THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KIM B. OLIVER	)	OEA Matter No. 1601-0005-04
Employee	)	
	)	Date of Issuance: January 19, 2006
v.	)	
	)	Daryl J. Hollis, Esq.
	)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	

Steven Silverberg, Esq., Employee Representative
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On October 27, 2003, Employee, a Special Education Teacher, filed a petition for appeal from Agency's final decision removing her for "Grave misconduct in office, violation of the rules, regulations or lawful orders of the Board of Education, specifically Superintendent's Directive 521.6: 'Reporting Suspected Child Abuse/Neglect'".

This matter was assigned to me on February 10, 2004. My review of the case file showed that Employee had filed a grievance contesting her removal through Article VI of the negotiated agreement between Agency and the Washington Teachers Union (WTU) prior to filing her appeal with this Office. Further, Employee's appeal here was untimely

filed. However, in its notice of removal to Employee, Agency had failed to advise her that she had appeal rights to this Office and of the time limit for filing an appeal here. In order to address the issues engendered by the above facts, on February 18, 2004, I sent an Order to Employee Regarding Choice of Forum.[1] That Order reads in pertinent part as follows:

> This matter was assigned to me on February 10, 2004. Employee was removed from her position effective September 24, 2003, but did not file her appeal with this Office until October 27, 2003. Since petitions for appeal are required to be filed within 30 days of the effective date of the action being appealed, Employee's petition for appeal was late. Normally, a late filing would result in the dismissal of the case. However, in its September 9, 2003 Notice of Termination, Agency did not advise Employee that she could appeal the removal to this Office, but rather advised her that her only appeal rights were through Article VI of the negotiated agreement between Agency and WTU. This was incorrect notwithstanding the fact that the agreement states that an appeal through Article VI is the exclusive method of appeal. The reason that this information was incorrect is as follows:
>
> D.C. Official Code § 1-616.52 (2001) ("Disciplinary Grievances and Appeals") reads in pertinent part as follows:
>
> **§ 1-616.52(b)** An appeal from a removal, a reduction in grade, [a separation by RIF], or suspension of 10 days or more may be made to the Office of Employee Appeals. . . .
>
> **§ 1-616.52(d)** Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization. . . .
>
> **§ 1-616.52(e)** Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure

[1] At that time, Employee was unrepresented.

may, in the discretion of the aggrieved employee, be raised either [before OEA], or [through] the negotiated grievance procedure, but not both.

§ 1-616.52(f) An employee shall be deemed to have exercised their option pursuant to subsection (c) . . . at such time as the employee timely files an appeal [with OEA] or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure . . ., whichever event occurs first.

We have interpreted the above sections as follows: Subsection (d) states that an exclusive negotiated procedure that provides an avenue of appeal wholly outside of this Office prohibits an employee from filing an appeal here. However, subsection (e) in effect trumps subsection (d), and offers the employee the choice of either filing here or through the negotiated procedure. This is so notwithstanding any exclusivity language that exists in the negotiated agreement. However, the employee may not do both. She may either file here or through the negotiated agreement. Subsection (f) sets forth the event that triggers either avenue of appeal, and also states that, in effect, whichever occurred first controls.

We have also held that where, as here, an agency does not inform an employee of her right to appeal to this Office, and as a result the employee's appeal is untimely filed, the agency may not utilize the 30-day filing limit as a bar to our jurisdiction.[2]

Here, as I have advised both parties, the current problem is this: Employee began the grievance process through the agreement prior to filing her appeal here. She has a Step III hearing scheduled for February 27, 2004. However, because Agency did not apprise her of her appeal rights to this Office, she was unable to make an informed decision as to which

[2] By telephone message left on my voice mail on February 13, 2004, Agency stated that it would waive any jurisdictional argument in this matter.

> avenue of appeal to take. But since Employee may only utilize one avenue of appeal, Employee must now choose her avenue.
>
> Therefore, Employee is hereby ORDERED to apprise me, by the close of business on **February 26, 2004**, of her choice: Does she wish to continue with the grievance process through the negotiated agreement; or does she wish to proceed with the appeal process through this Office? If Employee chooses the former, then she may withdraw the case currently before me or I will issue an initial decision dismissing the matter. If she chooses the latter, then she should take steps to advise the union that she is proceeding here and to have the February 27, 2004 Step III hearing canceled.

(emphasis in original). (footnote in original).

On February 26, 2004, Employee submitted a response to the February 18 Order. Her response reads in part as follows:

> In accordance with D.C. Official Code 1-616.52 (2001), ("Disciplinary Grievances and Appeals") – Subsection (c), I, Kim Oliver, hereby confirm my decision and apprise both parties (OEA and WTU) that my avenue of choice [is to proceed] in the appeals process with the Office of Employee Appeals, foregoing Article VI, Step III Grievance Hearing, scheduled for February 27, 2004.

(emphasis in original).

I conducted a Prehearing Conference on April 19, 2004.[3] For some time thereafter, the parties conducted discovery and engaged in settlement negotiations. However, these negotiations ultimately proved fruitless. Thus, I conducted a Status Conference on January 18, 2005 and an evidentiary Hearing on March 1 and 3, April 27 and June 8, 2005. Mr. Silverberg did an oral closing argument at the conclusion of the Hearing, and Ms. Segar submitted Agency's closing brief on December 2, 2005. This decision is based on the testimony elicited during the Hearing and on the exhibits of record. The record is closed.

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[3] By the time of the Prehearing, Mr. Silverberg was representing Employee.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency's adverse action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

STATEMENT OF THE CHARGES

By Notice of Termination dated September 9, 2003, Agency notified Employee of its determination that she would be removed. In part, that notice reads as follows:

> Pursuant to the District of Columbia Municipal Regulations (DCMR), Title 5, Chapter 14, as well as pertinent provisions of the negotiated Agreement between the Board of Education and the [WTU], you are kindly given notice that you will be terminated, effective September 24, 2003. Kindly be advised that you will be placed on administrative leave with pay until the effective date of your termination. . . .
>
> **Ground(s):** [DCMR] Section 1401.2(b), "Grave misconduct in office;" (t) "Violation of the rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the Board of Education." The specific directive violated was, Superintendent's Directive 521.6, Reporting Suspected Child Abuse/Neglect.[4]

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[4] Superintendent's Directive 521.6, issued June 25, 1997, reads as follows:

> The "Prevention of Child Abuse and Neglect Act of 1977," D.C. Law 2-22, mandates immediate reporting of any suspected child abuse or neglect case. The law does not require the reporter to have proof that abuse or neglect has occurred before reporting. Waiting for proof may involve grave risk to the child. The reporting of a suspected child abuse and neglect case

Reason(s): Pertaining to 1401.2(t), on May 20, 2003 while at Prospect Learning Center you failed to report suspected child abuse when the information came to your knowledge. Pertaining to 1401.2(b), on May 20, 2003 while at Prospect Learning Center you acted improperly when you conducted a mock trial with students of an allegedly explicit sexual statement and when you told a student you would provide a copy of the taped trial to his parents. You exhibited poor judgment and this kind of behavior cannot be tolerated.

Within five (5) school days of your receipt of this notice, you have the right to review any documents supportive of the charges, to reply in writing or in person to all charges and to furnish any documents in support of your reply. . . .

Your termination will be effective as stated above unless upon consideration of all relevant facts, the action is to be modified;

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indicates that a child may be abused or neglected, not that the parent(s) is necessarily the cause.

Employees are directed not to try to resolve or investigate a suspected case of child abuse or neglect. Rather, an employee's legal obligation is to orally report such knowledge or suspicion to the Metropolitan Police Department ("MPD") at (202) 671-7233; or, if a crime is in progress, 911. A written report is required if requested from MPD, or if the abuse involves drug related activity.

The law provides that any employee who fails to make a report when he or she suspects child abuse or neglect shall be fined up to $100.00 or imprisoned for not more than 30 days, or both.

The "Family Educational Rights and Privacy Act" ("Buckley Amendment") and the Board of Education Rules on release of school information do not preclude or prohibit such reports from being made. For the most part, the report will be premised on personal observations, not on information contained in a student's record. Moreover, even where a student's record must be disclosed in making a report, such action is justified under the "health or safety emergency" exception to the Buckley Amendment. In the case of suspected child abuse or neglect, records may be disclosed without parental consent.

(emphasis in original).

> at which time you and WTU will be so notified in writing. If you not receive such communication, this will serve as your final notice of termination. . . .[5]

(footnotes added).

FINDINGS OF FACT

a. Summary of testimony.

1. Loretta Blackwell: Ms. Blackwell is Agency's Director of Labor Management and Employee Relations (LMER). It is her office that prepares notices of adverse actions that are delivered to affected employees. Her office performed that function in the instant matter, and prepared the Notice of Termination set forth above at pp. 5 & 6. In performing her duties as they relate to the preparation of adverse action notices, she reviews any investigative reports that have been prepared in a particular case, as well the employee's personnel folder. She then assures that this information is reviewed by the appropriate officials, who in turn determine the penalty to be assessed.

In this case, the July 15, 2003 investigative report (Agency Ex. 19) was sent to LMER and Dr. Patricia Watkins, then Assistant Superintendent for the Division that included the Prospect Learning Center, on August 20, 2003 (*See* Agency Ex. 1). However, at the time the investigative report was delivered, Dr. Watkins had left Agency's employ, and thus it was reviewed by Dr. Raymond Bryant, then Chief of the Office of Special Education Reform, and Vera White, an Associate Superintendent.[6] According to Ms. Blackwell, such review was in keeping with Agency's past practice. Agency Ex. 3 is a September 3, 2003 memorandum from Dr. Bryant through Ms. White to Ms. Blackwell entitled "Recommendation for Adverse Action" that reads in part as follows:

> After reviewing the investigative reports on Kim Oliver, teacher . . . at Prospect Learning Center regarding the incident with student [S.]:[7] it is my recommendation based on [the Office of

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[5] The proposed action was not modified, and Employee was removed effective September 24, 2003.

[6] It is uncontroverted that an Associate Superintendent is a higher-level position than that of Assistant Superintendent.

[7] In the interest of privacy, only the first initial or the first two letters of each student's name will be used in this Initial Decision.

> Agency's General Counsel's] substantiation of the allegations of failure to report child abuse and grave misconduct in office by Oliver . . . that the adverse action should be termination.

After receiving this recommendation and again in keeping with Agency's past practice, Ms. Blackwell's office prepared Employee's September 9, 2003 Notice of Termination.

Agency Ex. 16 is an August 21, 2003 memorandum from Bernard Lucas, Sr. to Ms. Blackwell entitled "Adverse Action Recommendation" that reads as follows:

> Based on the scenario in the investigative report, the teacher's own admission, and the strict guidelines in the directive addressing suspected child abuse, the teacher's initial handling and response to the situation is unacceptable. Therefore, the most appropriate sanction is a thirty (30) day suspension and reassignment to another school. Placing the teacher back at Prospect [Learning Center] would not be appropriate.[8]

(footnote added).

According to Ms. Blackwell: "Bernard Lucas was a hearing officer for D.C. Public Schools. And he also provided assistance to DCPS in making recommendations for adverse actions against employees." Tr. I at 42. Although the memorandum was dated August 21, 2003, Ms. Blackwell did not receive a copy of it until sometime after October 8, 2003,[9] by

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[8] Employee Ex. 2 consists of two pages, the second of which is identical to Agency Ex. 16. The first page of Employee Ex. 2 is another copy of Mr. Lucas's August 21, 2003 memorandum. The bodies of the documents are identical (as set forth above). They differ in the following respects: 1) While they are both addressed to Ms. Blackwell, the first contains a number of cross-outs (a number of x's) preceding Ms. Blackwell's name and title; the second does not contain these cross-outs; 2) the first contains a handwritten notation: "This page should be done over. Urgent!"; the second has no such notation; 3) The first has a line for Associate Superintendent White's signature, but no signature; the second was signed by her on October 8, 2003; and 4) the first bears the signature "B.C. Lucas, Sr." above Mr. Lucas's printed name and title; the second does not have Mr. Lucas's signature. These discrepancies will be addressed in later testimony.

[9] Ms. Blackwell's testimony was based on the fact that the memorandum that she received (Agency Ex. 16) was not signed off on by Associate Superintendent Vera White until October 8, 2003. Apparently, the reason for the delay was the confusion in chain-of-command engendered by the departure of Assistant Superintendent Patricia Watkins during the Summer of 2003.

which time Employee had already been removed. Nevertheless, even if she had received it prior to the issuance of the September 9, 2003 Notice of Termination, she would not have given it as much weight as the recommendation of Dr. Bryant, and so the notice would not have changed. This is so because Dr. Bryant was in a higher position within Agency than was Mr. Lucas, and was the appropriate official to make a recommendation. Ms. Blackwell also noted that, prior to the issuance of Mr. Lucas's memorandum, there had been discussions among Agency officials concerning a recommendation that Employee be removed for her actions in the classroom the previous May 20. *See* Agency Ex. 2, printouts of e-mails dated August 20, 2003 pertaining to Employee's case.

Agency Ex. 5 is a November 17, 2004 memorandum to Ms. Segar from Eileen Clements, who works in Ms. Blackwell's office, that was generated pursuant to Employee's discovery request. That document lists two teachers, in addition to Employee herein, who were removed from their positions since 2001 for failing to report suspected child abuse. Ms. Blackwell confirmed that the information in that document was accurate. *See also* Agency Exs. 6 through 9, all of which are documents pertaining to the removal of the teachers named in Agency Ex. 5.

2. Vera White: Ms. White is an Associate Superintendent. As such, she supervises all of Agency's assistant superintendents. According to Ms. White, a request for an adverse action against a teacher is generated by the principal of the school to which the teacher is assigned. It is then reviewed by the assistant superintendent with oversight authority over the school, who makes the final decision regarding the proposed adverse action. That decision is reviewed by Ms. White and by LMER. Although Ms. White supervises the assistant superintendents, she has always deferred to them in matters of adverse actions.

In this case, the assistant superintendent who would normally have reviewed the principal's adverse action recommendation against Employee would have been Dr. Patricia Watkins. However, at that time Dr. Watkins was in the process of leaving the school system, and thus the recommendation was reviewed by Dr. Raymond Bryant, who was the Chief of Special Education. This was appropriate since Prospect Learning Center, where Employee worked, was a special education school.

Ms. White was questioned on the role played in this case by Bernard Lucas. Lucas was the author of Employee Ex. 2 and Agency Ex. 16, *supra*, the August 21, 2003 memorandum that recommended that Employee be suspended and transferred.[10] Ms.

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[10] *See* n.8, *supra*.

White testified that in 2003 he was the Executive Assistant for Employee Relations, and regularly reviewed proposed adverse actions. Because Employee was removed rather than suspended and transferred, Ms. White assumed that Dr. Bryant, who had the ultimate authority for determining the penalty, disagreed with Mr. Lucas's recommendation. Further, Mr. Lucas's memorandum did not comport with proper procedures, since it was addressed to Ms. Blackwell, the head of LMER. Rather, it should have been addressed to the appropriate assistant superintendent.

Regarding the first page of Employee Ex. 2, Ms. White testified:

> I remember this . . . because I have a note up at the top, that's my writing. This should be done over, urgent. . . . [I wrote that because] if there are a lot of X's and things like that, I don't send things out like that. . . . [I]t's just inappropriate because you've got X, X, X, and down here you've got X's. It just didn't seem like something I would send out.

Tr. I at 111-112.

Ms. White was then questioned as to why she did not sign Mr. Lucas's corrected memorandum until October 8, 2003, given that it was generated on August 21, 2003. She testified that she reviews and signs documents directed to her immediately upon her receipt of them, or in some cases the following day. Therefore, in all likelihood this particular document was not delivered to her until October 7 or 8. She attributed the delay to the volume of paperwork generated by various offices within Agency.[11]

3. John Harris: At the time of the incident in question, Mr. Harris was an Investigator with Agency's Office of School Security (SS). The function of SS is to receive reports of incidents from schools, then conduct interviews at the site to determine the facts of the incident. Following the investigation, an investigative report is prepared and sent first to Agency's Office of the General Counsel (OGC) for that office to determine if the information contained in the report is "legally sufficient" to support the conclusions therein. Final copies of the report are distributed to the appropriate assistant superintendent and OGC. A copy is also kept in SS's files.

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[11] Ms. White testified that since she signed the document, she probably agreed with Mr. Lucas's recommendation. Nevertheless, she would have deferred to Dr. Bryant's decision to remove Employee rather than suspending and transferring her.

Agency Ex. 19 is the July 15, 2003 Investigative Report concerning the incident herein. Mr. Harris conducted the investigation at Prospect Learning Center on May 21, 2003. At that time, according to Mr. Harris:

> I met with the principal [Eve Byford-Peterson]. And she advised me of the incident at her school involving a teacher and students, wherein a student had made some comments to other students. And the teacher [Employee] was informed of those comments and they were of a sexual nature, if you will, of the student possibly having a sexual affair with his father.

Tr. I at 130.

In conducting his investigation, Mr. Harris interviewed Employee; Willette Hill, who was an Educational Aide;[12] and Lisa Sligh, the School Psychologist. He also obtained written statements from these persons.[13] Additionally, he interviewed two of the students involved in the incident, [Da.] and [De.]. These interviews were done with the consent of the students' parent[s]/guardian[s], and in their presence. In conducting these interviews, Mr. Harris questioned the students and then wrote down both his questions and their answers.[14] He was unable to interview [S.], who is referred to in the report as the "victim",

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[12] Ms. Hill was also removed as a result of her participation in the May 20, 2003 incident. She did not file an appeal from her removal with this Office.

[13] These statements are attached as exhibits to the Investigative Report.

[14] These documents are also attached as exhibits to the Investigative Report. Attached to the transcript of [De.]'s interview is an addendum from Principal Byford-Peterson that reads as follows:

> [De.] is an identified special education student who receives full-time, comprehensive educational services as a learning disabled youngster at the Prospect Learning Center.
>
> Student was questioned about the incident and it is my position that though he responded to the questions, his perception of the questions and, therefore, the answers were altered slightly based on his perceptions and exhibited processing difficulties. Also, his expressive and receptive skills in the language area are delayed. Word retrieval appears to be a problem, as well as understanding what is asked of him.

Dr. Peterson did not include an addendum to the transcript of [Da.]'s interview.

because his parents would not give their consent. This was also the case with another student who was a witness to the statement made by [S.].

During his interview, [Da.] told Mr. Harris that [S.] said "that his father gives free head." Tr. I at 150. However, [De.] said that [S.] said, "if you were my father, I would give you free head." Tr. I at 151. When asked if he could reconcile the difference in these statements, Mr. Harris testified: "Well . . . two children heard the same statement [but] gave different accounts of what the statement was." Tr. I at 152. He admitted that because of this discrepancy and the fact that he was unable to interview [S.], he could not state conclusively exactly what [S.] told the others.[15]

During the course of his investigation, Mr. Harris also received information from the Metropolitan Police Department (MPD) concerning the existence of a tape recording that had been made of the "mock trial" that Employee and Ms. Hill had conducted on May 20, 2003 with their students after Employee received knowledge that [S.] had allegedly made an improper remark to his fellow students. Subsequently, Mr. Harris received a copy of that tape from MPD.[16] *See* Agency Ex. 20, the tape.

Mr. Harris was asked how he reached his determination that Employee was in violation of Superintendent's Directive 521.6 (Reporting Suspected Child Abuse/Neglect). He answered as follows:

> After finding out what the allegation was and looking into it, and finding out that the information [concerning [S.]] was received by a teacher that was reportable under a directive . . . I looked into that . . . and found that directive 521.6 . . . was one that I needed to research and read. And that's what I did.

Tr. I at 132.

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[15] Mr. Harris was also aware of another version, wherein [S.] said that his father gives "free haircuts."

[16] The following is a matter of record: Employee was arrested for her alleged failure to report suspected child abuse as a result of the occurrences of May 20, 2003. On June 26, 2003, she was arraigned in D.C. Superior Court, Criminal Division, on charges of "Failure to make a report." On November 10, 2003, the case was Dismissed Without Prejudice (DWP).

As to Employee, the conclusions in the Investigative Report are as follows:

> It is concluded that . . . OLIVER . . . violated Superintendent's [Directive] 521.6 . . . by not reporting the alleged Child Abuse when the information came to [her] knowledge.[17]
>
> It is also concluded that OLIVER acted improperly when she conducted a mock trial of the sexual statement allegedly made by [S.]. OLIVER also acted improperly when she told [S.] that she was going to provide a copy of the tape-recording of the mock trial.

Agency Ex. 19 at 5. (emphasis in original). (footnote added).

4. Bernard Lucas, Sr.: At the time of the incident in question, Mr. Lucas was the Executive Assistant to all of Agency's assistant superintendents. He was also a Hearing Officer, and in that role he conducted Step II grievance hearings for the Washington Teachers Union (WTU). Additionally, he reviewed investigative reports that came to him "from Labor Relations and Security. . . and [made] a recommendation to the appropriate assistant superintendent as to the appropriate adverse action it warranted." Tr. II at 8. Further:

> I would do a recommendation. . . . If for some reason the assistant superintendent had a question or wanted to discuss it with me, he or she would call me or come over to my office and we would discuss it. The final decision rests with the assistant superintendent . . . to implement the adverse action.

Tr. II at 12.

Mr. Lucas completed the first page of Employee Ex. 2 (his recommendation in this matter) on August 21, 2003. Until he was presented with the second page at this Hearing, he had never before seen the page.[18] As set forth above, Mr. Lucas recommended that Employee be suspended for 30 days and transferred from Prospect as a result of her actions

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[17] Mr. Harris testified that Employee told him that she no prior knowledge of Superintendent's Directive 521.6. *See* Tr. I at 156.

[18] Regarding the two-page document that is Employee Ex. 2, *see* n.8, *supra.*

on May 20, 2003. In preparing his recommendation, he reviewed the Investigative Report (Agency Ex. 19, supra). Regarding his recommendation, Mr. Lucas testified:

> My recommendation was appropriate because I read the investigative report thoroughly. I considered several things in making . . . a final decision for a recommendation. One, was the employee's action so egregious that . . . she couldn't be salvaged? Did the action warrant the ultimate sanction of termination? I felt in this particular case that the employee used poor judgment. And that with the property rights [to her job] that she had within the system, I felt that she was due a second chance. I felt that way then and I feel that way now. . . [B]ased on the information . . . in the investigative report, I did not feel that the employee's actions were so egregious that they warranted . . . termination.

Tr. II at 29-30.

At the time Mr. Lucas completed his recommendation in late August 2003, he was aware that Assistant Superintendent Patricia Watkins was leaving Agency's employ. (Normally, Dr. Watkins would have reviewed any of his recommendations that concerned employees at Prospect Learning Center). So he took the recommendation in this case, along with several others, to Dr. Watkins's office, with the initial understanding that her assistant would forward them to the appropriate reviewing authority. However, he later talked with Beverly West, Associate Superintendent Vera White's Administrative Assistant. Ms. West told him to bring the recommendations to Ms. White's office for her review. He did so. It appears that he had no further involvement with the recommendation in this case. Nevertheless, he testified that it was unusual that Ms. White did not sign off on his recommendation until October 8, 2003, after Employee's removal was effected. This is so because his recommendations were usually reviewed before final decisions regarding adverse actions were made.

5. Raymond Bryant: At the time of the May 20, 2003 incident, Dr. Bryant was Agency's Chief of Special Education Reform. Prospect Learning Center, where Employee worked prior to her removal, is a Special Education Center for all D.C. elementary-age children with both learning and emotional disabilities. It is a Level IV Special Education School, meaning that the students require full-time special education.

Regarding adverse actions proposed against staff members at special education schools throughout the city, Dr. Bryant's office has always been the first line of recommendation. His recommendations were always honored by the assistant superintendent in charge of the school where the alleged infraction occurred.

Dr. Bryant first became aware of the incident involving Employee when he received a call from Principal Peterson, alerting him that the incident had occurred and that she had spoken at the school with [S.]'s parents. Normally, the principal would have also contacted Assistant Superintendent Patricia Watkins, who had authority over Prospect, and "Dr. Watkins would have worked with [Dr. Bryant] on following up on the action, investigating and making a recommendation." Tr. II at 58. However, at that time it was known that Dr. Watkins was leaving Agency, and thus she had no involvement with the instant matter. Dr. Bryant was then asked to testify about Employee Ex. 1, a series of e-mails concerning the May 20, 2003 incident. These e-mails were generated on August 19 and 20, 2003.[19]

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[19] In order of generation, the e-mails read as follows:

> [1] **From**: Eve Peterson
> **To**: Ray Bryant
> **Sent**: Tuesday, August 19, 2003 5:24 PM
> **Subject**: Summary of Attempts to Obtain Feedback on Investigation
>
> I have been in contact with [Veleter Mazyck, Agency's General Counsel] who asked Ms. Harriet Segar, Attorney Advisor, to contact Security for an update. Ms. Segar . . . is on leave, so I contacted Security and was informed by Investigator Marshall that the findings had been substantiated and that the report now goes back to OGC. She recommended, in response to inquiries by [S.'s parents'] legal representative, that I inform them that the investigation was completed and refer them to the OGC offices. I have done that, but still I do not have a feel for the changes I will have to make in the instructional setup here at Prospect. I do not know who else to try. Can you assist?
>
> [2] **From**: Ray Bryant
> **To**: Eve Peterson
> **Sent**: Wednesday, August 20, 2003 11:57 AM
> **Subject**: Summary of Attempts to Obtain Feedback on Investigation
>
> Will the teacher [Employee] be removed permanently? Or is that something you still don't know?
>
> [3] **From**: Eve Peterson
> **To**: Ray Bryant
> **Sent**: Wednesday, August 20, 2003 1:25 PM

He testified that because the principal was unable to contact Assistant Superintendent Watkins, he intervened on behalf of the principal and contacted Loretta Blackwell, the head of LMER. He was questioned concerning his inquiry regarding Employee's removal, and he answered as follows:

> When Dr. Peterson relayed to me the incident, to be honest, I was very upset. . . . And I had written this saying . . . do you know what the action is? [We were] getting ready for the start of school. We knew the young man in question. He was going

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Subject: Summary of Attempts to Obtain Feedback on Investigation

I still have no feedback as to the status of the teacher or the aide. I really need to know prior to the start of school. Thanks.

[4] From: Ray Bryant
To: Loretta Blackwell
Cc: Eve Peterson; Veleter Mazyck
Sent: Wednesday, August 20, 2003 1:27 PM
Subject: Summary of Attempts to Obtain Feedback on Investigation
Importance: High

Loretta – are you familiar with the case at Prospect Learning Center? If so are the staff in question being terminated? If not can you, Eve and I speak PDQ. . .

[5] From: Loretta Blackwell
To: Ray Bryant
Cc: Eve Peterson; Veleter Mazyck
Sent: Wednesday, August 20, 2003 7:28 PM
Subject: Summary of Attempts to Obtain Feedback on Investigation

If OGC has substantiated the [investigative] report, my understanding is that Security sends a copy of the report to the department head/asst. sup and to LMER. The dept. head/Asst. Sup may confer with LMER, however, they are responsible for initiating a written recommendation for adverse action that must be approved by one level above. It is then sent to LMER to initiate the adverse action communication to the employee.

Eve, Dr. Watkins is no longer here, so you need to speak with Vera White about this situation. It appears she would be the recommending authority for adverse action in lieu of an Asst. Sup. In addition, you need to ensure that someone is addressing incoming mail previously addressed to Dr. Watkins attention, or the investigative report may go unopened and unaddressed.

> to be coming back [to Prospect]. We also knew we had to make some decisions at that point in time. If [Employee] was coming back and the student was coming back, what would we do or how would we deal with it. Would we offer the student a transfer to another school? What was going on?

Tr. II at 58-59.

Dr. Bryant testified that all Special Education teachers are trained never to investigate allegations of sexual abuse. In his words, "we don't investigate, we report." Tr. II at 63. Further, notwithstanding any training that the teachers receive, he believed that the rule that teachers should never investigate such allegations was "general knowledge." Tr. II at 62. Dr. Bryant was told that Employee claimed that, prior to the May 20, 2003 incident, she had never seen Superintendent's Directive 521.6 (n.4, *supra*) and had never received any training in reporting suspected child abuse. He responded that he found it difficult to believe that a teacher with over 20 years experience, such as Employee, had never heard about reporting suspected child abuse.

However, Dr. Bryant's recommendation that Employee be removed (Agency Ex. 3, *supra*) was not based on her failure to report suspected child abuse, but rather on her use of the "peer review court" or "classroom court" on May 20, 2003.[20] He testified as follows:

> If there was no [classroom] court and it was simply a matter of [Employee not reporting suspected child abuse], I think there would be a difference [as to my recommendation for removal]. If it was just not reporting . . . I guess how would we ever know she didn't report, unless . . . the information came out. [I]f it was just the reporting we [might] not have even known it. . . . It really is about what went on after the not reporting.

Tr. II at 74-75.

Dr. Bryant viewed a classroom or peer review court as a part of a child's education, specifically "teaching kids about rules and discipline." Tr. II at 67. In this context, the "classroom community" could use the peer review court to "make a resolution or a decision" regarding rules and discipline. *Id.* Nevertheless, he felt that Employee's use of a

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[20] The term "classroom court" as an accepted method of student discipline appears in several of Employee's yearly "Performance Target Plans". *See* Employee Ex. 5.

peer review court in this instance was improper. First of all, he believed that [S.] had not done anything improper, and thus there was nothing for which he should have been disciplined. Dr. Bryant also felt that no "education" occurred during this classroom court, but that what actually took place was an investigation into suspected child abuse, which of course he believed was not the teacher's role.

Dr. Bryant was especially concerned about the impact the peer review court had on [S.]. In his words:

> I think when you listen to the tape, beginning with the student being very apprehensive . . . and not speaking up, being yelled at to talk louder, the student dissolving into tears halfway through the tape. The student being threatened that God doesn't like liars. The student breaking down and crying and having people, both adults in this situation, challenging why the child is crying as opposed to supporting the child, getting the child out of the classroom and finding the school counselor [to sit down and calm] the child down. Everything about that tape, in my professional estimation, is reprehensible.
>
> It actually would play as a great tape of why we're not supposed to be investigators. The child was led in discussion. When the child didn't know what was going on, in terms of the words that were being used, someone gave him the words and asked if that was what was happening.
>
> Continued prompting in terms of was the child stroking somebody else, holding somebody else, rubbing somebody else, when the child never mentioned any of that. And yet, now all of a sudden this is confronted [by] this child who is now in tears, in front of his classroom, challenged in front of other kids. [For] any child, anybody, any of us, [this] would be a devastating event.

Tr. II at 72-73.

Although Dr. Bryant was aware that at some point the other students had left the classroom, leaving Employee and her aide alone with [S.], that did not change either his view of her use of the classroom court or his recommendation that Employee should be

removed. Further, he was not swayed by her 21 years of experience as a teacher, nor would he have been had he known that her past evaluations were positive.[21] Rather, based on what he considered to be the "egregiousness" of Employee's actions, he did not believe that she could be "rehabilitated" by a lesser sanction. *See* Tr. II at 89.

Dr. Bryant was unaware of Mr. Lucas's recommendation that Employee be suspended and transferred rather than being removed (Employee Ex. 2, ***supra***) until he was preparing for his testimony. Nevertheless, even if he had been aware of the document's existence at the time he recommended Employee's removal, it would not have affected his recommendation.

6. Lisa Sligh – At the time of the May 20, 2003 incident, Ms. Sligh was a School Psychologist at Prospect Learning Center. One of her duties was to provide individual and group counseling to Employee's students. She was qualified as an expert witness as to emotionally disturbed children, including those who may have been subjected to sexual abuse. *See* Tr. III at 149.

On May 20, 2003, at approximately 10:20 a.m., she went to Employee's classroom to pick up a group of students for a therapeutic counseling session. She described what she saw as follows:[22] When she entered, most of the class was gathered in the front of the room in a single row of chairs, facing forward. Two students, a girl named [B.] and a boy named [S.], were in chairs facing the rest of the class. Employee was having the class "swear to tell the truth by repeating an oath." Ms. Sligh described the scene as a "mock trial" or "mock classroom court", and noticed that Employee was tape-recording it. Although at the time Ms. Sligh was unaware of the nature of this "trial", it appeared to her that [B.] and [S.] were the subjects of it. [S.] was crying and was twisting and tearing a piece of tissue. Employee was questioning him about his behavior, and was asking [B.] what [S.] had said. Employee invited Ms. Sligh to remain, but after about 10 to 15 minutes, she was paged by Ms. Hampton, the Special Education Coordinator, to report to a previously-scheduled meeting. She then left the classroom.

That afternoon, following the end of the school day, Ms. Sligh saw [B.] in a hallway. She asked the girl about the peer review court that had taken place in Employee's classroom earlier that day. [B.] told her that [S.] "was going around to his peers saying that he was sucking his father's dick." Tr. III at 127. Ms. Sligh then went to Employee's room to ask

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[21] He testified that he had never seen those evaluations. *See* Tr. II at 89.

[22] *See* Tr. III at 123-125, 155. *See also* Agency Ex. 22, a May 20, 2003 memo from Ms. Sligh to Eve Byford-Peterson, the principal of Prospect.

her about the statement that [S.] had supposedly made. Employee confirmed the statement and told her that that was the reason she had conducted the peer review court. Employee played a portion of the tape of the session for Ms. Sligh. On the tape, [S.] gave several versions of the statement he made to the other students, from "giving free head to his father to getting free haircuts from his father." *See* Tr. III at 175, Agency Ex. 22 at p. 2. [S.] also said that another male student in Employee's class "would touch his private parts", and that he [S.] "does tell lies". *Id.*

Based on what [B.] told her and what she heard on the tape, Ms. Sligh told Employee that she would have to report [S.]'s statement to the principal, since it was a "sexual abuse incident." *Id.* Employee replied that she did not think it was necessary to report the incident, because she was "not sure of the child's sincerity in the matter." Tr. III at 130. Ms. Sligh disagreed with Employee, and reiterated that the statement would have to be reported to the principal. Thereafter, according to Ms. Sligh:

> I immediately went to the main office to report the incident but the principal was out of the building. I then conferred with Ms. Coleman [lead school psychologist] and she advised me of the [reporting] procedures. I then informed the administrational (sic) assistant Ms. Mingo and apprised her of the situation. I will be seeing [S.] and engaging in a series of play therapy techniques to assess the mental state of the child on May 21, 2003. I will be informing child protective services because the law requires it.

Agency Ex. 22 at p. 2. Ms. Sligh also testified that Ms. Coleman told her that at the beginning of each school year the teachers are given information about the reporting requirements for possible instances of child sexual abuse.

The next morning, May 21, 2003, Ms. Sligh was putting together a "clinical team" to do an "intervention" with [S.] as soon as he arrived at school. *See* Tr. III at 138-139. However, before the team could conduct the intervention, Principal Peterson advised Ms. Sligh not to have any dealings with the child, since "by that time, certain things had transpired that were out of the loop . . . administration and legally downtown." Tr. III at 139. Thus, the planned intervention never took place.

Prior to coming to Prospect, Ms. Sligh had worked with sexual abuse cases for approximately three years. In her experience, children express sexual abuse differently. Some "might display signs of masturbation, do inappropriate touching . . . in the

classroom, or they could come out and say inappropriate statements like [S.] did." Tr. III at 134.

However, it is normal for children, even those with emotional and learning problems, to talk about sex. Further, not every statement of a sexual nature that a child makes is indicative of sexual abuse. For example, Ms. Sligh agreed that statements such as "Your mother's a whore" or "I've seen your mother blow homeless men", when made by a child, are more likely "trash talking" rather than evidence of sexual abuse. *See* Tr. III at 169. She further testified that a trained professional, such as Employee, has the leeway to make a judgment as to whether a child's statement involving sexual terms may be an indicia of abuse or simply trash talking.

Finally, prior to seeing it at the evidentiary Hearing, Ms. Sligh had never seen Superintendent's Directive 521.6, *supra* at n.4. Her experience as it pertains to reporting cases of suspected abuse came from laws applicable to school counselors and psychologists.

7. Eve Byford-Peterson: Dr. Peterson is the Principal of Prospect Learning Center. She has been involved with Special Education for approximately 30 years. The students at Prospect range in age from six to 14, and those that were in Employee's class in 2003 were nine and ten. Regarding the student population at Prospect, Dr. Peterson testified:

> The major [difficulty is] that they are all below what one would expect academically. They learn differently and they have some definite learning difficulties. They bring with them also, because of what's happened to them in general education . . . problems such as impulsivity. They are very, very easily frustrated because they've had problems before academically.

Tr. IV at 12.

Dr. Peterson learned of the May 20, 2003 incident in Employee's classroom while at home that evening, after the end of the school day. She was called by Prospect's Business Manager, Pauline Mingo, who told her that she (Ms. Mingo):

> had been informed in the afternoon that a situation had occurred, that there was a trial of sorts held in [Employee's] classroom where there was a taping and the investigation that was done at that point in time was supposed to have

> determined or tried to determine whether or not an abuse situation had occurred.

Tr. IV at 13. Dr. Peterson then called Patricia Watkins, the Assistant Superintendent to whom Prospect was assigned, to inform her of the incident. Dr. Watkins told Dr. Peterson to call her back the next day with additional information. Agency Ex. 24 is a May 21, 2003 memorandum from Dr. Peterson to Dr. Watkins regarding the May 20, 2003 incident. In pertinent part, that document reads as follows:

> I was informed that a situation transpired . . . yesterday that involved verbal indications by a male student that he was engaging in oral sex activities. The disclosure had come in the form of discussions with classmates, particularly the boys, on May 19th. Reportedly, these statements were relayed to [Employee] yesterday, as she was absent on [May 19th].
>
> The classroom staff was reported to have decided to conduct a classroom court activity on Tuesday, May 20th, to determine whether the statements made by the child were truthful. A mock trial was held with student and adult (teacher and assistant) participation and reportedly the session was tape-recorded.
>
> I have attached a copy of the memorandum provided to me by the psychologist who first alerted me as to what had gone on during the day in regards to the incident. I have spoken with [Employee] and requested the tape. . . .
>
> It is my intention to contact Protective Services about the report that was made by the student regarding possible sexual abuse. . . . In addition, based on your direction in an earlier telephone conversation, I am forwarding a copy to the DCPS Office of Security.

As Dr. Peterson alluded to in the above memo, on May 21, 2003 she contacted Wanda Marshall, the Chief Investigator at Agency's Office of Security. Ms. Marshall advised her that she would call the Metropolitan Police Department. Sometime during the afternoon of May 21st, two police officers and a person from Child Protective Services came to Prospect. They first talked with Dr. Peterson, and then with [S.]. On the following

morning, May 22, 2003, [S.]'s parents came to Prospect and asked Dr. Peterson to contact the officials who had been there the previous day. She did so, and after the officials arrived (one of whom brought the tape recording of the May 20th session in Employee's classroom), all of them listened to the tape.

According to Dr. Peterson, after she heard the tape recording:

> My initial reaction was, well, I was very disturbed . . . because of the tone of the tape. I really had a hard time listening to what I heard as almost an interrogation of this young man who I knew because I know . . . all of the kids in school. . . .
>
> [T]ears came to my eyes . . . because just knowing what our kids are like and what we have to do to get them back on track both academically and emotionally. And . . . we're talking about some very vulnerable youngsters . . . some of them are fragile. And so I was disturbed by it.

Tr. IV at 20.

"Mock trial" was the term used by Ms. Mingo to describe the incident when she first contacted Dr. Peterson on the evening of May 20, 2003. Dr. Peterson testified that what she heard on the tape "sounded like a trial to me." *Id.* Further, after listening to the tape, she was aware that at some point all of the other students left the room, leaving [S.] alone with Employee and her assistant, Ms. Hill. She also knew that Ms. Hill participated in the discussion with [S.].

Dr. Peterson had seen the terms "peer review court" and "classroom court" in various documents, including Employee's previous Performance Target Plans (Employee Ex. 5). Her opinion as to the use of a classroom court is as follows:

> I see it as a disciplinary tool, that something happens on the playground, or in the classroom that can be used as a . . . social teaching tool. To have all students involved to clear up and stress and use it to understand that what was done or what activity was involved could have been injurious.

Tr. IV at 21. Further, Dr. Peterson saw nothing wrong with using a classroom court to address the use of unacceptable language in the classroom: "That would be a re-direction of

[the students'] learning experience, and I would see nothing wrong with that." Tr. IV at 51.

Dr. Peterson was aware that there were several versions of what [S.] reportedly said to his classmates. The following colloquy then took place between Ms. Segar and the witness:

> Q: [I]f any of [versions] occurred . . . would it be appropriate to use classroom court . . . to find out whether [S.] was telling the truth or not in front of the other children?
>
> A: My answer strongly is "no" because . . . the youngsters we're talking about . . . have social [and] emotional overlays of their learning disabilities which causes them to have low self-esteem. . . . We have a hard enough time trying to get them to bond [with] and to trust [us] when they initially come to us. To push them away with something that appears that they would have to go through if they ever came up with anything that needed to be questioned . . . in detail, I think they would just shut down.
>
> I think it would have a domino effect in regards to what they heard or thought they heard or the tone that they heard and not wanting to be a part of something. I think we'd have a whole lot of bridge building to do in regards to getting them back on track with their level of trust for us.

Tr. IV at 24.

As a result of her review of the May 20, 2003 tape-recording, Dr. Peterson was aware that Employee and Ms. Hill discussed the concept of "good touch/bad touch" with [S.]. Her testimony as to the appropriateness of such a discussion was inconsistent. She initially testified that such a discussion was acceptable. However, she then stated that such subjects should not be discussed with a student without the teacher first obtaining the parents' permission. Nevertheless, she finally testified that there might be times when it is appropriate for a teacher to immediately deal with the subject, rather than waiting for the parents' permission. *See* Tr. IV at 52, 67-68.

Dr. Peterson testified that Agency Ex. 25, which consists of a series of documents pertaining to student discipline, search procedures, field trips, requisition forms, as well as Superintendent's Directive 521.6 ("Reporting Suspected Child Abuse/Neglect")[23] were given to the staff at Prospect during the orientation period prior to the 2001-2002 School Year (SY). These same materials were probably given out during the 2002-2003 SY orientation period, although she could not say for certain that 521.6 was among them.

Regarding the reporting requirement of 521.6, she testified that an experienced teacher could hear a conversation between students of a sexual nature and conclude that the conversation was simply trash-talking, rather than an indication of child abuse. In such a case, the teacher would not be required to report the conversation as suspected child abuse per 521.6.

In Employee's last three performance evaluations, she was given the rating "Exceeds Expectations" by Dr. Peterson. This is the highest possible rating. Dr. Peterson also wrote a letter on June 15, 1999, in which she stated that Employee was "exemplary, exceptional, excellent and outstanding." *See* Tr. IV at 59.

Dr. Peterson had no input into Dr. Bryant's decision to remove Employee. Her only role was to provide information concerning the May 20, 2003 incident, first to Dr. Watkins and later to Dr. Bryant. Finally, she was unaware of Mr. Lucas's recommendation that Employee be suspended until she saw the document prior to the evidentiary Hearing.

8. Anthony Bell, Sr.: Mr. Bell retired as a Sergeant from the Metropolitan Police Department (MPD) in 1986, after a 23-year career. He is currently the owner of a fitness center in Southeast Washington. During the last eight or nine years of his tenure with MPD, he was the Watch Commander of the Child Abuse and Neglect Section. He had under his command ten to 12 officers who investigated reports of suspected child abuse and neglect. After the investigations were completed, it was Mr. Bell's duty to "ascertain the prosecutorial merits of each case." Tr. IV at 71. While he was with MPD, he also was the Director of the Police Boys and Girls Summer Camp, located in Pt. Lookout, MD.

Following his retirement from MPD, Mr. Bell had a number of jobs dealing with child abuse issues. He taught courses in domestic violence and child abuse and neglect at Prince George's County Community College; he worked for the State of Maryland teaching over 300 police officers and sheriffs the proper techniques for dealing with child abuse and domestic violence; and he was the Operations Manager for the Washington Hospital

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[23] *See* n.4, *supra*.

Center's Security Force. In that role, he taught doctors and nurses how to recognize cases of child abuse and neglect. Mr. Bell was qualified as an expert witness as to child abuse issues. *See* Tr. IV at 80.

In preparation for his testimony, Mr. Bell read the July 15, 2003 Final Investigative Report of the May 20, 2003 incident in Employee's classroom (Agency Ex. 19, ***supra***). In his opinion, her removal was "harsh treatment . . . a little overkill." Tr. IV at 82. He elaborated as follows:

> [S]he was acting in good faith, and as far as I can see, she didn't suspect child abuse. She suspected some lewd [and improper] language, and it looked like she was trying to get to the bottom of who said what, which had occurred on her day off. . . . And in our schools today, a lot of times . . . children make lewd statements and they think it's a big thing to do. And if you're a schoolteacher, you're going to make sure that the kids know that that shouldn't be used.

Tr. IV at 82-83.

Also in preparation for his testimony, Mr. Bell interviewed Employee. As a result of that interview, it was his understanding that Employee had no training in spotting the signs of child abuse. On cross-examination, he further testified that had she been properly trained, she would not have used the Classroom Court to address the situation involving [S]. In his words, "she didn't know any better." Tr. IV at 105. Additionally, even if Employee did not suspect child abuse, the safer path would be to pass on her knowledge of the incident to the "appropriate authorities" because "every incident occurring in a classroom should be documented and passed on. . . ." *See* Tr. IV at 106, 107. He stated that Employee's act of reporting the incident to Ms. Sligh, the School Psychologist, was satisfactory.

9. Susan A.W. Chadwick: Ms. Chadwick retired as a School Psychologist in 1997, after having worked for Agency for 27 years. She worked at Prospect Learning Center for 12 years, from 1985 until her retirement. While she was at Prospect, she knew Employee "fairly well." Tr. IV at 113.

Employee Ex. 14 is a February 9, 2004 letter from Ms. Chadwick addressed "To Whom It May Concern". In pertinent part, the letter reads as follows:

> I am a retired School Psychologist, having worked for DCPS from 1970 to 1997 and at Prospect Learning Center from about 1985-1997. I have been asked to state my recollection of procedures concerning the reporting of suspected child abuse and/or neglect. I do not recall receiving any written directives. Personally, I reported any concerns to the school principal who investigated and followed through with whatever course of action she deemed appropriate. I did not jump to conclusions and immediately contact the Police Department or Protective Services since I did not want to cause undue embarrassment to families if the allegations proved to be ungrounded. In most cases I was told that no further action was initiated.

In her testimony, Ms. Chadwick reiterated that she had never received any written directives pertaining to child abuse, and had no training on the subject while she was at Prospect. Returning to the above letter, she further testified as to the danger in "jumping to conclusions and immediately calling the police":

> Well, it may be totally unjustified and you're going to put the parents [and child] through something that they don't need to go through. I think you have to play it by ear and make your decisions based on the individual child and the situation.

Tr. IV at 116. Further, in her opinion when a child says something obscene, it should "absolutely" not be reported as suspected child abuse. Tr. IV at 119.

Ms. Chadwick was familiar with the May 20, 2003 incident in Employee's classroom, although she did not listen to the tape. In her words:

> I know that a child may have said my father gives free head, which is an inappropriate thing to say. And I know that he may have later recanted and said my father gives free haircuts. And the whole issue involved his father . . . there was nothing said that suggested that anything was done to him. . . . I know that Ms. Oliver excused a number of children from the room and discussed it with some of the other children and referred it to the school psychologist.

Tr. IV at 125, 126.

Ms. Chadwick stated that it was reasonable for Employee to conclude that this was a situation involving bad language and not an indication of child abuse. Further, Employee's use of the Classroom Court to address the situation was "quite appropriate." Tr. IV at 119. She expounded as follows:

> There are a variety of ways that you can deal with situations involving inappropriate behavior, and her chosen method is one she's used before and one for which she was approved to use through her Principal.

Tr. IV at 120.

10. Employee:[24] At the time of her removal, she had been employed at Prospect Learning Center as a Special Education Teacher for approximately 21 years. Prospect is a non-graded, Level IV school, meaning that the special education needs of its students require that they be taught in self-contained classrooms. The students are at Prospect because their needs cannot be met in general classrooms within the school system. On May 20, 2003, Employee had nine students in her classroom, all of whom were either nine or ten years old. The student in question, [S.], was nine years, 11 months old at the time of the incident, and was a recent arrival, having been placed in the school in or around January 2003. Pursuant to his Individual Educational Profile (IEP), [S.]'s problems were attention deficit disorder, social interaction difficulties, delayed language skills and gross motor deficit.

Employee was not at work on May 19, 2003, the day prior to the incident. On the morning of May 20, 2003, between 10:15 and 10:30 a.m., she was approached in the classroom by one of her female students, [B.]. [B.] said that the day before, [De.] and [Da.] (both boys) told her that [S.] had said to the boys that "his father gives free head." Employee pretended not to hear, so she asked [B.] to repeat what she had said. [B.] again stated that [S.] had said that "his father gives free head." Employee then took [S.] aside and asked him if he knew what [De.] and [Da.] had said that he said. [S.] stated that they had said that he said that "his father gives free head."

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[24] The following summary is based not only on Employee's testimony and the Hearing exhibits, but also on the contents of the tape of the May 20, 2003 incident, which I reviewed in detail prior to writing this decision. For the sake of clarity, *italics* will be used to denote direct quotes found on the tape.

Employee then had the students stop their work and arrange their chairs in a semi-circle in the front of the room.[25] She turned on a tape recorder and told the children that they were now in "*Classroom Court*" (*see* n.24, *supra*) and had them introduce themselves. She then told [S.] that he was the "***defendant***" and had him swear to tell the truth. She stated that he must tell the truth because he and his father could get into "*big time trouble*." She told the students, "*Some things we may say just to be 'Mr. Big and Bad Guy'* [but you] *better watch what comes out of your mouths.*" She then said, "*I will repeat this for [S.] and [his parents] to hear*", the "this" being that if [S.] had come to her in confidence and just needed to tell her a "*secret*" or needed to confide in someone, she "*wouldn't have brought this to* [Classroom] *Court.*" But since [S.] had been saying things to his classmates, then apparently it was not a secret.

She asked [S.], "***What are they saying you said?***" Although the tape is unintelligible at this point, apparently [S.] stated that his father was giving "free haircuts", because Employee replied, "*No, you did not say 'free haircuts' when we first started.*" At this point the tape recorder is turned off. When the recording recommenced, a girl (apparently [B.]) said that [S.] said to [Da.] and [De.] that "*his father gave him free head.*" Employee then asked the girl if [S.] said that "*his father gives him free head or if he gives his father free head?*" The girl's response is unintelligible, but Employee then asked the students if they know what these words mean. She then escorted those who responded negatively from the classroom. Those remaining were [S.], [B.], [Da.] and [De.].

When Employee returned to the front of the room, she noticed that [S.] was crying. She asked him why he was crying and if something was "*supposed to be a family secret?*" The students then engaged in a short discussion, most of which is unintelligible. Employee then said to [S.], "*If this is confidential and you don't want anybody to know about it, you need to say so right now.*" She again tells him to stop crying and then turns off the tape recorder. [B.], [Da.] and [De.] are dismissed, leaving Employee and Ms. Hill alone with [S.].

When the recording continues, Employee again asked [S.] what he said to the other boys. [S.] responded, "*free haircuts.*" She continued, "*What do you mean by free haircuts? First you said that your father gives you free head, do you know what that means? Was this supposed to be a secret? What's the secret?*" She then asked him if he was talking about the top of his head or the head "*down here*". Further, "*Is anybody messing with your private areas?*

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[25] According to Employee, Lisa Sligh, the School Psychologist, entered the room just as the students were rearranging their chairs. She stayed for approximately five to seven minutes and was then paged to attend a meeting. *See* Tr. II at 204, Tr. III at 69.

That's all we wanted to know. . . You're not going to get into trouble. The only way we can help you is if you tell the truth."

Employee proceeded to tell [S.] that many children "*experiment*" and that "*experimenting is not wrong, but once you do it you stop. But if a grownup is invading your body, it's a whole different thing.*" She continued, "*Why would you tell me that's what they are saying and then change it to a haircut? Did you lie to the kids when you said your father gives you free head?*" [S.] responded that he had lied to the boys, and Employee then asked him if he knew what "giving head" meant. He replied that he did not. She explained it to him as follows: "*Giving head means that you are putting your mouth on the head of someone's penis or they are putting their mouth on your penis.*" She asked him if anybody was doing that to him, and that he could be truthful to her. He told her no. She responded that if anyone does that to him, the first person he should tell is his mother, and that "*your mom will protect you.*" She also told him that he could confide in her. She concluded by saying, "*[S.], it's going to be O.K.*" She told him to wash his face and then had him join the other students at lunch. According to Employee, [S.] seemed fine after the discussion ended, and was not distraught. The class had a "normal afternoon" (Tr. III at 87), and no one talked any further about the earlier Classroom Court.

As set forth above at n.25, Employee testified that Ms. Sligh entered the classroom as the Classroom Court began and left five to seven minutes thereafter. Later in the day, she and Ms. Sligh "saw each other in passing and we said to one another that we would talk to each other at the end of the school day." Tr. II at 207. At approximately 2:30 p.m., they met and Employee told Ms. Sligh about the "ambiguous" statements that the children had made. *Id.* According to Employee, Ms. Sligh did not tell her that one of the students had earlier told her (Ms. Sligh) "what [S.] had said in some version." *See* Tr. II at 208. Employee had Ms. Sligh listen to a portion of the tape recording. Afterwards, Ms. Sligh said that she "was going to take this up with Dr. Peterson [and ask] if she could have intervention with the child the next day." Tr. II at 211. However, she never told Employee that she suspected that [S.] was being abused.

Regarding her use of the "Peer" or "Classroom" Court, Employee testified:

> My intention with the peer court, hearing the statement being brought by [B.] to me, [S.] said that his father gives free head, I wanted to just put a stop to that language right away. I know children, and I know if they can get away with just dirty talk, they're going to do it. And all I could think of was tomorrow, it might be ["]your mama gives free head["]. . . . The peer

> court was only to reinforce what language was going to be used and what language was not going to be used in [or outside of] the classroom.

Tr. IV at 131.

The Classroom Court ended when all of the students except [S.] were dismissed. Because there were differing versions of what [S.] had supposedly said, she again questioned him concerning his version. When he said that he had lied to the boys when he said that his father gives "free head", she asked him if he understood what those words meant. When he said that he did not, she felt it was necessary for her to explain it to him. Regarding her decision to do so, the following colloquy occurred between Mr. Silverberg and Employee:

> Q: Why did you talk about the meaning of giving free head to [S.]? . . . Why did you say it?
>
> A: Because [S.] is the type of child that will take something and run with it. He is the type of child that will do anything and everything just to be part of a group.
>
> Q: But why would you tell a child what it means?
>
> A: Why not? I mean, this is life. This is what's going on these days. These children are being sexually abused. . . . And I'm not saying that every child is being abused. But the thing was is that it was teaching and making [him] aware of what could happen.
>
> Q: Are you saying that you were trying to warn or help inform [S.] of the dangers?
>
> A: Most definitely.

Tr. III at 62-63.

Employee denied ever receiving Superintendent's Directive 521.6 (n.4, *supra*) or any other information pertaining to the reporting of suspected child abuse. In her words: "I nor the other teachers at Prospect even to this day, have never received [Superintendent's

Directive] 521.6. We have never had a workshop, explicitly to let us know how to react [to] or the indicators of [suspected] child abuse." Tr. II at 155. Employee's first awareness of 521.6 occurred during the investigation of the May 20, 2003 incident. Further, she specifically disagreed with "the prior testimony of some of the school officials that at the beginning of the year there was some training or . . . an assembly that talk[ed] about [reporting suspected child abuse] or . . . some sort of mandatory stuff that they [give out]. *See* Tr. III at 76.

Nevertheless, Employee, as a veteran teacher, was aware of the indicators of potential child abuse. Regarding the indicators in a boy, she testified:

> First of all, you're looking for behavior. . . . I'm speaking [of] the male child. Is the child pulling [his penis]? Is the child complaining about burning when he goes to the bathroom? Are there any sexual advances [toward other children]? Language also - that [the child says that] something has happened to me.

Tr. II at 156.

Throughout the course of her teaching career at Prospect, Employee has reported suspected child abuse or neglect approximately ten times. She cited two such examples: one child kept falling asleep in class and had bruises on his arms; the second involved a diabetic child whose mother did not supply him with "the proper snacks" that he needed during the day. Consequently, Employee had to feed the child. Further, the child did not bring in his glucose monitor on a regular basis. *See* Tr. III at 112.

Regarding the May 20, 2003 incident involving [S.]'s statements, Employee did not report this as suspected child abuse because, taking the incident as a whole, she did not believe there was abuse. According to her: "I did not see anything that would lead me to believe that the child was abused, not by the mere words, giving head. There were no physical or behavioral indicators at all." Tr. III at 25. Further, "I had no indicators . . . and I know the child. . . . I'm not the one to turn a blind eye and a deaf ear on anything, especially when it comes to the protection of my children." Tr. III at 59.

As to the charge that by questioning [S.] alone, she was improperly "investigating" suspected child abuse, Employee testified:

> I guess now that I have seen 521.6 . . . about suspected child abuse [and] neglect and when it does say that you should not investigate or attempt to investigate, I guess by asking questions, it could be . . . investigation, but this is just common practice. I mean, I'm a teacher. I have these children longer than a lot of parents even see their children. And before I'm going to report anything . . . [I'm] going to ask about it.

Tr. III at 39. Further:

> I am a teacher and educator of children with exceptional needs who often have severe language deficit difficulties and delays. My attempt to discover what the child intended to say has been labeled as a mock **trial**. This first step in determining what the child actually meant was far more prudent than the psychologist, Ms. Sligh, presenting anatomical dolls at my door and insisting on questioning the child. In my experience, we **often** move to a conclusion before a child's innocence, language skills deficits in both receptive and or expressive [language] as well as processing and reasoning deficits, parental background and daily activities are assessed.

Agency Ex. 18 at p. 3. (emphasis in original). Additionally, regarding Ms. Sligh and the "anatomical dolls", Employee testified:

> Like I said, Ms. Sligh presented anatomical dolls at my door and insisted on questioning [S.]. Well, she did not do [so] because I had asked Dr. Peterson and I told [Ms. Sligh], until you get approval from Dr. Peterson, then you are not going to question [S.] with the dolls. And I did go to Dr. Peterson and Dr. Peterson refused to let her have counseling and ask any questions . . . with the anatomical dolls. She said there will be no counseling in this regard until the investigation is over with.

Tr. III at 80.

Finally, with respect to the allegation that Employee stated that she would give a copy of the tape recording to [S.]'s parents, Employee wrote in her "refutation statement" (Agency Ex. 18, *supra*) as follows: "**I adamantly refute** this accusation. At **no** time did I

speak those words. However, there was a statement made on the recorder that denoted "I will say this loud and clear for [S.'s parents] to hear." Agency Ex. 18 at p. 2. (emphasis in original).

b. Undisputed facts.

The following is not subject to genuine dispute: Employee was a Special Education Teacher at Prospect Learning Center, a Level IV (self-contained, non-graded) Special Education School. As of May 2003, Employee had been employed for approximately 21 years. In her three most recent performance evaluations, Employee attained the highest rating possible, "Exceeds Expectations".

At the time of the incident in question, Employee had nine students in her classroom, all of whom were either eight or nine years old. She also had a classroom assistant, Willette Hill. On May 19, 2003, Employee was absent. On the morning of May 20, 2003, sometime between 10:00 and 10:30 a.m., Employee was approached in the classroom by one of the girls in her class, [B.]. [B.] told Employee that the day before, two boys in the class, [Da.] and [De.], had told her that another boy, [S.], had said to them that "his father gives free head." Employee asked [B.] to repeat what she had just said, and [B.] again said that the boys told her that [S.] said that "his father gives free head." Employee then took [S.] aside and asked him if he knew what [De.] and [Da.] had said that he said. [S.] stated that they had said that he said that "his father gives free head."

Employee then had the students stop their work and arrange their chairs in a semi-circle in the front of the room. She turned on a tape recorder and told the children that they were now in "Classroom Court"[26] and had them introduce themselves. Employee's use of a Classroom Court to address discipline in the class had been previously approved by Dr. Eve Byford-Peterson, the Principal of Prospect, in Employee's annual Performance Target Plans.

At the time that the students were rearranging their chairs, Lisa Sligh, a School Psychologist, came to Employee's classroom to pick up some students for a therapeutic counseling session. Employee invited Ms. Sligh to remain, and she did so for approximately five to ten minutes, at which time she was paged by Prospect's Special Education Coordinator to attend a meeting.

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[26] Throughout the previous testimony and exhibits, the technique that Employee used on May 20, 2003 has been called at various times a "Classroom Court", "Peer Court", "Peer Review Court", "Mock Classroom Court" or "Mock Trial." In the interest of consistency, for the remainder of this decision I will use "Classroom Court."

For several minutes after Employee began the Classroom Court, she tried to ascertain exactly what [S.] had said to the two boys the day before. As is evident from both the prior testimony and the exhibits of record, including the audio tape (Agency Ex. 20), there are numerous versions of what [S.] supposedly said. Nonetheless, Employee asked the students if they understood the meaning of the words "free head". Those that indicated that they did not understand the words were escorted from the room by Employee. The remaining students were [S.], [B.], [Da.] and [De.].

When Employee returned to the front of the room, she noticed that [S.] was crying. Shortly thereafter, the other three students were dismissed, leaving Employee and Ms. Hill alone with [S.]. Employee again asked [S.] what he had said to the two boys, and he responded, "free haircuts." She asked him why he had first said "free head" and if he knew what that meant and if this was supposed to be a family secret. Eventually, [S.] said that he had lied to the boys about "free head" and she again asked him if he knew what the words meant. When he said that he did not, she explained it to him. She asked if anyone was doing that to him, and he responded "no". She said that if anyone did that to him, he should first tell his mother, who would protect him. She also said that he could confide in her. She concluded by telling him that everything was going to be O.K. , and then had him wash his face and join the other students at lunch. The rest of the school day in the classroom was uneventful.

At the end of the school day, Ms. Sligh, the School Psychologist, and Employee met in Employee's classroom. Ms. Sligh stated that she had recently seen [B.], who told her that the earlier Classroom Court was about a statement that [S.] had made pertaining to having oral sex with his father. Employee stated that there were several ambiguous versions of what [S.] had supposedly said. She let Ms. Sligh listen to a portion of the tape recording, during which there were several versions of [S.]'s statement. Based on what she heard on the tape and on the version that [B.] had related, Ms. Sligh told Employee that she was going to report the incident to Dr. Peterson as an instance of possible sexual abuse and was planning to do an "intervention" with [S.] the next day. Employee disagreed with Ms. Sligh's interpretation of the differing versions of [S.]'s statement, and did not believe that this was an incident of possible sexual abuse. Nevertheless, Ms. Sligh went to the office, but Dr. Peterson was not there. She talked to Pauline Mingo, Prospect's Business Manager, and apprised her of the situation as she saw it.

On the evening of May 20, 2003, Ms. Mingo called Dr. Peterson at home and told her that during the afternoon she had been informed by Ms. Sligh that "that there was a trial of sorts held in [Employee's] classroom where there was a taping and the investigation that was done at that point in time was supposed to have determined or tried to determine

whether or not an abuse situation had occurred." Dr. Peterson then called Dr. Patricia Watkins, the Assistant Superintendent to whom Prospect was assigned, and informed her of what she had just been told. Dr. Watkins told Dr. Peterson to call her back the next day with additional information. On May 21, 2003, Dr. Peterson wrote a memo to Dr. Watkins, which was entered into evidence as Agency Ex. 24, and is set forth above at p. 22.

Also on May 21, 2003, Dr. Peterson called Wanda Marshall, the Chief Investigator at Agency's Office of Security. Ms. Marshall advised her that she would call the Metropolitan Police Department. Sometime during the afternoon of May 21st, two police officers and a person from Child Protective Services came to Prospect. They first talked with Dr. Peterson, and then with [S.].

Additionally, at some point during the morning of May 21st, Ms. Sligh appeared at Employee's classroom with "anatomical dolls", anticipating that she would complete the "intervention" with [S.] that she had discussed with Employee the day before. Employee told her that she would do no such thing until it had been approved by Dr. Peterson. Employee contacted Dr. Peterson, who advised Ms. Sligh that she was to have no further contact with [S.] since an investigation into the matter was underway.

On the morning of May 22, 2003, [S.]'s parents came to Prospect and asked Dr. Peterson to contact the officials who had been there the previous day. She did so, and after the officials arrived (one of whom brought the tape recording of the May 20th session in Employee's classroom), all of them listened to the tape. Further, on May 22nd, Employee was placed on administrative leave pending the outcome of the investigation into the May 20th incident. She never returned to Prospect.

The investigation was conducted by John Harris, an Investigator with Agency's Office of School Security. Mr. Harris interviewed and obtained written statements from Employee, Ms. Hill and Ms. Sligh. He also interviewed [Da.] and [De.], who gave differing versions of the statement that [S.] had supposedly made to them. He was unable to interview [S.], as his parents would not give their consent. Further, during the investigation he received a copy of the tape of the May 20, 2003 incident from MPD. On July 15, 2003, Mr. Harris issued the final report of the investigation, in which he concluded that: 1) Employee violated Directive 521.6 "by not reporting the alleged Child Abuse when the information came to [her] knowledge"; 2) she "acted improperly when she conducted a mock trial of the sexual statement allegedly made by [S.]"; and 3) she "also acted improperly when she told [S.] that she was going to provide a copy of the tape-recording of the mock trial." *See* Agency Ex. 19, ***supra***.

Bernard Lucas, the Executive Assistant to all of Agency's assistant superintendents, reviewed the investigative report pursuant to his duty to make a recommendation for final Agency action. On August 21, 2003, he sent a memo to Loretta Blackwell, Agency's Director of Labor Management and Employee Relations, setting forth his recommendation in the instant matter. The memo contained a signature line for Associate Superintendent Vera White.[27] Based on his review of the investigative report, Mr. Lucas recommended that Employee be suspended for 30 days and reassigned to another school. Although the memo was dated August 21st, Ms. White did not sign it until October 8, 2003, two weeks after Employee's removal was effected. Additionally, according to their testimony, neither Ms. White, Ms. Blackwell, Dr. Peterson or Dr. Raymond Bryant, the ***de facto*** Deciding Official,[28] knew of the existence of Mr. Lucas's memo until Employee had been removed.

c. Findings of fact on issues in dispute.

There are two salient factual issues in dispute in this case: 1) whether Employee was aware of Superintendent's Directive 521.6 (n.4, ***supra***) on May 20, 2003; and 2) whether she "[told] a student [that she] would provide a copy of the taped trial to his parents." *See* the September 9, 2003 Notice of Termination, above at pp. 5 & 6.

1. *Whether Employee was aware of Superintendent's Directive 521.6 on May 20, 2003.*

Employee testified that she had never seen this directive prior to May 20, 2003, nor for that matter had ever had any Agency-sponsored training on reporting suspected child abuse. I heard this testimony and observed Employee's demeanor as she gave it. Although her testimony is self-serving, I find it to be forthright and credible. Employee's testimony as to the lack of training is corroborated by that of Ms. Chadwick, the School Psychologist who worked at Prospect from 1985 until her retirement in 1993. Ms. Chadwick had no demonstrated motive to fabricate her testimony, and thus I find it credible. Additionally,

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[27] Mr. Lucas testified that in the ordinary course of business, Assistant Superintendent Patricia Watkins would have signed off on his memo. The reason why the signature line contained Ms. White's name instead is set forth above in Mr. Lucas's testimony at p. 14.

[28] Although it is Associate Superintendent Vera White who is charged with rendering final Agency decisions in adverse actions, she testified that she always deferred to the recommendations of the assistant superintendents. Here, under normal circumstances Dr. Watkins would have been the ***de facto*** Deciding Official. However, since she was in the process of leaving the agency in the Summer of 2003, Dr. Bryant assumed that role. *See*, above, his testimony and that of Ms. Blackwell, Ms. White and Mr. Lucas. *See also* the series of e-mails, ***supra*** at n.19.

even Ms. Sligh testified that she had not seen 521.6 until she testified at the evidentiary Hearing.

Further, Agency's witnesses provided no specific or reliable testimony to rebut that of Employee and Ms. Chadwick. Dr. Bryant never worked at Prospect, and Dr. Peterson, Prospect's Principal, only testified that 521.6 was given to the Prospect staff prior to the 2001-2002 SY. She was uncertain if 521.6 was in the batch of materials given to the staff prior to the 2002-2003 SY.

Given the credible testimony of Employee and Ms. Chadwick, and the lack of any reliable evidence to the contrary, I find that Employee was not aware of Superintendent's Directive 521.6 on May 20, 2003.

2. *Whether Employee "[told] a student [that she] would provide a copy of the taped trial to his parents."*

This specific charge is found in the September 9, 2003 Notice of Termination. It is uncontroverted that on the tape recording, Employee is heard to say: "I will repeat this for [S.] and [his parents] to hear."[29] But there is absolutely no evidence that she told [S.] or anyone else that she would provide a copy of the tape to [S.]'s parents. Therefore, I find that she did not make this statement.

ANALYSIS AND CONCLUSIONS

a. Whether Agency's action was taken for cause.

In the September 9, 2003 Notice of Termination, Agency charged Employee with the following:

> Ground(s): [DCMR] Section 1401.2(b), "Grave misconduct in office;" (t) "Violation of the rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the Board of Education." The specific directive violated was,

[29] As set forth earlier, the "this" was that if [S.] had come to her in confidence and just needed to tell her a "secret" or needed to confide in someone, she "wouldn't have brought this to [Classroom] Court." But since [S.] had been saying things to his classmates, then apparently it was not a secret.

> Superintendent's Directive 521.6, Reporting Suspected Child Abuse/Neglect.
>
> **Reason(s):** Pertaining to 1401.2(t), on May 20, 2003 while at Prospect Learning Center you failed to report suspected child abuse when the information came to your knowledge. Pertaining to 1401.2(b), on May 20, 2003 while at Prospect Learning Center you acted improperly when you conducted a mock trial with students of an allegedly explicit sexual statement and when you told a student you would provide a copy of the taped trial to his parents. You exhibited poor judgment and this kind of behavior cannot be tolerated.

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

I found that Employee was unaware of Superintendent's Directive 521.6 at the time she conducted the Classroom Court on May 20, 2003. Thus, I conclude that Agency has failed to prove this aspect of its case.[30] Likewise, I found that Employee did not tell a student that she would provide a copy of the tape to his parents. Therefore, this specification also fails.

In a strict legal sense, Agency's failure to prove that Employee was aware of 521.6 on May 20, 2003 necessarily leads to the conclusion that Agency has also not proven that she "failed to report suspected child abuse", since that latter specification was based on the former. Nevertheless, more needs to be said about her alleged failure to report suspected child abuse.

The key word in the phrase "suspected child abuse" is "suspected". At the time of the May 20, 2003 incident, Employee was an experienced teacher of challenged children, having taught at Prospect for approximately 21 years. During that time, she had reported suspected abuse perhaps ten times. However, she did not believe that the situation with

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[30] It must also be noted that Dr. Bryant, the Deciding Official, testified that his decision that Employee should be removed was not based on her alleged failure to report suspected abuse, but rather on her decision to conduct the Classroom Court. Thus, a reasonable conclusion could be made that Agency has withdrawn the charge that Employee failed to report suspected child abuse.

[S.] involved child abuse nor any suspicion thereof. Rather, based on her considerable experience, she decided that this was nothing more than "trash talk". I conclude that she was correct in making that determination. Further, Ms. Sligh, the School Psychologist and one of Agency's witnesses, acknowledged that it is normal for children, even those with emotional and learning disabilities, to make statements of a sexual nature that are not indicators of child abuse but more likely trash-talking. She also testified that a trained professional, such as Employee, has the leeway to make a judgment as to whether a child's statement involving sexual terms may be an indicia of abuse or simply trash-talking. Likewise, Dr. Peterson, Prospect's Principal, testified that an experienced teacher such as Employee could hear a conversation between students of a sexual nature and conclude that the conversation was simply trash-talking, rather than an indication of child abuse.

Turning to the issue of Employee's use of the Classroom Court, Agency claims that Employee acted inappropriately when she used it to address "an allegedly explicit sexual statement" supposedly made by [S.]. It cannot be seriously disputed that this specification is intertwined, probably inextricably so, with the prior specification concerning Employee's failure to report suspected child abuse, which Agency did not prove. Nevertheless, addressing the "Classroom Court" specification on its own merits, then based on my review of the entire record and my analysis thereof, I have determined that the "Classroom Court" portion of the session with [S.] and the other students on May 20, 2003 was utilized by Employee to emphasize to her students that improper language would not be tolerated either inside or outside of the classroom. This was an entirely appropriate teaching tool, previously approved by Dr. Peterson in Employee's performance plans and one that she testified to as being "a [proper] re-direction of the students' learning experience." Thus, I conclude that Employee's use of the Classroom Court does not constitute cause for Agency to have taken an adverse action against her.

The Classroom Court ended when all of the students except [S.] were dismissed. What followed was an attempt by Employee to again determine exactly what [S.] had supposedly said to [Da.] and [De.], and, notwithstanding his exact statement, to discover if any indicators of abuse were present. As detailed above, she properly determined that there were no such indicators. Employee then explained in graphic detail what "giving head" meant and told [S.] what to do if anyone ever did that to him. While her decision to provide him with such a graphic description may have been ill-advised, I would defer to her judgment to do so, given her knowledge of her students and her considerable experience with challenged children. Additionally, it is my considered opinion that in talking to [S.] alone, Employee acted with his best interests in mind. Further, while there is no question that she was stern and perhaps even harsh with [S.], there is no requirement that a teacher be all sweetness and light. It was she, and not the agency's officials, who knew [S.] best.

Her actions on May 20, 2003 do not approach misconduct, let alone "grave" misconduct. Thus, I conclude that Agency has failed to establish cause, and therefore its action removing her must be reversed. Given this conclusion, it is unnecessary to discuss the propriety of the penalty.

ORDER

It is hereby ORDERED that:

1. Agency's action removing Employee from her position is REVERSED; and

2. Agency reinstate Employee to her position of record, or to a comparable position, with all appropriate back pay and benefits; and

3. Agency file with this Office, within 30 days from the date on which this initial decision becomes final, documents showing compliance with the terms of this Order.

FOR THE OFFICE:

DARYL J. HOLLIS, Esq.
Senior Administrative Judge