Weigand was very troubled by the incident: "[T]he whole situation threw me back for a while . . . I was shook up by it when it all first happened." As a teacher in the Lee County School District for over ten years, with nearly eight of those years spent teaching at Royal Palm, Mr. Weigand put this incident in context: "I had never in my career had something like this happen."

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 120.65(6), Fla. Stat.

27. In this proceeding, Petitioner seeks to terminate Respondent's employment. Petitioner bears the burden of proof, and the standard of proof is by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

28. Respondent is an educational support employee. Section 1012.40(2)(b), Florida Statutes, provides that educational support employees such as Respondent may be terminated only "for reasons stated in the collective bargaining agreement."

29. The SPALC agreement provides that any discipline that constitutes "a verbal warning, letter of warning, letter of reprimand, suspension, demotion[,] or termination shall be for just cause." SPALC agreement, § 7.10. The SPALC agreement does not define "just cause." Id.

30. Petitioner has construed just cause for purposes of discipline pursuant to the SPALC agreement in the same manner as in section 1012.33 relating to instructional staff. See, e.g., Lee Cnty. Sch. Bd. v. Preiss, Case No. 08-4443 (Fla. DOAH Feb. 13, 2009; LCSB Mar. 24, 2009), RO at 18, ¶ 47, and cases cited

therein. Relevant to the charges in this case, "just cause" includes misconduct in office, as defined by rule of the State Board of Education. § 1012.33(1)(a), Fla. Stat.

31. Florida Administrative Code Rule 6A-5.056 (formerly Rule 6B-4.009) defines the just-cause terms used in section 1012.33(1)(a). "Misconduct in office" is defined to include a violation of the Code of Ethics of the Education Profession in Florida (Code of Ethics), which is promulgated as Florida Administrative Code Rule 6A-10.080; a violation of the Principles of Professional Conduct for the Education Profession in Florida (Principles of Conduct), promulgated as Florida Administrative Code Rule 6A-10.081; or a violation of adopted school board rules. Fla. Admin. Code R. 6A-5.056(2)(a)-(c).

32. Petitioner proved that Respondent committed misconduct in office by violating rule 6A-10.081(3)(a), one of the Principles of Conduct, which requires the following:

> (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.

33. Petitioner proved its charges that Respondent committed misconduct in office by committing battery on J.B. Respondent's uncalled-for physical contact with J.B. constituted battery, as an actual, intentional touching of another person against the

other's will. Cf. § 784.03(1)(a)1., Fla. Stat. (defining the criminal offense of battery). Respondent concedes as much, offering this as a conclusion of law: "[T]he physical contact by Respondent to [sic] J.B. technically is a battery and therefore constitutes misconduct in office." (R. PRO at 14)

34. Although Respondent concedes that he committed misconduct in office by committing battery, Respondent asks for understanding because Respondent "acted as many an ordinarily law-abiding person would" when subjected to J.B.'s profane comment and the alleged threat from J.B. that he was going to hit Respondent in the face. (R. PRO at 14) As found above, however, the undersigned accepts the version of the incident whereby J.B. did not threaten Respondent at all prior to the physical contact. Thus, the undersigned rejects Respondent's contention that his physical altercation was responsive to any threat. Instead, Respondent lost his composure and took off after an adolescent student when the student made a silly trash-talking comment about Respondent's wife. Respondent's overreaction is not understandable and is not acceptable. Respondent was the education paraprofessional; J.B. was the student. Respondent acted, without thinking, in the heat of the moment, when he was instead required to make reasonable effort to protect J.B. even if J.B. was the provocateur. Respondent was required to resist a

student's effort to provoke through inappropriate comments. That is far too easy a button for adolescent students to push.

35. Petitioner also proved that Respondent committed misconduct in office by violating several of Petitioner's adopted rules in evidence (School Board Policies). The Findings of Fact above demonstrate that Respondent violated the following promulgated rules:

- School Board Policy 5.02, requiring that employees adhere to high ethical standards;
- School Board Policy 5.29, requiring that employees exemplify conduct that is lawful and professional, and that contributes to a positive learning environment for students; and
- School Board Policy 2.02, requiring that school staff engage in appropriate behavior and avoid unacceptable/ disruptive behavior, including behavior which interferes with or threatens to interfere with school operations.

36. The Petition also charges Respondent with violating School Board Policy 4.09, Threats of Violence, providing:

> The School Board of Lee County is committed to a safe and orderly educational environment and authorizes the Superintendent and District staff to respond rapidly to any threats, suggestions or predictions of violence that occur on any District-owned property.

> There shall be a "zero" tolerance policy for threats of violence. No student, staff, parent/guardian or any other person shall make any verbal, written or electronically communicated threat, suggestion or prediction of violence against any person or group of persons or to any District-owned facility. Any serious threat of violence shall result in immediate disciplinary action and referral to the appropriate law enforcement agency.

37. Petitioner argues in its PRO that Respondent violated this "zero-tolerance" rule by committing battery. However, Petitioner's precedent requires the contrary conclusion. In Lee County School Board v. Joseph Cofield, Case No. 10-1654 (Fla. DOAH Sept. 24, 2010; LCSB Nov. 2, 2010), the School Board adopted as a conclusion of law the determination that Policy 4.09 "refers to threats of violence and not actual violence." RO at 15, ¶ 36. There, as here, the evidence established that a teacher had unwarranted physical contact with a student, but the evidence did not establish that the teacher had threatened the student. For the same reasons expressed in Cofield, Petitioner failed to establish that Respondent violated Policy 4.09.

38. Finally, the Petition charges Respondent with violating provision 7.13 of the SPALC Agreement, a Work Place Civility requirement providing:

> Employees shall not engage in speech, conduct, behavior (verbal or nonverbal), or commit any act of any type which is reasonably interpreted as abusive, profane, intolerant, menacing, intimidating, threatening, or harassing against any person

> in the workplace. . . . The resolution of a complaint under this provision may result in the involuntary, temporary transfer of an employee . . . . Such transfer may be permanent when deemed necessary by the Superintendent or the Superintendent's designee.

Petitioner proved that Respondent violated this provision. However, Petitioner has proposed termination of Respondent's employment, instead of the involuntary transfer contemplated. It does not appear that this violation supports the proposed action. In any event, the charge is cumulative, in that it is based on the same conduct for which Respondent has already been found to have committed misconduct in office.

39. As to the appropriate penalty, Petitioner has "just cause" within the meaning of the SPALC Agreement to discipline Respondent for his misconduct in office, up to and including termination of employment. Whether Petitioner should exercise its authority to terminate Respondent's employment is a matter within the School Board's discretion, to be exercised in a manner deemed appropriate under the circumstances of this case. In this regard, the SPALC Agreement provides the following general guidance:

> [I]n all instances the degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record.

* * *

> [Disciplinary] actions shall be when appropriate, progressive in nature[.]

SPALC Agreement, § 7.10.

40. Respondent has a good record with no prior discipline, albeit over a relatively short period of time. However, Respondent's offense was serious. Even though no harm may have been done to J.B., the visual evidence of Respondent losing his cool, chasing after a student, and pinning him to the wall was distressing. Respondent's staunchest ally, Mr. Weigand, admitted that he had never seen anything like that in his ten years as a teacher, including eight years at Royal Palm; and Mr. Weigand did not even see the worst part of the altercation.

41. Respondent urges that he be given a second chance. The undersigned notes that Petitioner has argued against any second chance by pointing to a "zero-tolerance" policy that does not apply. While the undersigned cannot conclude that termination of Respondent's employment is unreasonable, the School Board may wish to consider, in light of the inapplicability of its "zero-tolerance" policy, whether Respondent should be given a second and final chance to prove that the March 26, 2014, incident was truly an aberration that will never happen again.

42. Should the School Board be inclined to give Respondent a second chance, the undersigned would recommend discipline that includes suspension without pay for one year, from April 14,

2014, through April 13, 2015, and also, that requires Respondent to undergo anger management counseling/training of the School Board's choosing prior to returning to work.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order finding Respondent guilty of misconduct in office and either terminating his employment or suspending him without pay for one year and requiring Respondent to undergo anger management counseling/training before returning to work.

DONE AND ENTERED this 8th day of October, 2014, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of October, 2014.

ENDNOTES

[1/] References to Florida Statutes are to the 2014 codification, as the law in effect at the time of hearing. The undersigned notes that the incident described in the Petition took place on

March 26, 2014. If there had been subsequent changes to the statutes, rules, and Petitioner's policies establishing disciplinary standards or standards of conduct, Respondent would be entitled to have the laws applied as they existed on March 26, 2014. However, no such changes were identified.

[2/] Respondent's Exhibit 4 was offered as a two-page document. Page one is a student disciplinary referral form filled out by hand, with Kevin Weigand's name written as the person making the referral. In a section called "reason for referral," the form provides three lines for a response. As offered by Respondent, the document contained a handwritten response filling up all three lines on the form (page one), and continuing on a blank sheet, page two of the offered exhibit. Mr. Weigand confirmed that he filled out the student disciplinary referral form. However, he testified that he only filled out the first one and one-third lines of the "reason for referral" section, ending with "Mr. Fulton" on line two. He has no idea who filled out the rest of line two, or line three, or the continuation of the description on page two. Based on his testimony, page two of the proposed exhibit was removed. Page one was admitted, with the understanding that the unauthenticated handwriting (after "Mr. Fulton" on line two) would be disregarded. No explanation was provided for the troubling notion that the document had been intentionally altered by someone other than Mr. Weigand.

[3/] The parties agreed that students would be referred to by their initials only in an effort to protect their privacy, and the Transcript was prepared accordingly. However, not all of the exhibits offered by the parties were so protected. The School Board should take the necessary precautions with the record, in the event of a public records request, to ensure that the names of students appearing in some of the exhibits are redacted.

[4/] The video recordings were viewed simultaneously by the parties, witnesses, and counsel at the Fort Myers hearing site and by the undersigned at the Tallahassee hearing site. As the transcript reflects, the orientation for what was being viewed and discussed was two-fold: first, by identification of which of the two recordings on the DVD in evidence was being viewed--the first video file from camera 9, or the second file from camera 2; and second, by reference to the video time tracker, expressed in hours, minutes, and seconds. Thus, for example, the physical altercation can be seen on the first video file from camera 9, from approximately 13:54:30 to 13:54:37. It is noted that, in the event anyone besides Petitioner requires viewing of Petitioner's Exhibit 17, it will be necessary to first download

the proprietary software used by Petitioner for its surveillance system. For future reference of parties wanting to offer similar digital video evidence, the party offering such evidence should provide specific information on how third parties such as the Division of Administrative Hearings or an appellate court can access and download the software so as to be able to view the video evidence.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.