STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-3242
	)	
MICHAEL W. DEPALO,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on January 27, 2004, in Miami, Florida.

APPEARANCES

For Petitioner: Denise Wallace, Esquire
Miami-Dade County Public Schools
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Marcelle B. Poirier, Esquire
The Law Firm of Marcelle Poirier
2701 South Bayshore Drive, Suite 402
Miami, Florida 33133

STATEMENT OF THE ISSUE

The issue in this case is whether a district school board is entitled to terminate a teacher's employment for just cause based upon the allegation that he picked up an administrator and dropped her to the floor.

PRELIMINARY STATEMENT

At its regular meeting on September 10, 2003, Petitioner School Board of Miami-Dade County suspended Respondent Michael De Palo without pay from his position as a member of the district's instructional staff pending the outcome of dismissal proceedings. This action resulted from the allegation that on January 23, 2003, Mr. De Palo had picked up and dropped an administrator at the school where he worked.

Having been notified in advance of Petitioner's likely decision, Mr. Depalo's legal counsel had requested a formal hearing by letter dated September 4, 2003. Thus, on September 11, 2003, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. There, after two continuances for good cause, the final hearing was scheduled for January 27, 2004.

At the final hearing, Petitioner called the following witnesses, each of whom was, at all times material to this case, an employee in the Miami-Dade County Public School System: William B. Turner, Principal, Miami Norland Senior High School; Gladys Hudson, Assistant Principal, North Miami Middle School; Benjamin Cowins, TRUST Counselor, Miami Norland Senior High School; Detective Steven Hadley, Miami-Dade County Public Schools Police Department; Paul Greenfield, District Director,

Office of Professional Standards; and Mr. De Palo. In addition to these witnesses, Petitioner offered into evidence six Petitioner's Exhibits, numbered 1-3 and 5-7, all of which were admitted.[1]

Mr. De Palo testified on his own behalf and successfully introduced Respondent's Exhibits 2 and 3 into evidence. Respondent's Exhibit 1 was identified and offered but not received over objection.

The final hearing transcript was filed on April 19, 2004. Each party timely filed a Proposed Recommended Order before the established deadline, which was April 29, 2004.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2003 Florida Statutes.

FINDINGS OF FACT

Introduction

1. The Miami-Dade County School Board ("School Board"), Petitioner in this case, is the constitutional entity authorized to operate, control, and supervise the Miami-Dade County Public School System.

2. Respondent Michael De Palo ("De Palo") is a teacher. He was employed in the Miami-Dade County Public School System from September 1999 until September 10, 2003, on which date the School Board suspended him without pay pending termination. At all times relevant to this case, De Palo was assigned to Miami

Norland Senior High School ("Norland"), where he taught social studies.

3. The School Board's preliminary decision to dismiss De Palo was based on an incident that occurred at Norland on January 23, 2003. De Palo is alleged to have committed at least a technical battery that day upon the person of Gladys Hudson, an Assistant Principal, in the presence of Benjamin Cowins, a school counselor. These three are the only individuals who have personal knowledge of the January 23, 2003, incident.

4. De Palo, Ms. Hudson, and Mr. Cowins testified in person at the final hearing. Also, proof of some prior statements about the incident was introduced into evidence. The most reliable such proof, in terms of establishing what was actually said, consists of the signed, written statements of Ms. Hudson and Mr. Cowins, dated February 3, 2003, and January 27, 2003, respectively, as these documents contain the witness' own words. Ms. Hudson and Mr. Cowins also gave verbal accounts to Detective Hadley, the school police officer who investigated the incident. Detective Hadley recorded their statements in his March 5, 2003, Preliminary Personnel Investigation Report, which is in evidence. De Palo, too, made a brief oral statement about the matter to Detective Hadley, which statement is recounted in the investigative report. De Palo also gave an oral statement at a conference-for-the-record held on May 14, 2003, and this

statement is set forth in a Summary of Conference-for-the-Record dated May 19, 2003, which is in evidence. The aforementioned writings memorializing the several witness' prior oral statements, having been prepared by (and thus filtered through) someone other than the witness himself or herself, do not necessarily capture the witness' actual words and therefore have been accorded relatively little weight, as compared with the testimony given under oath at hearing.

5. Ms. Hudson and Mr. Cowins are largely in agreement as to what happened on January 23, 2003. Their version of the incident, however, conflicts irreconcilably with De Palo's on crucial points. After carefully reviewing the entire record and reflecting upon the respective impressions that each of the participant-eyewitnesses made on the undersigned at hearing, the fact-finder has determined that De Palo's testimony, for the most part, is more credible than that of Hudson/Cowins. To the extent any finding of material fact herein is inconsistent with the testimony of one witness or another, the finding reflects a rejection of all such inconsistent testimony in favor of evidence that the undersigned deemed to be more believable and hence entitled to greater weight.

Material Historical Facts

6. On the morning of January 23, 2003, Ms. Hudson and Mr. Cowins were standing and talking in the hallway outside the door

to Mr. Cowins' office. De Palo approached the pair as he walked through the hallway on his way to the copy machine.

7. The hallway where this encounter took place is narrow and does not afford sufficient space for three adults to pass by each other with ease. Consequently, Ms. Hudson, whose feet hurt almost every day due to preexisting conditions, requested that De Palo please take care not to step on her feet when he passed.[2] This plea for caution was not given because De Palo had stepped on Ms. Hudson's feet in the past, or because De Palo was approaching in a manner that threatened to injure her feet, but rather because the passage was so narrow. (Ms. Hudson would have said the same thing to any colleague who happened down the hallway at that particular time.)

8. In response to Ms. Hudson's entreaty, De Palo remarked that he would "sweep her off her feet" and help Ms. Hudson back to her office. De Palo, who was in good spirits at the time, made these comments in a lighthearted, even jovial manner. His demeanor was good-natured——not hostile, threatening, or menacing.

9. De Palo proceeded to pick Ms. Hudson up. At this point, it is relevant to note that De Palo is a retired firefighter and paramedic who had returned to teaching after a 28-year career with the fire department. From his work experience, De Palo was familiar with body mechanics, and he

knew how to lift and transport someone without injuring himself or the person being carried.

10. To lift Ms. Hudson, De Palo placed one hand and arm on her back at around shoulder level, and another hand and arm under her legs, at the knees. Once he had her off the ground, De Palo held Ms. Hudson close to his body, more-or-less at his waist level, in a semi-reclining position, her head somewhat higher than her legs. (To envisage the way he held her, imagine the iconic picture of the groom carrying his bride across the threshold.[3])

11. Ms. Hudson is relatively small woman——she weighed approximately 110 pounds at the time of the incident——but nevertheless De Palo likely could not have lifted her as he did, the undersigned reasonably infers, without her cooperation or acquiescence. This is because, in order to pick her up, De Palo needed to set his own feet and arms, during which maneuvering——which would have revealed his intentions——Ms. Hudson easily could have moved out of position (e.g. by stepping forward), had she objected to being lifted.[4] There is no persuasive evidence, and thus it is not found, that De Palo grabbed Ms. Hudson and forcibly wrestled her into his arms to be lifted.[5]

12. Ms. Hudson did not protest or object when De Palo picked her up. Indeed, the persuasive evidence establishes that she said nothing at all. The undersigned finds that had she

been physically or verbally resistant (which she was not), De Palo would have refrained from lifting Ms. Hudson off her feet. It is found as well that De Palo had no intent to harm Ms. Hudson in any way, including through the infliction of emotional distress. Rather, De Palo, the former fireman, believed that he was doing a good deed, in a playful manner.

13. With Ms. Hudson in his arms, De Palo walked a short distance (15 feet or so) to her office, which is around a corner, and hence cannot be seen, from Mr. Cowins' office. Mr. Cowins did not follow along. The door to Ms. Hudson's office was open, and De Palo carried her into the room, where he set her down on her feet. De Palo did not drop Ms. Hudson onto the floor, nor did she fall down, and any evidence suggesting otherwise is explicitly rejected. De Palo bade Ms. Hudson a good day and left. The entire episode had lasted no more than 30 seconds.

14. The next day, Ms. Hudson summoned De Palo to her office and told him that his lifting and carrying her had been inappropriate. De Palo agreed and apologized.

15. At some point after January 23, 2003, Ms. Hudson filed a workers' compensation claim relating to the incident, during which, she maintained, her back had been hurt. Ms. Hudson remained off duty for about one month. While these particular facts are not disputed, the evidence in the record does not

persuade the undersigned that Ms. Hudson was injured as a result of De Palo's actions on January 23, 2003.[6]

Ultimate Factual Determinations

16. De Palo's conduct on January 23, 2003, did not entail threats, threatening behavior, or acts of violence. Therefore, De Palo did not violate School Board Rule 6Gx13-4-1.08, which proscribes violence in the workplace.

17. De Palo's conduct on January 23, 2003, constituted horseplay. His spur-of-the-moment behavior, like most on-the-job tomfoolery, while foolish and inappropriate in hindsight, and certainly neither authorized nor praiseworthy, was nevertheless relatively harmless in the grand scheme. De Palo's actions for a half-minute that day were plainly out of place and unprofessional, but his conduct was not "unseemly"——an adjective that, as ordinarily used, denotes something offensive to good taste. Moreover, De Palo did not use abusive or profane language in the presence of Ms. Hudson and Mr. Cowins. Therefore, it is determined that De Palo did not violate School Board Rule 6Gx13-4A-1.21, which prohibits unseemly conduct and abusive or profane language.

18. The School Board has not identified, and the undersigned has not located, a specific principle in Florida Administrative Code Rule 6B-1.006 (prescribing the Principles of Professional Conduct for the Education Profession in Florida)

that clearly proscribes the conduct in which De Palo engaged on January 23, 2003. Accordingly, it is determined that De Palo is not guilty of misconduct in office, an offense defined in Florida Administrative Code Rule 6B-4.009(3).

19. Finally, it is determined that De Palo's conduct was not so serious as to impair his effectiveness in the school system.

CONCLUSIONS OF LAW

I.

20. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

21. In an administrative proceeding to dismiss a teacher, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). See McNeill v. Pinellas County School Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter County School Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995).

22. De Palo's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

II.

23. In its Notice of Specific Charges served October 13, 2003, the School Board advanced three theories for De Palo's removal: Violence in the Workplace (Count I); Conduct Unbecoming a School Board Employee (Count II); and Misconduct in Office (Count III).

24. Counts I and II are grounded in School Board Rules, namely School Board Rule 6Gx13-4-1.08 and School Board Rule 6Gx13-4A-1.21. These Rules, like all rules applicable to only one school district, are not published in the Florida Administrative Code. See § 120.55(1)(a)2., Fla. Stat.

25. The School Board neither introduced copies of its Rules into evidence nor asked that official recognition be taken of them. Thus, although the undersigned thinks he knows the contents of these Rules, based on experience and access to DOAH's Recommended Orders, he does not have before him, in this record, the complete text of either Rule as offered during the hearing, where the accused party would have had opportunities to inspect and object to the admission or official recognition thereof.

26. Though unlikely to be applauded on appeal, it is possibly within the undersigned's discretion to initiate the process, on his own motion, for taking official recognition of, or reopening the record to receive in evidence, the pertinent

School Board Rules. See Collier Medical Center, Inc. v. State Dept. of Health and Rehabilitative Services, 462 So. 2d 83, 86 (Fla. 1st DCA 1985)(Allowing "a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedures [sic] Act."). Such a process would entail (a) requesting copies of the Rules and (b) affording each party an opportunity to present information relevant to the propriety of supplementing the record in this manner. Cf. § 90.204, Fla. Stat. (setting forth the procedure for sua sponte taking judicial notice of a fact). The undersigned is disinclined to do this, however, believing it reasonable to insist that the School Board produce at hearing, without prompting, a complete copy of any unpublished rule upon which it relies——or suffer the consequence of failure.

27. The ordinary consequence of failing properly to introduce a pertinent rule would be, of course, a determination that the School Board had failed to prove a violation of the rule——and that is what would happen here. The undersigned cannot ultimately determine that De Palo violated either School Board Rule 6Gx13-4-1.08 or School Board Rule 6Gx13-4A-1.21, regardless of what the other evidence might establish, unless he can examine the Rules in question. Thus, the undersigned's

refusal to initiate a process for receiving these Rules into the record necessarily would be outcome determinative as to Counts I and II.

28. It so happens in this case, however, that when the undersigned applies what he thinks the Rules in question provide to the historical facts as found above, ultimate determinations of innocence result. Thus, in this case, receiving the Rules would not change the outcome, assuming the Rules say what the undersigned believes they say. The question of whether to receive the Rules sua sponte will therefore be sidestepped. For the purposes of this Recommend Order, it will simply be assumed, for the sake of reaching the merits, that the Rules are properly before the undersigned.[7]

III.

29. In this section, the three charged offenses will be examined one-by-one, putting aside momentarily the element of "resulting ineffectiveness," which, being common to all counts, will be addressed separately in the next section. For organizational convenience, the counts will be taken up in reverse order, starting with Count III.

A. Misconduct in Office

30. The School Board is authorized to terminate the employment of a teacher such as De Palo "only for just cause." See § 1012.33 (1)(a), Fla. Stat.; see also § 1012.33(6)(a), Fla.

Stat. ("Any member of the instructional staff . . . may be suspended or dismissed at any time during the term of the contract for just cause[.]") The term "just cause”

> includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

§ 1012.33(1)(a), Fla. Stat.

31. The term “misconduct in office” is defined in Florida Administrative Code Rule 6B-4.009, which prescribes the "criteria for suspension and dismissal of instructional personnel" and provides, in pertinent part, as follows:

> (3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

32. The Code of Ethics of the Education Profession (adopted in Florida Administrative Code Rule 6B-1.001) and the Principles of Professional Conduct for the Education Profession in Florida (adopted in Florida Administrative Code Rule 6B-1.006), which are incorporated in the definition of "misconduct in office," provide as follows:

> 6B-1.001 Code of Ethics of the Education Profession in Florida.

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.
(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.
(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

* * *

6B-1.006 Principles of Professional Conduct for the Education Profession in Florida.
(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.
(3) Obligation to the student requires that the individual:
(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.
(b) Shall not unreasonably restrain a student from independent action in pursuit of learning.
(c) Shall not unreasonably deny a student access to diverse points of view.

(d) Shall not intentionally suppress or distort subject matter relevant to a student's academic program.
(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
(f) Shall not intentionally violate or deny a student's legal rights.
(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.
(h) Shall not exploit a relationship with a student for personal gain or advantage.
(i) Shall keep in confidence personally identifiable information obtained in the course of professional service, unless disclosure serves professional purposes or is required by law.
(4) Obligation to the public requires that the individual:
(a) Shall take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated.
(b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.
(c) Shall not use institutional privileges for personal gain or advantage.
(d) Shall accept no gratuity, gift, or favor that might influence professional judgment.
(e) Shall offer no gratuity, gift, or favor to obtain special advantages.
(5) Obligation to the profession of education requires that the individual:
(a) Shall maintain honesty in all professional dealings.

(b) Shall not on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition if otherwise qualified, or social and family background deny to a colleague professional benefits or advantages or participation in any professional organization.
(c) Shall not interfere with a colleague's exercise of political or civil rights and responsibilities.
(d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.
(e) Shall not make malicious or intentionally false statements about a colleague.
(f) Shall not use coercive means or promise special treatment to influence professional judgments of colleagues.
(g) Shall not misrepresent one's own professional qualifications.
(h) Shall not submit fraudulent information on any document in connection with professional activities.
(i) Shall not make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.
(j) Shall not withhold information regarding a position from an applicant or misrepresent an assignment or conditions of employment.
(k) Shall provide upon the request of the certificated individual a written statement of specific reason for recommendations that lead to the denial of increments, significant changes in employment, or termination of employment.

(l) Shall not assist entry into or continuance in the profession of any person known to be unqualified in accordance with these Principles of Professional Conduct for the Education Profession in Florida and other applicable Florida Statutes and State Board of Education Rules.
(m) Shall self-report within forty-eight (48) hours to appropriate authorities (as determined by district) any arrests/charges involving the abuse of a child or the sale and/or possession of a controlled substance. Such notice shall not be considered an admission of guilt nor shall such notice be admissible for any purpose in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. In addition, shall self-report any conviction, finding of guilt, withholding of adjudication, commitment to a pretrial diversion program, or entering of a plea of guilty or Nolo Contendre for any criminal offense other than a minor traffic violation within forty-eight (48) hours after the final judgment. When handling sealed and expunged records disclosed under this rule, school districts shall comply with the confidentiality provisions of Sections 943.0585(4)(c) and 943.059(4)(c), Florida Statutes.
(n) Shall report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.
(o) Shall seek no reprisal against any individual who has reported any allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.
(p) Shall comply with the conditions of an order of the Education Practices Commission imposing probation, imposing a fine, or restricting the authorized scope of practice.
(q) Shall, as the supervising administrator, cooperate with the Education

> Practices Commission in monitoring the probation of a subordinate.

33. As shown by a careful reading of Rule 6B-4.009,[8] the offense of misconduct in office consists of three elements: (1) A serious violation of a specific rule[9] that (2) causes (3) an impairment of the employee's effectiveness in the school system. The second and third elements can be can be conflated, for ease of reference, into one component: "resulting ineffectiveness."

34. A school board seeking to terminate an employee on the basis of misconduct in office must prove "each and every element of the charge." MacMillan v. Nassau County School Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

35. Here, the School District did not allege or prove, nor has it argued, that De Palo violated a particular Principle of Professional Conduct. Further, none of the Principles appear, to the undersigned, to be obviously applicable to the situation at hand. Accordingly, it is concluded that the offence of misconduct in office has not been established.

B. Conduct Unbecoming a School Board Employee

36. The School Board grounded its charge of "conduct unbecoming a school board employee" on De Palo's alleged violation of School Board Rule 6Gx13-4A-1.21, which provides (the undersigned assumes) as follows:

> All persons employed by the School Board of Miami-Dade County, Florida are

> representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.
>
> Unseemly conduct or the use of abusive and/or profane language in the workplace is expressly prohibited.

37. This particular offense is not one of the just causes enumerated in Section 1012.33(1)(a), Florida Statutes, although that statutory list, by its plain terms, is not intended to be exclusive. Yet, the doctrine of ejusdem generis[10] requires that "conduct unbecoming" be treated as a species of misconduct in office, so that, to justify termination, a violation of School Board Rule 6Gx13-4A-1.21 must be "so serious as to impair the individual's effectiveness in the school system." See Miami-Dade County School Bd. v. Wallace, DOAH Case No. 00-4392, 2001 WL 335989, *12 (Fla.Div.Admin.Hrgs. Apr. 4, 2001), adopted in toto, May 16, 2001.

38. This case does not involve allegations of abusive or profane language in the workplace. Thus, the question whether De Palo violated School Board Rule 6Gx13-4A-1.21 turns on whether his conduct was "unseemly."

39. This is admittedly a fairly close question, made more difficult by the fact that the term "unseemly conduct," which is not defined in the Rule, has a kind of "I know it when I see it"

quality. In view of the Rule's elasticity, it would be possible without straining to label De Palo's inappropriate behavior "unseemly." The word "unseemly," however, usually suggests inappropriateness manifesting indecency, bad taste, or poor form (e.g. a crude joke in mixed company), and while De Palo's conduct displayed a little of each, it was a lot more sophomoric than indecorous——a silly, rather than unseemly, prank. Thus, it is concluded, De Palo acted inappropriately but not in violation of School Board Rule 6Gx13-4A-1.21.

C. Violence in the Workplace

40. In Count I of its Notice of Specific Charges, the School Board accused De Palo of violating School Board Rule 6Gx13-4-1.08, which (apparently) provides in pertinent part:

> Nothing is more important to Dade County Public Schools (DCPS) than protecting the safety and security of its students and employees and promoting a violence-free work environment. Threats, threatening behavior, or acts of violence against students, employees, visitors, or other individuals by anyone on DCPS property will not be tolerated. Violations of this policy may lead to disciplinary action which includes dismissal, arrest, and/or prosecution.

(Emphasis added.) The School Board neither alleged nor proved that De Palo engaged in "threats" or "threatening behavior." The questions at hand, therefore, are: (a) whether De Palo committed an act of violence against Ms. Hudson; and, if so, (b) whether the act was "so serious as to impair [De Palo's]

effectiveness in the school system." Cf. Miami-Dade County School Bd. v. Wallace, DOAH Case No. 00-4392, 2001 WL 335989, *12 (Fla.Div.Admin.Hrgs. Apr. 4, 2001), adopted in toto, May 16, 2001.

41. In support of its case, the School Board asserts (correctly, as far as it goes) that School Board Rule 6Gx13-4-1.08 encompasses acts that constitute battery under the criminal law and tort law. From this premise, the School Board turns to statutes and cases dealing with battery, a wrong of which the essence is the intentional touching of another person against such person's will. As the School Board then points out, it is often not necessary, in making out a battery case, to prove that the offensive contact was actually harmful or even intended to cause harm. Thus, the School Board concludes, De Palo violated School Board Rule 6Gx13-4-1.08 because he intentionally touched Ms. Hudson against her will.

42. The flaw in the School Board's logic is its casual equation of "acts of violence" (which the Rule proscribes) with "battery" (which the Rule does not mention). The fact is, although the two categories of misbehavior overlap to some extent, they are not synonymous. And significantly, of the two, "battery" is the broader, more inclusive class.

43. The term "violence" is commonly understood to mean an "[u]njust or unwarranted exercise of force, usually with the

accompaniment of vehemence, outrage, or fury." Black's Law Dictionary 1408 (5th ed. 1979). A battery——that is, an offensive or nonconsensual touching——can be committed with or without violence.[11] Thus, while all or most acts of violence by one person against another constitute battery,[12] all forms of battery clearly do not entail acts of violence.[13]

44. In this case, the evidence does not persuade the undersigned that De Palo committed an act of violence.[14] De Palo, therefore, is not guilty of violating School Board Rule 6Gx13-4-1.08.

IV.

45. To terminate De Palo's employment, the School Board needed to show that his conduct not only violated a specific rule, but also that the violation was so serious as to impair his effectiveness in the school system. Although the School Board's failure to prove that De Palo violated a specific rule is reason enough to recommend against termination, the issue of resulting ineffectiveness will be discussed anyway, providing an alternative basis for decision.

46. There was little, if any, direct evidence that De Palo's effectiveness in the school system was impaired as a result of the incident of January 23, 2003. On this issue, therefore, the Board must rely on inferences in aid of its proof.

47. For the School Board to profit from an inference of resulting ineffectiveness, it must establish two things: (1) that the violation was not of a private immoral nature, and (2) that, on the basis of past experience as drawn from the fund of common knowledge, the violation would not, in the ordinary course of events, have failed to impair the individual's effectiveness in the school system. See Miami-Dade County School Bd. v. Wallace, DOAH Case No. 00-4392, 2001 WL 335989, *19 (Fla.Div.Admin.Hrgs. Apr. 4, 2001), adopted in toto, May 16, 2001.

48. The allegations against De Palo do not involve misconduct of a private immoral nature, so the first condition is satisfied. The undersigned is not persuaded, however, that De Palo's carrying of Ms. Hudson back to her office could not have happened without impairing De Palo's effectiveness in the school system. Rather, taking into consideration all of the evidence in this case, it is determined that De Palo continued to be effective, notwithstanding the incident of January 23, 2003.

49. Thus, while an inference of resulting ineffectiveness might be legally permissible under the circumstances of this case, such an inference is not factually justified and hence has not been drawn. Ultimately, therefore, the School Board failed to prove that De Palo's effectiveness in the school system was

impaired by his conduct. For that independent reason, he must be found not guilty of the charges brought against him.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order: (a) exonerating De Palo of all charges brought against him in this proceeding; (b) providing that De Palo be immediately reinstated to the position from which he was suspended without pay; and (c) awarding De Palo back salary, plus benefits, that accrued during the suspension period, together with interest thereon at the statutory rate.

DONE AND ENTERED this 20th day of May, 2004, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2004.

ENDNOTES

[1]/ Petitioner's post-hearing Motion to Supplement the Record was granted on May 18, 2004, and consequently the record has been supplemented with a copy of Article XXI of the Contract Between the Miami-Dade County Public Schools and the United Teachers of Dade.

[2]/ As an Assistant Principal, Ms. Hudson was De Palo's immediate supervisor; thus, she had the authority to issue directives to him. Ms. Hudson's statement to De Palo regarding her feet was not, however, an order, command, or instruction, as from a boss to his subordinate, but merely a polite request, analogous to her asking him to "please pass the salt" during lunch.

[3]/ In its Proposed Recommended Order, the School Board argues that this "analogy" is inappropriate because it implies that Ms. Hudson consented, as would a new wife, to be carried in this fashion. The undersigned, however, uses the image here simply in aide of explaining how De Palo carried Ms. Hudson, not to insinuate that Ms. Hudson consented.

[4]/ It should be understood that lifting even a relatively small adult from a standing position cannot be done suddenly and immediately; several steps must be taken. For one thing, the person doing the lifting needs to set his feet and legs in such a way as to establish a base of support, to maintain his balance. It is reasonably inferred that this is what De Palo did. Moreover, it is inferred that, more likely than not, De Palo used his leg muscles to lift Ms. Hudson off the ground, which required him to bend at the knees after setting his feet. These movements would not have taken De Palo a great deal of time, to be sure, but they would have signaled to Ms. Hudson what he was doing (especially coupled with his comment about sweeping her off her feet)——and given her time to react. Although Ms. Hudson and Mr. Cowins described the lifting as a kind of "sucker punch" (albeit without using that term), coming suddenly and without warning, the fact-finder rejects this characterization as implausible.

[5]/ It is of passing interest that the record gives no reason to suppose De Palo caused a commotion in the hallway or even attracted any attention. One would expect that had there been a violent struggle, altercation, or other disturbance of the peace, someone might have emerged from an office to see what was going on; apparently, however, no one did.

[6]/ There is no nonhearsay expert testimony in evidence, as from a treating or examining physician, concerning Ms. Hudson's condition or its likely cause(s). The out-of-court statement attributed to Dr. Krestow, which appears in Detective Hadley's investigative report, is simply hearsay for which no exception was (or probably could have been) established. The undersigned does not believe that Dr. Krestow's hearsay statement (assuming Detective Hadley recorded it accurately) explains or supplements other, nonhearsay evidence, and therefore it cannot legitimately be used for any fact-finding purpose. See § 120.57(1)(c), Fla. Stat. In any event, to the extent that the Dr. Krestow hearsay could be used in aid of other evidence, the undersigned regards it as having little probative value.

[7]/ The undersigned leaves open the possibility that subsequent developments might necessitate his making the discretionary decision whether to reopen the record or take official recognition of the Rules in question.

[8]/ Rules 6B-4.009, 6B-1.001, and 6B-1.006, Florida Administrative Code, are penal in nature and must be strictly construed, with ambiguities being resolved in favor of the employee. See Rosario v. Burke, 605 So. 2d 523, 524 (Fla. 2d DCA 1992); Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

[9]/ To elaborate on this a bit, the Rule plainly requires that a violation of both the Ethics Code and the Principles of Professional Education be shown, not merely a violation of one or the other. The precepts set forth in the Ethics Code, however, are so general and so obviously aspirational as to be of little practical use in defining normative behavior. It is one thing to say, for example, that teachers must "strive for professional growth". See Fla. Admin. Code R. 6B-1.001(2). It is quite another to define the behavior which constitutes such striving in a way that puts teachers on notice concerning what conduct is forbidden. The Principles of Professional Conduct accomplish the latter goal, enumerating specific "*do*s" and "*don't*s." Thus, it is concluded that that while any violation of one of the Principles would also be a violation of the Code of Ethics, the converse is not true. Put another way, in order to punish a teacher for misconduct in office, it is necessary but not sufficient that a violation of a broad ideal articulated in the Ethics Code be proved, whereas it is both necessary and sufficient that a violation of a specific rule in the Principles

of Professional Conduct be proved. It is the necessary and sufficient condition to which the text refers.

[10]/ See generally Green v. State, 604 So. 2d 471, 473 (Fla. 1992)("Under the doctrine of ejusdem generis, where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated."); see also Robbie v. Robbie, 788 So. 2d 290, 293 n.7 (Fla. 4th DCA 2000)(When, in implementing a non-exhaustive statutory listing, the use of an unenumerated criterion is indicated, "that ad hoc factor will have to bear a close affinity with those enumerated in the statute——i.e., the factor employed must be ejusdem generis with the enumerated ones.").

[11]/ For a good example of a nonviolent battery, read Gouveia v. Phillips, 823 So. 2d 215 (Fla. 4th DCA 2002), a scholarly opinion wherein the court explains how a surgeon who operates without his patient's consent commits a battery against the patient for which damages can be awarded, even if the surgery was performed competently according to the standard of care.

[12]/ For this reason, School Board Rule 6Gx13-4-1.08 does encompass acts that constitute battery, namely, those which are accompanied by violence.

[13]/ In other words, acts of violence (by one person against another) are, as a class, a subset of the set of all batteries, not the other way around, as the School Board mistakenly posits.

[14]/ It is not necessary to decide whether the teacher committed a nonviolent battery against Ms. Hudson, for School Board Rule 6Gx13-4-1.08 does not prohibit such batteries.

COPIES FURNISHED:

Marcelle B. Poirier, Esquire
The Law Firm of Marcelle Poirier
2701 South Bayshore Drive, Suite 402
Miami, Florida 33133

Denise Wallace, Esquire
Miami-Dade County Public Schools
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

Daniel J. Woodring, General Counsel
Department of Education
325 West Gaines Street, Room 1244
Tallahassee, Florida 32399-0400

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

Merrett R. Stierheim
Interim Superintendent
Miami-Dade County School Board
1450 NE Second Avenue, No. 912
Miami, Florida 33132-1394

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.