

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 01-2482
)
 PATRICK E. BUDAY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on September 20, 2001, in Miami, Florida.

APPEARANCES

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

For Respondent: Courtney B. Wilson, Esquire
Shook, Hardy & Bacon, L.L.P.
Miami Center, Suite 2400
201 South Biscayne Boulevard
Miami, Florida 33131

STATEMENT OF THE ISSUE

The issue presented is whether Respondent Patrick E. Buday is guilty of the allegations contained in the Notice of Specific

Charges filed against him, and, if so, what disciplinary action should be taken against him, if any.

PRELIMINARY STATEMENT

By correspondence dated May 17, 2001, Petitioner Miami-Dade County School Board advised Respondent Patrick E. Buday that his employment by Petitioner was suspended and that dismissal proceedings were initiated effective at the close of the prior workday. Respondent timely requested an evidentiary hearing regarding that determination. This cause was thereafter transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

Petitioner presented the testimony of Willie E. Spells, Joanne Koski, and Virginia M. Bradford. Respondent testified on his own behalf. Additionally, Petitioner's Exhibits numbered 1-27 were admitted in evidence.

Both parties submitted proposed recommended orders after the conclusion of the final hearing. Those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent was employed by Petitioner as a Material Handler II assigned to one of Petitioner's warehouses.

2. Under the collective bargaining agreement covering Respondent's employment, unauthorized absences totaling ten or

more workdays during the previous twelve-month period constitute evidence of excessive absenteeism. Excessive absenteeism, in turn, constitutes grounds for termination of employment.

3. On April 29, 1997, Respondent's supervisor held a conference-for-the-record with Respondent to address Respondent's excessive absences. At the time of the conference, Respondent had accumulated eight and one-half days of unauthorized absences during the preceding twelve-month period. The conference resulted in a written warning that further disciplinary action, including termination of employment, could occur if Respondent's unauthorized absences totaled ten or more in the previous twelve-month period.

4. In May 1997, after accumulating seven unauthorized absences in the previous twelve-month period, Respondent was again warned in writing that he could be terminated if he accumulated ten or more unauthorized absences.

5. During a two-week pay period in June 1997, Respondent was tardy four of the ten workdays. Respondent received a written warning.

6. In July 1997, Respondent was again warned regarding his excessive absenteeism after he had accumulated eight unauthorized absences in the prior twelve-month period.

7. In October 1998, Respondent accumulated ten and one-half days of unauthorized absences, a number sufficient to

warrant his dismissal. Rather than terminating his employment, however, Respondent's supervisor again warned Respondent in writing about his excessive absenteeism.

8. Despite this written warning, Respondent, just six months later, accumulated ten days of unauthorized absences as of April 1999. Respondent was warned that he could be fired for such excessive absences.

9. In an effort to assist Respondent in correcting his deficiencies, Respondent's supervisor referred Respondent to the School Board's Employee Assistance Program. Respondent, however, declined to participate.

10. Nevertheless, Respondent continued to accumulate unauthorized absences. In November 1999, Respondent was warned that he had accumulated nine and one-half days of unauthorized absences.

11. In March 2000, after accumulating ten unauthorized absences during the previous twelve-month period, Respondent was again warned that he could be fired for excessive absences. During the conference-for-the-record to address his unauthorized absences, Respondent gave no explanation as to why he was repeatedly absent without authorization.

12. After the conference, Respondent was referred a second time to the Employee Assistance Program due to his excessive

absenteeism. Respondent, however, failed to appear for his scheduled appointment.

13. By June 2000, Respondent had again accumulated ten unauthorized absences during the prior twelve-month period and was warned that he could be terminated from employment on that basis.

14. Thus, in the twenty-month period between October 1998 and June 2000, Respondent accumulated ten or more unauthorized absences during the prior twelve-month period on four separate occasions.

15. On August 31, 2000, Respondent lost his driver's license as a result of driving while intoxicated. Even though he knew he needed a driver's license for his job, Respondent did not tell his supervisor that he no longer had a driver's license. Respondent's supervisor only learned that Respondent had lost his driver's license after a routine records check was performed by the School Board's Office of Professional Standards.

16. Under School Board Rule 6Gx13-4A-1.21, Respondent was under an affirmative duty to report to his site supervisor that he no longer had a driver's license.

17. On February 5, 2001, a Judgment was entered finding Respondent guilty of driving under the influence and revoking Respondent's driver's license for ten years. Respondent signed

a copy of the Judgment indicating that he had received a copy and that he understood its contents. That Judgment has not been overturned, amended, or corrected.

18. On March 5, 2001, a conference-for-the-record was held with Respondent by the Office of Professional Standards to address the information regarding Respondent's driver's license which Petitioner had obtained through its routine employee records check. Following the conference, Respondent's supervisors recommended his dismissal from employment for failure to maintain minimum job qualifications. On May 16, the School Board suspended Respondent from his employment and initiated this dismissal proceeding.

19. The minimum qualifications for a School Board employee holding the position of Material Handler II, such as Respondent, include possession of a valid Class D driver's license. The license is required because materials and equipment must be delivered all over the county. Material handlers are routinely assigned to assist the regular drivers with deliveries and are sometimes assigned to different warehouses than those to which they are regularly assigned. Material handlers are called upon to assist with driving duties on the average of three to four times a week, and sometimes daily. The inability of material handlers to drive can impact the School Board's ability to move around employees and materials as needed to fulfill its mission.

20. Respondent knew he was required to have and maintain a valid driver's license to be employed as a material handler.

21. Under the collective bargaining agreement, an employee may be terminated from employment for failing to maintain minimum job qualifications.

CONCLUSIONS OF LAW

22. 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.

23. The Notice of Specific Charges filed in this cause contains four counts. However, the School Board voluntarily dismissed Count IV during the final hearing.

24. Count I alleges that Respondent's conduct constitutes non-performance of his job responsibilities and/or deficient performance and cites Article XI, Section 4.C, of the collective bargaining agreement. That section merely defines the types of separation, or termination of employment, that can occur. It does not, in and of itself, give rise to a basis for terminating Respondent's employment.

25. Count II of the Notice of Specific Charges alleges that Respondent's excessive absenteeism warrants his dismissal. While that may be true, the testimony is uncontroverted that Respondent's superiors did not rely on Respondent's repeated excessive absenteeism as the basis for recommending to the

School Board that Respondent's employment be terminated. Rather, the uncontroverted testimony is that Respondent's superiors relied solely on Respondent's failure to maintain minimum qualifications in their recommendations that he be dismissed. Further, the School Board's letter to Respondent notifying him that he was suspended from his employment and that dismissal proceedings were being initiated against him, although mentioning several bases for that action, does not include Respondent's excessive absenteeism as a basis.

26. Count III alleges that Respondent violated School Board Rule 6Gx13-4A-1.21, which requires employees to conduct themselves in such a manner as to reflect credit upon themselves and the school system. Subsection VI of that Rule applies to non-instructional personnel such as Respondent and provides as follows:

Members of the non-instructional staff shall maintain all certifications, licenses and job requirements as a condition of employment. Failure to do so shall warrant disciplinary action up to and including dismissal from all employment.

Any loss of certification, license or other job requirement shall immediately be reported by the non-instructional staff member to his/her site supervisor. Failure to do so shall constitute a violation of this rule.

27. The School Board has met its burden of proof to show that Respondent's driver's license was suspended and then

revoked; that a driver's license is a minimum qualification for the position of Material Handler II; that Respondent, accordingly, failed to maintain a license required as a condition of employment, and that Respondent failed to report his loss of license to his site supervisor. The School Board has, accordingly, proven that Respondent violated Rule 6Gx13-4A-1.21, and the Rule provides that disciplinary action up to dismissal is warranted. The School Board has properly exercised its authority to dismiss Respondent from his employment. Section 230.23(5)(f), Florida Statutes.

28. Respondent argues that even though a driver's license is a condition for his employment, that it should not be. He reasons that since there are others employed as material handlers who have driver's licenses, they can be called upon when the need for a driver arises. Although Respondent does not think a driver's license is an important condition for his position of employment, that determination is not Respondent's to make. Respondent's job description clearly sets forth that the possession of a driver's license is required, and Respondent does not have one.

RECOMMENDATION

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

RECOMMENDED that a final order be entered dismissing Counts I and II of the Notice of Specific Charges, finding Respondent guilty of the allegations in Count III of the Notice of Specific Charges, ratifying his suspension without pay, and terminating his employment by the Miami-Dade County School Board.

DONE AND ENTERED this 16th day of November, 2001, in Tallahassee, Leon County, Florida.

LINDA M. RIGOT
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of November, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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