

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-6759TTS

VERNARD M. WHITLEY,

Respondent.

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RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015),^{1/} before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on February 19, 2016, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Sara M. Marken, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend Respondent without pay and terminate his employment as a school security monitor.

PRELIMINARY STATEMENT

On November 18, 2015, Petitioner, School Board of Miami-Dade County ("Petitioner" or "School Board"), took action to suspend Respondent without pay and terminate his employment as a school security monitor. Respondent timely requested an administrative hearing to challenge Petitioner's proposed action, and the matter was forwarded to DOAH for assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1).

On January 26, 2016, Petitioner filed the Notice of Specific Charges in this proceeding, alleging that on May 19, 2015, Respondent had engaged in inappropriate physical contact with a student. Petitioner charged Respondent with having violated specified Department of Education rules and School Board policies.

The hearing was held on February 19, 2016. Petitioner presented the testimony of Officer Delontay Dumas; D.C.M., Jr. (also referred to as "D.M." or "D.C.M."); Tramaine Morgan; Tangella Rhea; Mary Kate Parton; DanySu Pritchett; and Respondent. Petitioner's Exhibits 1, 2, 4 through 10, 15, 23,

and 27 were admitted into evidence without objection, and Petitioner's Exhibit 3 was admitted into evidence over objection. Respondent testified as part of Petitioner's case-in-chief and did not proffer any exhibits for admission into evidence.

The one-volume Transcript of the final hearing was filed at DOAH on March 3, 2016, and the parties were given until March 14, 2016, to file proposed recommended orders. Both proposed recommended orders were timely filed and duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner is a duly-constituted school board charged with operating, controlling, and supervising all free public schools within Miami-Dade County, Florida, pursuant to Article IX, section 4(b), Florida Constitution and section 1001.32, Florida Statutes.

2. At all times relevant, Respondent was employed with Petitioner pursuant to a professional services contract as a school security monitor at John F. Kennedy Middle School ("JFKMS"), a public school in Miami-Dade County, Florida.

3. Respondent has been employed with Petitioner as a school security monitor at JFKMS since 2010.

4. At all times relevant, Respondent's employment was governed by the collective bargaining agreement between Miami-Dade County Public Schools and the United Teachers of Dade Contract, Petitioner's rules, and Florida law.

II. Notice of Specific Charges

5. Petitioner's Notice of Specific Charges, which constitutes the administrative charging document in this proceeding, was filed on January 26, 2016. In the Notice of Specific Charges, Petitioner alleges that Respondent picked up J.F., a JFKMS student, and dropped him to the floor, and also alleges that Respondent grabbed J.F. by the hood of his sweatshirt in such a manner that J.F. complained of being unable to breathe.

6. The Notice of Specific Charges charges Respondent with having committed misconduct in office, as defined in Florida Administrative Code Rule 6A-5.056(2), including violating specified rules and School Board policies incorporated therein; and with having committed gross insubordination, as defined in rule 6A-5.056(4).

III. The Evidence Adduced at Hearing

7. The events giving rise to this proceeding occurred on or about May 19, 2015, at JFKMS.

8. That day, Respondent was on duty as a school security monitor. At the time of the incident giving rise to this

proceeding, Respondent was monitoring the "spill-out" area at JFKMS. The spill-out area is the area outside of the cafeteria where students congregate after they have finished eating.^{2/} It is separated from a courtyard by a wall consisting of bars. A gate connects the spill-out area to a courtyard.^{3/}

9. Respondent saw J.F. slap a student on the head and then initiate a slap-boxing episode with another student.

10. Slap-boxing is a form of play-fighting in which the participants slap each other with open hands rather than hit each other with fists. Although it is play-fighting, slap-boxing can, and often does, escalate into real fighting if the participants are hurt or become angry. Slap-boxing is contrary to Petitioner's policies governing student conduct and discipline, including the Code of Student Conduct.^{4/}

11. Respondent ordered J.F. and the other student to stop slap-boxing. Thereafter, they exited the spill-out area and went into the courtyard, where they continued to slap-box.

12. Respondent began to close the gate separating the courtyard from the spill-out area. Thereafter, the interaction between Respondent and J.F. that gave rise to this proceeding occurred.

13. J.F. did not testify at the final hearing.

14. To establish that Respondent engaged in the conduct specifically alleged in the Notice of Specific Charges,

Petitioner presented the testimony of Officer Delontay Dumas, an officer in Petitioner's Police Department. Dumas was assigned to, and on duty at, JFKMS on the day of the events giving rise to this proceeding.

15. Through his school radio, Dumas heard shouting that there was a fight going on. When he arrived at the spill-out area, he observed Respondent and J.F., who, at that point, appeared to have been separated from each other by staff members and students.

16. Dumas did not personally see the events that gave rise to this proceeding.

17. Petitioner presented video footage recorded by two surveillance cameras, hereafter referred to as "Camera 5" and "Camera 6," located in the spill-out area. Although Dumas did not personally witness the events, he identified Respondent, J.F., and another person (D.M.) shown in the video footage. Dumas also provided some narrative description of the events depicted in the footage.^{5/}

18. The quality of the video footage from both Cameras 5 and 6 generally is poor. One can reasonably assume, based on the very small size of the images in the video footage, that the cameras are located considerable distances from the specific location within the spill-out area where the incident occurred. As such, one is unable to clearly—or, in some instances, at

all—see or identify who is present and what is happening. When the image is enlarged to "full size," the resolution becomes extremely poor, again making it very difficult to impossible to clearly, if at all, see or identify who is present and what is happening. No audio recording associated with the video footage from either camera was provided.

19. Camera 5 is a panning surveillance camera.^{6/} As such, it does not continuously monitor or depict a specific location within the spill-out area; rather, the footage depicts a particular location for a brief period before the camera pans to another location in the spill-out area. Thus, one is not able to see a continuous sequence of events occurring in any given location within the spill-out area.

20. The only video footage from Camera 5 that is relevant to this proceeding is that showing the gate between the spill-out area and courtyard.

21. The following constitutes the pertinent timeline^{7/} of events, with a description of the events as observed by the undersigned, at the time shown on the timestamp on the relevant video footage from Camera 5^{8/}:

13:01:44 A person who appears to be Respondent (as identified by Dumas in connection with testimony regarding Camera 6) is standing at the gate between the spill-out area and the courtyard, and closes the gate.

13:02:49 Students are at the gate, which is open. Respondent is not at the gate.

13:03:16 Student is in the gate, which is open.
Respondent is not at the gate.

13:03:52 A student in a red shirt exits gate into
courtyard. Respondent is not at the gate.

13:04:26 No one is at/in the gate, which is open.

13:05:02 The gate is open and several people are standing
near or in it. No one can be identified due to poor image
quality. The small image is dark and distant; the "full
size" image has such poor resolution that one is unable to
identify the persons shown in the footage.

13:05:04 - 13:05:06 Respondent is identified from the
white emblem on the back of his black shirt (as seen more
clearly in the footage from Camera 6). He is standing in
the open gate and is facing into the courtyard. The
students near him are not and cannot be identified. It
appears that Respondent closes the gate at approximately
13:05:06.

13:05:35 A person who appears to be Respondent is standing
at the gate, inside the spill out area. The gate door is
closed. A person can be seen on the other side of the gate
door. That person cannot be definitively identified due to
the poor video quality. Two other people, who cannot be
identified, are standing inside the spill-out area near the
Respondent.

13:06:11 A person who appears to be Respondent is standing
at the gate, inside the spill out area. The gate is
closed. A person can be seen on the other side of the gate
door. That person may be J.F., but he or she cannot be
definitively identified due to the poor video quality.

13:07:09 The gate is open and two persons are standing
near each other. The person in dark clothing appears to be
Respondent and the person in a white top appears to be J.F.
However, neither the small nor "full-size" video images are
of sufficient quality or provide sufficient resolution to
definitively discern the actions of these persons.

13:07:23 Respondent is standing in the open gate facing
into the courtyard, and the white emblem is visible
although not legible. The student, who appears to be J.F.,

appears to be on the other side of the gate in the courtyard.

13:07:27 Three other persons, who are unidentified, are now standing in close proximity to Respondent.

13:07:52 The gate is open, Respondent and a student, who appears to be J.F., appear to be engaged with each other. The student appears to be moving toward or pushing Respondent. Although the image resolution is too poor on both small and "full size" to enable one to precisely see the respective positions of these persons, J.F.'s head does not appear to be covered by the hood.

13:07:53 The person who appears to be J.F. is inside the spill-out area. Respondent is in the gateway, but it is not possible to determine whether Respondent is touching J.F. or vice versa.

13:07:54 The person who appears to be J.F. is in the spill-out area, and the person who appears to be Respondent appears to be crouching next to him. However, it cannot be determined whether Respondent is touching J.F. or vice versa.

The video footage for Camera 5 ends at 13:08:12.

22. Based on the foregoing, the undersigned finds that the video footage for Camera 5 does not definitively depict, and therefore does not establish, that Respondent picked up J.F., dropped him to the floor, or grabbed the hood of his sweatshirt such that it caused J.F. to be unable to breathe, as is alleged in the Notice of Specific Charges. The poor quality of the video footage does not enable the viewer, with any reasonable certainty, to identify persons shown at numerous key points in the footage or to precisely see or determine the actions in which they are engaged.^{9/} Accordingly, the undersigned finds the

video footage from Camera 5 unconvincing to show that Respondent engaged in the conduct alleged in the Notice of Specific Charges.

23. Camera 6 is a stationary surveillance camera located in the spill-out area.^{10/} The following constitutes the pertinent timeline^{11/} of events, with a description of the events as observed by the undersigned, at the time shown on the timestamp on the relevant video footage from Camera 6^{12/}:

13:01:36 - 13:01:45 Respondent (who is identified by Dumas) appears in the video field and walks to the gate separating the spill-out area from the courtyard. At this point, the white emblem identifying him as a school security monitor can be seen on the back of his shirt but it is not legible due to the poor quality of the video footage.

13:01:46 - 13:02:13 Respondent is standing at the gate. Several students walk into and out of the spill-out area through the gate.

13:01:14 Respondent walks away from the gate, toward another part of the spill-out area.

13:02:34 Respondent is no longer visible in the video footage.

13:02:52 J.F. (identified by Dumas), who is wearing a white hooded sweatshirt and khaki shorts, appears in the video footage. He is accompanied by, and interacting with, other students.

13:03:19 J.F. and another student, who is wearing a red top and khaki pants, are interacting with each other. J.F. briefly turns around and faces the direction in which Respondent previously walked as he left the field of view. By 13:03:24, J.F. has turned back in the opposite direction and walks away from the other student.

13:03:33 Respondent reappears on the right-hand edge of the video footage, coming from the direction J.F. faced as he briefly turned, before turning back around and walking away.

13:03:48 J.F. is in close proximity to, and interacting with, the student in the red top.

13:03:50 J.F. exits the spill-out area through the gate and goes into the courtyard. By 13:03:53, the student in the red top also has exited the spill-out area into the courtyard. Respondent can be seen near the lower right-hand corner of the video footage, facing in the direction of J.F. and the student in the red top. By this time, movement in the courtyard can be seen on the left-hand edge of the video footage. Respondent begins to walk toward the gate.

13:04:24 Respondent walks toward the gate between the spill-out area and the courtyard.

13:04:33 Respondent stands at the gate.

13:04:35 Respondent is no longer visible at the gate; it appears that he moved through the gate toward or into the courtyard.

13:04:36 J.F. moves back into the spill-out area. He appears to be falling backward into the spill-out area, and in doing so, appears to fall into other students, who are walking by. Respondent is not visible.

13:04:37 J.F. appears to regain his balance and appears to stand upright or nearly upright. Respondent is not visible.

13:04:38 J.F. again appears to be falling backward, with his back facing the gate. Respondent is not visible. A person, who cannot be identified, is standing in the gate and appears to crouch down.

13:04:38 A student wearing red enters the spill-out area from the courtyard and partially obscures the view of J.F. Respondent is not visible.

13:04:39 A person wearing black, who cannot be clearly seen and cannot be identified by viewing the video footage,

appears to be standing over J.F., who appears to be lying on the ground.

13:04:40 The person wearing black, who cannot be clearly seen or identified by viewing the video footage, appears to bend down over J.F., then stands up. It appears that J.F. is sitting up. The view of J.F. and the person wearing black largely is obscured by student bystanders, including the student in the red top, who is running away from the location of J.F. and the person wearing black.

13:04:41 Neither J.F. nor the person wearing black are visible in the video footage.

13:05:17 A person wearing black is standing at the gate. The person cannot be identified by viewing the video. J.F. is not visible.

13:05:17 - 13:07:00 The person wearing black is standing at the gate. Many students walk by and stand, obscuring the view of the gate. Students exit and enter the spill-out area through the gate. J.F. is not visible.

13:07:01 - 13:07:56 The person in black is no longer visible at the gate. Many students walk by and stand, obscuring the view of the gate. Students exit and enter the spill-out area through the gate. J.F. is not visible.

13:07:57 Respondent (as identified by Dumas) is seen standing at the gate. A student wearing a light green or blue top is standing in a position that partially obscures the view of Respondent. J.F. is not visible.

13:08:10 J.F. (as identified by Dumas) is standing next to Respondent at or in the gate.

13:08:13 J.F. moves forward from the gate into the spill-out area and appears to be crouching or bending down.

13:08:14 J.F. swings around such that he is facing the spill-out area and appears to grasp the bars that comprise the separation wall between the spill-out area and the courtyard. Respondent appears to briefly place his arm on J.F.'s torso.

13:08:15 Respondent and J.F. are seen standing next to each other in the gate.

13:08:17 J.F. appears to have backed up and is holding onto the bars. The view of J.F. is obscured by another person wearing a white short-sleeved shirt and dark pants, previously identified as D.M. by Dumas, who stands next to J.F.

Starting at 13:08:18 to the end of the video footage at 13:12:01, the notation "[No Recorded Data]" intermittently appears for brief intervals in the lower left corner of the video footage. Simultaneously with this notation, the video footage briefly freezes before resuming, causing the footage to appear jerky and to rapidly skip forward.

13:08:30 J.F. appears to be standing in the spill-out area. The view of Respondent is almost completely obscured by D.M.

13:08:34 J.F. is in the spill-out area standing next to Respondent at the gate. They do not appear to be in any physical contact with each other. The view of both J.F. and Respondent is partially obscured by D.M.

13:08:35 - 13:08:49 D.M. almost completely blocks the view of Respondent and J.F.

13:08:49 Respondent and J.F. are standing in the gate.

13:08:52 J.F. begins to move side-way into the spill-out area and appears to crouch slightly. His back is facing the camera.

13:08:54 - 13:09:00 J.F. is upright and standing in the spill-out area next to and facing Respondent, who is standing at the gate.

13:09:01 J.F. appears to be facing, and moving back away from, Respondent. He is standing up and his arms are spread away from his body.

13:09:02 J.F. is crouching forward and facing Respondent. One arm is visibly spread away from his body.

13:09:03 J.F. is standing upright in the spill-over area, facing Respondent, who is standing in the gateway.

13:09:04 J.F. has bent over, and his sweatshirt appears to have ridden up in the back such that you can see a bit of

his back between the bottom of the sweatshirt and the top of his shorts. His head appears to be visible. J.F. has substantially obscured the view of Respondent.

13:09:05 J.F.'s right arm is raised, and his head is slightly lowered but still visible. J.F.'s sweatshirt is ridden up in the back. J.F. has substantially obscured the view of Respondent.

13:09:07 J.F.'s right arm is again raised and he is facing Respondent.

13:09:08 J.F. bends over, then stands upright. Respondent is standing in the gate and as J.F. stands up, he largely obscures the view of Respondent.

13:09:10 J.F. is rising up from the bent-over position. Respondent appears to grasp J.F. on his upper back and under his right arm.

13:09:10 J.F. is bent over and Respondent's hand appears to touch J.F.'s upper back.

13:09:11 J.F. bends over and spins around. J.F.'s head is not visible. The sweatshirt appears to be covering his head.

13:09:12 Respondent's arm appears to circle J.F.'s waist. J.F. twists around into an upright position. J.F.'s back is to the camera. The sweatshirt appears to be covering the back of his head. J.F. is grasping one of the bars comprising the separation wall with one hand.

13:09:12 Respondent's arm appears to circle J.F.'s waist and he slightly lifts J.F. as he attempts to move him through the gate back into the courtyard. J.F. is grasping the bars of the separation wall with one hand.

13:09:14 - 13:09:16 J.F. pulls away from Respondent and backs into the spill-out area. He appears to still be wearing the sweatshirt and his head no longer appears covered by the sweatshirt.

13:09:17 By this point, students are almost completely obscuring the view of both J.F. and Respondent.

13:09:18 The view of Respondent and J.F. is completely blocked by students. A white object, which cannot be specifically identified, is briefly seen being flung.

Between 13:09:18 and 13:12:01, when the video footage ends, students have gathered, completely obscuring the view of Respondent and J.F.

24. Although the video footage from Camera 6 appears to show that Respondent briefly touched J.F. on the torso and upper back and placed his arm around J.F.'s waist, it does not show Respondent picking up J.F., dropping him to the floor, or grabbing the hood of his sweatshirt such that J.F. was unable to breathe, as alleged in the Notice of Specific Charges. The poor quality of the video footage—specifically, the small size of the footage as originally shot by the camera and its extremely poor resolution when enlarged to "full size"—does not enable the viewer, with any reasonable certainty, to identify persons shown at numerous key points in the footage or to precisely see or determine the actions in which they are engaged. Accordingly, the undersigned finds that the video footage from Camera 6 does not constitute persuasive evidence that Respondent engaged in the conduct alleged in the Notice of Specific Charges.

25. When Dumas spoke with J.F. after the incident occurred, he took custody of J.F.'s sweatshirt, and the sweatshirt was admitted into evidence at the final hearing.

The sweatshirt has a vertical rip approximately one-half inches long at the front center of the neck.

26. Dumas testified that J.F. told him that he (J.F.) had ripped off his sweatshirt because Respondent had grabbed the hood, which was choking him.^{13/}

27. As noted above, Dumas did not witness the incident, so he did not see J.F. rip the sweatshirt. Dumas did not see the sweatshirt before J.F. gave it to him, and it was ripped when Dumas received it.

28. Petitioner also presented the testimony of student D.C.M., who was present in the spill-out area on the day in question and saw the incident.

29. D.C.M. saw J.F. slap-boxing with another student in the courtyard. He testified that Respondent ordered J.F. and the other student to "hurry up and get back inside" the spill-out area. However, he also testified that Respondent blocked the gate between the courtyard and spill-out area to prevent J.F. and the other student from re-entering the spill-out area^{14/}; that they tried to get back through the gate; and that the other student ultimately made it through the gate but J.F. did not.

30. D.C.M. testified: "[a]nd then I saw [Respondent] like —I guess he had picked [J.F.] up and put him on the ground."

31. D.C.M. testified that he saw J.F. get up off of the ground, laughing; that J.F. again tried to force his way back through the gate; that Respondent, who was attempting to lock the gate, blocked J.F. with his body to prevent him from coming back through the gate; and that J.F. did finally "get his body a little bit through."

32. D.C.M. testified that "[Respondent] has him against like the gate—right there, there's like metal bars, then he had him holded [sic], so I guess he had his—had [J.F.] by the hoodie of the jacket. Then I guess [J.F.], he said, 'Let me go. I can't breathe. I can't breathe.'"

33. D.C.M. testified that at that point, J.F. became angry, ripped off his jacket, and freed himself from Respondent's grasp. J.F. then tried to hit Respondent. D.C.M. testified that he restrained J.F. and at that point, another school security monitor responded to the incident.

34. On cross-examination, D.C.M. testified that when J.F. tried to re-enter the spill-out area, "I guess [Respondent] had picked him up and then like put him on the ground."

35. On balance, the undersigned does not find D.C.M.'s testimony persuasive to establish that Respondent engaged in the conduct alleged in the Notice of Specific Charges. Although D.C.M. was present and claimed to have seen the events, his testimony regarding the specific conduct with which Respondent

is charged was repeatedly qualified with the preface "I guess." As such, D.C.M.'s testimony regarding Respondent's actions and conduct is equivocal and indefinite. D.C.M. did not state, unequivocally, that he saw Respondent pick J.F. up and put him on the ground or that he saw Respondent grab the hood of J.F.'s sweatshirt. As such, D.C.M.'s testimony does not persuasively establish that Respondent engaged in the specific actions with which he is charged in the Notice of Specific Charges.

36. Respondent also testified regarding the incident. He observed J.F. and another student (who was wearing a red shirt) running around, slapping other students, and engaging in slap-boxing with each other in the spill-out area. Respondent twice directed them to stop. They exited the spill-out area and went into the courtyard, where they resumed slap-boxing.

37. In order to isolate them in the courtyard to prevent them from engaging in further disruptive behavior involving other students in the spill-out area, Respondent walked over to close the gate between the spill-out area and the courtyard. Respondent testified, credibly, that he intended to separate them from each other once he had isolated them in the courtyard.

38. Once Respondent began to close the gate, J.F. and the other student ran toward the gate to try to get back inside the spill-out area. The student wearing the red shirt got through the gate and back into the spill-out area.

39. Respondent testified, credibly, that J.F. also attempted to get through the gate, but ran into him and fell down. Respondent caught J.F. under his arm, walked him back out of the spill-out area, and closed the gate in order to isolate J.F. until the class bell rang. Respondent testified, credibly, that he explained to J.F. that he was to remain in the courtyard until the class bell rang, at which point Respondent would let him back into the spill-out area.

40. J.F. continued to try to re-enter the spill-out area. Respondent did not call for another security monitor to assist him, because, in his judgment, the situation at that point was calm and under control.

41. J.F. then pulled on the gate with sufficient force that Respondent lost his grasp on the gate, which opened. At that point, J.F. again tried to re-enter the spill-out area. Respondent again blocked J.F. with his body to prevent him from re-entering the spill-out area.

42. In the course of blocking J.F. from re-entering the spill-out area, Respondent testified, credibly, that he caught the back of J.F.'s hooded sweatshirt and tried to move him back outside of the gate. At that point, J.F. squeezed out of his sweatshirt, threw it at him, and started throwing punches and cursing at him. Respondent attempted to stop or deflect the punches.

43. Until that point, Respondent had not tried to call for assistance because, in his words, "it literally went from zero to 60 like that."

44. Respondent acknowledged that before the incident escalated to the point that J.F. threw punches at him, he had placed his hands on J.F.; however, this was after J.F. had run into him, and Respondent did so in order to guide J.F. back out of the gate. Respondent testified that he did not recall having otherwise placed his hands on J.F.

45. Respondent also stated that he grabbed the hood of J.F.'s sweatshirt as J.F. tried to squeeze past him back into the spill-out area. However, he denied having pulled the hood of the sweatshirt with force sufficient to prevent J.F. from going through the gate because he already had blocked J.F. with his body.

46. In response to being asked why he did not "just let [J.F.] through," Respondent responded that he did not allow J.F. to re-enter the spill-out area because J.F. already had slapped other students, was running around, and had caused a disturbance, and that allowing him back into the spill-out area would have "opened it up further to more disturbance."

47. The undersigned finds Respondent's account of the events credible and persuasive. The video footage from Camera 6 appears to show Respondent briefly touching J.F. on his torso,

upper back, and waist; however, it is noted that Respondent testified that he did "not recall" having touched J.F. other than picking him up under the arm to guide him back out into the courtyard. This apparent inconsistency with the video footage from Camera 6, as observed by the undersigned, is credited to Respondent's lack of perfect recall rather than lack of candor.

48. Importantly, Respondent persuasively and credibly denied having picked J.F. up and dropping him on the ground and grabbing him by the hood of his sweatshirt such that he could not breathe. As described above, the video footage does not contradict Respondent's testimony on these key points.

49. Petitioner also presented the testimony of Tremaine Morgan, another school security monitor at JFKMS who arrived at the scene of the incident involving Respondent and J.F. as it was concluding. Specifically, Morgan saw J.F. throwing punches at Respondent and he saw a student grab and try to restrain J.F. as he was doing so. He did not see the entire incident, so did not see Respondent engage in the conduct alleged in the Notice of Specific Charges.

50. Morgan stated that he did not see or hear any calls from Respondent on his school radio, but he also acknowledged that it was loud in the spill-out area at lunchtime, so that such calls would not be able to be heard.

51. Morgan testified regarding his understanding of the proper procedure for handling instances of slap-boxing between students. According to Morgan, the students are first to be given the directive to stop, and that if they do not respond, the school administration should be called so, as he put, it "a higher power will take care of it." He testified that in his experience, that course of action has resolved the issue.

52. On cross-examination, Morgan acknowledged that separate instances of slap-boxing between students is not necessarily identical or similar, and that in some instances, slap-boxing can escalate into real fighting. He testified that for that reason, students are not allowed to slap-box at school.

53. Morgan's testimony apparently was presented to establish or demonstrate the correct way that an incident of slap-boxing is to be handled by a school security monitor. However, Petitioner did not present any evidence showing that Morgan possessed any greater authority, expertise, or knowledge regarding proper procedures than did Respondent.

54. Further, as a fine, but key, point—the alleged conduct giving rise to this proceeding did not occur as Respondent was breaking up a slap-boxing episode between J.F. and the other student. The evidence shows that by the time J.F. and Respondent had physical contact with each other, J.F. and the other student already had ceased slap-boxing, the student in

the red top already had re-entered the spill-out area, and J.F. was in the process of directly disobeying Respondent's directives to remain in the courtyard by attempting to run and squeeze past him to re-enter the spill-out area. The persuasive evidence establishes that J.F., not Respondent, initiated the physical contact between them when he ran into Respondent while trying to run through the gate, then again made physical contact with Respondent as he attempted to squeeze through the gate, in direct defiance of Respondent's order to remain in the courtyard. Only after J.F. had made physical contact with Respondent twice, in direct disobedience of Respondent's directives to stay out of the spill-out area and in the courtyard, did Respondent grab J.F.'s sweatshirt by the hood. Accordingly, Morgan's testimony as to how slap-boxing incidents should be handled is not directly relevant to the specific circumstances present in this case.

55. Further, under any circumstances, the persuasive evidence establishes that Respondent did direct J.F. and the other students to stop slap-boxing, twice, and that they disregarded his directives.

56. Mary Kate Parton,^{15/} principal at JFKMS, testified that school security monitors should not place their hands on a student unless the student presents a danger to himself or others, and that whether touching of a student by a school

security monitor is inappropriate depends on the specific circumstances with which the school security monitor is presented in a given situation. She concurred that students at JFKMS are not allowed to slap-box, and she acknowledged that whether a school security monitor's response to slap-boxing episodes depends on the specific circumstances and situation.

57. Respondent previously has been disciplined for having inappropriate physical contact with students at JFKMS.

58. Specifically, in April 2013, Respondent was reprimanded for touching a student on the shoulder as he took her to the school office after she called him a racial slur. He was directed by the then-principal of JFKMS to, among other things, refrain from any physical touching of students. However, he also was directed to follow Miami-Dade County Public Schools Procedures for Safe Restraint when necessary, which authorize the reasonable use of physical force when necessary under certain circumstances, such as to quell a disturbance threatening physical injury to others, for self-defense, or to prevent harm or injury to the student, self, or others.

59. In November 2013, Respondent was suspended for 12 days for engaging in horseplay with a student that resulted in them falling to the ground; at the hearing, Respondent acknowledged that he had been too familiar with the student and that his conduct in that instance had been inappropriate. In addition to

the previously-issued directives, Respondent was directed to adhere to the Standards of Ethical Conduct, School Board Policy 4210; the Code of Ethics, School Board Policy 4210; and the Student Supervision and Welfare Policy, School Board Policy 4213. Additionally, he was directed, in pertinent part, to refrain from inappropriate communication with students in a way or manner such that they would perceive his position to be a friend rather than adult and a professional; to refrain from inappropriate physical contact in a way or manner that does not directly relate to his job as a security monitor; and to be a credit to himself in his employment and in the community.

60. These incidents are not probative of whether Respondent again engaged in inappropriate touching of a student that led to this proceeding.^{16/} They are relevant only to the issue of whether Respondent's actions at issue in this proceeding constitute gross insubordination.

IV. Findings of Ultimate Fact

61. Whether Respondent committed the offenses charged in this proceeding is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

A. Misconduct in Office

62. Having considered the evidence, the undersigned finds that Petitioner has not established, by a preponderance of the competent, credible, and persuasive evidence, that Respondent's actions in this case constitute misconduct in office, as defined in rule 6A-5.056(2), which incorporates rule 6A-10.080, rule 6A-10.081, and Standards of Ethical Conduct, School Board Policy 4210; the Code of Ethics, School Board Policy 4210; and the Student Supervision and Welfare Policy, School Board Policy 4213.

63. As discussed in greater detail above, the video camera footage simply does not show, with any degree of clarity or precision, that Respondent engaged in the conduct with which he is charged in the Notice of Specific Charges—i.e., picking up J.F. and dropping him to the floor and grabbing him by the hood of his sweatshirt such that he was unable to breathe.^{17/}

64. Further, as discussed above, D.C.M.'s testimony was equivocal regarding Respondent's specific actions, and, as such, was not sufficiently persuasive to find that Respondent engaged in the conduct alleged in the Notice of Specific Charges.

65. As discussed above, the video footage does show, with some reasonable certainty, some physical contact between Respondent and J.F.^{18/} The undersigned finds that this contact constituted the use of reasonable force which was appropriate

under the circumstances, and that Respondent's actions in attempting to physically block J.F. from re-entering the spill-out area (where he already had been disruptive and physically engaged with other students) were consistent with the JFKMS procedures for dealing with disruptive behavior by a student.

66. Specifically, Respondent testified, credibly, that, consistent with the JFKMS protocol for dealing with disruptive student behavior, he directed J.F. and the other student to stop slap-boxing with each other. He did so twice; both times, they disobeyed those directives. Once J.F. and the other student exited into the courtyard, Respondent attempted to isolate them in that area so they would not return to the spill-out area and resume in behavior that was disruptive and potentially dangerous to themselves and other students. At that point, J.F. and the other student stopped slap-boxing and attempted to get past Respondent, with one of them actually succeeding. Respondent blocked the gate with his body, consistent with the type of reasonable force that is authorized under circumstances where the student's behavior may result in injury to himself or others.^{19/}

67. As discussed above, the evidence shows that J.F. made the initial contact with Respondent by running into him, at which point J.F. fell to the ground. Thereafter, as Respondent again tried to prevent him from returning into the spill-out

area—while telling him he had to remain in the courtyard until the class bell rang—J.F. again attempted to squeeze past him. At this point, Respondent was justified in holding J.F. to prevent him from re-entering the spill-out area, where he previously had engaged in disruptive behavior (which could have escalated into a real fight) and had shown no inclination to stop even after being directed twice to do so.

68. As discussed above, Respondent did not attempt to call for the assistance of another school security monitor or administration until J.F. ripped off his sweatshirt and started throwing punches at him, because until that point, Respondent considered the situation under control.

69. Under these circumstances, the undersigned finds that Respondent did not engage in conduct constituting misconduct in office as defined by rule 6A-5.056(2).

B. Gross Insubordination

70. The undersigned also finds that Respondent's actions do not constitute gross misconduct, as defined in rule 6A-5.056(4).

71. In connection with the April 2013 reprimand of Respondent for inappropriate physical contact with a student, the then-principal of JFKMS issued directives that included the following: "[r]efrain from any physical touching of students." Another directive appeared to temper this directive by stating:

"[f]ollow MDCPS Procedures for Safe Physical Restraint when necessary."

72. In connection with the suspension of Respondent in September 2013, for horseplay with a student, the following additional directives were issued: "[r]efrain from inappropriate physical contact with students in a way or in any manner that does not directly relate to your job as a school security monitor."

73. Here, the evidence does not show that Respondent's actions constitute the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

74. With respect to the April 2013 directives, to the extent they direct Respondent, as a school security monitor, to literally refrain from any physical contact with students, they are directly contrary to School Board Policy 5630, titled "Corporal Punishment and Use of Reasonable Force," which expressly authorizes school staff members, which includes school security monitors, to, within the scope of their employment, "use and apply reasonable force to quell a disturbance threatening physical injury to others, . . . in self-defense, or for the protection of persons and property." To the extent the principal's April 2013 directives are contrary to this School Board policy, they were (and are) unreasonable.

75. Respondent's actions also do not violate the additional directives issued in September 2013 in association with his suspension.

76. As discussed above, Respondent's conduct under the circumstances present in this case, where J.F. had engaged in disruptive behavior having the potential to escalate into a fight that could harm or injure himself or others, constituted use of reasonable force—which consisted of blocking J.F. as he tried to re-enter the spill-out area after having been told he was to remain in the courtyard until the class bell rang, and holding J.F. when J.F. again disobeyed that directive and again made physical contact with Respondent.

77. The evidence also shows that, consistent with the September 2013 directive, Respondent followed MDCSP Procedures for safe restraint when necessary. As discussed above, Respondent twice told J.F. and the other student to stop slap-boxing, and he also repeatedly told J.F. to remain in the courtyard until the class bell rang. He gave these directives before engaging in physical restraint of J.F. by blocking, and then holding, him when he disobeyed, ran into Respondent, and ultimately, tried to punch Respondent. Further, Respondent's actions with respect to J.F. were directly related to his job as a school security monitor.

78. Under these circumstances, the undersigned finds that Respondent did not engage in gross insubordination under rule 6A-5.056(2).

CONCLUSIONS OF LAW

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

80. Section 1012.40(1)(a), Florida Statutes, defines "educational support employee" as follows:

"Educational support employee" means any person employed by a district school system who is employed as a teacher assistant, an education paraprofessional, a member of the transportation department, a member of the operations department, a member of the maintenance department, a member of food service, a secretary, or a clerical employee, or any other person who by virtue of his or her position of employment is not required to be certified by the Department of Education or district school board pursuant to s. 1012.39. This section does not apply to persons employed in confidential or management positions. This section applies to all employees who are not temporary or casual and whose duties require 20 or more hours in each normal working week.

81. As a school security monitor employed by Petitioner, Respondent is an "educational support employee."

82. Here, on the basis of Respondent's alleged conduct,^{20/} Petitioner seeks to terminate Respondent's employment as a

school security monitor for misconduct in office and gross insubordination.

83. As such, section 1012.40(2)(c) pertains to this proceeding. That statute states:

In the event a district school superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event there is no collective bargaining agreement.

84. Article XXI(3)(D) of the collective bargaining agreement between Petitioner and the United Teachers of Dade ("UTD Contract") provides that termination of an educational support employee requires a showing of "just cause," which expressly includes "misconduct in office" and "gross insubordination" as those terms are defined by rule.^{21/}

85. Because Petitioner seeks to terminate Respondent's employment, it bears the burden, by a preponderance of the evidence, to prove the allegations set forth in its Notice of Specific Charges. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

86. 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).

87. As discussed above, whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

88. Rule 6A-5.056(2) defines "misconduct in office" to mean one or more of the following:

- (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;
- (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;
- (c) A violation of the adopted school board rules;
- (d) Behavior that disrupts the student's learning environment; or
- (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

89. For the reasons discussed above, it is concluded that Petitioner did not prove, by a preponderance of the evidence,

that Respondent engaged in conduct constituting misconduct in office.^{22/}

90. Rule 6A-5.056(4) defines "gross insubordination," in pertinent part, as meaning "the intentional refusal to obey a direct order, reasonable in nature, and given by and with property authority[.]"

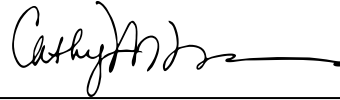
91. For the reasons discussed above, it is concluded that Petitioner did not prove, by a preponderance of the evidence, that Respondent engaged in conduct constituting gross insubordination.

92. Accordingly, it is concluded that just cause does not exist, as required by section 1012.40(2)(c), to suspend Respondent without pay and terminate his employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Miami-Dade County School Board, enter a final order dismissing the Notice of Specific Charges against Respondent, reinstating Respondent's employment as a school security monitor, and awarding Respondent back pay for the period of his suspension without pay.

DONE AND ENTERED this 7th day of April, 2016, in
Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2015.

ENDNOTES

^{1/} All statutory references are to the 2015 version of Florida Statutes.

^{2/} The incident occurred shortly after 1:00 p.m., according to the digital timeline shown in the surveillance camera video-recordings that were admitted into evidence.

^{3/} Other buildings border the courtyard, and while there is access from the courtyard to the parking lot, where students presumably could leave the school campus, those areas are monitored to ensure that students do not leave the campus.

^{4/} See Petitioner's Policy 5500, which has been formally adopted and incorporates by reference the Code of Student Conduct Secondary. Petitioner has published both of these documents.

^{5/} The video footage was admitted into evidence. This is a de novo proceeding in which the undersigned is obligated to determine for herself what the video footage depicts rather than relying on the witness's narrative description of the events depicted.

6/ The video footage from Camera 5 contains, on the top left corner of the footage, the notation "[5] rear aud.," which presumably identifies that camera's location.

7/ The times set forth on the timeline are derived from the timestamp shown in the lower left corner of the video footage for Camera 5.

8/ The undersigned viewed the video footage from Camera 5 numerous times, both at regular speed and frame-by-frame, and both at the "original" size as recorded by the camera and at "full size."

9/ For example, in response to a question asked on direct examination, Officer Dumas identified a "silhouette" as Respondent. However, the video's poor quality is such that the "silhouette" is barely (if at all) visible, and its identity cannot be discerned by viewing the video; this "identification" based on an assumption of the identity of the person is not persuasive.

10/ The video footage from Camera 6 contains, on the top left corner of the footage, the notation "[6] boys loc.," which presumably identifies that camera's location.

11/ The times set forth on the timeline are derived from the timestamp shown in the lower left corner of the video footage for Camera 6.

12/ The undersigned viewed the video footage from Camera 6 numerous times, both at regular speed and frame-by-frame, and both at the "original" size as recorded by the camera, and at "full size."

13/ This testimony is hearsay and no predicate was established for its admission under the hearsay exceptions codified in sections 90.803 or 90.804, Florida Statutes. In administrative proceedings conducted pursuant to section 120.57(1), hearsay evidence is admissible and may be used to supplement or explain other evidence, but is not sufficient in itself to constitute the sole evidentiary basis for a finding of fact unless it is admissible under an exception to the hearsay rule. See §§ 120.569(2)(g) and 120.57(1)(c), Fla. Stat. (2015). See also Fla. Admin. Code R. 28-106.213(3).

14/ The undersigned notes that this testimony seems inconsistent, in that it would be nonsensical for Respondent to

order J.F. and the other student back into the spill-out area from the courtyard, then attempt to block them from entering the spill-out area through the gate. Further, this testimony is contradicted by Respondent's credible testimony that he attempted to isolate J.F. and the other student in the courtyard to prevent them from causing further disruption in the spill-out area.

^{15/} Parton did not witness the incident between Respondent and J.F.

^{16/} See § 120.569(1)(d), Fla. Stat.

^{17/} Petitioner contends, in its Proposed Recommended Order, that even if the video footage did not depict the conduct alleged in the Notice of Specific Charges and Respondent's version of the events were accurate, "[Respondent's] behavior is still inexcusable." Petitioner's Proposed Recommended Order, p. 15, ¶ 58. To the extent Petitioner contends that Respondent should be disciplined on the basis of actions not specifically alleged in the Notice of Specific Charges, that position is rejected. It is well-established in Florida law that a person cannot be subjected to administrative disciplinary action for offenses not specifically charged in the administrative charging document—here, the Notice of Specific Charges. See Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); Willner v. Dep't of Prof'l. Reg., 568 So. 2d 805, 806 (Fla. 1st DCA 1990). Here, the Notice of Specific Charges alleges the specific conduct—picking J.F. up and dropping him to the ground and grabbing the hood of his sweatshirt such that J.F. was unable to breathe—that Respondent is charged with having engaged. Petitioner failed to prove, by a preponderance of the evidence that Respondent did, in fact, engage in such conduct. Petitioner cannot, at this juncture, effectively expand the scope of the conduct it alleges constitutes misconduct in office or gross insubordination and discipline Respondent on this basis. See Ghani v. Dep't of Health, 714 So. 2d 1113, 1115 (Fla. 1st DCA 1998) (where the plain language of the administrative complaint only addresses certain conduct, discipline cannot be imposed on the basis of conduct not specifically addressed in the complaint). The undersigned further notes that Petitioner contends, in its Proposed Recommended Order, that Respondent taunted J.F., causing him to "erupt." However, there is no evidence whatsoever in the record showing or otherwise indicating that Respondent taunted J.F.

^{18/} However, as discussed above, the video does not show, with any precision or clarity, the specific conduct in which Respondent is alleged to have engaged.

^{19/} Exhibit 2, Petitioner's training materials, authorizes the use of reasonable force, which may include blocking a student's path or holding a student, when circumstances warrant. Pet. Ex. 2, p. 47. Circumstances justifying the use of reasonable force include quelling a disturbance, to prevent harm or injury to the student or others, and in self-defense. Id. at p. 40.

^{20/} As discussed above, the evidence establishes that slap-boxing can, and with some frequency does, escalate into real fighting. As such, it constitutes behavior that is disruptive to a safe and orderly learning environment, and may result in harm or injury to the participants and to others. Petitioner's school monitor training program specifically contemplates the use of reasonable force, such as holding a student, to stop the disruptive behavior.

^{21/} The UTD Contract cites Florida Administrative Code Rule 6B-4.009. However, this rule was transferred to rule 6A-5.056, which was substantially amended in 2012. The 2012 version of rule 6A-5.056 was in effect at the time of the incident giving rise to this proceeding, so that version applies to this proceeding.

^{22/} This conclusion necessarily entails a conclusion that Respondent did not violate the Code of Ethics of the Education Profession in Florida, the Principles of Professional Conduct for the Education Profession in Florida, or adopted school board rules, as well as the other grounds established in rule 6A-5.056. As discussed in detail above, the undersigned finds that Respondent's conduct constituted the use of reasonable force, consistent with School Board Policy 5630 and Petitioner's established standards used to train school security monitors. See Pet. Ex. 2, pp. 40, 47.

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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.