STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-1758
	)	
MANUEL BRENES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on September 7, 2006, in Miami, Florida.

APPEARANCES

For Petitioner: Ana I. Segura, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether a schoolteacher physically assaulted three third-graders in his music class,

thereby giving his employer, the district school board, just cause to terminate his employment.

PRELIMINARY STATEMENT

At its regular meeting on May 10, 2006, Petitioner School Board of Miami-Dade County suspended Respondent Manuel Brenes without pay pending his dismissal as a member of the district's instructional staff. This action resulted from the allegation that on November 18, 2005, Mr. Brenes had physically attacked several third-grade boys in his music class.

Mr. Brenes timely requested a formal administrative hearing to contest Petitioner's intended action. Thus, on May 12, 2006, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. Thereafter, on May 26, 2006, the School Board filed its Notice of Specific Charges. (Later, on September 5, 2006, Petitioner filed an amended charging document.)

At the final hearing, which took place on September 7, 2006, Petitioner presented the testimony of students K. C. (male), K. M., C. P., and K. C. (female). Petitioner also called as witnesses: Isabel Castillo, principal of Little River Elementary School; Pedro Valdes, a detective with the Miami-Dade County School Police Department; Pamela C., a colleague of Brenes's and mother of K. C. (male); Lucy Iturrey, Director of the Office of Professional Standards; Dr. Isabel Siblesz, an

administrator in the district's Human Resources Department; and Mr. Brenes.

Petitioner offered Petitioner's Exhibits numbered 1 through 33, inclusive, and each was received in evidence.

Mr. Brenes rested on the record made during Petitioner's case-in-chief.

The final hearing transcript was filed on December 15, 2006. Each party timely filed a Proposed Recommended Order before the established deadline, which was January 16, 2007.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2006 Florida Statutes.

FINDINGS OF FACT

Background

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. At all times relevant to this case, Respondent Manuel Brenes ("Brenes") was a music teacher at Little River Elementary School ("Little River"), which is within the Miami-Dade County Public School System.

3. The alleged events giving rise to this case allegedly occurred on November 18, 2005. The School Board alleges that on that date, Brenes lost his temper in the classroom and

physically assaulted three students, each of whom was in the third grade at the time and about nine or 10 years old. More particularly, it is alleged that Brenes poked a boy named K. C. in the head several times; choked, slapped, and/or picked up and dropped another boy, K. M.; and threw a chair at a third boy, whose name is C. P. For his part, Brenes denies these charges, claiming that his interventions were neither assaultive nor potentially harmful, but rather were reasonably necessary either to protect students from harm or to maintain order.

4. There is no question that an incident occurred in Brenes's classroom on November 18, 2005, and that the students K. C., K. M., and C. P. were involved. The evidence adduced at hearing, however, is conflicting, confusing, and often incredible, affording the fact-finder little more than a fuzzy picture, at best, of what actually happened.

5. Five eyewitnesses to the disputed incident testified. These were four student-accusers (comprising the three alleged victims and one of their classmates, a girl named "Kate"[1]) plus the accused teacher himself. In addition, Pamela C. ("Ms. C."), who is the mother of K. C. and also a teacher at Little River, testified regarding her observations and impressions as the "first responder" to arrive on the scene after the disputed incident had taken place. (To be clear, Ms. C. did not see Brenes commit any wrongful act; she has maintained——and

testified——that Brenes made incriminating admissions to her in the immediate aftermath of the events at issue.)

6. None of these witnesses impressed the undersigned as wholly reliable; rather, each had credibility problems that have caused the undersigned to discount his or her testimony to some degree. For example, every eyewitness who testified at hearing had made at least one prior statement about the incident that differed in some unexpected way from his or her subsequent testimony. Moreover, to the extent sense can be made of any given eyewitness account, there exist material discrepancies between the witnesses' respective stories. The upshot is that the undersigned does not have much persuasive, coherent, consistent evidence upon which to make findings of fact.

7. Given the generally poor quality of the evidence, which ultimately precludes the undersigned from making detailed findings of historical fact, a brief summary of the key witnesses' testimonies about the controversial event will next be provided. These summaries, it is believed, give context to the limited findings of historical fact that then follow; they also should help explain the determinations of ultimate fact derived from the findings. It is important to note, however, that the summaries below merely report what each witness said occurred; they do not necessarily, or even generally, correspond

to the undersigned's findings about what likely took place in Brenes's classroom on November 18, 2005.

K. C.

8. K. C. testified that the incident began when one of the boys told a joke that made "the whole class" laugh. Brenes was teaching a lesson at the time, writing on the board. Whenever Brenes faced the board, this particular boy would make "funny faces behind ["Brenes's] back," and when Brenes turned around, the boy would sit down.

9. One student, C. P., continued to laugh, and Brenes made him stand in the corner. Undeterred, C. P. kept laughing. Brenes grabbed the two front legs of a chair, lifted it over his head, and threw the chair at C. P., who "ducked to the ground" to avoid being hit. After that, C. P. was frightened and remained on the ground "for like five minutes."

10. Brenes told the students to put their heads down. He walked over to K. C. and poked the boy in the head three times, apparently for no reason. Then Brenes grasped K. M. by the throat and lifted the student, with one arm, off the ground and over his (Brenes's) head. While holding K. M. in the air by his throat, Brenes shook and slapped the boy before using two arms to set him down.

11. A short while later, Ms. C. entered the classroom, having been summoned by Brenes. K. C. told his mother what had

just occurred. Their conversation, as Ms. C. remembers it, will be recounted below.

12. Angered and upset by what her son had reported, Ms. C. removed K. C. from Brenes's classroom and took him back to her own room. There, on November 18, 2005, K. C. wrote the first of two statements about the incident. K. C.'s second statement, dated November 23, 2005, was written in his mother's classroom as well. The most noteworthy discrepancy between K. C.'s prior written statements and his testimony at hearing is the absence of any mention in the prior statements about Brenes having poked him in the head.[2] Asked at hearing about this omission, K. C. testified that he had "forg[o]t[ten] that part" because Ms. Castillo (the principal) rushed him to complete his statements.[3]

K. M.

13. K. M. testified that "everybody was laughing" because the classroom smelled bad. Brenes put C. P. in the corner and then threw a chair at him. C. P. moved or ducked, however, and hence he was not struck by the chair. Brenes hit K. C. on the head. Then Brenes caught K. M. laughing at him (Brenes). Consequently, Brenes grabbed K. M. by the throat with both hands, lifted him out of his seat, and held him in midair, so that his feet were off the ground. Brenes held K. M. at arm's length, with his arms straight out from his body, for about one "second" before setting the boy down. Brenes did not shake or

slap K. M., who was able to breathe while Brenes held him by the neck, suspended off the ground; indeed, K. M. never felt as though he were choking, even as he was practically being hanged.

14. Shortly thereafter, K. M. wrote a statement about the incident, which is dated November 22, 2005. In the statement, K. M. made no mention of Brenes's having thrown a chair, nor did he report that Brenes had hit K. C. in the head, as he would testify at hearing.

C. P.

15. According to C. P., the trouble began when K. M. made C. P. laugh, which was sufficiently disruptive that Brenes told C. P. to stand in the corner. This discipline proved to be ineffective, for C. P. continued to laugh. C. P.'s ongoing laughter caused Brenes to grab a chair and walk quickly ("a little bit running") towards C. P. The boy ducked, and the chair, which remained in Brenes's hands and was not thrown, struck the wall. C. P. was unable to give consistent testimony at hearing concerning the distance between his body and the spot where the chair hit the wall. In different answers he indicated that the chair struck as near to him as two or three feet, and as far away as 20 feet.

16. Brenes put the chair down, nowhere close to any students, and told the children to put their heads down. C. P. finally stopped laughing. In a discovery deposition taken

before hearing, C. P. had testified that he thought Brenes's use of the chair as a disciplinary tool was funny. At hearing, however, he claimed that he had "just made that up" and given false testimony at the deposition.

17. C. P. testified that Brenes had swung him by the arm, but he could not keep straight when this had occurred. At first, C. P. said that Brenes had taken his arm and swung him after sending him (C. P.) to the corner, because C. P. had kept on laughing despite the mild punishment. Then, because C. P. "was still laughing," even after having been swung by the arm, Brenes had rushed at him with a chair, ultimately causing the boy to quit laughing. Later in the hearing, however, C. P. changed his story and explained that Brenes had grabbed his arm and swung him around after the "chair affair"——when C. P. was no longer laughing——for the purpose of leading him back to his seat. Yet another version of the "arm swinging" episode appears in a prior statement dated November 21, 2005, wherein C. P. wrote that after Brenes had threatened him with a chair, he (C. P.) "was still laughing so [Brenes] took my arm and he [swung] me."

18. Testifying about what Brenes did to K. M., C. P. stated that the teacher had taken K. M. by the neck and shaken him, lifting the boy up from his chair and then putting him back down, all because K. M. had been laughing. This testimony

corresponded fairly closely to C. P.'s statement of November 21, 2005. Interestingly, however, on December 13, 2005, C. P. had told the detective who was investigating the charges against Brenes that Brenes merely had grabbed K. M. by the shirt and placed him back on his chair because K. M. was "playing around." C. P. also informed the detective that "the class [had been] laughing and playing, and Mr. Brenes was trying to stop them."

19. C. P. said nothing at hearing about Brenes's allegedly having struck K. C. on the head. Likewise, he did not mention, in his written statement of November 21, 2005, the alleged attack on K. C. However, C. P. did tell the detective on December 13, 2005, that he had seen Brenes "tap" K. C. on the head.

Kate

20. Kate was in the classroom when the disruption occurred, although she did not see "all of it, really." She testified that, at the beginning of class on November 18, 2005, while Brenes was calling the roll, some boys were talking and laughing, and they kept on laughing even after Brenes had instructed them to stop.

21. C. P. was one of the laughers. Brenes made him stand in the corner. The laughter continued, so Brenes got up and threw the chair on which he had been sitting toward the wall

where C. P. was standing. The chair flew across the room, in the air, and hit the wall. C. P. ducked and was not harmed.

22. Meantime, K. M. was laughing. Brenes "grabbed him up" and talked to him. K. M. started to cry, and Brenes let him go. Kate did not see anything untoward happen to K. C. Rather, Brenes "just talk[ed] to him, because he was laughing, too."

23. After the incident, Kate prepared a written statement, which is dated November 21, 2005. As far as it went, her hearing testimony was essentially consistent with her prior statement. The prior statement, however, contains an additional detail about which she said nothing at hearing. In her statement, Kate wrote that, after throwing a chair in C. P.'s direction, Brenes took a table and hit a desk with it, causing the desk to hit the wall.

Ms. C.

24. Ms. C. was at lunch on the day in question when two students approached her with a request from Brenes that she come to his classroom, where her son was presently supposed to be having a music lesson. Ms. C. told the students that she would be there in about five minutes.

25. When Ms. C. arrived, Brenes's students were well-behaved and "sitting very quietly." Brenes informed Ms. C. that her son, K. C., had been disrespectful to him, in particular by laughing at Brenes as though he were "a stupid person." Upon

learning of her son's misbehavior, Ms. C. was neither perturbed nor nonplussed, but skeptical; she immediately demanded an explanation from Brenes: "How do you know when someone is laughing at you as though you're a stupid person?"

26. After being persuaded that her son had behaved badly, Ms. C. reprimanded him in front of the class. Brenes thanked Ms. C. for coming, and she turned to leave. Before taking his seat, K. C. said, "But mommy, that's not all that happened."

"What happened?" she asked.

"Mr. Brenes poked me in the head," replied K. C. Ms. C. asked Brenes if this were true, and Brenes admitted that he had "tapped" K. C., but not hard enough to cause pain.

27. Ms. C. started to leave, but K. C. stopped her again: "But mommy, that's not all." Thereupon, an exchange ensued much like the one just described, except this time, K. C. reported that Brenes had thrown a chair at C. P. "Mr. Brenes, did you throw the chair?" Ms. C. asked. Again, Brenes admitted that the accusation was true, but denied endangering the children.

28. Before Ms. C. could leave, K. C. stopped her for the third time, saying, once again, "But mommy, that's not it." This initiated the now-familiar pattern of dialogue. K. C. accused Brenes of having picked up K. M. and dropped the boy "hard." Ms. C. asked Brenes if he had done that. Brenes

conceded that he had, yet he assured Ms. C. that the children had never been in danger.

29. Ms. C. had heard enough. She instructed K. C. to leave the classroom with her, which he did. The two of them proceeded directly to the principal's office. Ms. C. reported the incident to the principal. After listening to Ms. C. and her son, the principal decided to have Brenes removed from his class, and she called the school police. (Evidently, it was not thought necessary to hear from Brenes before taking these actions.)

30. Brenes was kept out his class for a day or two but then was allowed to return to his regular duties. This upset Ms. C., who felt that "nothing was being done." As a result, Ms. C. "took it upon [her]self" to call the School Board's "Region Office" and lodge a complaint in her capacity as parent. Ms. C. was told to prepare an "incident report," which she did, on November 22, 2005. She submitted the incident report the following day.

31. Shortly thereafter, Brenes was removed from Little River and administratively reassigned to the Region Office pending the outcome of the investigation.

Brenes

32. On November 18, 2005, Brenes met a class of third-graders at the cafeteria and took the students to his music room

for a lesson. At the time, his music classes were being held in a portable classroom because Brenes's regular room had been damaged in a hurricane.

33. Brenes's temporary classroom had an unpleasant odor. The room's bad smell caused the children to go "berserk" upon arrival; many began running around and misbehaving. One of the boys, C. P., pushed another student to the floor. The tables in the room were on wheels, and some of the children were pushing a table toward the boy on the ground. Brenes pushed the table out of the way, so that the student would not be hurt.[4]

34. Meantime, K. M. was engaging in horseplay, throwing himself off his seat and landing on the floor. Brenes viewed this misbehavior as not just disruptive, but potentially dangerous, so he took hold of the naughty child at the waist, lifted him up off the floor, and placed him back on his seat where he belonged.[5]

35. The students continued to be disruptive, so Brenes tossed a chair toward the wall, away from all the students, to grab their attention and stop the rowdy behavior.[6]

36. This quieted the students down——except for K. M., who started running for the door, where C. P. was standing with his arm outstretched, blocking K. M.'s path. Brenes rushed over and pulled C. P. away from the door to prevent a dangerous collision.[7]

37. Brenes's disjointed testimony fails to give a cogent explanation for why C. P. had been standing next to the door in the first place.[8] In a prior statement, however, Brenes reportedly had told the detective that, before having tossed the chair, he had taken C. P., who was misbehaving, by the arm and led him to the corner, where the student was to remain until he had calmed down. This prior statement finds ample corroboration in the students' respective accounts.

38. While the commotion continued, K. C. was laughing at the situation. Walking past the student's desk, Brenes tapped K. C. gently on the head and told him to quit laughing.

39. About this time, the students calmed down and became quiet. Brenes commenced teaching his lesson for the day, and thereafter the class paid attention and stayed on task.

40. Near the end of the period, Ms. C. appeared in the classroom, having been summoned by Brenes earlier when her son (among others) was misbehaving. Brenes was not asked at hearing to recount the particulars of his conversation with Ms. C. Whatever was said, however, resulted in Ms. C.'s yelling at Brenes in front of the whole class. Brenes, trying to defuse this awkward situation, became apologetic and attempted to explain what had happened, but to no avail. Ms. C.——who took her little boy's word against Brenes's——would not let Brenes tell his side of the story.

Resolutions of Evidential Conflict Regarding the Disputed Event

41. It is not the School Board's burden to prove to a certainty that its allegations are true, but only that its allegations are most likely true; for dismissal to be warranted, in other words, no more (or less) must be shown than that there is a slightly better than 50 percent chance, at least, that the historical event in dispute actually happened as alleged. As the fact-finder, the undersigned therefore must consider how likely it is, based on the evidence presented, that the incident took place as alleged in the School Board's Notice of Specific Charges.

42. Having carefully evaluated the conflicting accounts of the disputed event, the undersigned makes the following findings concerning what happened in Brenes's classroom on November 18, 2005.

43. It is highly likely, and the undersigned finds with confidence, that the incident stemmed from the misbehavior of students who were cutting up in class and generally being disruptive. There were, however, neither allegations, nor proof, that Brenes was in any way responsible for this misbehavior. Rather, it is likely, and the undersigned finds, that the children became boisterous in consequence of the classroom's foul odor.

44. The students K. C., K. M., and C. P. were the ringleaders of the rowdy students, and, in the course of the event, Brenes was compelled to redirect each of them.

45. More likely than not, C. P. was the worst behaved of the three main offenders. Because C. P. was clowning around, Brenes placed him in the corner. It is likely that when he did this, Brenes took C. P. by the arm and led him to the spot where he was to stand. The evidence is insufficient to persuade the undersigned that Brenes touched C. P. in a manner that was intended, or reasonably would be expected, to cause harm or discomfort; it is *possible* that this occurred——the odds, on this record, being roughly in the range of 25 to 40 percent——but not *likely*.

46. As for what exactly happened with K. M., the undersigned can only speculate. The undersigned believes that the *likelier* of the possibilities presented is that the boy was rolling off his chair and flopping to the ground, more or less as Brenes described K. M.'s disruptive activity (although Brenes probably exaggerated the risk of danger, if any, this misbehavior posed to the child). The *likelier* of the scenarios presented (having a probability somewhere in the neighborhood of 35 to 50 percent) is that Brenes physically returned the boy to his chair, picking him up in a reasonable, nonpunitive fashion and similarly setting him back down.[9] The possibility that

Brenes strangled the boy, as charged, is relatively low——between 15 and 30 percent——but nevertheless nontrivial and hence bothersome, given the seriousness of the accusation. That said, however, the undersigned is unable to find that *any* of the possibilities presented is more likely than not true. Therefore, the School Board's proof fails as a matter of fact on the allegation that Brenes choked, slapped, or otherwise assaulted K. M.

47. Brenes admits having tossed a chair, a point that is corroborated (to some degree) by all of the eyewitnesses except, ironically, C. P., the student toward whom the chair was allegedly thrown. Brenes, however, denies having tossed a chair at any student, and the undersigned credits his denial. More likely than not, it is found, Brenes tossed a chair away from the students, as he initially claimed, to focus the students' attention on something other than the rambunctious boys who were creating a disturbance. (The undersigned doubts that the chair was tossed to prevent injury, as Brenes asserted at hearing.)

48. Brenes also admits that he tapped K. C. on the head while urging the boy to be quiet. It is likely——and indeed Brenes effectively has admitted——that this was done as a disciplinary measure. Brenes denies, however, that he tapped the child in a manner intended, or as reasonably would be expected, to cause harm or discomfort. The undersigned credits

Brenes's denial in this regard and therefore rejects as unproven by a preponderance of the evidence the charge that the teacher forcefully "poked" K. C. in or about the temple.

Other Material Facts

49. The evidence is undisputed that after Brenes had gotten the three rowdiest boys under control——which seems to have taken but a few minutes——the rest of the class fell in line and behaved for the balance of the period. It is reasonable to infer, and the undersigned does find, that whatever actions Brenes took were effective in restoring order to the class. That is to say, Brenes's conduct did not *create* chaos, but *quelled* a disturbance that, from every description, could have gotten out of hand. Such efficacy would not justify improper means, of course, but the results Brenes obtained counsel against any easy inference that his alleged misconduct impaired his effectiveness in the classroom.

50. Continuing on the subject of Brenes's alleged ineffectiveness in consequence of his alleged misconduct, the undersigned is struck by the undisputed fact that, notwithstanding the accusations that had been lodged against Brenes, the principal of Little River allowed the teacher to return to his classroom after spending one day in the library. Thereafter, he taught his music classes, as usual, for five or

six days before being administratively assigned to the Region Office effective on or about December 5, 2005.

51. The significance of this fact (Brenes's post-incident return to the classroom) lies in the opportunity it afforded the School Board to observe whether Brenes's alleged misconduct actually had, in fact, impaired his effectiveness as a teacher. As the fact-finder, the undersigned cannot help but wonder: What happened in Brenes's classroom in the next two weeks after the incident?

52. The School Board did not provide an answer. Instead, it presented the conclusory opinions of administrators who declared that Brenes could no longer be effective, which opinions were based on the assumption that all the factual allegations against Brenes were true. Because that underlying assumption was not validated by the evidence adduced in this proceeding, however, these opinions lacked an adequate factual foundation. Moreover, the undersigned infers from the absence of any direct proof of actual impairment that Brenes's effectiveness stayed the same after November 18, 2005.[10]

53. While Brenes was spending time at the Region Office pending the outcome of the investigation, another teacher who also was awaiting the results of an investigation began to pick on Brenes, ultimately provoking Brenes into an argument on a couple of occasions. During one of these arguments, Brenes

responded to his antagonist by saying, "fuck you." While this profanity might have been overheard by other adults nearby (the evidence is inconclusive about that), it is clear that no students were around.

54. Brenes was the only witness with personal knowledge of these arguments who testified at hearing; in lieu of firsthand evidence, the School Board offered mostly hearsay that failed to impress the fact-finder. In light of Brenes's uncontroverted testimony that the other man had been badgering him "for the longest time," the fact that Brenes lost his temper and used vulgar language, while unadmirable, is at least understandable. The bottom line is, this was a private dispute between adults, one of whom——the one not accused of wrongdoing as a result——was actually more at fault as the provocateur.

Determinations of Ultimate Fact

55. The greater weight of the evidence fails to establish that Brenes is guilty of the offense of misconduct in office.

56. The greater weight of the evidence fails to establish that Brenes is guilty of the offense of violating the School Board's corporal punishment policy.

57. The greater weight of the evidence fails to establish that Brenes is guilty of the offense of unseemly conduct.

58. The greater weight of the evidence fails to establish that Brenes is guilty of the offense of violating the School Board's policy against violence in the workplace.

CONCLUSIONS OF LAW

59. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes.

60. A district school board employee against whom a dismissal proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J. concurring).

61. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated, and none other. See Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Department of Business and Professional

Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (1991).

62. In an administrative proceeding to suspend or dismiss a member of the instructional staff, 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); MacMillan v. Nassau County School Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

63. The teacher'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).

64. Pursuant to Section 1012.33(6)(a), Florida Statutes, the School Board is authorized to suspend or dismiss

> [a]ny member of the instructional staff . . . at any time during the term of [his teaching] contract for just cause . . . . The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges

> are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid.

(Emphasis added.) 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.

65. In its Amended Petitioner's Notice of Specific Charges filed on September 5, 2006, the School Board advanced four theories for dismissing Brenes: Misconduct in Office (Count I); Violation of Corporal Punishment Policy (Count II); Unseemly Conduct in Violation of School Board Policy (Count III); and Violation of the Violence in the Workplace Policy (Count IV).

Misconduct In Office

66. 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.

67. 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 in pertinent part 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.
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> * * *
>
> 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.

* * *

(f) Shall not intentionally violate or deny a student's legal rights.

68. As shown by a careful reading of Rule 6B-4.009,[11] the offense of misconduct in office consists of three elements: (1) A serious violation of a specific rule[12] that (2) causes (3) an impairment of the employee's effectiveness in the school system. The second and third elements can be conflated, for ease of reference, into one component: "resulting ineffectiveness."

69. The School Board failed to prove, by a preponderance of the evidence, facts sufficient to establish the essential elements of this offense. Thus, the charge of misconduct in office fails as a matter of fact. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law regarding this offense.

Corporal Punishment

70. The School Board's policy on corporal punishment, as set forth in School Board Rule 6Gx13-5D-1.07, is that the practice is "strictly prohibited."

71. The Rule does not define "corporal punishment"; the School Board relies instead on Section 1003.01(7), Florida Statutes, which provides as follows:

> "Corporal punishment" means the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rule. However, the term "corporal punishment" does not include the use of such reasonable force by a teacher or principal as may be necessary for self-protection or to protect other students from disruptive students.

72. It is reasonably clear from this definition, and the undersigned concludes, that "corporal punishment" in the school setting entails the use, as a disciplinary measure, of such physical force or contact as reasonably would be expected to inflict bodily pain or discomfort. Miami-Dade County School Bd. v. Thompson, DOAH Case No. 06-2861, 2006 Fla. Div. Adm. Hear. LEXIS 596, at *17 (Fla.Div.Admin.Hrgs. Dec. 22, 2006), adopted in toto, Jan. 26, 2007. The archetypal form of corporal punishment is (or was) paddling.

73. The corollary to the foregoing is that not all physical contact constitutes corporal punishment. For one thing, not all physical contact is undertaken as a means of imposing discipline. For another, not all physical contact reasonably would be expected to cause bodily pain or discomfort. It is concluded, therefore, that a teacher or paraprofessional

can touch a student, even as a disciplinary measure, without necessarily administering "corporal punishment" on the student.[13] See Thompson, 2006 Fla. Div. Adm. Hear. LEXIS 596, at *17-*18.

74. Florida law recognizes, moreover, that in some circumstances a teacher or paraprofessional might be required to use physical force or contact to protect himself or another from danger. For example, Section 1003.32(1)(j), Florida Statutes, authorizes each member of the instructional staff to use "reasonable force, according to standards adopted by the State Board of Education, to protect himself or herself or others from injury." See also Fla. Admin. Code R. 6A-1.0404(8)(m) (Instructional personnel shall have the authority, "[w]hen necessary, [to] use reasonably force to protect themselves, students and other adults from violent acts[.]").

75. For another example, Rule 6A-1.0404(8)(c) authorizes the use of "reasonable efforts to protect the student from conditions harmful to learning, mental and physical health, and safety (paragraph (3)(a) of Rule 6B-1.006, F.A.C.)." Indeed, Florida Administrative Code Rule 6B-1.006(3)(a), which is cross-referenced in Rule 6A-1.0404(8)(c), actually requires, as an affirmative duty, that teachers "make [a] 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." Nothing in the Rules relating to the right and duty to make

reasonable protective efforts excludes the possibility that such efforts might include, when reasonable, the use of physical force or contact.

76. All this is to say that, although Brenes touched the three students who were disrupting his class and hence creating conditions harmful to learning, the undersigned nevertheless has determined, as a matter of ultimate fact, that such contact——which, viewed from an objective standpoint, was not such as reasonably would be expected to inflict bodily pain or discomfort——did not constitute "corporal punishment." Therefore, Brenes cannot be found guilty of violating the School Board's ban on corporal punishment.

Unseemly Conduct

77. The School Board grounded its charge of "unbecoming conduct" on Brenes's alleged violation of School Board Rule 6Gx13-4A-1.21, which provides 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.

78. This particular offense is not one of the just causes enumerated in Section 1012.33(1)(a), Florida Statutes, although the statutory list, by its plain terms, is not intended to be exclusive. Yet, the doctrine of ejusdem generis[14] requires that the offense of unseemly conduct 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. Depalo, DOAH Case No. 03-3242, 2004 Fla. Div. Adm. Hear. LEXIS 1684, at *27-*28 (Fla.Div.Admin.Hrgs. Apr. 29, 2004), adopted in toto, July 14, 2004; 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.

79. Here, Brenes admitted having used profane language in the workplace, when he had been provoked into an argument by another teacher who, like Brenes, was spending time at the Region Office pending the outcome of an investigation. Therefore, Brenes technically violated the plain language of School Board Rule 6Gx13-4A-1.21.

80. Under the circumstances shown, however, the undersigned was unable to determine, as a matter of ultimate fact, that Brenes's "locker room" talk was a serious violation of the Rule, for several reasons. First, the vulgarity was

directed at another adult who had provoked Brenes to anger. Second, no students were around. Third, the entire affair was a personal, fundamentally private matter between two men who were not in mixed company at the time.

81. Finally, there was no persuasive evidence that Brenes's use of rough language in this instance in any way impaired his effectiveness in the school system.

Violence In The Workplace

82. The School Board has accused Brenes of violating School Board Rule 6Gx13-4-1.08, which 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 questions at hand, therefore, are: (a) whether Brenes committed or threatened an act of violence; and, if so, (b) whether the violent act or threat thereof was "so serious as to impair [Brenes's] effectiveness in the school system." See Miami-Dade County School Bd. v. Depalo, DOAH Case No. 03-3242, 2004 Fla. Div. Adm. Hear. LEXIS 1684, at *30 (Fla.Div.Admin.Hrgs. Apr. 29, 2004), adopted in toto, July 14,

2004; 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.

83. The only proven act of Brenes's that arguably falls within School Board Rule 6Gx13-4-1.08's sphere of operation is his tossing of the chair. The undersigned has no doubt that, depending on the circumstances, throwing a chair in the classroom could constitute either a violent act or threatening behavior. On the other hand, such an act also could be neither violent nor threatening, depending, once again, on the circumstances.

84. In this case, it is a close question whether Brenes's tossing of a chair away from the students to get their attention and prevent a classroom disturbance from becoming chaotic contravened the Rule. Assuming for argument's sake that it did, however, the severity of the violation must be assessed, as measured by Brenes's alleged resulting ineffectiveness.

85. There was no persuasive, direct evidence that Brenes's effectiveness in the school system was impaired as a result of the incident under consideration. Indeed, the absence of such evidence concerning Brenes's post-incident teaching performance was itself telling as an indirect indicator of Brenes's likely continued effectiveness. The opinion testimony that was offered on this subject, which was conclusory and founded on facts that

the evidence failed to establish, failed as well to meet the School Board's burden of proof.

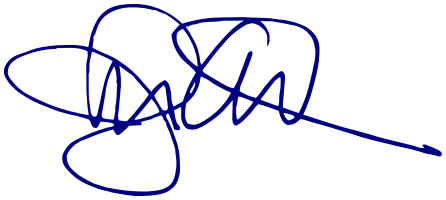
86. Further, there was no persuasive evidence that, as the incident unfolded, Brenes lost control of the class or otherwise clearly demonstrated his ineffectiveness, as had the teacher on trial in Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA), rev. denied, 773 So. 2d 58 (Fla. 2000).[15]

87. Ultimately, therefore, although 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. Rather, taking into consideration all of the evidence in the record, it is determined that Brenes can continue to be effective in the school system, notwithstanding the incident at issue.

RECOMMENDATION

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

DONE AND ENTERED this 27th day of February, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February, 2007.

ENDNOTES

[1]/ "Kate" is not the student's real name. A pseudonym is being used in place of the child's initials——which happen to be "K. C."——to avoid confusion.

[2]/ The undersigned is aware that, technically speaking, K. C.'s prior statements are not *inconsistent* with his later hearing testimony in the sense of being logically incompatible therewith. That is, the recently remembered details in K. C.'s testimony, which add facts to his previous statements, do not contradict his contemporaneous, yet apparently incomplete, written accounts. Nevertheless, the undersigned expects that a student who prepares a formal written statement charging a teacher with wrongdoing will take care to include therein all the relevant facts, which should be fresh in his mind, especially when the statement is prepared, as here, shortly after the event at issue. Further, common sense and experience teach that memories generally do not improve over time but instead fade, becoming less vivid and more prone to corruption. Therefore, when a contemporaneous statement fails to include a remarkable——indeed seemingly unforgettable——detail (the teacher

hit me in the head), which subsequent testimony purports to prove, the undersigned considers the prior statement to be inconsistent, if not in logic, then with reasonable expectations about what the witness should have written contemporaneously if his later testimony were to be credited as truthful.

[3]/ There is no evidence that Ms. Castillo was present in Ms. C.'s classroom when K. C. wrote out his statements, nor is there any reason to believe that Ms. Castillo, if present, would have pressured K. C. to hurry through the preparation of his written statements.

[4]/ This detail, about which Brenes testified at hearing, was also recounted in a written statement that Brenes had prepared on January 2, 2006, in the presence of the detective, to whom Brenes then gave the statement. Kate's written statement of November 21, 2005, seems to corroborate Brenes's testimony regarding this table-pushing incident.

[5]/ Brenes's prior statements are consistent with his hearing testimony on this score. C. P.'s statement to the detective corroborates Brenes in this particular, as does (albeit to a lesser extent) Kate's testimony about the incident.

[6]/ At hearing, Brenes testified that he had tossed the chair not only to capture the class's attention, but also to prevent injury to the boy on the floor. In prior statements made during the investigative phase, however, Brenes had never mentioned that his tossing of the chair was done, in part, in an effort to protect a student from harm. At any rate, Brenes's testimony in this regard is too confusing——and insufficiently believable——to support a finding of fact.

[7]/ C. P.'s testimony that Brenes was "a little bit running" when he approached him with the chair seems somewhat corroborative of Brenes's testimony here. On the other hand, in prior statements Brenes did not disclose, contrary to expectation, that he had hurried over to C. P. to pull him out of harm's way.

[8]/ In fairness, it should be noted that Brenes is not entirely to blame for the considerable confusion to which his testimony gives rise. Suffice it to say that if the goal were to elicit a coherent, chronological narrative, then the questions posed to Brenes were not as effective as they might have been.

[9]/ Brenes was an uneven witness whose testimony the undersigned has discounted as intermittently unreliable. Brenes, however, did not have the burden to prove his innocence, and his relative lack of credibility added nothing to the credibility of any witness who testified against him. The upshot of Brenes's weaknesses as a witness is the undersigned's inability to make many affirmative exculpatory findings.

[10]/ The undersigned believes that ineffectiveness stemming from teacher misconduct in the classroom usually should be manifested most clearly, if at all, in the immediate aftermath of the misconduct, when the incident is fresh in everyone's minds. Therefore, if Brenes were truly impaired, direct proof of such ineffectiveness should have been available in abundance given that he was allowed to continue teaching for two weeks after the incident.

[11]/ Florida Administrative Code Rules 6B-4.009, 6B-1.001, and 6B-1.006 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).

[12]/ 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.

[13]/ If the School Board desires to forbid all touching of students, then it ought to promulgate a rule that clearly and unambiguously imposes such a prohibition, and quit referring to "corporal punishment," a term which, as commonly used and understood, denotes not any touching of the body, but painful touching thereof.

[14]/ 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.").

[15]/ In Walker, a teacher appealed his discharge on the ground that the school board had failed to prove that his violation of school board policy resulted in impaired effectiveness. The charges against him stemmed from a classroom incident that arose from two apparently unrelated disruptions: an alleged theft of someone's compact disc and the presence of an intoxicated student. Id. at 128. A commotion ensued when the students learned that school authorities, whom the teacher had summoned for assistance, would search their personal belongings. The teacher fanned the flames by offering to hold the students' contraband in exchange for cash, although he evidently did not intend that anyone would take this highly inappropriate proposal seriously. Not surprisingly, the situation degenerated into chaos. Id.

The second district held that "under the circumstances . . . [the teacher's] ineffectiveness may be inferred." Id. Elaborating, the court explained that the "chaos in [the teacher's] classroom"——which accompanied his violation of "established school board policy"——"sp[oke] for itself" regarding the teacher's resulting ineffectiveness. Id. It was therefore permissible for the trier of fact to infer the teacher's impaired effectiveness in the school system from the loss of classroom control to which his violation of school board policy immediately had led.

In Walker, the basic fact from which the trier could infer impaired effectiveness——that which spoke for itself——was classroom chaos, i.e. the contemporaneous consequence of the teacher's violation of school board policy. Indeed, the classroom chaos that resulted immediately from the teacher's rule violation constituted direct (as opposed to circumstantial) evidence of some actual impaired effectiveness on one occasion, of limited duration.

The facts of Walker are readily distinguishable from those at hand, because Brenes's conduct caused no chaos; to the contrary, his conduct prevented a chaotic situation from arising.

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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.