STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-2861
	)	
CYNTHIA THOMPSON,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on October 16, 2006, in Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether a district school board is entitled to dismiss a paraprofessional for just cause based principally upon the allegation that she struck a disabled student on the head with her elbows.

PRELIMINARY STATEMENT

At its regular meeting on May 10, 2006, Petitioner School Board of Miami-Dade County suspended Respondent Cynthia Thompson without pay pending her dismissal as a member of the district's instructional staff. This action resulted from the allegation that on January 6, 2006, Ms. Thompson had attacked a disabled student, striking the child twice in the head.

Ms. Thompson timely requested a formal administrative hearing to contest Petitioner's intended action. Thus, on August 9, 2006, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. Thereafter, on August 22, 2006, the School Board filed its Notice of Specific Charges. (Later, on September 29, 2006, Petitioner filed an amended charging document.)

At the final hearing, which took place on October 17, 2006, Petitioner called the following witnesses: Henny Cristobol, Assistant Principal; John Messenger, Detective; Latanya Stephenson, Registrar; Respondent Cynthia Thompson; Dr. Alberto

Fernandez, Principal; and Gretchen Williams, Administrative Director, Office of Professional Standards. Petitioner's Exhibits 3, 16, 20-34, and 36-42 were received in evidence. Ms. Thompson, for her part, rested on the testimony she had given during Petitioner's case-in-chief and offered no exhibits.

The final hearing transcript was filed on November 22, 2006. Each party timely filed a Proposed Recommended Order before the established deadline, which was enlarged to December 15, 2006, at Petitioner's request.

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. As of the final hearing, Respondent Cynthia Thompson ("Thompson") had worked in the Miami-Dade County Public School System for approximately 16 years. From August 2002 forward, and at all times relevant to this case, Thompson was employed as an education paraprofessional at Neva King Cooper Education Center, where she provided educational services to students having severe developmental disabilities.

3. The alleged events giving rise to this case allegedly occurred on January 6, 2006. The School Board alleges that on that date, in the cafeteria at around 9:00 a.m., as a breakfast session was winding down, Thompson used her elbows to strike one of the students in her charge, a profoundly mentally handicapped, 15-year-old female named K. P., on the head. This allegation is based on the account of a single eyewitness—— Latanya Stephenson, the school's assistant registrar.[1]

4. Thompson consistently has maintained her innocence, denying that she hit K. P. as charged. She claims——and testified at hearing——that she merely used her arms to prevent K. P. from getting up to rummage through the garbage can in search of food and things to put in her mouth.

5. This, then, is a "she said——she said" case that boils down to a credibility contest between Thompson and Ms. Stephenson. If Ms. Stephenson's account is truthful and accurate, then Thompson is guilty of at least one of the charges against her. On the other hand, if Thompson's account is believed, then she is not guilty of misconduct. Given that the credibility determination drives the outcome, the undersigned will first, as a predicate to evaluating the evidence, set forth the two material witness's respective accounts of the incident in question, and then make determinations, to the extent possible, as to what might have happened. It is important to

note, however, that the findings in the next two sections merely report what each witness said occurred; these do not necessarily correspond to the undersigned's findings about what likely took place in the cafeteria at Neva King Cooper Education Center on January 6, 2006.

Stephenson's Story

6. Ms. Stephenson recounts that on the morning in question, while on break, she went to the cafeteria to get a snack. She went through the line, bought a cookie, and, before leaving the building, stopped to chat with two custodians who were sitting in a closet that holds supplies. As she leaned against a wall, listening to the custodians' conversation, Ms. Stephenson looked back into the cafeteria and, at a distance of about 10 to 12 feet, saw Thompson interact with K. P.

7. K. P. was sitting at a table, her chair pushed in close, hands in her lap. Thompson, whose hands were clasped in front of her body, approached K. P. from behind and——after "scanning" the room——struck her twice in the head, first with her right elbow and then, rotating her body, with her left elbow. Ms. Stephenson heard the blows, saw K. P.'s head move, and heard K. P. moan.

8. Ms. Stephenson called out Thompson's name, and Thompson, apologizing, explained that K. P. repeatedly had tried to pick through the garbage can in search of things to eat.

Thompson told Ms. Stephenson that she would not hit K. P. again, but that striking the student was an effective means of getting her to stay put.

9. Ms. Stephenson did not check on K. P. to see if she were injured or in need of assistance.

10. According to Ms. Stephenson, there were about 40 to 50 students in the cafeteria at the time, ranging in age from three to 22 years. There were also approximately 12 to 15 members of the instructional staff (i.e. teachers and paraprofessionals) present, meaning that, besides Thompson and Ms. Stephenson, about a dozen responsible adults were on hand at the time of the incident in dispute. Ms. Stephenson did not bring the incident to the attention of any of the teachers or paralegals who were in the cafeteria at the time.

Thompson's Testimony

11. Thompson was responsible for three students at breakfast that morning. The teacher under whose supervision she worked, Mr. Ibarra, was watching the other five students in the class. Mr. Ibarra was on one side of the table, Thompson the other.

12. Thompson was feeding one of her students, "R.", while watching K. P. and a third student. R. did not want to eat, so to coax him into opening his mouth, Thompson was playing an "airplane game" with him, trying to make the feeding fun.

Thompson had a plastic utensil in her right hand, with which she was feeding R. some applesauce (or similar food); in her left hand was a toy.

13. At the time of the alleged incident, some students had finished breakfast and been brought back to their classrooms. Still, there were quite a few people in the cafeteria, 60 to 80 by Thompson's reckoning, including adults.[2]

14. K. P. was sitting at the table, behind Thompson; they had their backs to one another. Consequently, while feeding R., Thompson needed to look over her shoulder to keep an eye on K. P. Suddenly, Thompson noticed K. P. starting to rise from her chair. (K. P. has a history of darting to the garbage can, grabbing food and trash, and putting these things in her mouth to eat.) Thompson reached back with her right arm and, placing her elbow on K. P.'s left shoulder, prevented the child from getting up. K. P. then tried slipping out to her (K. P.'s) right, whereupon Thompson swung around and, with her left arm, blocked K. P.'s escape.

15. Right after this happened, Ms. Stephenson spoke to Thompson, criticizing her handling of K. P. Thompson explained to Ms. Stephenson (who, as an assistant registrar, does not work directly with the children) that she simply had prevented K. P. from getting into the trash can. Ms. Stephenson walked away.

Soon thereafter, Mr. Ibarra said, "Let's go." The children were escorted back to the classroom.

Resolutions of Evidential Conflict

16. The competing accounts of what occurred are sufficiently in conflict as to the crucial points that both cannot simultaneously be considered fully accurate. The fact-finder's dilemma is that either of the two material witnesses possibly might have reported the incident faithfully to the truth, for neither witness's testimony is inherently incredible, impossible, or patently a fabrication. Having observed both witnesses on the stand, moreover, the undersigned discerned no telltale signs of deception in the demeanor of either witness. In short, neither of the competing accounts can be readily dismissed as false.

17. Of course, 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. As the fact-finder, the undersigned therefore must consider how likely it is that the incident took place as described by the respective witnesses.

18. In her testimony, Ms. Stephenson told of an unprovoked battery on a defenseless disabled person. It is an arresting story, shocking if true. Ms. Stephenson appeared to possess a clear memory of the event, and she spoke with confidence about

it. Nothing in the evidence suggests that Ms. Stephenson had any reason to make up the testimony she has given against Thompson.

19. Nevertheless, some aspects of Ms. Stephenson's testimony give the undersigned pause. There is, to start, the matter of the large number of persons——including at least a dozen responsible adults, not to mention about 50 students——who were on hand as potential witnesses to the alleged misdeed. The undersigned hesitates to believe that Thompson would attack a child in plain view of so many others, particularly in the absence of any provocation that might have caused her suddenly to snap.[3] The cafeteria would not likely have afforded Thompson a favorable opportunity for hitting K. P., were she inclined to do so.

20. Next, it puzzles the undersigned that Ms. Stephenson did not immediately signal to someone——anyone——in the cafeteria for help. The undersigned expects that a school employee witnessing the beating of a disabled child under the circumstances described by Ms. Stephenson would promptly enlist the aid of other responsible persons nearby. Indeed, the undersigned can think of no reason (none was given) for Ms. Stephenson's rather tepid response to a violent, despicable deed——other than that it did not happen exactly the way she described it.

21. Finally, Ms. Stephenson's incuriosity about K. P.'s condition after the alleged beating is curious. Having, she says, witnessed Thompson twice strike K. P. in the head with enough force that the blows could be heard over the din of dozens of children, and having heard K. P. moan, presumably in pain, Ms. Stephenson by her own admission made no attempt to ascertain whether the child was hurt or in need of attention. This indifference to the welfare of the alleged victim strikes the undersigned as inconsistent with Ms. Stephenson's testimony that Thompson attacked the child.

22. Turning to Thompson's testimony, she, like Ms. Stephenson, has not been shown to have a motive for lying about the incident in question——assuming she is innocent of the charges, which the undersigned must do unless and until the greater weight of the evidence proves otherwise. Thompson is, however, a convicted felon, which is a chink in her credibility's armor.

23. That said, there is nothing obviously discordant about her account of the relevant events. Her testimony regarding K. P.'s proclivity for diving into trashcans is corroborated by other evidence in the record, and the undersigned accepts it as the truth. Her testimony about the feeding of R. was not rebutted and therefore is credited. Her explanation for having

used her arms and elbows (while her hands were full) to block K. P. from racing to the garbage is believable.[4]

24. If there is anything eyebrow-raising about Thompson's testimony, it is that the blocking maneuver she described, quickly twisting her body around from right to left, elbows and arms in motion, seemingly posed the nontrivial risk of accidentally hitting the child, possibly in the head. One is tempted to speculate that Thompson unintentionally might have struck K. P. in the course of attempting to keep her from engaging in a potentially harmful behavior, namely eating refuse from the garbage can.[5]

25. The undersigned does not, however, think or find that this happened, more likely than not, because of the "dog that didn't bark"[6]——or, more particularly, the teachers and paraprofessionals who never spoke up. Most likely, if Thompson had struck K. P. in the manner that Ms. Stephenson described, then the noise and commotion would have attracted the attention of someone besides Ms. Stephenson. There were, after all, approximately 12 other members of the instructional staff nearby in the cafeteria when this alleged incident occurred. Yet, no one in a position to have witnessed the alleged attack——except Ms. Stephenson——has accused Thompson of wrongdoing, nor has anyone come forward to corroborate the testimony of Ms. Stephenson. This suggests that nothing occurred which the

instructional personnel, who (unlike Ms. Stephenson) regularly work directly with this special student population, considered unusual or abnormal.

26. Taken as a whole, the evidence is insufficient to establish that, more likely than not, Thompson struck K. P. as alleged. Based on the evidence, the undersigned believes that, as between the two scenarios presented, the incident more likely occurred as Thompson described it; in other words, relative to Stephenson's account, Thompson's is more likely true.

27. Accordingly, the undersigned accepts and adopts, as findings of historical fact, the statements made in paragraphs 6 and 9-15 above. The upshot is that the School Board failed to carry its burden of establishing, by a preponderance of the evidence, that Thompson committed a disciplinable offense.

Determinations of Ultimate Fact

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

29. The greater weight of the evidence fails to establish that Thompson is guilty of the offense of gross insubordination.

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

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

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

CONCLUSIONS OF LAW

33. 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.

34. 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).

35. 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).

36. 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).

37. The instructional staff member'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).

38. In its Amended Petitioner's Notice of Specific Charges filed on September 29, 2006, the School Board advanced five theories for dismissing Thompson: Misconduct in Office (Count I); Gross Insubordination or Willful Neglect of Duty (Count II); Violation of Corporal Punishment Policy (Count III); Unseemly

Conduct in Violation of School Board Policy (Count IV); and Violation of the Violence in the Workplace Policy (Count V).

39. Each of the School Board's several counts depends on the allegation that, on January 6, 2006, Thompson used her elbows to batter a disabled student about the head. The School Board, however, failed to prove this essential allegation by a preponderance of the evidence. Thus, all of the charges against Thompson necessarily fail, as a matter of fact. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law, with a few exceptions, which follow below, relating to corporal punishment.

40. 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."

41. 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.

42. 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. The archetypal form of corporal punishment is (or was) paddling.

43. 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 without necessarily administering "corporal punishment" on the student.

44. 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[.]").

45. 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.

46. All this is to say that, although Thompson physically made contact with K. P. during the disputed occurrence, the undersigned nevertheless determined, as a matter of ultimate fact, that such contact——which, viewed from an objective standpoint, was neither administered as a disciplinary measure nor such as reasonably would be expected to inflict bodily pain or discomfort——did not constitute "corporal punishment." This ultimate factual determination was informed by the legal conclusions set forth above.

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 Thompson of all charges brought against her in this proceeding; (b) providing that Thompson be reinstated to the position from which she was suspended without pay; and (c) awarding Thompson back salary, plus benefits, that accrued during the suspension period, together with interest thereon at the statutory rate.

DONE AND ENTERED this 22nd day of December, 2006, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2006.

ENDNOTES

[1]/ The alleged victim, who has the cognitive abilities of an infant, is nonverbal and thus unable to tell what she experienced.

[2]/ At hearing, Thompson testified that there had been 30 to 40 adults in the room. Possibly, in using the term "adults," Thompson meant to reference the staff plus the students who had reached the age of majority, although this seems unlikely. Probably she misspoke or was mistaken. In any event, the persuasive evidence establishes that there were approximately a dozen members of the instructional staff nearby during the alleged incident.

[3]/ To this can be added that there is no evidence whatsoever of motive.

[4]/ The School Board contends that Thompson made inconsistent statements about the incident during the questioning she faced by the principal, the detective, and other administrators after being accused of misconduct by Ms. Stephenson (whose account, in contrast, the relevant school personnel seem to have accepted uncritically during the investigative process). These alleged "inconsistencies" strike the undersigned as, at worst, the sort of immaterial linguistic variations that inevitably arise when a story is told and re-told multiple times.

[5]/ The undersigned rejects as unpersuasive the School Board's argument that K. P.'s fixation with food——which drives her to put things she finds in the trash into her mouth, including inedible objects such as plastic utensils——did not pose any danger to herself. Responsible adults do not let babies eat refuse from the garbage can, for lots of reasons, but ultimately because eating garbage is neither sanitary nor safe, raising at a minimum the possibilities of infection and choking. For the same reasons, the risk of harm that eating trash poses to K. P.——who is, cognitively, a baby——should be apparent to any reasonable person.

[6]/ The reference, which has worked its way into the popular culture, derives from Arthur Conan Doyle's short story "Silver Blaze," wherein one of the clues upon which Sherlock Holmes relies to solve the crime was the watchdog's failure to bark when the theft was committed, suggesting that the dog recognized the intruder.

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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.