

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 06-2369
)
 ROBERT BOUNDY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 27, 2006, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ana I. Segura, Esquire
School Board of Miami-Dade County
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent had just cause to suspend Petitioner for 30 workdays, without pay.

PRELIMINARY STATEMENT

By letter dated June 21, 2006, Miami-Dade County School Board, hereinafter School Board, notified Robert Boundy, among other things, that the School Board, at its scheduled meeting on March 15, 2006, took action to suspend him from employment for 30 workdays; that the United Teachers of Dade, hereinafter UTD, by letter dated May 24, 2006, contested the School Board's action and requested a hearing; that the request for hearing was untimely; that the School Board, at its meeting on June 14, 2006, accepted his (Mr. Boundy's) request to waive the 15-day filing requirement and granted the request for hearing. On July 5, 2006, this matter was referred to the Division of Administrative Hearings.

On August 9, 2006, the School Board filed a Notice of Specific Charges, consisting of four counts. The School Board charged Mr. Boundy as follows: Count I, Misconduct In Office - violating Florida Administrative Code Rules 6B-4.009(3), 6B-1.001(2) and (3), and 6B-1.006(3)(a) and (f), constituting just cause for suspension without pay; Count II, Violation of School Board Policy - violating School Board Rule 6Gx13-4A-1.21, constituting just cause for suspension without pay; Count III, Violation of Corporal Punishment Policy - violating Sections 1003.01(7) and 1002.20(4)(c), Florida Statutes, and School Board Rule 6Gx13-5D-1.07, constituting just cause for suspension

without pay; and Count IV, Violation of Violence in the Workplace Policy - violating School Board Rule 6Gx13-4-1.08 and Florida Administrative Code Rules 6B-1.001(2), or 6B-1.006(3)(a), constituting just cause for suspension without pay.

At hearing, the School Board presented the testimony of nine witnesses, including Mr. Boundy, and entered 28 exhibits (Petitioner's Exhibits numbered 1-28) into evidence. Mr. Boundy presented the testimony of one witness and entered no exhibits into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on January 8, 2007. Subsequently, on January 16, 2007, Petitioner requested an extension of time to file post-hearing submissions, to which Respondent did not object; the request was granted. The parties timely filed post-hearing submissions, and their post-hearing submissions have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that the School Board is a constitutional entity charged with the duty to operate, control and supervise the public schools within the school district of Miami-Dade County, Florida.

2. No dispute exists that, at all times material hereto, Mr. Boundy was employed full-time with the School Board as a teacher and held a professional service contract.

3. Mr. Boundy had been a teacher with the School Board for 15 years.

4. In his professional career, Mr. Boundy had been a teacher, then had practiced law in the State of Florida for 15 years, and had become a teacher again.

5. No dispute exists that, at all times material hereto, Mr. Boundy was assigned to Nautilus Middle School, hereinafter Nautilus, in the Miami-Dade County's school district. He was assigned to teach science.

6. On September 30, 2005, Mr. Boundy was teaching his science class at Nautilus. He was having problems with one particular student, D. M., who was approximately 14 years of age.¹ D. M. had just returned to class from being on indoor suspension, for cutting class.

7. Earlier that day, after having returned from indoor suspension, D. M. had been involved in a physical altercation, a "minor"² fight, and Mr. Boundy counseled him. At lunch time, another teacher broke-up a fight between D. M. and another student; Mr. Boundy counseled him again. Mr. Boundy determined that the first fight did "not" warrant a "write-up" and that the

second fight perhaps "may" have warranted a write-up but that he decided not to do so.³

8. After lunch, while in Mr. Boundy's class, D. M. had another fight with a student, which was D. M.'s third fight that day. Mr. Boundy has a policy in his class that, "after three strikes, you're out,"⁴ therefore, instead of counseling D. M. again, Mr. Boundy determined that a "write-up" was warranted and that D. M. had to leave his class.

9. Mr. Boundy told D. M. to leave the class and go to the office. Before leaving the class, D. M. began spraying perfume and then walked out into the hallway but did not go the office. Mr. Boundy observed D. M. still outside in the hallway. When Mr. Boundy walked out of his class into the hallway, he observed D. M spraying perfume in the hallway. Mr. Boundy asked D. M. to give the perfume to him (Mr. Boundy). D. M. raised his hand and brought it down as if to strike Mr. Boundy at which time Mr. Boundy grabbed D. M.'s hand and pulled it behind his (D. M.'s) back and told D. M. that he (D. M.) needed to go to the office.

10. The hallway outside of Mr. Boundy's classroom is equipped with a surveillance camera, which recorded the interaction between Mr. Boundy and D. M. after the contact described above. The surveillance camera does not record as a regular video camera but records as a series of snapshots or

still pictures approximately every second, with gaps in between the snapshots; therefore, the surveillance camera fails to reveal completely what happens within a segment of time.⁵

11. As a result of the gaps in between snapshots of the surveillance camera, the testimony of witnesses is crucial in determining what happened.

12. While in the hallway, the surveillance camera shows Mr. Boundy's back to it and D. M. directly in front of him in such close proximity as if their bodies were touching. Mr. Boundy testified that he took D. M. by the arms and was directing him toward the doors leading to the office. Mr. Boundy's testimony is found to be credible.

13. Subsequently, while also in the hallway, the surveillance camera, in several snapshots, shows Mr. Boundy and D. M. separated, with D. M. facing Mr. Boundy, who testified that D. M. wrestled away from him. The surveillance camera also shows, in one snapshot, Mr. Boundy's left hand on D. M.'s right shoulder and, in another snapshot, D. M. moving back toward the classroom. Mr. Boundy testified that D. M. was going back to the classroom without his (Mr. Boundy's) permission. D. M. admitted that he was returning to the classroom without Mr. Boundy's permission. Mr. Boundy's testimony is found credible.

14. Further snapshots by the surveillance camera show Mr. Boundy grabbing D. M. by the arms and shoulder area, when D. M. gets close to the classroom, and pushing D. M. down the hallway; and shows some students observing the conduct in the hallway. Also, the snapshots by the surveillance camera show Mr. Boundy and D. M. exiting the exit doors at the stairwell, with Mr. Boundy continuing to hold D. M.'s arms. After they go through the exit doors, the snapshots by the surveillance camera show Mr. Boundy releasing D. M. and watching D. M. go down the stairs. Mr. Boundy testified that he told D. M. to go to the office. D. M. does not deny that Mr. Boundy told him to go to the office at that point.

15. D. M. went to the main office. The school counselor, Amy Magney, talked with D. M., who was loud and appeared to be agitated. Ms. Magney observed marks on D. M.'s arms and the back of his neck, which she described as "very red." D. M. informed Ms. Magney that Mr. Boundy's forceful touching had caused the red marks. Ms. Magney took D. M. to the assistant principal, Ms. Gonsky, who observed marks on D. M.'s arms, which were red, and marks on D. M.'s the neck, shoulder area, which Ms. Gonsky described as a "little red."

16. Mr. Boundy admits, and at no time did he deny, that he grabbed D. M. by the arms and shoulder area. For example, at the Conference for the Record (CFR) held on November 15, 2005,

Mr. Boundy admitted that he held D. M.'s arms by the back directing him towards the stairs.

17. A detective of the School Board's police department reviewed the snapshots by the surveillance camera. From the detective's observation, he determined that Mr. Boundy did not take any malicious action against D. M.; that D. M. was resisting Mr. Boundy; that, at one point, D. M. made an aggressive action against Mr. Boundy; and that Mr. Boundy was "directing, escorting" D. M. through the exit doors.

18. D. M. testified that Mr. Boundy also grabbed him around the neck. Mr. Boundy denies that he grabbed or touched D. M.'s neck but admits that he grabbed D. M. at the shoulder area.

19. V. V., a student in Mr. Boundy's class, testified that Mr. Boundy grabbed D. M. by the neck, pushing D. M. out of the classroom. Also, the Conference for the Record (CFR) held on November 15, 2005, indicates that the same student stated that, while Mr. Boundy and D. M. were in the hallway, D. M. swung at Mr. Boundy and struck him in the chest. Mr. Boundy denies that he was struck by D. M. and D. M. denies that he struck Mr. Boundy. V. V.'s testimony is not found to be credible.

20. The snapshots by the surveillance camera do not show Mr. Boundy grabbing or touching D. M.'s neck. Ms. Magney was the first person in the school's office to observe the marks,

and when she saw the marks on the back of D. M.'s "neck," the marks were "very red"; however, when Ms. Gonsky, the second person in the school's office to observe the marks, the marks around the "neck, shoulder area" were a "little red." Further, D. M. had been in two physical altercations before the incident with Mr. Boundy and the last altercation had occurred at lunch time. Ms. Gonsky's account of the location of the red marks is not inconsistent with Mr. Boundy's testimony, regarding the shoulder area. Additionally, when Ms. Gonsky observed the marks at the neck, shoulder area, they were a little red, not red or very red. The undersigned finds Mr. Boundy's and Ms. Gonsky's testimony and account more credible regarding the marks being at the shoulder area, not the neck. Furthermore, the undersigned finds that Mr. Boundy grabbed D. M. at the shoulder area and that the marks at the shoulder area were caused by Mr. Boundy and were a little red.

21. No dispute exists that D. M. was being disruptive. Mr. Boundy had counseled D. M. on two occasions that same day for fighting. D. M. had committed a third strike by fighting again in Mr. Boundy's class, and according to Mr. Boundy's classroom policy of which the students were aware, the third strike meant that the student was leaving the classroom and going to the school's office.

22. Mr. Boundy was going to write-up D. M. for the incident but did not do so. Before he could write-up D. M., Mr. Boundy was summoned to the school's office after the administrators in the office observed the marks and heard D. M.'s version of the incident.

23. At the beginning of each school year, the principal of Nautilus, Caridad Figueredo, has an opening meeting, consisting of two days. At the opening meeting, among other things, Ms. Figueredo notifies the Nautilus' faculty that they must comply with the rules of the School Board and the Code of Ethics, and some of the rules are reviewed with the faculty. Further, at the opening meeting, Nautilus' faculty is provided a copy of the Faculty Handbook. Nautilus' faculty signs an acknowledgement that they understand that they are responsible for becoming knowledgeable about the rules and adhering to them. Mr. Boundy signed an acknowledgement and received a copy of the Faculty Handbook.

24. Regarding physical contact, Ms. Figueredo indicates at the opening meeting that the School Board prohibits using physical contact to maintain discipline or to affect a student's behavior. As a result, at the opening meeting, she informs Nautilus' faculty, and stresses to them, that they should not use physical force or, generally, to come in physical contact with the students.

25. However, as to coming into physical contact with students, an exception is recognized and allowed in the touching of a student by a teacher if the teacher has a rapport with the student and the student has no objection to or approves of the teacher just tapping him or her. That exception is not applicable in the instant case.

26. Nautilus had a 2005-2006 Faculty and Staff Handbook, hereinafter Handbook. The Handbook contained a Progressive Discipline Plan, hereinafter Plan, for teachers to use when they encounter disruptive students. The Plan contained several steps of action, which provided in pertinent part:

Step I: Teacher

The teacher may handle discipline in the following ways (list not inclusive):
Move close to the student - use verbal and/or non-verbal techniques to correct behavior problems

* * *

Speak with the student on a one-to-one basis

* * *

Contact parent (verbal and/or written)
Hold parent or student/parent conference

PLEASE NOTE: Parent contact is REQUIRED before a referral can be made to the administration. Only disciplinary problems involving infractions of the Code of Student Conduct Group III or higher (fighting . . .) may be directly referred to the administration using a case management form.

* * *

Step IV: Referring Students For Administrative Action

Students should be sent directly to the appropriate administrator only when critical incidents occur such as fighting . . . Please use your emergency button to request for[sic] assistance.

If a student becomes disruptive and you request removal the administrator will take the appropriate disciplinary action deemed necessary according to the Code of Student Conduct and provide teachers immediate feedback.

(emphasis in original)

The Handbook also contained a section entitled "Things To Remember When Dealing With A Student," which provided in pertinent part:

4. DON'T:
Snatch things away from students.
Become confrontational.
Physically block an exit.
Argue or get on the student's level.
Shout or put them down.
Disrespect them.

* * *

6. Use common sense regarding touching students: Be aware that affectionate gestures may be misconstrued. Avoid physical contact of any kind in situations involving you and student (i.e. where there are no witnesses).

Additionally, the Handbook contained a section entitled "How to Avoid Legal Complications as an Educator," which provided in pertinent part:

Respect the space of others. Do not place your hands on students.

* * *

Know the laws, School Board policies and school rules, and follow them.

* * *

Corporal punishment is prohibited in Miami-Dade County Public Schools. Treat each student with respect. Establish a policy regarding discipline. Distribute the policy to students and parents at the beginning of the year or when the students begin your class.

27. The School Board has established "Procedures for Promoting and Maintaining a Safe Learning Environment," which provides in pertinent part:

Purpose of the Procedures for Promoting and Maintaining a Safe Learning Environment

This document, Procedures for Promoting and Maintaining a Safe Learning Environment, is incorporated by reference and is a part of School Board Rule 6Gx13-5D-1.08, Maintenance of Appropriate Student Behavior. It has been prepared to assist school administrators in promoting and maintaining a safe learning environment in the public schools of Miami-Dade County, Florida. These procedures and directions are set forth to guide and promote orderly and productive participation of students in school life and support the achievement of

Florida's education goal for school safety and environment, Section 229.591(3)(e), F.S.

Student actions and behaviors that can be defined as disruptive and/or threatening must be dealt with according to Florida Statutes, and Florida Board of Education and Miami-Dade County School Board Rules. This manual contains information necessary to assist school administrators in making the most appropriate decisions and taking warranted action in promoting maintaining a safe learning environment.

* * *

Administrators, counselors, and appropriate staff are expected to become familiar with this document, to review it periodically, and to utilize it according to its inherent purpose -- promoting and maintaining a safe learning environment in the public schools of Miami-Dade County, Florida. As the administration and staff at each school site address the requirements of current Miami-Dade County Public Schools (M-DCPS) guidelines, they should also review modifications of requirements related to school discipline and school safety as established by the Florida Legislature.

* * *

GUIDELINE #39: REMOVAL OF STUDENT FROM CLASS AND POSSIBLE EXCLUSION OF THE STUDENT BY THE TEACHER

CURRENT LAW AND/OR PRACTICE: Florida Statutes and Miami-Dade County School Board Rules allow for teachers to remove a disruptive student from class if the behavior of the student has an adverse effect on the teacher's ability to communicate effectively with students or the ability of the students to learn. Section 232.271, F.S., provides for the right of the teacher to refuse to accept a student back

to class who has been removed for disruptive behavior which adversely affects the teacher's ability to communicate effectively with the students or with the ability of the students to learn.

Provisions for Exceptional Students: The Placement Review Committee shall refer to the IEP team all exclusion requests for students from exceptional education classes.

A. Temporary Removal from Class

1. The teacher shall have the authority to remove a seriously disruptive student from the classroom. In such cases, the principal or designee shall be notified immediately and the teacher shall be entitled to receive, prior to the student's return to class, a report describing corrective action(s) taken. Guidelines for implementing this provision shall be developed by each Educational Excellence School Advisory Council (EESAC).

B. Code of Student Conduct Infractions

1. The principal or designee will follow the Code of Student Conduct on all disciplinary matters.
2. Only those disciplinary problems which disrupt a teacher's instruction, when the teacher requests the student's permanent removal from class, shall be referred to the Placement Review Committee, if the request is not resolved by the principal.

28. A CFR was held on November 15, 2005. A Summary of the CFR was prepared and provides in pertinent part:

[Mr. Boundy was asked]: 'Did you touch the student?' [Mr. Boundy] replied: 'Yes and it will never happen again.'

* * *

The following directives are herein delineated which were issued to you [Mr. Boundy] during the conference:

1. Adhere to all M-DCPS [Miami-Dade County Public Schools] rules and regulations at all times, specifically School Board Rules [sic] 6Gx13-4A-1.21, Responsibilities and Duties.
2. Adhere to The Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida.
3. Cease and desist from utilizing physical means to effect the behavior of students.

* * *

During the conference, you [Mr. Boundy] were directed to comply with and were provided copies of the following School Board Rules: 6Gx13-4A-1.21, Responsibilities and Duties 6Gx13-4A-1.213, The Code of Ethics

You [Mr. Boundy] were advised of the high esteem in which teachers are held and of the District's [School Board's] concern for any behavior, which adversely affects this level of professionalism. You [Mr. Boundy] were reminded of the prime directive to maintain a safe learning environment for all students and that your actions violated this directive. . . .

29. Further, attached to the Summary of the CFR was "Guideline #9: Corporal Punishment, Current Law and/or Practice, from the Procedures for Promoting and Maintaining a Safe Learning Environment," which provides in pertinent part:

GUIDELINE #9: CORPORAL PUNISHMENT

CURRENT LAW AND/OR PRACTICE: CORPORAL PUNISHMENT IS PROHIBITED IN MIAMI-DADE COUNTY PUBLIC SCHOOLS. . . .

Corporal punishment is physical force or physical contact applied to the body as punishment.

Section 228.041(27), F.S., defines corporal punishment as:

. . . 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.

The use of physical restraint techniques in accordance with the Miami-Dade County School Board Rule 6Gx13-~~6A-1.331~~, Procedures for Providing Special Education for Exceptional Students and Article VIII of the Contract Between Miami-Dade County Public Schools and the United Teachers of Dade is not corporal punishment.

30. Prior to Mr. Boundy's going into the hallway, to confront D. M., alternative avenues were available to Mr. Boundy for sending D. M. to the school's office without confronting him in the hallway. Nautilus has a protocol that, whenever a teacher is unable to control a disruptive student by using classroom management techniques, the teacher can press a security button, located in the classroom, and a security monitor or an administrator will immediately come to the classroom. The security monitor or administrator will assess the situation and remove the disruptive student. Mr. Boundy failed to use this established protocol.

31. The undersigned does not find credible the testimony given on alternative methods of dealing with D. M., as a

disruptive student, in terms of in-school suspension, student mediation, conflict resolution, parent involvement, alternative education, suspension, and expulsion as being applicable to the instant case. These alternatives are available after the student is removed from the classroom to the school's office; they fail to address the immediate removal of the physical presence of a disruptive student from the classroom.

32. The exception to corporal punishment found at Guideline Nos. 9 and 39, regarding the use of physical restraint techniques for situations involving Exceptional Student Education (ESE), is not applicable to the instant case. Mr. Boundy's class was not an ESE class, and D. M. was not an ESE student.

33. Also, the exception to corporal punishment found at Guideline No. 9, regarding situations to protect other students, is not applicable to the instant case. None of the other students in Mr. Boundy's class were in harm's way or needed protection in the hallway outside Mr. Boundy's classroom.

34. However, the exception to corporal punishment in a situation for self-protection, i.e., the protection of Mr. Boundy from D. M., was applicable in the instant case. When D. M. raised his hand and brought it down as if to strike Mr. Boundy, Mr. Boundy grabbed D. M.'s arms and put his (D. M.'s) arms behind his back; at that instant, Mr. Boundy was

in need of self-protection and he (Mr. Boundy) acted appropriately.

35. But, the evidence fails to demonstrate that, after Mr. Boundy prevented D. M. from striking him, Mr. Boundy continued to be in need of self-protection. Self-protection failed to continue to exist and failed to exist during the time that Mr. Boundy was directing/escorting D. M. down the hall to the exit doors.

36. The Administrative Director of the School Board's Office of Professional Standards, Gretchen Williams, testified that Mr. Boundy's use of physical contact in the handling of D. M. in the hallway and that the presence of red marks on D. M., exemplified excessive force, which rendered Mr. Boundy's action as a violent act. Further, she testified that Mr. Boundy's conduct was corporal punishment; that his violent act constituted unseemly conduct; and that his violent act was contrary to the School Board's prime directive to maintain a safe learning environment, which constituted unseemly conduct and was conduct unbecoming a School Board employee. Ms. Williams' testimony is found to be credible.

37. Also, the School Board's Administrative Director, Region II, DanySu Pritchett testified that Mr. Boundy's physical force constituted violence in the workplace; and that he failed to maintain the respect and confidence of the student and the

value of worth and dignity of the student through the use of physical force. Further, she testified that the failure to use an alternative method of removal by using the emergency call button was poor judgment and constituted conduct unbecoming a School Board employee. Ms. Pritchett's testimony is found to be credible.

38. Additionally, Ms. Figueredo, testified that Mr. Boundy subjected D. M. to unnecessary embarrassment by using physical force in the hallway in front of D. M.'s classmates while Mr. Boundy was directing/escorting D. M. down the hall. Further, Ms. Figueredo testified that, during the hallway incident, Mr. Boundy engaged in corporal punishment, conduct unbecoming an employee of the School Board, unseemly conduct, and poor judgment, and was not a good role model to the students and staff. Ms. Figueredo's testimony is found to be credible.

39. Also, Ms. Figueredo testified that Mr. Boundy's use of poor judgment and failure to use established protocol and to exemplify a good role model to the students and the staff caused Mr. Boundy to lose his effectiveness. Ms. Figueredo's testimony is found to be credible.

40. Pending the investigation of the incident by the School Board, Mr. Boundy was removed from the classroom. He was placed on alternative assignment, i.e., at his home.

41. Due to Mr. Boundy's failure to follow established protocol at Nautilus for the removal of D. M. from the classroom, to the physical force used by Mr. Boundy, to the marks that were a little red and were caused by the physical force, and to the seriousness of the incident, by memorandum dated November 21, 2005, Ms. Figueredo recommended a 30-day suspension for violation of School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties. Ms. Pritchett agreed with the recommendation.

42. By memorandum dated December 1, 2005, the School Board's Region Center II concurred in the recommendation.

43. On February 28, 2006, a meeting was held with Mr. Boundy to address the forthcoming School Board's consideration of the recommendation for a 30-day suspension without pay. Those in attendance included Mr. Boundy, Ms. Williams, Ms. Pritchett, Ms. Figueredo, and a UTD representative, Mr. Molnar. The determination was that Mr. Boundy would be recommended for a 30-day suspension without pay for just cause, including but not limited to "deficient performance of job responsibilities; conduct unbecoming a School Board employee; and violation of State Board Rule 6B-1.001, Code of Ethics of the Education Profession in Florida; and School Board Rules 6Gx13-4A-1.21, Responsibilities and Duties; and 6Gx13-5D-1.07, Corporal Punishment--Prohibited."

44. By letter dated March 1, 2006, Mr. Boundy was notified by the School Board's Assistant Superintendent, among other things, that the School Board's Superintendent would be recommending, at the School Board's meeting scheduled for March 15, 2006, the 30-day suspension without pay for just cause, indicating the violations aforementioned.

45. By letter dated March 16, 2006, the School Board's Assistant Superintendent notified Mr. Boundy, among other things, that the School Board had approved the recommendation and that he was not to report to work at Nautilus from March 16, 2006 through April 26, 2006.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

47. The School Board has the burden of proof to show by a preponderance of the evidence that Mr. Boundy committed the offenses in the Notice of Specific Charges. McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

48. No dispute exists that at all times material hereto, Mr. Boundy was subject to the rules and regulations of the School Board and that his employment was also subject to the

terms and conditions of the contract between the School Board and the UTD Contract .

49. The School Board contends that just cause exists for the suspension, without pay, of Mr. Boundy.

50. Section 1012.22, Florida Statutes (2005), provides in pertinent part:

The district school board shall:

(1) Designate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees as follows, subject to the requirements of this chapter:

* * *

(f) Suspension, dismissal, and return to annual contract status.--The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed, or returned to annual contract except as provided in this chapter.

51. Section 1012.33, Florida Statutes (2005), provides in pertinent part:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall

contain provisions for dismissal during the term of the contract only for just cause. 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. (emphasis added)

* * *

(6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). 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. . . .

52. The UTD Contract, which provides in pertinent part:

ARTICLE V -- EMPLOYER RIGHTS

Section 1. Exclusive Management Authority

The provisions of this Contract are not to be interpreted in any way or manner to change, amend, modify, or in any other way, to delimit the exclusive authority of the Board [School Board] and the Superintendent for the management of the total school system and any part of the school system. It is expressly understood and agreed that all rights and responsibilities of the Board [School Board] and Superintendent, as established now and through subsequent amendment or revision by constitutional provision, state and federal statutes, State Board and Board Rules, shall continue to be exercised exclusively by the Board [School Board] and Superintendent without prior

notice or negotiations with the Union [UTD], except as specifically and explicitly provided for by the stated terms of this Contract. Such rights thus reserved exclusively to the Board [School Board] and Superintendent, by way of illustration and not by way of limitation, include the following: (1) selection and promotion; (2) separation, suspension, dismissal, and termination of employees for just cause (emphasis added)

53. Florida Administrative Code Rule 6B-4.009, Criteria for Suspension and Dismissal, provides in pertinent part:

The basis for charges upon which dismissal action against instructional personnel may be pursued . . . The basis for each of such charges is hereby defined:

* * *

(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, FAC., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC., which is so serious as to impair the individual's effectiveness in the school system.

54. Florida Administrative Code Rule 6B-1.001, Code of Ethics of the Education Profession in Florida, provides in pertinent:

(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.

55. Florida Administrative Code Rule 6B-1.006, Principles of Professional Conduct for the Education Profession in Florida, provides in pertinent part:

(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.

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

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

56. The School Board's interpretation of its own rules is given great deference unless it amounts to an unreasonable

interpretation or is clearly erroneous. Woodley v. Department of Health and Rehabilitative Services, 505 So. 2d 676, 678 (Fla. 1st DCA 1987).

57. School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties, provides in pertinent part:

I. Employee Conduct

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.

58. School Board Rule 6Gx13-4A-1.213, Code of Ethics, provides in pertinent part:

II. APPLICATION

This Code of Ethics applies to all members of The School Board of Miami-Dade County, Florida, administrators, teachers, and all other employees. . . .

Employees are subject to various other laws, rules, and regulations, including but not limited to "The Code of Ethics for the Education Profession in Florida and the Principles of Professional Conduct of the Education Profession in Florida," Chapter 6B-1.001 and -1.006, F.A.C., the "Code of Ethics for Public Officers and Employees," found in Chapter 112, Part III of the Florida Statutes, and School Board Rule 6Gx13-4A-1.212, Conflict of Interest, which

are incorporated herein by reference and this Code of Ethics should be viewed as additive to these laws, rules and regulations. To the extent not in conflict with any laws, School Board rules or governmental regulations, this Code of Ethics shall control with regard to conduct. In the event of any conflict, the law, regulation or School Board Rule shall control.

III. FUNDAMENTAL PRINCIPLES

The fundamental principles upon which this Code of Ethics is predicated are as follows:

Citizenship - Helping to create a society based upon democratic values; e.g., rule of law, equality of opportunity, due process, reasoned argument, representative government, checks and balances, rights and responsibilities, and democratic decision-making.

Cooperation - Working together toward goals as basic as human survival in an increasingly interdependent world.

Fairness - Treating people impartially, not playing favorites, being open-minded, and maintaining an objective attitude toward those whose actions and ideas are different from our own.

Honesty - Dealing truthfully with people, being sincere, not deceiving them nor stealing from them, not cheating or lying.

Integrity - Standing up for your beliefs about what is right and what is wrong and resisting social pressure to do wrong.

Kindness - Being sympathetic, helpful, compassionate, benevolent, agreeable, and gentle toward people and other living things.

Pursuit of Excellence - Doing your best with the talents you have, striving toward a goal, and not giving up.

Respect - Showing regard for the worth and dignity of someone or something, being courteous and polite, and judging all people on their merits. It takes three major forms: respect oneself, respect for other people, and respect for all forms of life and the environment.

Responsibility - Thinking before you act and being accountable for your actions, paying attention to others and responding to their needs. Responsibility emphasizes our positive obligations to care for each other.

Each employee agrees and pledges:

1. To abide by this Code of Ethics, making the well-being of the students and the honest performance of professional duties core guiding principles.

* * *

4. To treat all persons with respect and to strive to be fair in all matters.

5. To take responsibility and be accountable for his or her actions.

* * *

V. CONDUCT REGARDING STUDENTS

As set forth in the Principles of Professional Conduct for the Education Profession in Florida, each employee

1. 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.

* * *

5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

6. Shall not intentionally violate or deny a student's legal rights.

59. Regarding corporal punishment, Section 1003.01, Florida Statutes (2005), provides in pertinent part:

(7) '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.

60. Further, Section 1002.20, Florida Statutes (2005), provides in pertinent part:

(4) DISCIPLINE

* * *

(c) Corporal punishment.--In accordance with the provisions of s. 1003.32, corporal punishment of a public school student may only be administered by a teacher or school principal within guidelines of the school principal and according to the district school board policy. . . .

61. School Board Rule 6Gx13-5D-1.07, provides in pertinent part:

CORPORAL PUNISHMENT -- PROHIBITED

The administration of corporal punishment in Miami-Dade County Public Schools is strictly

prohibited. Miami-Dade County Public Schools has implemented comprehensive programs for the alternative control of discipline. These programs include, but are not limited to, counseling, timeout rooms, in-school suspension centers, student mediation and conflict resolution, parental involvement, alternative education programs, and other forms of positive reinforcement.

In addition, suspensions and/or expulsions are available as administrative disciplinary actions depending upon the severity of the misconduct. . . .

62. The School Board interprets the prohibition of corporal punishment to include forcing a student through physical contact to do something that the student does not wish to do. However, corporal punishment does not include self-protection or conduct for the protection of students. The School Board's interpretation is not unreasonable nor is it clearly erroneous.

63. The evidence fails to demonstrate that, prior to the hallway incident, Mr. Boundy engaged in corporal punishment.

64. Additionally, the evidence fails to demonstrate that Mr. Boundy engaged in corporal punishment when D. M. lifted his (D. M.'s) hand and brought it down as if to strike Mr. Boundy and Mr. Boundy grabbed D. M. That action by Mr. Boundy was not captured on the surveillance camera. In that particular instance, Mr. Boundy was protecting himself.

65. However, when Mr. Boundy released D. M. and D. M. moved away from Mr. Boundy down the hall, the evidence demonstrates that the need for self-protection no longer existed.

66. Furthermore, when D. M. turned around and came back towards the classroom with the intent to enter the classroom, the evidence demonstrates that Mr. Boundy engaged in corporal punishment. Mr. Boundy had available to him an alternative to grabbing D. M.; Mr. Boundy could have re-entered his classroom and pushed the emergency button, which would have caused a security person or an administrator to come to the classroom or the hallway and remove D. M. This alternative was an established protocol of Nautilus and should have been used by Mr. Boundy.

67. The School Board argues that the use of corporal punishment by Mr. Boundy does not reflect credit upon himself, constitutes unseemly conduct and fails to protect D. M. from conditions harmful to learning and/or D. M.'s physical health and/or safety. Therefore, the School Board argues that Mr. Boundy's conduct violated School Board Rules 6Gx13-4A-1.21 and 6Gx13-4A-1.213. As a result, the School Board contends that his violation of the School Board Rules constitute misconduct in office and is just cause for suspension.

68. The School Board's interpretation of its own rules is reasonable. The evidence demonstrates that Mr. Boundy violated School Board Rules 6Gx13-4A-1.21 and 6Gx13-4A-1.213.

69. Further, the evidence demonstrates that Mr. Boundy violated the Code of Ethics and committed misconduct in office.

70. Additionally, the School Board argues that Mr. Boundy's impaired effectiveness as a teacher may be inferred, thus, resulting in just cause for suspension due to misconduct in office, citing Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2nd DCA 2000). The undersigned is persuaded that Walker, supra, is applicable to the case at hand. The evidence in the case at hand demonstrates that Mr. Boundy's conduct "by its very nature, demonstrates his ineffectiveness in the school system" and that "independent evidence" of his ineffectiveness in such a situation would be "superfluous." Id. at 128.

71. Also, the School Board argues that Mr. Boundy's conduct violated the School Board's policy on violence in the workplace. School Board Rule 6Gx13-4-1.08 provides in pertinent part:

VIOLENCE IN THE WORKPLACE

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 . . . 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.

Any person who makes substantial threats, exhibits threatening behavior, or engages in violent acts on DCPS property shall be removed from the premises as quickly as safety permits, and shall remain off DCPS premises pending the outcome of an investigation. DCPS will initiate an appropriate response. This response may include, but is not limited to, . . . reassignment of job duties, suspension or termination of employment . . . of the person or persons involved.

72. The evidence demonstrates that Mr. Boundy committed violence in the workplace as set forth by School Board Rule 6Gx13-4-1.08 and, therefore, violated the said Rule.

73. Therefore, the School Board demonstrated that Mr. Boundy's conduct violated the Code of Ethics and Florida Administrative Code Rules 6B-1.001, 6B-1.006, and 6B-4.009.

74. Hence, the School Board established and demonstrated that Mr. Boundy's conduct constituted just cause for a 30-day suspension without pay.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Miami-Dade County School Board enter a final order finding that just cause existed for the 30-day suspension, without pay, from employment of Robert Boundy.

DONE AND ENTERED this 30th day of April 2007, in Tallahassee, Leon County, Florida.

S

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2007.

ENDNOTES

^{1/} At hearing, D. M. testified that he was 15 years of age.

^{2/} Descriptive word used by Mr. Boundy.

^{3/} Id.

^{4/} Id.

^{5/} This Administrative Law Judge viewed a copy of the incident recorded by the surveillance camera admitted into evidence as Petitioner's Exhibit 27.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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