

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-2997TTS

INOCENTE LARIOSA,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

This case came before Administrative Law Judge  
Jessica Enciso Varn for final hearing by video teleconference on  
October 31, 2014, with sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Cristina Rivera Correa, Esquire  
Miami-Dade County School Board  
1450 Northeast Second Avenue, Suite 430  
Miami, Florida 33132

For Respondent: Mark S. Herdman, Esquire  
Herdman and Sakellarides, P.A.  
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Clearwater, Florida 33761-1538

STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend  
Respondent without pay and terminate Respondent's employment.

PRELIMINARY STATEMENT

On June 18, 2014, the Miami-Dade County School Board (School Board) voted at its regularly scheduled meeting to suspend Respondent, Inocente Lariosa, without pay and initiate dismissal proceedings against him. Mr. Lariosa timely requested an administrative hearing. On June 24, 2014, the School Board referred the matter to the Division of Administrative Hearings (DOAH). On July 2, 2014, the undersigned scheduled the hearing for September 3, 2014.

A week before the hearing, on August 25, 2014, the School Board filed its Notice of Specific Charges. On that same day, Mr. Lariosa requested a continuance, which was granted; the hearing was re-scheduled for October 31, 2014.

The School Board charged Mr. Lariosa with the following violations in five counts: (1) misconduct in office; (2) gross insubordination; and (3) violation of School Board policies 3210, 3210.01, and 3213. At hearing, the School Board presented the testimony of Rosa Bergen, James Parker, Leidys Lopez, and Helen Piña. Mr. Lariosa testified on his own behalf. School Board's Exhibits 1-11 and 13 were admitted into evidence.

The one-volume Transcript was filed on December 15, 2014. Both parties timely submitted proposed recommended orders, which were given consideration in the preparation of this Recommended Order. Unless otherwise indicated, all rule and statutory

references are to the versions in effect at the time of the alleged violations.

#### FINDINGS OF FACT

1. The School Board is the entity authorized to operate, control, and supervise the public schools in Miami-Dade County, Florida.

2. Mr. Lariosa has been employed as a teacher by the School Board since 1997. He has worked in various positions, including vocational adult education, special education, elementary education, virtual high school education, and most recently, as a co-teacher in a kindergarten class.

3. In November 2004, during his tenure as a vocational adult teacher, Mr. Lariosa received a written reprimand for an incident that occurred in 2002. In the reprimand, Mr. Lariosa was directed to cease and desist from any future inappropriate contact with students; to cease and desist from buying gifts for students; and to refrain from engaging in any behavior that gave the appearance of impropriety.

4. Along with the reprimand, Mr. Lariosa received a list entitled "How to Use Common Sense and Professional Judgment to Avoid Legal Complications in Teaching," which included the statement: "Keep your hands and other parts of your body to yourself."

5. Mr. Lariosa's tenure as a co-teacher in a kindergarten classroom began in the Fall of 2013. His co-teacher was Ms. Lopez and between the two teachers, they managed a large group of students.

6. One of their students was A.N., a kindergartner with a speech impairment. According to Mr. Lariosa, who worked with A.N. on a daily basis, A.N. was able to communicate in complete sentences.

7. On March 19, 2014, both teachers were in the classroom with the students. Ms. Lopez was at the front of the classroom teaching. Mr. Lariosa was at a kidney table, waiting for Ms. Lopez's lesson to finish. A.N., who had been working on a computer, approached Mr. Lariosa and told him that she had a headache.

8. Mr. Lariosa, in an effort to try and relieve her discomfort, placed one hand on her forehead to keep her head stable, and with the other hand, briefly rubbed the back of her neck.

9. Ms. Lopez, who had an unobstructed view of the kidney table, saw Mr. Lariosa rubbing A.N.'s neck. She testified that his interaction with A.N. was very brief--possibly lasting just a few seconds. A.N. did not pull away from Mr. Lariosa, nor did she react in any manner to Mr. Lariosa's actions. A.N. simply walked away after he tried to alleviate her discomfort.

10. Ms. Lopez, who is apparently easily alarmed, felt uncomfortable with what she saw, wrapped up her lesson, and asked Mr. Lariosa to supervise the class while she stepped out. Ms. Lopez went directly to the office to report Mr. Lariosa's actions with A.N.

11. Mr. Lariosa credibly testified that he had no intention of hurting A.N., and had no sexual intention when he very briefly rubbed A.N.'s neck. Consistent with his testimony, Ms. Lopez testified that Mr. Lariosa rubbed A.N.'s neck in plain sight, with no attempt to conceal the brief touching.

12. Based on Ms. Lopez's report, an investigation ensued, and eventually led to the School Board initiating dismissal proceedings.

13. The brief rubbing of A.N.'s neck, as described by Mr. Lariosa, amounted to nothing more than a teacher attempting to relieve a young student's discomfort. Common sense dictates that kindergarten students are more inclined, as compared to older students, to hug or be hugged by their teachers, patted on the back by teachers, or to walk hand in hand with their teachers. Momentarily rubbing a young child's neck after she has complained of a headache (or a sore knee after a fall) is certainly within the realm of reasonable physical contact with a kindergarten student.

14. Mr. Lariosa's conduct did not constitute misconduct in office or gross insubordination and did not violate the School Board's policies specified in the Notice of Specific Charges.

CONCLUSIONS OF LAW

15. DOAH has jurisdiction of the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

16. The School Board must prove, by a preponderance of the evidence, that Mr. Lariosa committed the violations alleged in the Notice of Specific Charges, and that such violations constitute "just cause" for suspension and termination. §§ 1012.33(1)(a) & (6), Fla. Stat.; Mitchell v. Sch. Bd., 972 So. 2d 900, 901 (Fla. 3d DCA 2007); Gabriele v. Sch. Bd. of Manatee Cnty., 114 So. 3d 477, 480 (Fla. 2d DCA 2013).

17. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280, n.1 (Fla. 2000).

18. Whether Mr. Lariosa committed the charged offenses is a question of ultimate fact to be determined by the trier of fact. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985).

19. "Just cause" is defined in section 1012.33(1)(a) to include misconduct in office and gross insubordination.

20. Mr. Lariosa has been charged with misconduct in office, gross insubordination, and a violation of three School Board policies.

21. Section 1001.02(1), Florida Statutes, grants the State Board of Education authority to adopt rules pursuant to sections 120.536(1) and 120.54 in order to implement provisions of law conferring duties upon it.

22. Exercising its rulemaking authority, the State Board of Education has defined "misconduct in office" in rule 6A-5.056(2), which provides:

(2) "Misconduct in Office" means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C.;

(c) A violation of the adopted school board policies;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleague's ability to effectively perform duties.

23. Rule 6A-10.080, titled "Code of Ethics of the Education Profession in Florida" (formerly numbered as rule 6B-1.001), is

repeated in relevant part in School Board Policy 3210.01. They provide:

A. 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.

B. 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.

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

24. The Principles of Professional Conduct for the Education Profession in Florida are found in rule 6A-10.081 (formerly numbered as rule 6B-1.006). It states, in relevant part:

(3) Obligation to the students 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.

\* \* \*



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

\* \* \*

(5) Obligation to the profession of education requires that the individual:

\* \* \*

(d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

25. School Board Policy 3210, titled "Standards of Ethical Conduct," provides in part:

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.

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;

\* \* \*

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

\* \* \*

22. not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable efforts to assure that each individual is protected from such harassment or discrimination;

26. School Board Policy 3213, titled "Student Supervision and Welfare," provides in relevant part:

Protecting the physical and emotional well-being of students is of paramount importance. Each instructional staff member shall maintain the highest professional, moral, and ethical standards in dealing with the supervision, control, and protection of students on or off school property.

\* \* \*

E. Staff members shall not inappropriately associate with students at any time in a manner which may give the appearance of impropriety, including, but not limited to, the creation or participation in any situation or activity which could be considered abusive or sexually suggestive or involve illegal substances such as drugs, alcohol, or tobacco.

27. Mr. Lariosa's actions, which amounted to a brief rubbing of a kindergartner's neck after she complained of a headache, do not constitute misconduct in office. He did not violate any of the above provisions.

28. Lastly, "gross insubordination" is defined in rule 6A-5.056(4) as the "intentional refusal to obey an order, reasonable

in nature, and given by and with proper authority, misfeasance, or malfeasance as to involve failure in the performance of the required duties.”

29. Here, the only directive was found in a reprimand from 2004, accompanied by a list of “common sense” guidelines. Both were issued a decade before this event, when Mr. Lariosa worked with adult vocational students, and they were general in nature. Mr. Lariosa was not given a direct order that he refused to obey while working as a kindergarten teacher; and even assuming it constitutes a direct order, Mr. Lariosa’s physical contact with A.N. was not inappropriate.

30. The School Board failed to prove, by a preponderance of the evidence, that Mr. Lariosa is guilty of misconduct in office, gross insubordination, or of any conduct rising to the level of a violation of any School Board policy.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order dismissing the charges against Mr. Lariosa and reinstating him with full back pay and benefits.

DONE AND ENTERED this 16th day of January, 2015, in  
Tallahassee, Leon County, Florida.



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JESSICA ENCISO VARN  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of January, 2015.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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