STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-3206
	)	
GLORIA P. SCAVELLA,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 1, 2003, by video teleconference with the parties appearing from Miami and Tallahassee, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Marci A. R. Rosenthal, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue
Suite 400
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
2595 Tampa Road, Suite J
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STATEMENT OF THE ISSUE

The issue in this matter is whether the Respondent, Gloria P. Scavella, should be suspended from her employment for thirty days for just cause. The Petitioner, School Board of Miami-Dade County, Florida, (Petitioner or Board) maintains the suspension should be upheld.

PRELIMINARY STATEMENT

On August 20, 2003, the Petitioner took action to suspend the Respondent for thirty days without pay for just cause. More specifically, the Petitioner alleged that the Respondent had exhibited conduct unbecoming an employee and had violated the regulation regarding corporal punishment. The Respondent timely challenged the Board's decision and sought a formal administrative hearing in connection with the allegations. The matter was forwarded to the Division of Administrative Hearings for formal proceedings on September 8, 2003.

Thereafter, the case was promptly scheduled for hearing. At the Respondent's request the case was continued and re-scheduled for December 1, 2003. At the hearing, the Petitioner presented testimony from Tracy Cabal, Isabel Siblesz, Janice Hopton-Cobb, Julia Gilchrist, Shaquille Harris, Raynard Felder, Kededra Middleton, Lisa Jones, and Selena Felder Williams. The

Petitioner's Exhibits numbered 1 through 7 were admitted into evidence.

The Respondent testified in her own behalf and offered testimony from the following witnesses: Carnell White; Arthur Collins; Doretha Dennis; and Lisa Young. The Respondent's Exhibit 1 was admitted into evidence.

The transcript of the proceedings was filed with the Division of Administrative Hearings on January 15, 2004. By order entered January 23, 2004, the parties requested and were granted leave to extend the time to file Proposed Recommended Orders. The parties were directed to file same no later than 5:00 p.m., February 4, 2004. Thereafter, the parties timely filed Proposed Recommended Orders. The proposed orders have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is authorized by Florida law to operate and administer the public schools within the Miami-Dade County School District. Accordingly, all personnel decisions, such as the matter at issue herein, fall within its operational authority.

2. At all times material to the issues of this case, the Respondent was an employee of the School District. The Respondent served as a full-time paraprofessional assigned to

Skyway Elementary School. The Respondent has been so assigned for approximately eight years. The terms and conditions of her employment with the School District are governed by a collective bargaining agreement between the Petitioner and the United Teachers of Dade (UTD contract).

3. School employees receive training annually regarding the rules and regulations of the School District. More specifically, staff members, including the Respondent herein, are apprised of the School Board's policy regarding corporal punishment.

4. At all times material to the incident complained of in this case, the Petitioner maintained a policy that prohibited corporal punishment. That policy, School Board Rule 6Gx13-5D-1.07 (prohibiting the use of corporal punishment), was clearly and fully outlined in a handbook distributed to school employees. There is no dispute that the Respondent knew or should have known of the policy.

5. In fact, according to records maintained at Skyway Elementary School, the Respondent was present during the staff meeting when employees were reminded, among other topics, of the policy regarding corporal punishment for the school year at issue in this proceeding.

6. It is undisputed that the Respondent's assignment at Skyway Elementary was difficult. At times the Respondent was

charged with the responsibility of maintaining order among numerous students, some acted disruptively. Prior to the incident complained of, the Respondent enjoyed a reputation as an excellent employee. She had no prior disciplinary incidents and had been recommended for commendations for her fine work.

7. Nevertheless, on February 27, 2003, the Respondent struck a student in such a manner that it caused the student embarrassment and minor physical discomfort.

8. On the date in question, the Respondent was supervising a group of students on the "hard court" outside the school building during the early pre-school time. Students congregate in the area before entering the classrooms at the time designated for school to start. It is common for parents to wait with their children in this area as well.

9. The incident complained of in this case occurred while one student, R. F., played with the younger sibling of another student who was present on the hard court waiting with the parent. Following a minor exchange between the parent and R. F., the Respondent came to the scene to ask what had happened. The parent, who had observed the young sibling and the student, R. F., told the Respondent that R. F. had hit the sibling. When the Respondent was so advised, she turned to R. F. and slapped him on the head. The manner of the "slap" did not result in physical injury to R. F. Although the student

cried, the credible evident would suggest that the tears were prompted more from embarrassment than from physical pain. Later, on realizing the student had been embarrassed, the Respondent promptly went to the student, apologized for the incident, and believed the matter had been fully resolved. The Respondent maintains that she did not intend to embarrass the student and did not strike the student as an act of corporal punishment. The Respondent claims she “pushed” the student’s head to get his attention so that he would refrain from involvement with the young sibling.

10. As one might expect, word of the incident spread among members of the school community. Eventually the principal learned of the incident. The principal spoke to several persons regarding the incident including R. F., his parents, and the Respondent.

11. Pursuant to School District protocol, the principal referred the matter to the school police for investigation. The school police followed up with an investigation of their own and decided to substantiate the claim that Respondent had violated the Board’s corporal punishment policy.

12. School employees are expected to conduct themselves in a manner that will reflect credit on themselves and the School District.

13. The Petitioner's Office of Professional Standards (OPS) conducted a conference for the record to address the findings substantiated by the school police's investigation. During that conference the Respondent was again offered an opportunity to explain the incident that occurred on February 27, 2003.

14. The Respondent has not offered a credible explanation for why she touched the student, R. F., on the date in question. There is undisputed evidence that there was physical contact between the student and the Respondent. It is undisputed that Respondent initiated that contact. It is undisputed that the student was sufficiently embarrassed by that contact that he began to cry. And it is undisputed that the Respondent knew she had caused the student distress because she went to him and apologized. It is immaterial whether the touching was a "tap," a full force "slap," a "smack," or a "pop." It was directed from the Respondent to the student and it was intended to get his attention and to modify his behavior. It was an inappropriate touching.

15. When the OPS reviewed the incident a recommendation for a 30-day suspension was made to the Petitioner. According to Ms. Siblesz the Petitioner does not suspend employees for more or less than 30 days. Presumably, if a suspension is warranted it must be for 30 days. Presumably, if more than a

30-day suspension is warranted, termination is appropriate. Thus the question becomes, what if less than a 30-day suspension is warranted? Apparently the Petitioner has no mechanism to discipline an employee with less than a 30-day suspension.

16. The Respondent is a 13-year employee of the School District with an excellent work history. The Respondent serves in a difficult role and is invaluable to the teachers she assists.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57, Fla. Stat. (2003).

18. The Petitioner bears the burden of proof in this case to establish by a preponderance of the evidence the allegations set forth in the Notice of Specific Charges. The Respondent acknowledges the standard of proof applicable to this case but maintains that the Petitioner has failed to establish just cause for the suspension sought.

19. "Just cause" is required to discipline an employee of the School District pursuant to the UTD contract. A recommendation for suspension must be under-girded by "just cause." In this case, that "just cause" is cited as the violation of the School Board policy prohibiting corporal

punishment. Thus, in order to establish "just cause" the Petitioner must establish a violation of the policy.

20. Accordingly, by a preponderance of the evidence the Petitioner must show that the Respondent committed an act constituting corporal punishment.

21. Section 1003.01, Florida Statutes, defines "corporal punishment" as "physical force" or "physical contact" to "maintain discipline." By her admission the Respondent touched the student, R. F., to get his attention and to redirect his behavior. Frankly, she did get his attention and he did refrain from further contact with the sibling. She also embarrassed him. She also "touched" him in a manner such that the preponderance of the evidence established the Respondent used "corporal punishment" within the meaning of the statute.

22. Clearly the Respondent was in a difficult situation. She was required to maintain order on the hard court during the pre-school hour with little assistance from others. She did not mean to hurt the student. Moreover, she immediately apologized to the student when she realized the extent of her inappropriate behavior. The Respondent must be credited with attempting to take responsibility for the incident.

23. Regrettably, thirteen years of valued service to the School District must be dismissed with one lapse of judgement. In the instant case, there is no alternative. It is concluded

that in a single moment of poor judgement, the Respondent made inappropriate physical contact with the student in order to control his behavior. Accordingly, there is just cause for discipline of this employee.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is

RECOMMENDED that the Miami-Dade County School Board enter a Final Order affirming the 30-day suspension of the Respondent.

DONE AND ENTERED this 30th day of March, 2004, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of March, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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