

STATEMENT OF THE ISSUE

Whether Respondent engaged in the conduct alleged in the Notice of Specific Charges, as amended at hearing, and, if so, whether such conduct constituted "just cause" to suspend her from her teaching position for 25 workdays without pay.

PRELIMINARY STATEMENT

By letter dated February 16, 2012, from Miami-Dade County School Board (School Board) Administrative Director Ana Rasco, Ed.D., Respondent was notified that the School Board had taken action to suspend her from her teaching position at West Hialeah Gardens Elementary School (WHGES) for 25 workdays (from February 16, 2012, through March 21, 2012) without pay. Respondent, by letter dated that same day (February 16, 2012), "request[ed] a hearing [on the matter] to be held before an administrative law judge." Respondent's hearing request was referred to DOAH on March 2, 2012.

On July 26, 2012, the School Board filed a Notice of Specific Charges, which, in its "Statement of Facts," alleged that Respondent had engaged in the following conduct:

8. During her employment with the School District, Respondent has exhibited behavior that illustrates poor judgment. Specifically, Respondent (a) failed to strive to achieve or sustain the highest degree of ethical conduct and integrity, (b) failed to conduct herself in a manner that would reflect credit upon herself or the school system, (c) failed to make every

effort to protect students from conditions harmful to learning and/or to the students' mental and/or physical health and/or safety, and/or (d) failed to use proper measures of discipline.

9. As a result of Respondent's poor judgment and because her conduct was not in the best interests of the students, specifically the elementary school students to whom she was assigned, the School Board suspended her for twenty-five (25) workdays without pay.

10. On or about October 3, 2011,^[2/] Respondent committed a battery on a fourth-grade student (E[.]A[.]) who was enrolled in Respondent's class; E[.]A[.] suffers from a Specific Learning Disability. Respondent, while yelling at E[.]A[.] and in the presence of other students and staff, punched E[.]A[.] twice in the arm. While this battery was committed in a common area of the school, Respondent punched E[.]A[.] with such force that it made a noise, which was heard by a teacher and students in [an] adjacent area of the school.

11. Respondent's battery on E[.]A[.] was unprovoked and is in contravention of School Board Policies.

12. While Respondent was [p]unching E[.]A[.], she also used profanity in the presence of E[.]A[.] and other students in Respondent's class.

13. As a result of Respondent's egregious act as referenced in paragraphs 10-12 above, E[.]A[.] was physically harmed and began to cry.

The Notice alleged that, based on these "[f]acts," Respondent was guilty of "misconduct in office," as defined in Florida Administrative Code Rule 6B-4.009(3) (Count I); violated School

Board Policy 3210, Standards of Ethical Conduct (Count II); violated School Board Policy 3210.01, Code of Ethics (Count III); and violated School Board Policy 5630, Corporal Punishment and Use of Reasonable Force (Count IV), thus giving the School Board "just cause" to suspend Respondent.

As noted above, the final hearing in the instant case was held on September 24, 2012.^{3/} Testifying on behalf of the School Board were Maria Pineiro, Kristina Pena, C. S., A. M., L. R. T., E. A., R. B., Sharon Gonzalez, and Dr. Jimmie Brown. The School Board also offered into evidence 23 exhibits (School Board Exhibits 1 through 23), all of which were received. Respondent testified on her own behalf. She presented no other evidence.

At the conclusion of the hearing, the undersigned announced, on the record, that the parties would have 10 days from the date of the filing of the hearing transcript with DOAH to file their proposed recommended orders. The hearing Transcript (consisting of one volume) was filed with DOAH on November 13, 2012. On November 16, 2012, Petitioner filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders. By Order issued November 20, 2012, the motion was granted and the proposed recommended order filing deadline was extended to December 13, 2012. On December 10, 2012, Respondent filed a Motion for Extension of Time to File

Proposed Recommended Orders, which was unopposed. By Order issued December 11, 2012, the motion was granted and the proposed recommended order filing deadline was further extended to December 20, 2012.

Respondent and Petitioner timely filed their Proposed Recommended Orders on December 20, 2012.

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, WHGES), and for otherwise providing public instruction to school-aged children in the county.

2. Among the personnel policies that that the School Board has adopted to govern the conduct of its personnel working at these public schools in the county are School Board Rule Policy 3210, Standards of Ethical Conduct; School Board Policy 3210.01, Code of Ethics; and School Board Policy 5630, Corporal Punishment and Use of Reasonable Force.

3. At all times material to the instant case, School Board Rule Policy 3210 has provided, in pertinent part, as follows:

All employees are representatives of the District and shall conduct themselves, both in their employment and in the community, in

a manner that will reflect credit upon themselves and the school system.

A. An instructional staff member shall:

* * *

3. 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;

* * *

7. not intentionally expose a student to unnecessary embarrassment or disparagement;

8. not intentionally violate or deny a student's legal rights;

* * *

21. not use abusive and/or profane language or display unseemly conduct in the workplace;

4. At all times material to the instant case, School Board Policy 3210.01 has provided, in pertinent part, as follows:

Each employee agrees and pledges:

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

B. To obey local, State, and national laws, codes and regulations.

C. To support the principles of due process to protect the civil and human rights of all individuals.

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

E. To take responsibility and be accountable for his/her actions.

F. To avoid conflicts of interest or any appearance of impropriety.

G. To cooperate with others to protect and advance the District and its students.

H. To be efficient and effective in the performance of job duties.

* * *

Conduct Regarding Students

Each employee:

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.^[4/]

5. At all times material to the instant case, School Board Policy 5630 has provided as follows:

Teachers or other designated members of the staff are authorized to control students assigned to them and shall keep order in the classroom.

Corporal punishment is strictly prohibited.^[5/] Comprehensive programs for alternative discipline 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.

Suspensions and/or expulsions are also available as administrative disciplinary actions depending upon the severity of the misconduct (Policy 5610).

Instructional and support staff, within the scope of their employment, may use and apply reasonable force to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon or within the control of the student, in self-defense, or for the protection of persons or property.

6. Respondent has been employed by the School Board since 1993, initially as a noninstructional employee and then, for approximately the last 15 years, as an instructional employee. She presently holds a professional service teaching contract with the School Board.

7. 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 the UTD (UTD Contract).

8. Article VIII of the UTD Contract addresses the subject of maintaining a "[s]afe [l]earning [e]nvironment."

9. Section 3 of Article VIII is entitled, "Physical Restraint," and provides as follows:

Manual Physical Restraint - an emergency intervention requiring the use of physical

restraint techniques that involve physical force applied by a teacher or other staff member to restrict the movement of all or part of the student's body when the student demonstrates behaviors that pose a threat to the physical safety of themselves or others.

A. There are emergency situations where students exhibit behaviors that are disruptive to the learning environment and pose a threat to the safety of themselves and other persons.

B. Some special education students because of the nature of their disability, may, on occasion, experience impaired impulse control of such severity that the use of manual physical restraint is necessary to prevent such students from inflicting serious injury or causing the death of self and/or others.

C. The purpose of manual physical restraint is to prevent behaviors that pose a clear and imminent risk of serious injury or death to the students and others. It is only to be used in emergency situations when an immediate and significant threat to the physical safety of the student and/or others exists. It is not to be used to "teach a student a lesson" or as punishment.

D. For students who exhibit such behaviors as aggression or self-injury, the use of manual physical restraint procedures in emergency situations shall be discussed as part of the Individualized Education Plan (IEP) development, Behavior Intervention Plan (BIP) development and program review process. A recommendation for the use of Board approved manual physical restraint procedures must be made by the Multi-Disciplinary Team (M-Team) and shall be documented on the student's IEP or BIP form before the use of such procedures may be authorized. When parents or surrogates are not present at the IEP or BIP meeting,

written notification to them regarding the use of manual physical restraint will be provided.

E. Positive Behavioral strategies designed to increase and maintain appropriate behavior while reducing inappropriate behavior shall be utilized on an ongoing basis. However, when an explosive event occurs with or without warning and is of such degree that the demonstration of behavior poses a clear threat to the physical safety of others and/or the student the use of manual physical restraint techniques is authorized for such emergency situations.

F. The Board shall identify personnel to be trained in manual physical restraint and maintain a record that includes the names, dates, and positions of the persons trained. Refresher training is recommended at least annually for all staff members who have successfully completed the initial manual physical restraint training. Training manuals developed for this purpose are, by reference, incorporated and made a part of this Agreement.

G. Manual physical restraint techniques provided in training programs approved by the Board are authorized and, when utilized in accordance with the training provided and these guidelines, shall not constitute grounds for disciplinary action.

H. If an employee is faced with emergency situations where an immediate and significant threat to the physical safety of the student and/or others exists, the employee is authorized to employ the moderate use of physical force or physical contact as may be necessary to restrict the movement of all or part of a student's body. The use of manual physical restraint procedures shall not constitute a violation of the corporal punishment policy (Board

Policy 5630) and shall not constitute grounds for disciplinary action.

I. Manual physical restraint refers to the use of physical intervention techniques designed to restrict the movement of a student in an effort to de-escalate aggressive behavior or self-injurious behaviors. In order to promote a safe learning environment, the District has authorized the implementation of specific manual physical restraint procedures to be used in Special Education programs when a student's IEP or behavior intervention plan (BIP) documents the potential need for their use. These procedures include, but are limited to, holding and escape techniques which, when implemented, prevent injury to students and staff or prevent serious damage to property. Specific physical restraint procedures may also be approved for use with other specific student populations, upon mutual agreement of the parties, and would be reviewed on an annual basis.

J. The use of manual physical restraint must be documented as a part of the M-DCPS Use of Manual Physical Restraint Incident Notification and Incident Reporting system. Instructional or support staff who utilize manual physical restraint techniques shall complete forms FM-7419 and FM-7421 to record information regarding each incident. Directions shall be provided to instructional and support staff to assist them in completing the appropriate form.

Respondent received School Board-provided training on appropriate manual physical restraint techniques (which she learned, through that training, did not include, among other things, punching a student).

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

11. Section 1.A.1. of Article XXI provides that "the [School] Board and [UTD] recognize the principle of progressive discipline," that they "agree that disciplinary action may be consistent with the concept of progressive discipline when the [School] Board deems it appropriate," and that "the degree of discipline shall be reasonably related to the seriousness of the offense."

12. 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."

13. 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)"

14. At all times material to the instant case, Sharon Gonzalez and Maria Pineiro were the principal and the assistant principal, respectively, of WHGES; Respondent was a teacher at the school, teaching mathematics to special education students; and E. A. was a fourth-grade student in a varying exceptionalities mathematics class taught by Respondent.

15. On September 27, 2011, E. A. had an in-school therapy

session which caused him to be late to Respondent's class that day. The class had already begun when E. A. arrived at the classroom door. Instead of opening the door (which was closed, but unlocked) and walking into the classroom, E. A. remained outside in the hallway and started knocking on the classroom door and on the window adjacent to the door. Respondent ultimately came to the door (which opened out into the hallway) and began to open it. E. A. initially tried to block the door from opening by pushing back against it. When he stopped pushing and moved away from behind the door, the door swung open, hitting a wall. Respondent then exited the classroom, angrily yelling at E. A.^{6/} as she approached him. E. A. retreated backwards towards a wall until he could retreat no further. After having cornered E. A. (who posed no threat to the physical safety of either Respondent, himself, or anyone else), a still yelling Respondent grabbed him and hit him at least twice on the arm with closed-fisted jabs, without justification and in violation of School Board Policies 3210, 3210.01, and 5630. Thereafter, in compliance with Respondent's directives, a sobbing E. A. went into the classroom, followed by Respondent, who slammed the classroom door behind her.^{7/}

16. Respondent's physical aggression towards E. A. in the hallway outside of her classroom that day was witnessed by another teacher at the school, Kristina Pena. Ms. Pena, along

with a small group of her fourth grade students to whom she was providing reading instruction, were seated at a table in an alcove in the hallway.^{8/} From her vantage point approximately 15 feet away, she had had a clear view of what had happened between Respondent and E. A. after the door to Respondent's classroom had swung open.^{9/} She was quite distressed by what she had seen. As she explained at hearing, she "did not ever think that [she] would witness a teacher hitting a child."^{10/}

17. After quieting the children in her class, Ms. Pena went to the grade level chair to report the incident. The grade level chair, in turn, contacted the principal, Ms. Gonzalez, who dispatched the assistant principal, Ms. Pineiro, to Respondent's classroom.

18. Ms. Pineiro went immediately to Respondent's classroom. When she entered, E. A. was bent over, holding his arm, and sobbing. Ms. Pineiro then asked Respondent three times, "what's going on," without getting any response from Respondent. Shortly thereafter, Ms. Gonzalez arrived in the classroom and was told by Mrs. Pineiro that she had been "trying to find out what [had] happened, but [that Respondent was] not talking."

19. Ms. Gonzalez and Ms. Pineiro then took E. A. outside of the classroom and, in response to their questioning, E. A. told them about Respondent's having hit him moments earlier.

Ms. Gonzalez later interviewed Ms. Pena, as well as students in Ms. Pena's class and in Respondent's class, about the incident.

20. The matter was ultimately turned over to the School Board's Civil Investigative Unit, which, based on its investigation, determined that there was probable cause to support the allegation that Respondent had violated School Board Rule Policies 3210, 3210.01, and 5630.

21. A conference-for-the-record (CFR) was conducted on December 15, 2011, by Dr. Jimmie Brown, the District Director of the School Board's Office of Professional Standards. Through her union representative at the CFR, Respondent "den[ied] all allegations."

22. Following the CFR, the Disciplinary Review Team met at Dr. Brown's request, and it recommended that Respondent be suspended without pay for 25 workdays. The recommendation was adopted, and Respondent subsequently served the suspension from February 16, 2012, through March 21, 2012.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to chapter 120.

24. "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).

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

26. The personnel policies that have been adopted by the School Board include School Board Rule Policies 3210, 3210.01, and 5630, which are set out, in pertinent part, above.

27. A district school board is deemed to be the "public employer," as that term is used in chapter 447, part II, "with respect to all employees of the school district." § 447.203(2). 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.

28. At all times material to the instant case, district school boards have had the right, under section 1012.33(6)(a), to suspend, for "just cause," classroom teachers and other instructional personnel^{11/} having professional service contracts.

29. At all times material to the instant case, "just cause," as used in section 1012.33, has been legislatively defined (in subsection (1)(a) of the statute) 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 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 suspension or dismissal, provided such wrongdoing is at least of the same seriousness or magnitude as those misdeeds specifically mentioned in the statute. See Dietz v. Lee Cnty. Sch. Bd., 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(1)(a)] constituting just cause,^[12/] 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.'"); and Miami-Dade Cnty. Sch. Bd. v. Singleton, Case No. 07-0559, 2006 Fla. Div. Adm. Hear. LEXIS 614 *51 (Fla. DOAH Oct. 26, 2006; Miami-Dade Cnty. Sch. Bd. Aug. 10, 2007) ("Neither offense is specifically mentioned in [s]ection 1012.33(1)(a), Florida Statutes, as an example of 'just cause,' although the statutory list of such instances, as we have seen, is not intended to be exclusive. Yet, the doctrine of ejusdem generis, . . . requires that for 'just cause' to be found based upon an unexemplary instance, the unexemplary instance must bear a close affinity to one of the exemplary instances."); see also Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC, 986 So. 2d 1244, 1257 (Fla. 2008) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); and Peninsular Indus. Ins. Co. v. State, 61 Fla. 376, 380-381 (Fla. 1911) ("From these statutory provisions it is clear that the obligation to pay the two per cent tax upon gross receipts is placed upon 'each insurance company, or association, firm or individual doing business in this State, including' some that are specially enumerated; but such enumeration manifestly is not complete for the less extensive word 'including' is used merely as illustrative and not exclusive.").

30. At all times material to the instant case, "misconduct

in office" was defined "by rule of the State Board of Education" (specifically Florida Administrative Code Rule 6A-5.056 (formerly 6B-4.009))^{13/} 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, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.^[14/]

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

32. Florida Administrative Code Rule 6B-1.006, which

contains the Principles of Professional Conduct for the Education Profession in Florida, provides, in pertinent part, as follows:

(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.

(b) Shall not unreasonably restrain a student from independent action in pursuit of learning.

* * *

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

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

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.^[15/]

33. As was stated in Miami-Dade Cnty. Sch. Bd. v. Brenes, Case No. 06-1758, 2007 Fla. Div. Adm. Hear. LEXIS 122 n. 12 **42-43 (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007):

Rule [6B-4.009(3)] plainly requires that a violation of both the Ethics Code and the Principles of Professional Education be shown, not merely a violation of one or the other. The precepts set forth in the Ethics Code, however, are so general and so obviously aspirational as to be of little practical use in defining normative behavior. It is one thing to say, for example, that teachers must "strive for professional growth." See Fla. Admin. Code R. 6B-1.001(2). It is quite another to define the behavior which constitutes such striving in a way that puts teachers on notice concerning what conduct is forbidden. The Principles of Professional Conduct accomplish the latter goal, enumerating specific "dos" and "don'ts." Thus, it is concluded that that while any violation of one of the Principles would also be a violation of the Code of Ethics, the converse is not true. Put another way, in order to punish a teacher for misconduct in office, it is necessary but not sufficient that a violation of a broad ideal articulated in the Ethics Code be proved, whereas it is both necessary and sufficient that a violation of a specific rule in the Principles of Professional Conduct be proved. It is the necessary and sufficient condition to which the text refers.

34. "Misconduct in office" may be established in the absence of "specific" or "independent" evidence of impairment, but only 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 service and effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands Cnty. Sch. Bd., 752 So. 2d 127, 128-29 (Fla. 2d DCA 2000); and Summers v. Sch. Bd. of Marion Cnty., 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995).

35. "[U]nder Florida law, a [district] school board's decision to [suspend or] 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."^{16/} McIntyre v. Seminole Cnty. Sch. Bd., 779 So. 2d 639, 641 (Fla. 5th DCA 2001).

36. Pursuant to section 1012.33(6)(a), the hearing may be conducted, "at the district school board's election," 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).

37. The teacher must be given written notice of the specific charges prior to the hearing. See Schimenti v. Sch. Bd. of Hernando Cnty., 73 So. 3d 831, 833 (Fla. 5th DCA 2011) ("When a school board brings a proceeding to discharge a teacher from her employment, the teacher must have fair notice

and an opportunity to be heard on each of the charges against her."). 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. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983) (Jorgenson, J., concurring). The teacher may be suspended, without pay, pending the outcome of the proceeding; "but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid."

§ 1012.33(6) (a) .

38. At the hearing, the burden is on the district school board to prove the allegations contained in the notice. The district school board's proof need only meet the preponderance of the evidence standard. See Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009); Cisneros v. Sch. Bd. of Miami-Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); and Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883, 884 (Fla. 3d DCA 1990). This burden "is not satisfied by proof creating an equipoise, but it does

not require proof beyond a reasonable doubt." Dep't of HRS v. Career Serv. Comm'n, 289 So. 2d 412, 415 (Fla. 4th DCA 1974). The evidence must merely "lead[] the factfinder to find that the existence of [the] contested fact [or facts] is more probable than its nonexistence." Smith v. State, 753 So. 2d 703, 704 (Fla. 5th DCA 2000).

39. In determining whether the district school board has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegation(s) made in the written notice of specific charges. Due process prohibits a district school board from disciplining a teacher based on matters not specifically alleged in the notice. See Pilla v. Sch. Bd. of Dade Cnty., 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); and Texton v. Hancock, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978); see also Sternberg v. Dep't of Prof'l Reg., 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985) ("For the hearing officer and the Board to have then found Dr. Sternberg guilty of an offense with which he was not charged was to deny him due process.").

40. In the instant case, the Notice of Specific Charges, as amended at hearing, alleges that "just cause" existed to suspend Respondent from her teaching position for 25 workdays without pay in that she engaged in "misconduct in office," as then defined by State Board of Education rule, as well as

violated School Board Policies 3210, 3210.01, and 5630, when, on September 27, 2012, at WHGES, "while yelling at E[.]A[.] and in the presence of other students and staff," she "[p]unch[ed] E[.]A[.]" without justification and, as she was doing so, "used profanity."

41. Although its evidentiary presentation was insufficient to prove the allegation that Respondent "used profanity in the presence of E[.]A[.] and other students," the School Board did establish, by a preponderance of the record evidence, that a yelling Respondent did indeed unjustifiably "punch[] E[.]A[.]" as other students and Ms. Pena looked on.

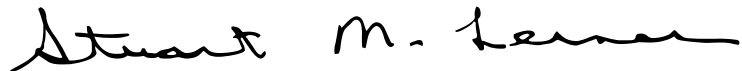
42. As a result of her having engaged in this conduct, Respondent was guilty of "misconduct in office," as then defined by State Board of Education rule, and of violating School Board Policies 3210, 3210.01, and 5630, as alleged in the Notice of Specific Charges, as amended at hearing. The School Board thus had "just cause," as defined in section 1012.33(1)(a), to suspend Respondent from her teaching position for 25 workdays without pay 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 Miami-Dade County School Board issue a final order upholding Respondent's 25-workday suspension without pay for the reasons set forth above.

DONE AND ENTERED this 26th day of December, 2012, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of December, 2012.

ENDNOTES

^{1/} Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to that version of Florida Statutes in effect at the time of the occurrence of the particular event or action being discussed.

^{2/} At hearing, the School Board requested, and was granted (without opposition by Respondent), leave to amend this paragraph of the Notice of Specific Charges to reflect that the alleged battery on E. A. was committed "on or about September 27, 2011" (not October 3, 2011).

^{3/} The hearing was originally scheduled for May 1, 2012 (the earliest date that, according the Joint Response to Initial Order, both parties were available for hearing), but was continued three times.

4/ The provisions of School Board Rule Policy 3210 and School Board Policy 3210.01 set out above are those that were recited in the Notice of Specific Charges.

5/ Pursuant to section 1003.32(1)(k)(1), Florida Statutes, "[t]he use of corporal punishment [in a Florida public school] shall be approved in principle by the principal before it is used." "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 district school board policy." § 1002.20(4)(c)1, Fla. Stat. The School Board's policy with respect to corporal punishment is stated in School Board Policy 5630, which provides, in pertinent part, that "[t]he administration of corporal punishment in Miami-Dade County Public Schools is strictly prohibited."

6/ The record evidence does not reveal exactly what she said and whether she used profanity.

7/ Before returning to the classroom, Respondent had picked up E. A.'s book bag from the hallway floor where E. A. had left it and flung it into the classroom.

8/ Other students in Ms. Pena's class were working individually at computer stations in the same area of the hallway where this table was located.

9/ It was the commotion that accompanied the opening of the door that attracted Ms. Pena's attention to Respondent and E. A.

10/ Aside from Respondent, Ms. Pena was the only adult eyewitness to testify at hearing. She impressed the undersigned as a disinterested and reliable witness who testified truthfully and accurately about the events she witnessed. The undersigned therefore has credited her testimony (and has also credited the testimony of E. A. and the other student witnesses, to the extent that their testimony is consistent with Ms. Pena's), and he has rejected as contrary to the greater weight of the evidence Respondent's uncorroborated, self-serving testimony that she did not hit E. A., but rather, acting in self-defense, merely employed a "block[ing]" maneuver when E. A. "rais[ed] his arm as if he was going to hurt [her]," which resulted in her having "physical contact" with E. A. See Martuccio v. Dep't of Prof'l Reg., 622 So. 2d 607, 609 (Fla. 1st DCA 1993) (although self-serving nature of testimony given by "[p]ersons having a

pecuniary or proprietary interest in the outcome of litigation" does not render testimony inadmissible, interest of person in outcome of case may be considered in evaluating credibility of testimony); and Asan v. U.S., Case No. 11 Civ. 5370 (CSH), 2012 U.S. Dist. LEXIS 163524 *42 (S.D. N.Y. Nov. 14, 2012) ("Where there are factual disputes, the Court resolves them by applying the usual time-tested criteria: the credibility of the witnesses, the presence or absence of corroborating evidence, the inherent plausibility or implausibility of one version of facts or the other--all viewed within the totality of the evidence in the record.").

^{11/} Pursuant to section 1012.01(2), the term "instructional personnel," as used in section 1012.33, includes "classroom teachers."

^{12/} "Immorality" was added to the "non-exclusive list of sins" in section 1012.33(1)(a) by section 28 of chapter 2008-108, Laws of Florida, effective July 1, 2008.

^{13/} This rule "define[d]" the "basis for charges upon which dismissal action against instructional personnel could be pursued."

^{14/} The current version of Florida Administrative Code Rule 6A-5.056 is inapplicable to the instant case because it took effect July 8, 2012, after Respondent's alleged misconduct. See Anglickis v. Dep't of Prof'l Reg., 593 So. 2d 298, 300 (Fla. 2d DCA 1992) ("[T]his rule was not in effect at the time of the audit; therefore, appellants cannot be found to have violated this rule."); and Dep't of Bus. & Prof'l Reg. v. Aleong, Case No. 10-2388PL, 2010 Fla. Div. Adm. Hear. LEXIS 1005 *23 (Fla. DOAH 2010), adopted in pertinent part, Case No. 2006-022640 (Dep't of Bus. & Prof'l Reg. July 5, 2011) ("This version of the rule is inapplicable to the instant case, however, as it was not in effect at the time Respondent committed the charged offense.").

^{15/} These are the only "principles" Respondent is alleged, in the Administrative Complaint, to have violated.

^{16/} "A county school board is a state agency falling within [c]hapter 120 for purposes of quasi-judicial administrative orders." Sublett v. Dist. Sch. Bd. of Sumter Cnty., 617 So. 2d 374, 377 (Fla. 5th DCA 1993); see also Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1231 (Fla.

2009) ("No one disputes that a school board is an 'agency' as that term is defined in the APA."); Volusia Cnty. Sch. Bd. v. Volusia Homes Builders Ass'n, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006) ("[T]he School Board is an agency subject to the Administrative Procedure Act."); and Witgenstein v. Sch. Bd. of Leon Cnty., 347 So. 2d 1069, 1071 (Fla. 1st DCA 1977) ("It was obviously the legislative intent to include local school districts within the operation of [c]hapter 120.").

COPIES FURNISHED:

Luis M. Garcia, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

Mark S. Herdman, Esquire
Herdman and Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761

Alberto M. Carvalho, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue
Miami, Florida 33132-1308

Dr. Tony Bennett, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.