

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 08-2679  
 )  
 ROBERT BLANC, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on September 25, 2008, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Janeen Richard, Esquire  
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For Respondent: Mark Herdman, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether a district school board is entitled to suspend for 30 workdays, without pay, a paraprofessional for just cause based upon the allegation that he kicked an autistic student and struck the student with an umbrella.

PRELIMINARY STATEMENT

At its regular meeting on May 21, 2008, Petitioner School Board of Miami-Dade County suspended Respondent Robert Blanc without pay for thirty workdays. This action resulted from the allegation that on October 12, 2007, Mr. Blanc kicked an autistic student and struck the student with an umbrella.

Mr. Blanc timely requested a formal administrative hearing to contest Petitioner's action. On June 5, 2008, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. Thereafter, on June 27, 2008, the School Board filed its Notice of Specific Charges.

At the final hearing, which took place on September 25, 2008, Petitioner called the following witnesses: Julie Ann Rodriguez, paraprofessional; Nemy Aimable, paraprofessional; Gilberto Bonce, Principal, South Miami Senior High School; and Lucy Iturrey, District Director, Office of Professional Standards. Petitioner's Exhibits 1 through 20 were received in evidence. Mr. Blanc testified on his own behalf and called Yvette Williams and Luis Fernandez, both of whom are teachers, as witnesses. Respondent offered no exhibits.

The final hearing transcript was filed on December 3, 2008. Each party timely filed a Proposed Recommended Order before the established deadline of December 15, 2008.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 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 Robert Blanc ("Blanc") had worked in the Miami-Dade County Public School System for more than 20 years. During the 2006-07 school year, and at all times relevant to this case, Blanc was employed as a therapeutic paraprofessional at South Miami Senior High School, where he provided educational services to students with disabilities.

3. The alleged incident giving rise to this case occurred on Friday, October 12, 2007. The School Board alleges that on that date, at approximately 2:30 p.m., Blanc kicked an autistic student named C. R. in the leg, and then used his umbrella to strike C. R. on the arm. This allegation is based on the accusations of two purported eyewitness (hereafter, collectively, the "Accusers")—Julie Ann Rodriguez and Nemy Aimable—both of whom were (and as of the final hearing

continued to be) education paraprofessionals working at South Miami Senior High School.

4. Blanc consistently has maintained his innocence, denying that he kicked or struck C. R. as charged. Moreover, he claims—and testified at hearing—that C. R. kicked him, and that he (Blanc) then used verbal commands to redirect C. R. and get the student to sit down, thereby protecting himself and others.

5. This case boils down to a credibility contest between the Accusers and Blanc. If the Accusers' account is truthful and accurate, then Blanc is guilty of at least one of the charges against him and should be disciplined. On the other hand, if Blanc's account is believed, then he 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 competing 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 unless otherwise specifically stated, the findings in the next two sections merely report what the respective witnesses *said* occurred; these do not necessarily correspond to the undersigned's findings about what likely took place on October 12, 2007.

### The Accusers' Story

6. While the respective accounts of Ms. Rodriguez and Mr. Aimable concerning the incident in question differ as to some nontrivial details, they agree on the big picture. Their story begins at about 2:30 on a Friday afternoon. The Accusers were on "bus duty," as were other staff members, as was Blanc. Ms. Rodriguez and Mr. Aimable were sitting next to one another on a wall or ledge overlooking a field of grass that lay between them and the road where a line of buses stood waiting for children to clamber aboard.

7. This was a busy time of day, and many people were moving about the bus loading area. Sitting on the long wall with the Accusers were a number of other school employees—at least 25 teachers and aides in all, maybe more, Ms. Rodriguez recalled (and the undersigned finds). Blanc, however, was not sitting on the wall; he was standing on the grass, among the students.

8. Ms. Rodriguez and Mr. Aimable were engaged in conversation, when suddenly each noticed Blanc—who was located about 10 feet in front of them—kick C. R. on the leg and strike the student with an umbrella across the upper body. Ms. Rodriguez recalls that C. R. was sitting down on a ledge, near other faculty members, when Blanc attacked. Mr. Aimable, in

contrast, remembers C. R. standing in the grass when Blanc struck.

9. According to Ms. Rodriguez, Blanc yelled at C. R., threatening to "beat up" the student if C. R. ever hit Blanc again. Mr. Aimable does not recall Blanc making such a threat, although he vaguely remembers Blanc uttering something about not letting C. R. get away with hitting him.

10. By their own admissions, which are accepted as credible and found as fact, neither of the Accusers saw anything that transpired between Blanc and C. R. before the alleged battery.

11. The altercation upset Ms. Rodriguez, and she began to cry. She and Mr. Aimable continued talking—but not about the battery they had just witnessed. It is undisputed that neither of them made any attempt to protect C. R. or other students from Blanc; nor did they examine C. R. for injuries or offer any assistance.<sup>1</sup> No one else did either. Apparently none of the other staff members on the scene saw Blanc attack C. R., and the Accusers (it is found, again based on undisputed evidence) did not mention to anyone sitting near them on the wall the remarkable event they had seen. About ten minutes later, the Accusers rose from the wall and walked to the office, where they would "sign out" for the day.

### Blanc's Testimony

12. Blanc, who was on bus duty the afternoon of Friday, October 12, 2007, was standing in the middle of the grassy area near the buses, chatting with another teacher, when he felt a sharp pain in his lower right leg. C. R. had just kicked him hard, without warning, and was now pressing very close, invading his personal space.

13. C. R. is a special education student who has been diagnosed with autism. He is reportedly nonverbal. (C. R. did not appear at the final hearing.) It is an undisputed fact that C. R. has a history of violent and assaultive behavior: he has injured teachers and once broke a bus driver's nose; in addition, he hurt a student by striking her in the stomach. Also material are the undisputed facts that C. R. is an adult-sized male who, at the time of the incident, was 17 years old, stood approximately six feet tall, and weighed about 200 pounds.

14. Blanc, who is blind in one eye, was taken by surprise when C. R. attacked him. Though his hands were full—Blanc was holding a collapsible umbrella in one hand and a coffee mug in the other—he raised his arms to protect his face, yelled at C. R. to sit down, and began backing C. R. toward the ledge, where he could be seated. This approach worked. C. R. sat down, and the situation was defused. At this point, Isidro

Alfonso, who is C. R.'s one-on-one paraprofessional, took charge of C. R.

15. Blanc immediately reported to his supervisor, Yvette Williams, that C. R. had kicked him. Ms. Williams was (and as of the final hearing continued to be) a special education teacher at South Miami Senior High School. She, too, was on bus duty that day but had arrived on the scene after the incident took place. Blanc told Ms. Williams that he was going home to put ice on his ankle, which hurt. Ms. Williams saw no need to report the incident because C. R. was known to lash out at teachers and others. Blanc, for his part, declined to make a formal report out of concern for Mr. Alfonso, who, he felt certain, would be disciplined for inattentiveness if the matter were brought to the attention of the administration.

#### Resolutions of Evidential Conflict

16. The competing accounts of what occurred are sufficiently in conflict that both cannot simultaneously be considered *fully* accurate. The fact-finder's dilemma is that neither account—the Accusers' on the one hand, Blanc's on the other—is inherently incredible, impossible, or patently a fabrication; neither, in short, can be readily or easily 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 evaluating the credibility of the witnesses who testified against Blanc, the undersigned has considered the relationship that existed between Ms. Rodriguez and Mr. Aimable, as well as their post-incident conduct.

19. As mentioned above, after the incident, the Accusers walked to the office together, arriving at about 2:45 p.m. At some point, they agreed to report what they had observed, namely that Blanc had physically attacked a disabled student. Yet, once the two were in the office, they decided that it was "too busy" there—and so, rather than waiting to be seen, they left after at most ten minutes, without telling anyone in authority that Blanc had (at least as they understood the situation) committed a battery on a minor.

20. This impatience seems a bit strange, given the circumstances. The undersigned supposes that a reasonable school employee, having witnessed an incident as serious as the one the Accusers claim to have seen, would have been *insistent* about speaking to someone in the administration about it. That the Accusers lacked such persistence does not completely discredit them, but it does raise doubts about their veracity.

21. Leaving the office, Ms. Rodriguez and Mr. Aimable walked to the parking lot, got into Ms. Rodriguez's car, and drove off the premises together, around three o'clock. This was not unusual for them: they carpoled to work. Ms. Rodriguez and Mr. Aimable were not, in other words, merely co-workers; they were co-workers who spent off-duty time together.

22. The Accusers made two stops on the way home that day, to pick up Ms. Rodriguez's children from their respective schools. Ms. Rodriguez then dropped off Mr. Aimable at his place. By that time, it was about 3:35 p.m.

23. At home, Mr. Aimable continued to stew about the incident, he says, and after about an hour, around 4:30, he called Ms. Rodriguez to ask that she pick him up and return with him to the school to report the matter. According to Mr. Aimable, Ms. Rodriguez assented; she arrived at his residence around 4:50 p.m. From there, they proceeded to the school, where they eventually found an assistant principal, Ms. Tudor. It was now around 5:30 Friday evening, some three hours after the alleged event.

24. Each of the Accusers prepared for Ms. Tudor a written statement about the incident. According to Mr. Aimable, this process took until about 6:45 p.m., at which time the Accusers went home.

25. Later Friday night, at a homecoming dance, Ms. Tudor notified the school's principal, Gilberto Bonce, about the complaint made earlier against Blanc; she also let him know that the Accusers' statements were on his desk. Mr. Bonce took no action that night, however, nor did he do anything in reference to alleged incident over the weekend or during the following Monday, October 15. Curiously, in view of the possibility (if the Accusers were believed) that one of his staff might have committed a crime against a student, Mr. Bonce did not report the matter to the school police until Tuesday, October 16, 2007.

26. All in all, the circumstances—especially the following—give the undersigned reasons to discount the Accusers' testimonies. The failure of Ms. Rodriguez and Mr. Aimable to take any immediate action at the scene of the incident not only is inconsistent with their claim to have seen Blanc beat C. R., but also it ensured that there would be no better evidence than their eyewitness accounts of a sudden and unexpected, fast-moving event whose duration can be measured in seconds. Had the Accusers gone to the aid of C. R., *as a reasonable, responsible adult in their position should have done*, they could have examined him for injuries. If Blanc had given C. R. a hard kick in the leg and struck him with an umbrella, the blows likely would have left at least a red mark somewhere on the student's body. Mr. Aimable, for example,

could have studied such a mark or welt, not for a moment, but long enough to form a firm, lasting impression, one less subject to misinterpretation or distortion than the mental image left behind after catching a fleeting glimpse of activity that occurred unexpectedly in his field of vision, while focused on something else. Testimony about such an injury would have been compelling. But there was none.

27. The Accusers' decision not to report the incident immediately because it was too "busy" in the office is inconsistent with the gravity of the alleged misconduct. But more than that, because Ms. Rodriguez and Mr. Aimable left the premises together before telling anyone about what they claim they saw, the two had ample opportunity to talk privately for a couple of hours—plenty of time to "get their story straight." One does not need to believe that the Accusers consciously intended to harm Blanc to realize that their discussing the incident (which they must have done—after all, they returned to the school on a Friday evening to make a report about it) likely helped them reach a consensus about what had happened, potentially corrupting their memories in the process. The Accusers' respective accounts are not, at bottom, *independent* accounts, and may, in fact, be *dependent* on one another.<sup>2</sup> Indeed, in this case, one eyewitness might have been more persuasive than these two.

28. Finally, it is significant that, while the incident took place in full view of more than two dozen responsible adults, not one of them intervened—and no one (besides the Accusers) even saw the altercation. To be sure, these facts cut both ways: nobody saw C. R. kick Blanc or intervened to help *him* either. Nevertheless, as between the competing scenarios, it seems more likely that C. R. was the attacker, rather than the other way around, for at least two reasons. First, C. R. had a history of assaultive behavior whereas Blanc did not. Second, if Blanc were inclined to hit C. R., he likely would have refrained from doing so in broad daylight before an audience of his peers. C. R., on the other hand, being severely autistic and physically aggressive in nature, would not likely have been deterred by the presence of witnesses.

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

30. Accordingly, the undersigned accepts and adopts, as findings of historical fact, the statements made in paragraphs 12 through 15 above. The upshot is that the School Board failed

to carry its burden of establishing, by a preponderance of the evidence, that Blanc committed a disciplinable offense.

#### Determinations of Ultimate Fact

31. The greater weight of the evidence fails to establish that Blanc is guilty of the offense of violating the School Board's policy against violence and threatening behavior in the workplace.

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

33. The greater weight of the evidence fails to establish that Blanc is guilty of violating the School Board's Code of Ethics.

#### CONCLUSIONS OF LAW

34. 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.

35. A district school board employee against whom a disciplinary 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).

36. 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. 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).

37. 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).

38. 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).

39. In its Notice of Specific Charges filed on June 27, 2008, the School Board advanced three theories for suspending Blanc: Violation of the Violence in the Workplace Policy (Count I); Unseemly Conduct in Violation of School Board Policy (Count II); Violation of School Board Policy Establishing a Code of Ethics (Count III).

40. Each of the School Board's several counts depends on the allegation that, on October 12, 2007, Blanc "kicked an autistic student and struck [the student] with an umbrella." The School Board, however, failed to prove this essential allegation by a preponderance of the evidence. Thus, all of the charges against Blanc necessarily fail, as a matter of fact. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law.

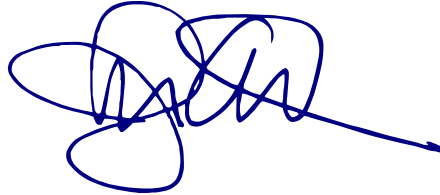
#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order exonerating Blanc of all charges brought against him in this proceeding and awarding him the back pay, plus benefits if any,



which accrued while he served the previously imposed suspension of 30 workdays.

DONE AND ENTERED this 6th day of January, 2009, in Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of January, 2009.

ENDNOTES

<sup>1/</sup> Any fact identified herein as "undisputed" is hereby adopted as a finding.

<sup>2/</sup> To be sure, the undersigned need not find (and is not saying) that either Ms. Rodriguez or Mr. Aimable deliberately gave false testimony. For that matter, the undersigned is not finding that either one's memory *necessarily* was distorted by talking to the other. The point of the above discussion, rather, is to explain why the undersigned, as fact-finder, has elected to discount the probative value of the Accusers' account.

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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.