

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 20-4552TTS

HALYNA SHVANK,

Respondent.

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RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings (“DOAH”), for final hearing by Zoom teleconference on February 11, 2021.

APPEARANCES

For Petitioner: Andrew Carrabis, Esquire  
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For Respondent: Robert F. McKee, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether the district school board has just cause to suspend an instructional employee for three days without pay, where it has alleged that the teacher verbally and physically abused two of her exceptional education students.

PRELIMINARY STATEMENT

On October 6, 2020, Petitioner Broward County School Board (the “School Board” or “District”) approved the issuance of an Amended Administrative Complaint against Respondent Halyna Shvank (“Shvank”), charging the instructional employee with disciplinable offenses based upon allegations that, on September 18, 2019, she yelled at and roughly handled two of her students, both of whom have autism and receive special education services. Believing that these alleged incidents constitute just cause for a three-day suspension of Shvank’s employment, without pay, the District imposed the punishment subject to further administrative proceedings.

Shvank timely requested a formal administrative hearing. By letter dated October 14, 2020, the School Board referred the matter to DOAH. Upon assignment, the undersigned set the final hearing for December 10, 2020, a date which was later continued to February 11, 2021.

At the final hearing, the District called as witnesses Diego Balin, Galina Markevich, Kelly Walker, and Elizabeth Williams. Petitioner’s Exhibits 1 through 17 were received in evidence without objection. Shvank testified on her own behalf and offered the testimony of Emma Hirsch, Linda Silvitella, and Jocelyn Cosme. Shvank did not offer any exhibits.

The final hearing transcript was filed on March 2, 2021. Each party timely filed a Proposed Recommended Order, and these submissions were considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2020, except that all references to statutes or rules defining disciplinable offenses or prescribing penalties for

committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

#### FINDINGS OF FACT

1. The School Board is the constitutional entity authorized to operate, control, and supervise the Broward County Public School System. At all times relevant, it was Shvank's employer.

2. As an instructional employee of the School Board, Shvank holds an annual contract, and she may be dismissed or suspended during the term of the contract only for just cause. Shvank is certified to teach exceptional student education, and during the relevant school year, 2019-2020, she was assigned to Dania Elementary School, where she taught a first-grade class composed of nine students with autism.

3. In this proceeding, the School Board seeks to suspend Shvank for three days without pay based upon three separate incidents, which occurred in her classroom on September 18, 2019. Two of these incidents involved a student named M.S., while the third was an interaction with L.G., another student.

4. The only evidence against Shvank having any meaningful probative value in the judgment of the fact-finder are videos recorded by a college student who used his iPhone to film Shvank while observing her class pursuant to his own studies as an education major. He later edited the raw footage, which was reduced to three brief clips, hereafter the "Chin Segment," the "Words Segment," and the "Dance Segment." Before turning to these clips, some findings about how the videos came to be made are in order.

5. In September 2019, Diego Balin was a student at Broward College in his final year of a program leading to a degree in education. As part of his studies, Mr. Balin needed to complete a practicum, whereby he would be placed in a classroom to observe an experienced teacher in action. Mr. Balin was assigned to Shvank's classroom.

6. As a student teacher, Mr. Balin was present in Shvank's classroom on two different days, the first being a date before that of the subject incidents. There is some dispute as to how long Mr. Balin stayed that first day, but he saw enough to conclude that Shvank was too aggressive with the students for his taste. It should be added that the two other adults in the classroom (besides Shvank and Mr. Balin), namely a paraprofessional and a speech-language pathologist, did not observe any questionable behavior on Shvank's part, either that day or at any time.

7. The next time that Mr. Balin was in Shvank's classroom turned out to be September 18, 2019. Within about ten minutes after arriving, Mr. Balin saw what he perceived as aggressive behavior by Shvank, so he began secretly video recording her using the iPhone in his shirt pocket as a concealed body camera. In total, Mr. Balin recorded approximately two hours' worth of footage, capturing about half of his time in the classroom that day.

8. Reviewing the video later, Mr. Balin identified three incidents that bothered him. He reported his concerns to Kelly Walker, the professor overseeing his practicum, and told her that he had made a video recording. Professor Walker asked for a copy of the video.

9. Mr. Balin edited the footage by cutting out three short clips, as mentioned, which together comprise about three and a half minutes of playing time. The Chin Segment is 23 seconds long. The Words Segment runs for one minute, 23 seconds. The Dance Segment is one minute, 46 seconds in duration. Mr. Balin sent these clips to Professor Walker. After seeing the video clips, Professor Walker reported her suspicion of possible child abuse to, among others, the principal of Shvank's school and the Department of Children and Families' abuse hotline.

10. The District's case depends almost entirely upon the persuasiveness of these three clips. For that reason, the undersigned notes that, as a fact-finder, he must *interpret* the videos, which do not convey an obvious, unambiguous meaning. Indeed, these videos are neither objective nor

definitive. Heavily edited for length, thereby potentially depriving the viewer of important context, they afford only one visual perspective, which is sometimes obstructed, making it impossible to know what is being missed or possibly misperceived. Crucially, the most relevant actions of Shvank, i.e., the ones which the District contends are disciplinable, take place literally within fractions of a second, a mere blink of the eye. It is not an overstatement to say that a viewer can see what he or she wants to see in these video clips.

11. With that in mind, the undersigned notes, further, that as a fact-finder, he is troubled by the provenance of these clips. There is a narrative at work here, which the undersigned believes might tend to bias some viewers against Shvank, making them more likely to “see” abuse in the videos.

12. To begin, we have the apparently altruistic whistleblower, Mr. Balin, who is shocked by what he perceives as child abuse which no one else seems to notice, impliedly because the classroom “regulars” have grown accustomed or indifferent to Shvank’s aggressive manner. He is appalled, but instead of reporting his concerns to the school administration, which could have investigated the matter in the ordinary course if the allegations warranted such attention, Mr. Balin decides unilaterally that there is a reasonable basis for an investigation, which he will personally carry out.

13. To gather evidence, Mr. Balin conducts covert electronic surveillance of Shvank, effectively deputizing himself as an undercover agent of the District. This was a questionable decision for several reasons, and one the District should be hesitant to condone. Some of the reasons are legal in nature, others practical.

14. From a legal standpoint, the question as to whether the secret recording of Shvank constituted an illegal interception under section 943.03, Florida Statutes, is one that could be fairly debated. Because Shvank did not object pursuant to section 934.06 to the admission of the videos into evidence, however, the question need not be decided here. Even if the covert

interception of her oral communications was legal, however, as it might have been, there is something unsavory about secretly videotaping a teacher on a fishing expedition for evidence of wrongdoing that has yet to occur, based on suspicions that have not been vetted for reasonableness, either by the teacher's supervisors or by law enforcement.

15. Another legal issue arising from these circumstances is whether Mr. Balin's videos constitute education records subject to the privacy protections afforded under the Family Educational Rights and Privacy Act. *See* 20 U.S.C. § 1232g. There are, after all, identifiable student images in these video clips. The students shown in the clips, moreover, are enrolled in the District's special education program, which means that the videos might also come under the confidentiality provisions of the Individuals with Disabilities Education Act. *See* 20 U.S.C. § 1417(c). These issues need not be decided here. The point is that the decision to covertly videotape Shvank *and her students* is one that Mr. Balin should not have made on his own authority, and it is one that the District might want to distance itself from, given that the lawfulness of such surveillance is not free from doubt.

16. Practically speaking, this case might have a chilling effect on teachers' willingness to welcome student teachers into their classrooms. Shvank had a spotless record until the student teacher arrived. But then, her life was upended by Mr. Balin's brief appearances in her classroom. In addition to this disciplinary action, the Balin videos wound up in the news, generating bad publicity for Shvank, which surely damaged her professional reputation. She was forbidden from entering a classroom to teach for nearly one and a half years. None of this would have happened if Shvank had refused to let the student teacher observe her at work. Considering Shvank's experience, it takes no imagination to foresee that, in the future, some teachers might think twice about hosting a student teacher. (In the absence of evidence to the contrary, of which there is none, the undersigned presumes that a teacher would not be *required* to host a teaching student if he or she preferred not to.)

17. None of the foregoing factors impugn the credibility of the video clips per se, but they do shed light on Mr. Balin's credibility. Mr. Balin is not, in the fact-finder's view, as disinterested a witness as he appears to be at first blush. Rather, Mr. Balin was a motivated witness, as shown by the fact that he decided personally to gather evidence of *anticipated* wrongdoing on Shvank's part. While there is no evidence that he had any preexisting animus towards Shvank, Mr. Balin secretly recorded her because he wanted to find proof that she was being abusive with her students, to corroborate his own perception of Shvank's conduct. As stated above, if, like Mr. Balin, you *want* to see abusive behavior in these videos, then that is what you will likely see.

18. Mr. Balin testified credibly as to his opinion about what the video clips show. Mr. Balin, however, sincerely and honestly believed *before* September 18, 2019, that Shvank was overly aggressive with her students, and, to repeat, he *wanted* his surveillance videos to prove him right. Mr. Balin, therefore, was primed to see abuse in the footage he shot. Mr. Balin's evident sincerity and obvious conviction, moreover, may have primed other viewers to see what he sees in the videos. The undersigned, in watching the videos, has made a conscious effort neither to expect to see, nor to ignore, evidence of wrongdoing.

19. The Chin Segment. At the beginning of this clip, Shvank is standing behind her desk. She looks up and sees M.S. doing something that attracts her attention, whereupon she walks briskly over to the student. Standing before M.S., Shvank exclaims, "Didn't I say 'no'?" As she speaks, she reaches out and places her finger under M.S.'s chin, lifts the finger, and wags it in a gesture signaling "no, no, no." As this happens, M.S.'s head jerks backwards. The District contends that Shvank snapped M.S.'s head back by forcefully pushing his chin upwards.

20. A casual viewer might agree with the District. The entire "head snapping" episode takes place *within* the eight-second mark of the video clip. It happens fast, and M.S.'s head does appear to jerk backwards.

Unfortunately, the video does not afford a clear line of sight, and the angle of the shot is less than ideal. By watching the clip in slow motion, frame by frame, however, the undersigned has determined that Shvank did *not* likely snap M.S.'s head back. For one thing, her fingertip barely touches his chin, doing so only glancingly at best. For another, there is simply little or no visual evidence of exertion or use of force on Shvank's part, sufficient to produce M.S.'s reaction. Neither her hand nor her arm moves with the kind of sudden, propulsive force that would be required to transfer enough energy to M.S.'s chin to propel his head backwards. In contrast, M.S.'s shoulders appear to shrug simultaneously, a flinching movement consistent with the theory that M.S. jerked his head back under his own power, perhaps because he was startled or surprised.

21. It is found that, more likely than not, M.S. himself threw his head back when Shvank placed her finger under his chin.

22. After this, the video shows Shvank repositioning M.S. in his chair so that he is sitting upright with his arms on the desk. While doing this, Shvank says, "Now, close your mouth, I'm going to watch you." The District contends that Shvank "manhandle[d]" M.S. as she situated him at his desk. The undersigned sees no persuasive evidence of such rough treatment in the video. Rather, Shvank appears to be making sure that M.S. is properly seated.

23. Shvank testified credibly that she had observed M.S. pushing his chair away from the desk, which caught her eye because he did this sort of thing ahead of engaging in self-injurious behavior, i.e., head banging. So, she rushed over to stop him. Because M.S. is nonverbal and low-functioning, Shvank put her finger under his chin as a signal for him to look up at her and pay attention. She repositioned him at the desk to prevent him from trying again to harm himself. Shvank's testimony is consistent with the video clip and is credited as truthful.



24. The Words Segment. This clip shows Shvank working one-on-one with M.S. to teach him “B” words such as “bus” and “bird.” She and the student are sitting in chairs next to each other at a round table. Shvank speaks a word, e.g., “bus,” and instructs M.S. to touch the flashcard having a picture of a bus. Shvank’s voice is loud, but the classroom is a noisy environment, and she is clearly trying to keep the student’s attention focused on the exercise. The District argues that Shvank was “yelling” at, and being “aggressive” with, M.S., but the undersigned finds that she was merely instructing M.S. in a raised voice appropriate to the setting and the purpose.

25. At one point, Shvank says, “This is working. You don’t want to hear it?” M.S. appears to have leaned away from the flashcards and stopped participating in the exercise. Shvank puts her arm around M.S.’s shoulder and then pats his head, pulling him closer, so that he can get back to the lesson. The District contends that Shvank slapped M.S.’s head out of frustration, but the video clip does not support such a finding. When the clip is viewed frame by frame, Shvank’s gestures are seen, not as aggressive, but as affectionate. She was not frustrated but, rather, was trying to redirect M.S. and put him back on task.

26. The Dance Segment. In this clip, Shvank is dancing with the students to a recording of the Mexican Hat Dance. She is standing behind, and dancing with, L.G. Most of this video is unremarkable. At about the one minute, 30 second mark, L.G. drops from view, having flopped to the floor. Shvank gets him up and they continue with the dance, until L.G. does something with his hands that the camera fails to capture. Possibly, L.G. reaches out for the student next to him. Whatever L.G. has done, Shvank reprimands him, saying, “No! No food.” Shvank testified that this meant she would withhold L.G.’s snack as a punishment. When she tells L.G. “no,” Shvank cups his cheeks with her open hands and points his face upwards to look at her. The District contends that Shvank “grab[bed] L.G. under the jawline and yank[ed]” his head up. The video does not support this

characterization. To the contrary, the video shows that Shvank's hand did *not* grab or otherwise take hold of L.G.'s face. Her hands are open, fingers straight ahead. Shvank's touch was appropriate to the situation and not aggressive or punitive.

27. The District claims that L.G. immediately covered his ears after Shvank touched him, implying that Shvank had hurt his ears. L.G. does indeed briefly cover his ears, but the video does not support a finding that he did so because Shvank injured him. There is little or no visual evidence that Shvank made any contact with L.G.'s ears, much less sufficient contact to cause harm. The undersigned credits Shvank's testimony that L.G. covered his ears in reaction to being told that he would not be receiving a snack, a gesture meaning he did not want to hear that message.

#### DETERMINATION OF ULTIMATE FACT

28. The School Board has failed to prove its allegations against Shvank by a preponderance of the evidence.

#### CONCLUSIONS OF LAW

29. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes.

30. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." *Jacker v. Sch. Bd. of Dade Cty.*, 426 So. 2d 1149, 1150-51 (Fla. 3d DCA 1983) (Jorgenson, J. concurring).

31. Once a school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon

which dismissal may be predicated. *See Lusskin v. Ag. for Health Care Admin.*, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); *Klein v. Dep't of Bus. & Prof'l Reg.*, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); *Willner v. Dep't of Prof'l Reg., Bd. of Med.*, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), *rev. den.*, 576 So. 2d 295 (Fla. 1991).

32. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). *See McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); *Sublett v. Sumter Cty. Sch. Bd.*, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); *MacMillan v. Nassau Cty. Sch. Bd.*, 629 So. 2d 226 (Fla. 1st DCA 1993).

33. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

34. In its Amended Administrative Complaint, the District charged Shvank with misconduct in office and other offenses, based on Mr. Balin's videos, which it alleges show Shvank being verbally or physically abusive to her students M.S. and L.G.


35. The School Board, however, failed to prove, by a preponderance of the evidence, that Shvank behaved as alleged. Thus, the charges against Shvank necessarily fail, as a matter of fact. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order

exonerating Halyna Shvank of all charges brought against her in this proceeding and awarding her back salary and benefits as required under section 1012.33(6)(a).

DONE AND ENTERED this 11th day of May, 2021, in Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 11th day of May, 2021.

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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.