

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VOLUSIA COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 00-4992
)
 TERRY M. LUCHTERHAND,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was held in this case on March 7, 2001, with video teleconference sites located in Tallahassee, Florida, and Daytona Beach, Florida, before the Division of Administrative Hearings, by its Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Thomas Gonzalez, Esquire
Kelly L. Soud, Esquire
Thompson, Sizemore & Gonzalez
109 North Brush Street, Suite 200
Post Office Box 639
Tampa, Florida 33601

For Respondent: Terry M. Luchterhand, pro se
111 Seton Trail
Ormond Beach, Florida 32176

STATEMENT OF THE ISSUE

The issue is whether Petitioner had just cause to terminate Respondent's employment for being under the influence of alcohol while on duty.

PRELIMINARY STATEMENT

By letter dated October 19, 2000, Petitioner Volusia County School Board (Petitioner) advised Respondent Terry M. Luchterhand (Respondent) that his employment was terminated. The letter alleged that Respondent had violated Petitioner's policy relative to the conduct of employees regarding illegal drug and alcohol abuse.

On or about December 11, 2000, Respondent requested a formal hearing. Petitioner referred this case to the Division of Administrative Hearings on December 18, 2000.

A Notice of Hearing by Video Teleconference dated December 28, 2000, scheduled the case for hearing on February 13, 2001. Subsequently, Petitioner filed a Motion for Continuance. An order dated January 26, 2001, granted this motion and rescheduled the case for hearing on March 7, 2001.

On March 5, 2001, Petitioner filed three proposed exhibits. The exhibits included the following: (a) School Board Policy 415 with Respondent's Signature; (b) U. S. Department of Transportation Breath Alcohol Testing Form dated July 20, 2000; and (c) Letter of Recommendation of Termination.

During the hearing, Petitioner presented the testimony of eight witnesses. Petitioner offered the above-referenced three exhibits for admission into evidence. Petitioner's exhibits were admitted with the exception of the second exhibit, U.S. Department of Transportation Breath Alcohol Testing Form, dated July 20, 2000. The undersigned reserved ruling on the admissibility of the numerical results of the two breath alcohol tests contained in the breath alcohol testing form. For reasons set forth below, the numerical test results are hereby excluded as uncorroborated hearsay.¹

Respondent testified on his own behalf. He offered one exhibit that was accepted into evidence.

The Transcript was filed on March 23, 2001. Petitioner timely filed its Proposed Recommended Order on April 2, 2001.

Respondent filed a letter on April 5, 2001, which was read and considered. The undersigned issued a Notice of Ex Parte Communication regarding this letter on April 6, 2001.

FINDINGS OF FACT

1. At all times material to this proceeding, Petitioner employed Respondent as a facilities maintenance technician at Pathways Elementary School.

2. Respondent's job required him to maintain the school's heating and air conditioning equipment and all electrical equipment. Respondent's position was safety-sensitive because

his work occasionally exposed him to as much as 220 volts of electricity.

3. Respondent was aware of Petitioner's personnel policy regarding illegal drug or alcohol abuse. This policy is set forth in policy No. 415, which states as follows in relevant part:

It is the intention of the School Board of Volusia County to maintain a drug-free workplace and school environment for its employees and students
An employee of the school board shall not manufacture, distribute, dispense, possess or use alcoholic beverages on school grounds, on school board property, or at school board activities (on or off school board property) at which students are present

* * *

Disciplinary action, including, but not limited to termination of employment and referral for prosecution, if appropriate will be taken against any employee who violates this policy. . . . Procedures shall be developed to effectuate the intent of this policy. The procedures shall include provisions for drug testing applicants for employment and employees. Employee testing may be part of a routinely scheduled fitness-for-duty medical examination or based upon reasonable suspicion that an employee is violating the terms of this policy. . . .

Respondent signed a document on October 12, 1998, acknowledging his receipt of policy No. 415. Respondent admits he had a

responsibility to make sure that he was not under the influence of alcohol at work.

4. On July 20, 2000, the school's secretary was making photo identification badges for school staff members. The secretary radioed Respondent and requested that he come to the office to have his picture taken. During this conversation, the secretary noticed that Respondent's speech was slurred. Because Respondent's voice did not sound right, the secretary asked the school's resource teacher to be present when Respondent arrived.

5. In order to take the picture, the secretary had to place the camera fairly close to Respondent's face. The secretary smelled alcohol on Respondent's breath. She also observed that Respondent was sweating profusely and that his complexion was very pale.

6. Upon Respondent's arrival at the office, the resource teacher smelled a strong odor of alcohol in the room. The resource teacher noticed Respondent's slurred speech. She also observed that Respondent appeared ill because he was pale and sweating profusely.

7. The school secretary called the assistant principal to tell him that she had observed Respondent in an intoxicated state. The assistant principal, in turn, telephoned Respondent's immediate supervisor regarding Respondent's

observable intoxication. The assistant principal made this call around 1:00 p.m.

8. Subsequently, the assistant principal observed two bottles of vodka and several bottles of mouthwash in Respondent's vehicle. The vehicle was parked in the school's parking lot.

9. Respondent's immediate supervisor first called Petitioner's professional standards investigator who agreed to meet the supervisor at Pathways Elementary School. The supervisor and the investigator wanted to observe Respondent's behavior firsthand.

10. Arriving at the school, the supervisor noted that Respondent's speech was slurred. Upon her subsequent arrival, the investigator noted Respondent's disheveled clothing, his confused conversation, and the smell of alcohol about his person. Based on her training and experience and her observations of Respondent, the investigator concluded that Respondent was under the influence of alcohol.

11. Respondent freely agreed to submit to a sobriety test. The supervisor transported Respondent to Deland, Florida, for a breath alcohol test. They arrived at the testing center about 3:00 p.m. After taking two breath alcohol tests, Respondent signed a document setting forth the numerical results.

12. As a result of Respondent's intoxication on the job, and in light of Petitioner's drug-free workplace policy, Petitioner gave Respondent another work assignment pending completion of an investigation. After the investigation was complete, Petitioner voted to terminate Respondent's employment. Petitioner's decision was consistent with its policy of terminating employees upon their first violation of the prohibition against using alcoholic beverages on school property.

13. Respondent presented testimony that he is now enrolled in an intensive alcohol-treatment program. He admits that he "has a problem with alcohol." Respondent's testimony that he was not intoxicated from using alcohol while at work on July 20, 2000, is not persuasive.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

15. Petitioner has the burden of proving by a preponderance of the evidence that it has just cause for terminating Respondent's employment.

16. Despite the inadmissibility of Respondent's breath alcohol test results, Petitioner met its burden of proving that Respondent was intoxicated at work on July 20, 2000, because lay

witnesses presented persuasive testimony about his observable intoxication. See Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989) review denied, 560 So. 2d 234 (Fla. 1990). The credible testimony of the secretary, the resource teacher, the supervisor, and the investigator constitute competent evidence of Respondent's impairment. Accordingly, Petitioner had just cause to terminate Respondent's employment.

RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order finding just cause for terminating Respondent's employment.

DONE AND ENTERED this 9th day of April, 2001, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of April, 2001.

ENDNOTE

1/ On July 20, 2000, Respondent signed the breath alcohol testing form setting forth the numerical results of two breath alcohol tests, indicating that they were accurately recorded on the form. Petitioner may have been competent to determine that the recorded results on the document correctly reflected the numerical readings on the breath machine after each of the breath alcohol tests. However, he is not and never has been competent to verify the accuracy and reliability of the breath machine or its recorded results. This is especially true in light of Respondent's testimony that the test results were not accurate.

Petitioner presented testimony at the hearing that its professional standards investigator participates in the on-site random drug testing of Petitioner's employees four times a year. On those occasions, the investigator accompanies a technician who performs breath alcohol tests using a portable machine. This same investigator was present at the testing center when Respondent was tested on July 20, 2000. Nevertheless, the investigator was not qualified to testify about the reliability of the breath-testing machine used to test Respondent's breath or the validity and accuracy of his numerical test results. More importantly, Petitioner did not present the testimony, in person or by deposition, of the breath alcohol technician who performed Respondent's breath alcohol tests.

During the hearing, Petitioner argued that the U.S. Department of Transportation Breath Alcohol Testing Form dated July 20, 2000, was admissible as an exception to the rule against hearsay under Section 90.803(6), Florida Statutes. That section relates to records of regularly conducted business activities ". . . if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation" Section 90.803(6), Florida Statutes. The breath alcohol testing form at issue here does not meet these conditions.

Petitioner argues in its Proposed Recommended Order that the numerical results of the two breath alcohol tests are admissible because they corroborate otherwise admissible evidence of Respondent's intoxication under Section 120.57(1)(c), Florida Statutes, which states as follows:

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

In this case, no witness testified about the exact content of alcohol in Respondent's breath. Therefore, the numerical test results are not admissible pursuant to that statute.

It should also be noted that the document in question does not meet the criteria for self-authentication and admissibility under Sections 316.1934(5) and 327.354(5), Florida Statutes. These sections set forth the conditions under which breath alcohol test results are admissible as an exception to the hearsay rule in Section 90.803(8), Florida Statutes, for public records, without further authentication, and as presumptive proof of the results.

COPIES FURNISHED:

Thomas Gonzalez, Esquire
Kelly L. Soud, Esquire
Thompson, Sizemore & Gonzalez
109 North Brush Street, Suite 200
Post Office Box 639
Tampa, Florida 33601

Terry M. Luchterhand
111 Seton Trail
Ormond Beach, Florida 32176

William E. Hall, Superintendent
Volusia County School Board
Post Office Box 2118
Deland, Florida 32721-2118

James A. Robinson, General Counsel
Department of Education
The Capitol, Suite 1701
Tallahassee, Florida 32399-0400

Honorable Charlie Crist
Commissioner of Education
Department of Education
The Capitol, Plaza Level 08
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.