

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 08-2680
)
MARITZA WAGENSOMMER,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,¹ before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on October 17, 2008, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Janeen Richard, Esquire
 Miami-Dade County School Board
 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

Whether Respondent committed the violations alleged in the Notice of Specific Charges and, if so, what disciplinary action should be taken against her.

PRELIMINARY STATEMENT

By letter dated May 22, 2008, Respondent was notified that the Miami-Dade County School Board (School Board), at its May 21, 2008, meeting, had taken action to suspend her without pay from her teaching position and initiate dismissal proceedings against her. Respondent subsequently "request[ed] a hearing to be held before an administrative law judge" on the matter. Respondent's hearing request was referred to DOAH on June 6, 2008.

On September 30, 2008, the School Board filed a Notice of Specific Charges (Notice). The Notice contained the following Statement of Facts:

Statement of Facts

7. At all times material hereto, Petitioner employed Respondent as a Teacher pursuant to a professional service contract. Respondent was assigned to Palm Springs Middle School.

8. In 1992, an allegation was made that Respondent taped two students' mouths shut. The Allegation was referred to M-DCPS Special Investigation Unit for investigation (Case No. 92-0946). The allegations were substantiated. As a result, Respondent received a written reprimand with clear directives to refrain from demeaning

students or punishing them by taping their mouths. In addition, Respondent was directed to conduct herself in a professional manner at all times.

9. In 1995, an allegation was made that Respondent hit a student with a stack of papers (Case No. 95-12689). The school principal investigated this allegation, as an Administrative Review, and substantiated the allegation that Respondent inappropriately disciplined a student. Respondent was directed once again to refrain from touching or tapping students as a form of discipline and to conduct herself in a professional manner.

10. In December of 2003, an allegation was made that Respondent pulled a student's hair (Case No. J08655). The allegation was substantiated as a violation of Board Rule 6Gx13-5D-1.07 Corporal Punishment-Prohibited. Respondent received a letter of reprimand. For the third time, Respondent was directed to refrain from using any physical means to affect student behavior.

11. On about November 8, 2004, John L. Winn, the Florida Commissioner of Education, filed against Respondent an Administrative Complaint with the Education Practices Commission ("EPC") alleging that Respondent had "inappropriately disciplined . . . A. G., a 13-year-old female student by pulling A. G. by the hair and jerking her head back. Thereafter, Respondent attempted to inappropriately influence the testimony of student witnesses."

12. Respondent entered into a settlement agreement whereby she agreed to the issuance of [a] formal reprimand. The EPC accepted the settlement and Respondent was reprimanded.

13. During the 2007-2008 school year, allegations were made that Respondent pushed

and grabbed students, threatened them, and forced them to stand for [an] extended period of time with book bags on their heads. Respondent was notified of the allegations and was assigned to an alternate location at the Region office pending the investigation of the matter.

14. The allegation was assigned to School Police for investigation (SPAR Case No. N-85085). After interviewing several witnesses including Respondent the police detective found probable cause that Respondent violated School Board Rule 6Gx13-5D-1.07, Corporal Punishment-Prohibited.

15. On about February 6, 2008, a conference-for-the-record was held with Respondent in the Office of Professional Standards ("OPS") to address the investigative findings and her future employment with M-DCPS. After consulting with several administrators, OPS recommended to terminate Respondent's employment.

16. On or about April 2, 2008, Respondent was advised of the recommended disciplinary action and of her right to seek final review by the Superintendent or his designee.

17. On or about May 7, 2008, Respondent was notified by letter that the Superintendent of Schools was recommending to the School Board to suspend her without pay and initiate dismissal proceedings. The letter further notified Respondent the reasons for the recommendation included, but was not limited to, misconduct in office [and] violations of School Board Rules 6Gx13-5D-1.07, Corporal Punishment-Prohibited and 6Gx-13-4A-1.21, Responsibilities and Duties.

18. Petitioner, at its regularly scheduled meeting on May 21, 2008, took action to suspend Respondent without pay and initiate dismissal proceedings for just cause including, but not limited to misconduct in

office and violations of those School Board Rules set forth above. Respondent was notified of the Board action by letter dated May 22, 2008.

There were four counts set forth in the Notice: Count I, alleging "misconduct in office," as defined in Florida Administrative Code Rule 6B-4.009(3); Count II, alleging a violation of the School Board's "policy on corporal punishment" set forth in School Board Rule 6Gx13-5D-1.07; Count III, alleging a violation of School Board Rule 6Gx13-4A-1.21, which describes the "responsibilities and duties" of School Board employees; and Count IV, alleging "gross insubordination" by the "continued failure to comply with administrative directives regarding appropriate behavior" and the "repeated failure to comply with School Board policies and procedures."

The final hearing in the instant case was held, as noted above, on October 17, 2008. Nineteen witnesses testified at the hearing: Student Y. L., Parent L. S., Student J. T., Student I. M., Detective Steven Hadley, Cortnye Arce, Niki Ruiz, Melissa Wolin, Jennifer Andreu, Milagros Hernandez, Respondent, Jose Fernandez, Maria Delgado de Perez, Jose Macios, Varinia Asencio, Student E. R., Student I. R., Student A. V., and Student E. V. In addition, 29 exhibits (Petitioner's Exhibits 1 through 29) were offered and received into evidence. At the close of the evidentiary portion of the hearing on October 17, 2008, the

undersigned established a deadline (30 days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The Transcript of the final hearing (which consists of two volumes) was filed with DOAH on November 7, 2008.

The School Board and Respondent both filed their Proposed Recommended Orders on December 8, 2008.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. The School Board is responsible for the operation, control and supervision of all public schools (grades K through 12) in Miami-Dade County, Florida (including, among others, Phillis Wheatley Elementary School (Phillis Wheatley) and Palm Springs Middle School (Palm Springs)), and for otherwise providing public instruction to school-aged children in the county.

2. Respondent is now, and has been since October 1987, employed as a classroom teacher by the School Board. She holds a professional services contract.

3. Respondent first taught for the School Board at Phillis Wheatley. In 1996, she moved to Palm Springs, where she remained until she was "assigned to a paid administrative placement at [the] Region Center I [effective October 4, 2007]

pending the resolution of investigative case # N-85085"
(referenced in paragraph 14 of the Notice of Specific Charges).

4. Respondent has previously been disciplined by the School Board for using physical means to control student behavior.

5. In 1992, following an investigation during which Respondent "admitted to placing tape on one student's mouth and telling the other to place the tape on his mouth" and "also admitted to hitting a student on the head with a dictionary and tapping another student on the hand with a ruler," she received the following "letter of reprimand" from her principal at Phillis Wheatley:

On August 8, 1992, you were charged with conduct unbecoming a School Board employee and battery of students.

You violated the Chapter 6B-1.01(3), Code of Ethics of the Education Profession in Florida, and Dade County School Board Rule 6Gx-13-4A-1.21, "Conduct Unbecoming a School Board Employee." The above infractions were substantiated by the Special Investigative Unit, Case No. 92-00946.

You are directed to comply with the procedures outlined in the Chapter 6B-1.01(3), Code of Ethics of the Education Profess[ion] in Florida, to refrain from demeaning students, punishing them by taping mouths, touching or taping students to discipline them or to demonstrate affection, and to conduct yourself in a professional manner.

Any recurrence of the infractions will result in further disciplinary actions.

6. In 1995, Respondent was reprimanded for striking a student with a stack of papers and received the following "Confirmation of Administrative Action" from the Phillis Wheatley principal:

Please be advised that after a complete investigation of Case Number 95-12689 done by this administrator the following guidelines must be reviewed with this administrator.

1. Review the faculty handbook pg 18, on Corporal Punishment.
2. Review a copy of School Board Rule 6Gx4A-1.21, Employee Conduct, and Chapter 6B-1.01(3), Code of Ethics of the Education Profession in Florida.
3. You are to refrain from touching or tapping students to discipline them and you must conduct yourself in a professional manner at all times.

Any recurrence of this infraction will result in further disciplinary action.

7. In 2004, after determining that Respondent had "acted inappropriately" when, in anger, she had "grabbed" a student by the "hair yanking [the student's] head backwards," the Palm Springs principal issued Respondent the following written reprimand:

On December 11, 2003, you inappropriately disciplined (a) student(s) while waiting in front of the cafeteria.

You violated the Contract between the Miami-Dade County Public Schools and the United Teachers of Dade, Article VIII, Section 1. [a]s well as School and Miami-Dade County School Board Rules, 6Gx13-5D-1.07, Corporal Punishment, and 6Gx13-5D-1.08, Code of Student Conduct.

It is your responsibility as a classroom teacher to maintain control and discipline of students. However, it is imperative that you follow school and Miami-Dade County School Board rules in doing so. Rules governing student discipline a[re] outlined in the Code of Student Conduct, Board Rule 6Gx13-5D-1.08, faculty handbook, and Promoting and Maintain[ing] a Safe Learning Environment document, and are referenced in the United Teachers of Dade Contract, Article VII, Section I.

You are directed immediately to refrain from using any physical means to affect student behavior.

You are directed immediately to implement the appropriate procedures for dealing with inappropriate student behavior as stipulated in the documents above[].

The above infraction was substantiated by an Administrative Review, Case Number J08655.

You are directed to refrain from using inappropriate procedures in the performance of your assigned duties. You are directed to implement immediately, approved procedures in the performance of your assigned duties.

Any recurrences of the above infraction will result in further disciplinary action.

8. As a School Board employee, Respondent is expected to conduct herself in accordance with School Board rules, including

the aforementioned School Board Rules 6Gx13-4A-1.21 and 6Gx13-5D-1.07.

9. At all times material to the instant case, School Board Rule 6Gx13-4A-1.21I has provided as follows:

Permanent Personnel

RESPONSIBILITIES AND DUTIES

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 presence of students is expressly prohibited.

10. At all times material to the instant case, School Board Rule 6Gx13-5D-1.07 has provided, in pertinent part, as follows:

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 action depending upon the severity of the misconduct. Procedures are in place for students to make up any work missed while on suspension, or to participate in an alternative program if recommended for expulsion.

11. As an instructional employee of the School Board, Respondent is a member of a collective bargaining unit represented by the United Teachers of Dade (UTD) and covered by a collective bargaining agreement between the School Board and UTD (UTD Contract).

12. Article V of the UTD Contract addresses the subject of "[e]mployer [r]ights."

13. Section 1 of Article V provides, in part, that the School Board has the exclusive right to suspend, dismiss or terminate bargaining unit employees "for just cause."

14. Article VIII of the UTD Contract addresses the subject of "[s]afe learning environment."

15. Section 1.D. of Article VIII provides as follows:

The parties recognize the potential for difficult circumstances and problems related to the use of corporal punishment. Accordingly, the parties agree that such punishment shall be prohibited as a disciplinary option, and further agree to act affirmatively in continuing to identify and implement more effective alternatives for dealing with student behavior. The involvement of school-site personnel in developing such alternatives is critical to their potential for success.

16. Article XXI of the UTD Contract addresses the subject of "[e]mployee [r]ights and [d]ue [p]rocess."

17. Section 1.B.1.a. of Article XXI provides that "[a]ny member of the instructional staff may be suspended or dismissed at any time during the school year, provided that the charges against him/her are based upon Florida Statutes."

18. Section 1.B.2. of Article XXI provides, in part, that "[d]ismissals and suspensions shall be effected in accordance with applicable Florida Statutes, including the Administrative Procedures Act (APA)"

19. In the instant case, the School Board is seeking to dismiss Respondent based on conduct in which she allegedly engaged during the 2007-2008 school year.

20. While assigned to Palm Springs during the 2007-2008 school year, Respondent taught three periods of language arts to sixth and seventh grade Spanish-speaking ESOL students. She also had responsibility for a sixth grade homeroom class.

21. Y. L., J. T., and I. M. were sixth grade students at Palm Springs during the 2007-2008 school year. They each had Respondent for homeroom and language arts for a brief time during the beginning of that school year.

22. At all material times during the 2007-2008 school year, Respondent understood that the School Board had a policy "strictly prohibit[ing]" the use of corporal punishment.

23. Nonetheless, on more than one occasion during this time period, Respondent used physical means to redirect Y. L. She grabbed him by the hair and pulled him by the arm, hurting him in the process. She also "grabbed other students by their arms" to control their behavior.

24. Respondent made threats to throw Y. L. and other students out the window if they did not behave. Although Respondent had no intention of carrying out these threats, Y. L. believed that the threats were real and that Respondent meant what she had said. On one occasion, Respondent opened a window, had Y. L. stand next to it, and told him that if he moved at all, she would toss him out the open window.

25. As a disciplinary measure, Respondent had Y. L. pick up his wheel-equipped book bag (filled with textbooks and notebooks for all his classes) and hold it on top of his head for an extended period of time while he was standing in place. Y. L. felt some discomfort in his shoulder when he did this.

26. Afraid of Respondent, Y. L. often "hid[]" in the bathroom" at school instead of going to Respondent's classroom.

27. On numerous occasions, Y. L.'s mother had to pick him up from school before the end of the school day because he had vomited.

28. At home, Y. L. had trouble sleeping and refused to eat. He lost approximately 20 pounds (going from 100 pounds down to 80).

29. Y. L. was not the only student that Respondent directed to stand with a filled book bag on his head. J. T. and I. M. were also issued such a directive by Respondent. It happened the first week of the school year on a day when the students remained in their homeroom classes until dismissal because of a power outage that left the school without lights and air conditioning for much of the day.

30. Towards the end of the day (after power had been restored to the school), J. T. and I. M. were talking to one another when they were not supposed to. In response to their transgression, Respondent instructed them to stand in separate corners of the classroom and hold their book bags (which were similar to Y. L.'s) on top of their heads.² The book bags remained on their heads for a substantial enough period of time to cause them to experience pain.³

31. Y. L., J. T., I. M., and their parents complained to the Palm Springs administration about Respondent's disciplinary tactics.

32. In response to Y. L.'s and his mother's complaints, one of the school's assistant principals, Niki Ruiz, interviewed "randomly selected" classmates of Y. L.'s. These students "corroborated what Y. [L.] was saying."

33. On September 26, 2007, the matter was turned over to the School Board's General Investigative Unit (GIU) for investigation.

34. Respondent was removed from the classroom and placed on alternative assignment pending the outcome of the investigation.

35. Following the GIU investigation, the matter was referred to the School Board's Office of Professional Standards.

36. There was a conference-for-the-record held on February 6, 2008, at which Respondent had the opportunity to tell her side of the story. In her remarks, she expressed a disdain for authority when she said, "I'm very professional but I don't stick to rules."

37. The School Board's Superintendent of Schools recommended that the School Board suspend Respondent and initiate termination proceedings against her.

38. The School Board took such action at its May 21, 2008, meeting.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

40. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat.

41. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See §§ 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat.

42. The latter statutory provision, Section 1012.23(1), Florida Statutes, grants district school boards the authority to "adopt rules governing personnel matters."

43. The "rules governing personnel matters" that have been adopted by the School Board include School Board Rules 6Gx13-4A-1.21 (dealing with "[r]esponsibilities and [d]uties") and 6Gx13-5D-1.07 (which prohibits "[c]orporal [p]unishment").

44. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat. As such, it has the right

"to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons," provided it exercises these powers in a manner that is consistent with the requirements of law. § 447.209, Fla. Stat.

45. At all times material to the instant case, district school boards have had the right, under Section 1012.33, Florida Statutes, to dismiss professional service contract teachers for "just cause."

46. At all times material to the instant case, "just cause," as used Section 1012.33, Florida Statutes, has been legislatively defined to include, "but . . . not [be] limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude." The "but . . . not limited to" language in the statute makes abundantly clear that the list of things constituting "just cause" was intended by the Legislature to be non-exclusive and that other wrongdoing may also constitute "just cause" for dismissal. See Dietz v. Lee County School Board, 647 So. 2d 217, 218-19 (Fla. 2d DCA 1994)(Blue, J., specially concurring)("We assume that drunkenness and

immorality, which are not included in the non-exclusive list of sins [set forth in Section 231.36(1)(a), Florida Statutes (2001), the predecessor of Section 1012.33, Florida Statutes] constituting just cause, would also be grounds for dismissal. . . . In amending section 231.36 and creating a new contract status for teachers (professional service) and by failing to further define just cause, the legislature gave school boards broad discretion to determine when a teacher may be dismissed during the contract term. . . . I agree with the majority--that the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause.'"⁴).

47. At all times material to the instant case, "misconduct in office" has been defined by rule of the State Board of Education (specifically Florida Administrative Code Rule 6B-4.009⁵), as follows:

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.

48. The Code of Ethics of the Education Profession (set forth in Florida Administrative Code Rule 6B-1.001), at all times material to the instant case, has provided as follows:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

49. The Principles of Professional Conduct for the Education Profession in Florida (set forth in Florida Administrative Code Rule 6B-1.006), at all times material to the instant case, have required a teacher to, among other things, "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"; "not intentionally expose a student to unnecessary embarrassment or disparagement"; and "not intentionally violate or deny a student's legal rights."

50. "Misconduct in office" may be established, even in the absence of "specific" or "independent" evidence of impairment, where the conduct engaged in by the teacher is of such a nature

that it "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands County School Board, 752 So. 2d 127, 128-29 (Fla. 2d DCA 2000); Summers v. School Board of Marion County, 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995); Brevard County School Board v. Jones, No. 06-1033, 2006 Fla. Div. Adm. Hear. LEXIS 287 *17 (Fla. DOAH June 30, 2006)(Recommended Order)("[T]he need to demonstrate 'impaired effectiveness' is not necessary in instances where the misconduct by a teacher speaks for itself, or it can be inferred from the conduct in question."); and Miami-Dade County School Board v. Lefkowitz, No. 03-0186, 2003 Fla. Div. Adm. Hear. LEXIS 675 *23-24 (Fla. DOAH July 31, 2003)(Recommended Order)("The School Board failed to prove by a preponderance of the direct evidence that Mr. Lefkowitz's actions were so serious that they impaired his effectiveness as a teacher. Nonetheless, based on the findings of fact herein, it may be inferred that Mr. Lefkowitz's conduct impaired his effectiveness as a teacher in the Miami-Dade County public school system.")(citation omitted). Disciplining a student for

talking in class by making him stand in front of his classmates with a heavy book bag on his head, as Respondent did the instant case, is an example of such conduct that "speaks for itself."

51. At all times material to the instant case, "gross insubordination" has been defined by Florida Administrative Code Rule 6B-4.009 as "a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority." An isolated act of defiance does not fall within this definition. See Smith v. School Board of Leon County, 405 So. 2d 183, 185 (Fla. 1st DCA 1981)("As to the latter charge, her actions did not meet the definition of 'gross insubordination' since they were an isolated outburst and could not have been deemed 'constant or continuing.'").

52. "Under Florida law, a [district] school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."⁶ Sublett, 617 So. 2d at 377.

53. Where the employee is a professional service contract teacher, the hearing may be conducted, pursuant to Section 1012.33, Florida Statutes, either by the district school board itself or by a DOAH administrative law judge (who, following the hearing, makes a recommendation to the district school board).

54. The teacher 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, or policy] the [district 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).

55. The teacher may be suspended without pay pending the outcome of the termination proceeding; "but, if the charges are not sustained, the [teacher] shall be immediately reinstated, and his or her back salary shall be paid." § 1012.33(6)(a), Fla. Stat.

56. At the termination hearing, the burden is on the district school board to prove the allegations contained in the notice. Unless there is a collective bargaining agreement covering the bargaining unit of which the teacher is a member that provides otherwise⁷ (and there is not such a collective bargaining agreement controlling the instant case), the district school board's proof need only meet the preponderance of the evidence standard. See Cisneros v. School Board of Miami-Dade County, 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008)("As the ALJ properly found, the School Board had the burden of proving the

allegations of moral turpitude by a preponderance of the evidence."); McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal."); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We agree with the hearing officer that for the School Board to demonstrate just cause for termination, it must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true"); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not involve the loss of a license and, therefore, Allen's losses are adequately protected by the preponderance of the evidence standard."); and Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence to support both charges by a preponderance of the evidence standard.").

57. In determining whether the district school board has met its burden of proof, it is necessary to evaluate the district school board's evidentiary presentation in light of the specific allegation(s) made in the written notice of charges. Due process prohibits a district school board from terminating a professional service contract teacher based on matters not specifically alleged in the notice of charges, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

58. In the instant case, the School Board has alleged in its Notice that "just cause" exists to terminate Respondent's employment as a professional service contract teacher with the School Board because (as alleged in the Notice's thirteenth numbered paragraph), during the 2007-2008 school year, she "pushed and grabbed students, threatened them, and forced them to stand for [an] extended period of time with book bags on their heads."⁸ According to the Notice, by engaging in this conduct, Respondent committed "misconduct in office," as defined in Florida Administrative Code Rule 6B-4.009(3) (Count I); violated the School Board's "policy on corporal punishment" set forth in School Board Rule 6Gx13-5D-1.07 (Count II); violated

School Board Rule 6Gx13-4A-1.21, describing the "responsibilities and duties" of School Board employees (Count III); and engaged in "gross insubordination" (Count IV).

59. The preponderance of the record evidence establishes that, during the 2007-2008 school year, in an effort to control student behavior, Respondent (as alleged in paragraph (13) of the Notice) "grabbed" a student (Y. L.) by his hair and arm and "grabbed" other students by their arms; "threatened" to throw students out the classroom window; and directed students "to stand for [an] extended period of time with book bags on their heads"; and that she did so despite having received reprimands in previous years directing that she cease using these types of measures to affect the conduct of her students.

60. By dealing with her students in such a manner, Respondent engaged in the wrongdoing charged in Counts I through IV of the Notice.

61. Having established that she engaged in this wrongdoing, the School Board has "just cause," as defined in Section 1012.33(1)(a), Florida Statutes, to dismiss Respondent pursuant to Subsection (6)(a) of the statute.

RECOMMENDATION

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

RECOMMENDED that the School Board issue a final order sustaining Respondent's suspension and terminating her employment as a professional service contract teacher with the School Board for the reasons set forth above

DONE AND ENTERED this 16th day of December, 2008, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of December, 2008.

ENDNOTES

1/ Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2008).

2/ The undersigned rejects, as contrary to the greater weight of the evidence, Respondent's claim that her "actions toward I. M. and J. T. were playful [not punitive] in nature" and that she was merely "joking around with the students about putting book bags on their heads if they did not stop clowning around." It is reasonable to assume that, had Respondent not been serious, she would have immediately attempted to stop the boys when they started to put the book bags on their heads. Respondent, however, acknowledged at hearing that she did not take such action. According to her testimony, her reaction when she saw J. T. and I. M. with their book bags on their heads was,

not to tell them to put the bags down, but rather to laugh at them, along with the rest of the class.

3/ Relying on the credible testimony of J. T. and I. M., the undersigned finds that Y. L. was mistaken when he testified about his being involved in this incident.

4/ Judge Blue noted in his opinion that the Legislature provided a "separate standard for dismissal" for continuing contract teachers which authorized the taking of such action only "for conduct constituting one of the so-called 'seven deadly sins': immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude." Id. at 218.

5/ Florida Administrative Code Rule 6B-4.009 "define[s]" the "basis for charges upon which dismissal action against instructional personnel may be pursued."

6/ "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

7/ Where the district school board, through the collective bargaining process, has agreed to bear a more demanding standard, it must honor, and act in accordance with, its agreement. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment"); and Palm Beach County School Board v. Auerbach, No. 96-3683, 1997 Fla. Div. Adm. Hear. LEXIS 5185 *13-14 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . . However, in this case, the district must comply with the terms of the collective bargaining agreement, which, as found in

paragraph 27, above, requires the more stringent standard of proof: clear and convincing evidence.").

8/ No allegations of name-calling on Respondent's part were made in the Notice. Accordingly, contrary to the suggestion made by the School Board in its Proposed Recommended Order, that Respondent may have also "called [her students] dumb" cannot play any role in the outcome of this case.

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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.