

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 01-2112
)	
FRANK F. FERGUSON,)	
)	
Respondent,)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 25, 2001, at Miami, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John A. Greco, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate Respondent's employment as a school custodian based on the allegations contained in the Notice of Specific Charges filed June 21, 2001.

PRELIMINARY STATEMENT

On May 16, 2001, Petitioner voted to terminate Respondent's employment as a school custodian, subject to his due process rights. Respondent requested a formal administrative hearing to challenge the proposed action, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

On June 21, 2001, Petitioner filed its Notice of Specific Charges setting forth the grounds for the termination of his employment. The facts found below and the grounds for the termination of Respondent's employment set forth below were properly alleged in the Notice of Specific Charges.

At the final hearing, Petitioner presented the testimony of the following School Board employees assigned to Horace Mann Middle School (Horace Mann): Mark Wilder (math teacher and coach), Clarence Strong (physical education teacher), Carolyn Blake (principal), Robin Hechler (assistant principal), Noel Chambers (custodian), William McIntyre (lead custodian), and Willie Lee Ellis, Jr. (head custodian). Petitioner also presented the testimony of E. D. (a student at Horace Mann at times pertinent to this proceeding) and Reinaldo Benitez (Executive Director of Petitioner's Office of Professional Standards). Petitioner offered the following pre-marked exhibits, each of which was admitted into evidence: 1, 3, 4, 5,

7, 10, 13, 14, 15, 16, 18, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, and 32.

Respondent did not appear at the final hearing.

A transcript of the proceedings was filed on November 26, 2001. Petitioner filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Petitioner was a duly-constituted School Board charged with the duty to operate, control, and supervise all free public education within the school district of Miami-Dade County, Florida. See Section 4(b) of Article IX of the Constitution of the State of Florida, and Section 230.03, Florida Statutes.

2. At all times pertinent to this proceeding, Respondent was employed by Petitioner as a custodian at Miami Edison Middle School (Miami Edison) and Horace Mann. Both schools are public schools located in Miami-Dade County, Florida.

3. On May 16, 2001, Petitioner voted to suspend Respondent's employment as a school custodian and to terminate that employment.

4. Respondent is a non-probationary "educational support employee" within the meaning of Section 231.3605, Florida Statutes, which provides, in pertinent part, as follows:

(1) As used in this section:

(a) "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. 231.1725. . . .

(b) "Employee" means any person employed as an educational support employee.

(c) "Superintendent" means the superintendent of schools or his or her designee.

(2)(a) Each educational support employee shall be employed on probationary status for a period to be determined through the appropriate collective bargaining agreement or by district school board rule in cases where a collective bargaining agreement does not exist.

(b) Upon successful completion of the probationary period by the employee, the employee's status shall continue from year to year unless the superintendent terminates the employee for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist . . .

(c) In the event a 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.

5. Respondent is a member of the American Federation of State, County, and Municipal Employees, Local 1184 (AFSCME). AFSCME and Petitioner have entered into a Collective Bargaining Agreement (the Agreement) that includes provisions for the discipline of unit members.

6. Article II of the Agreement provides that Petitioner may discipline or discharge any employee for just cause.

7. Article XI of the Agreement provides specified due process rights for unit members. Petitioner has provided Respondent those due process rights in this proceeding.

8. Article XI of the Agreement provides for progressive discipline of covered employees, but also provides that ". . . the degree of discipline shall be reasonably related to the seriousness of the offense and the employees [sic] record. . . ."

9. Article XI, Section 4C of the Agreement provides that employment may be terminated at any time for disciplinary cause arising from the employee's performance or non-performance of job responsibilities.

10. On February 6, 1996, Respondent was issued a memorandum from the principal of Miami Edison involving

Respondent's use of profanity in the presence of students. In the memorandum, the principal directed Respondent not to use profanity on school grounds.

11. On May 21, 1998, Respondent, Mark Wilder, Clarence Strong, and a student were in the cafeteria of Horace Mann preparing for a fund raising activity. Respondent spouted profanities directed towards Mr. Wilder and threatened him with a mop handle. Respondent feigned a swing of the mop handle, causing Mr. Wilder to reasonably fear he was about to be struck by the mop handle. Mr. Wilder had done nothing to provoke Respondent. Mr. Strong knew Respondent and was able to defuse the situation.

12. Mr. Wilder reported the incident to Senetta Carter, the principal of Horace Mann when the incident occurred. Ms. Carter reported the incident to Petitioner's director of region operations. Respondent received a copy of the School Board rule prohibiting violence in the workplace. After investigation, the school police substantiated a charge of assault against Respondent.

13. On March 15, 1999, Petitioner's Office of Professional Standards held a Conference for the Record (CFR) with Respondent pertaining to the incident with Mr. Wilder. Respondent was specifically directed to refrain from using improper language

and from displaying any action that another person could interpret as being a physical threat.

14. On October 25, 2000, during the evening shift, Respondent physically assaulted William McIntyre and Noel Chambers while all three men were working as custodians at Horace Mann. Respondent shouted profanities towards both men, threatened them, and violently grabbed them by their shirt collars. Respondent punched Mr. McIntyre in the area of his chest and broke a chain Mr. Chambers wore around his neck.

15. Mr. Chambers and Mr. McIntyre reported the incident to Robin Hechler, an assistant principal at Horace Mann.

16. Respondent came to Ms. Hechler's office while she was interviewing Mr. McIntyre about the incident. When Ms. Hechler attempted to close the door to her office so she could talk to Mr. McIntyre in private, Respondent put his hand out as if to move Ms. Hechler out of his way. Ms. Hechler told Respondent not to touch her and instructed him to wait outside her office. Ms. Hechler later told Respondent to come in her office so she could interview him. Respondent was acting irrationally. Ms. Hechler told him if he could not control himself she would call the school police. Respondent replied that was fine and walked out of her office. Ms. Hechler reported the incident to the school police, who ordered Respondent to leave the premises.

17. Following the incident, neither Mr. Chambers nor Mr. McIntyre wanted to work with Respondent because they were afraid of him.

18. In response to the incident involving Mr. McIntyre and Mr. Chambers, the principal of Horace Mann referred Respondent to the Petitioner's Employee Assistance Program on November 2, 2000. Respondent's shift was changed so he would not be working with Mr. Chambers or Mr. McIntyre.

19. On November 7, 2000, Respondent attacked J. C., a student at Horace Mann, in the cafeteria area of Horace Mann to punish J. C. for something Respondent thought J. C. had said or done. Respondent shouted profanities towards J. C. and choked his neck. J. C. was very upset and injured by Respondent's attack. Respondent was arrested on November 7, 2000, on the offense of battery on a student. On February 21, 2001, he was adjudicated guilty of that offense, placed on probation for six months and ordered to attend an anger control class. Respondent was also ordered to have no contact with J. C.

20. School Board Rule 6Gx13-4-1.08, prohibiting violence in the workplace, provides as follows:

Nothing is more important to Dade County Public Schools (DCPS) than protecting the safety and security of its students and employees and promoting a violence-free work environment. Threats, threatening behavior, or acts of violence against students, employees, visitors, guests, or other

individuals by anyone on DCPS property will not be tolerated. Violations of this policy may lead to disciplinary action which includes dismissal, arrest, and/or prosecution.

Any person who makes substantial threats, exhibits threatening behavior, or engages in violent acts on DCPS property shall be removed from the premises as quickly as safety permits, and shall remain off DCPS premises pending the outcome of an investigation. DCPS will initiate an appropriate response. This response may include, but is not limited to, suspension and/or termination of any business relationship, reassignment of job duties, suspension or termination of employment, and/or criminal prosecution of the person or persons involved.

Dade County Public Schools [sic] employees have a right to work in a safe environment. Violence or the threat of violence will not be tolerated.

21. School Board Rule 6Gx13-5D-1.07, provides that corporal punishment is strictly prohibited. Respondent's attack on J. C. constituted corporal punishment.

22. School Board Rule 6Gx13-4A-1.21, provides as following pertaining to employee conduct:

I. Employee Conduct

All persons employed by The School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

Unseemly conduct or the use of abusive and/or profane language in the workplace is expressly prohibited.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. Sections 120.569 and 120.57(1), Florida Statutes.

24. Petitioner has the burden of proving by a preponderance of the evidence the allegations contained in the Notice of Specific Charges. See Florida Department of Transportation v. J.W.C., Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3d DCA 1990); and Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990).

25. Respondent violated Rule 6Gx13-4-1.08 (prohibiting violence in the workplace), Rule 6Gx13-5D-1.07 (prohibiting corporal punishment), and Rule 6Gx13-4A-1.21 (prohibiting conduct unbecoming a School Board Employee). Moreover, his effectiveness as a school employee has been impaired by his repeated aggressive conduct towards a teacher, co-workers, and a student.

26. Petitioner established by the requisite evidentiary standard that it has 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 terminating Respondent's employment.

DONE AND ORDERED this 12th day of December, 2001, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
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 12th day of December, 2001.

COPIES FURNISHED:

Frank Ferguson
7155 Northwest 17th Avenue, No. 9
Miami, Florida 33147

John A. Greco, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

Dr. Roger C. Cuevas, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue
Miami, Florida 33132

Honorable Charlie Crist
Commissioner of Education
Department of Education
The Capitol, Plaza Level 08
Tallahassee, Florida 32399-0400

James A. Robinson, General Counsel
Department of Education
The Capitol, Suite 1701
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.