

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-2483
	)	
AVERY G. NAIRN,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 3 and 4, 2001, in Miami, Florida, before Florence Snyder Rivas, an 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  
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Miami, Florida 33132

For Respondent: Moneque S. Walker, Esquire  
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Miami, Florida 33144

STATEMENT OF THE ISSUE

Whether Respondent's employment by the School Board should be terminated.

PRELIMINARY STATEMENT

On June 20, 2001, Petitioner, the School Board of Miami-Dade County, Florida (Petitioner or School Board), took action to suspend without pay, and initiate dismissal proceedings against, Respondent, Avery G. Nairn (Respondent or Nairn). Respondent timely asserted his statutory and contractual rights to an administrative hearing.

On September 21, 2001, Petitioner served its Notice of Specific Charges (Notice). In its Notice, Petitioner raised four grounds for termination: (1) violation of School Board Rule 6Gx13-4.108 which prohibits violence in the workplace; (2) gross insubordination and willful neglect of duty; (3) deficient or non-performance of job responsibilities; and (4) violation of School Board Rule 6Gx13-4A-1.21 which prohibits conduct unbecoming a School Board employee.

At the hearing, Petitioner presented the testimony of Joanne Koski, Heidi Carlo, Joseph Spear, and Virginia Bradford. Petitioner's Exhibits numbered 1, 24-26, 28-34, 36-42, 44, 46-47, 49, and 51-57 were admitted without objection. The balance of Petitioner's exhibits was admitted over objection.

Respondent testified in his own behalf and also presented the testimony of Herman Bain. Respondent's Exhibit numbered 4 was admitted into evidence.

The transcript of these proceedings was filed with the Division of Administrative Hearings on January 28, 2002. Both parties sought and were granted enlargements of time to submit proposed recommended orders. Timely proposed orders were filed on February 16, 2002, and have been carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times pertinent to this case, Nairn was employed by the School Board as a Materials Acquisition Transportation Specialist, more commonly known as a truck driver.

2. The job is an important one in a large, urban school district such as Miami-Dade County. While truck drivers do not directly participate in the education of the tens of thousands of students served by the school district, they play an essential role in supporting and maintaining a physical environment in which learning can safely and comfortably take place.

3. Each day, Nairn and his colleagues drive district-owned trucks throughout Miami-Dade County to pick up essential supplies from vendors and warehouses, and deliver them to the appropriate schools and School Board offices. Any driving is inherently dangerous, and commercial trucks are sufficiently different from regular automobiles that the state requires drivers to hold a special trucking license, which Nairn does.

4. Nairn and his colleagues are supervised by staff whose job it is to see that drivers fulfill their pick-up and delivery responsibilities in a safe and efficient manner. Toward that end, drivers are properly required to stay in close communication with their supervisors, to follow prescribed routes, and to conduct themselves with civility in their dealings with co-workers and members of the public whom they encounter in the course of the work day.

5. Because of the high degree of independence and responsibility accorded to Petitioner's truck drivers, who spend most of their day on the road and out of the sight of their supervisors, they are reasonably expected to exhibit mature behavior and to be able to follow rules without constant reminders.

6. The tasks assigned to drivers change from day to day and sometimes hour to hour, and thus the job requires extensive contact with supervisors. Drivers also must work cooperatively with school board employees and members of the public with whom the School Board does business to effect efficient pick-ups and deliveries. For all of these reasons, drivers are expected to have at least average communication skills, and to use them appropriately.

7. Nairn reported to Heidi Carlo (Carlo) and Joseph Spear (Spear), among others.

8. Nairn and other truck drivers are provided by Carlo with training regarding work site procedures and policies. Individual training is provided by Carlo when an employee is hired, and thereafter group training is provided on an annual basis. Drivers also receive a handbook setting forth procedures and policies applicable to them.

9. Supervisors are available at all times to address questions or concerns any of the truck drivers may have about a particular assignment, policy, or personal or professional problem encountered on or off the job.

10. Another means of resolving issues which affect job performance is offered in the form of an employee assistance program (EAP), which may be accessed by employees upon a self-referral, or an employer referral.

11. Prior to October 1994, Nairn worked for the School Board as a custodian. In October 1994 he began work as a truck driver, and for the first seven months of that employment, there are no documented disciplinary incidents.

12. There is no evidence that Nairn is unable to understand his job requirements. The evidence and testimony offered at the final hearing, coupled with the undersigned's careful observations of Nairn as he testified, and as he interacted with various hearing participants during the course of the two day hearing, demonstrate that he is articulate and

well able to communicate effectively and to conduct himself in a gentlemanly manner.

13. At the final hearing, Nairn testified to his side of the story with regard to some, but not all, of the disciplinary incidents documented in his file. Nairn's testimony was self-serving, uncorroborated, and unpersuasive.

14. In general, Nairn portrays himself as a victim of poor management. He claims that over the years he was unfairly disciplined by capricious supervisors who constantly changed their instructions. This testimony is not consistent with any other evidence in the record. In addition, Nairn did not attempt to deny or explain the most serious charges, the three occasions on which he used his School Board truck for unauthorized purposes.

15. Nairn's first documented encounter with the School Board's disciplinary machinery occurred on May 24, 1995, at which time he received a written warning for failure to follow procedures and destruction of private property.

16. On September 1, 1995, Nairn received a second written reprimand. The subject of the reprimand related to what would become a source of continuing friction between Nairn and his supervisors and co-workers: Nairn's unwillingness to reliably submit himself to the requirement that drivers stay in close communication with their supervisors, and, more specifically,

that drivers contact their dispatcher upon arriving and departing each site; schedule lunch in accordance with School Board policies; and respond promptly to pages.

17. On November 18, 1996, Nairn received a verbal warning for having used his School Board-owned truck to go to his residence for two hours during a workday without authorization.

18. On other occasions, Nairn ignored directives by his supervisors to lock School Board-owned vehicles.

19. Nairn was frequently insubordinate toward supervisors, in ways others than the ones noted above. He often demonstrated that he held co-workers in low esteem by abruptly hanging up the telephone during conversations with them. Some, but not all, of this behavior was documented in an October 29, 1997, memorandum to Nairn.

20. By the time of his termination, Nairn had been the subject of at least five formal disciplinary conferences.

21. On March 27, 2000, Nairn again engaged in unauthorized use of his School Board vehicle by taking his truck to Broward County for personal business without permission. When the truck broke down in Broward County, Carlo had to arrange for the it to be towed back to the work site. Nairn exacerbated the seriousness of this breach of trust by using his School Board toll card to pay his tolls for this unauthorized use of time and equipment.

22. Three months after this incident, on June 20, 2000, Respondent once again used a School Board vehicle for personal and unauthorized purposes.

23. The School Board went well beyond what was required of it in allowing Nairn to continue his employment, notwithstanding his inability or unwillingness to follow reasonable rules. In addition to allowing him to keep his job following a number of incidents which, standing alone, would have warranted termination, on November 30, 1999, and April 26, 2000, Carlo referred Nairn to the School Board's EAP. The EAP offers many kinds of professional services geared to providing confidential assistance for persons who have problems with, for example, submitting to authority; following rules with which they disagree; or getting along with people they dislike.

24. Nairn declined to participate, which is his right, but Carlo's patience was justifiably wearing thin as the disciplinary incidents continued at an accelerating pace.

25. On February 16, 2001, Nairn's 18-year-old son was in a car accident which triggered a series of events resulting in the School Board's decision to terminate Nairn.

26. Under ordinary circumstances, an employee who claimed to have been notified on his cell phone that his son, a new driver, had been in an accident, as Nairn did, would instantly be accorded permission by his immediate supervisor, in this case



Spear, to leave the workplace. But Nairn, through his own actions, had marked himself as untrustworthy. Spear was justifiably unwilling to allow Nairn to leave on Spear's authority, when Spear's own supervisor, Carlo, was present in the building. Spear thus directed Nairn to see Carlo about his request to leave.

27. Nairn went to Carlo's office, and an ugly scene ensued. Carlo was busy with other things, and unaware of the accident, and reasonably did not drop what she was doing to attend to an agitated Nairn. Instead, she told him to wait his turn.

28. Nairn was loud, angry, and sufficiently insistent upon getting Carlo's undivided attention that she got up from her desk to close her door so that she could finish a telephone conversation with an outside vendor.

29. As Carlo tried to close her door, Nairn stuck his foot in the doorway and pushed the door open. Spear got in front of Respondent and eased him away so that Carlo would be able to close the door.

30. Carlo was upset by this incident. She prepared a memorandum describing the incident and requesting that Respondent be dismissed. In addition, Carlo requested that staff advise her if Respondent was entering her office area.

31. On May 3, 2001, Koski recommended dismissal of Respondent based on the February 16, 2001, incident and Respondent's lengthy disciplinary history. The recommendation was supported by the Associate Superintendent, Bureau of Procurement and Materials Management. As a result, on June 20, 2001, Petitioner initiated the current dismissal proceedings against Respondent.

32. At all times material to this case, the School Board was in compliance with applicable statutory and contractual provisions concerning employee discipline and termination with respect to Nairn.

#### CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties. See Sections 120.569, 120.57(1), and 231.29(3)(d)3.b, Florida Statutes (1999).

34. The School Board has the burden of proving just cause to terminate Nairn's employment by a preponderance of the evidence. See McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

35. Section 447.209, Florida Statutes, provides that it is the right of public employers to "direct its employees, take

disciplinary action for proper cause, and relieve its employees from duty because of lack of work or other legitimate reasons."

36. Respondent is a non-probationary "educational support employee" within the meaning of Section 231.3605, Florida Statutes, which provides:

(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.

37. 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 (AFSCME Contract) that includes provisions for the discipline of its members.

38. Article II, section 3, of the AFSCME Contract provides:

It is understood and agreed that management possesses the sole right, duty, and responsibility for operation of the schools and that all management rights repose in it, but that such rights must be exercised consistently with the other provisions of this agreement. These rights include, but are not limited to, the following:

A. Discipline or discharge of any employee for just cause;....

Article XI, section 1, of the AFSCME Contract provides due process rights to employees, and states:

Progressive discipline steps should be followed, however, in administering discipline, the degree of discipline shall be reasonably related to the seriousness of

the offense and the employee's record.

Therefore, disciplinary steps may include:

1. Verbal warning;
2. Written warning (acknowledge);
3. Letter of reprimand;
4. Suspension/demotion; and
5. Dismissal.

(Emphasis added.) Moreover, Article XI, Section 1, of the AFSCME Contract further provides: "[I]t is agreed that disciplinary actions taken against AFSCME, Local 1184 bargaining unit members shall be consistent with the concept and practice of progressive or corrective discipline and that in all instances the degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record."

(Emphasis added.)

39. Thus, the AFSCME Contract, by its very terms, permits the School Board to take into consideration the employee's entire record in determining the degree of discipline to be imposed each time the occasion arises to consider the imposition of discipline.

40. Article XI, Section 4, of the AFSCME Contract delineates the distinct types of separation: voluntary; excessive absenteeism/abandonment of position; disciplinary; and non-reappointment.

41. Disciplinary separation, involved in this proceeding, is defined as follows: "The employee is separated by the employer for disciplinary cause arising from the employee's

performance or non-performance of job responsibilities. Such action occurs at any necessary point in time."

42. Non-reappointment, not involved in this proceeding, is distinct from disciplinary separation. This conclusion is supported by the plain language of Article XI: "such non-reappointment shall not be in lieu of discipline or lay-off."

(Emphasis added.) Thus, Respondent's argument, that reappointment in the past precludes Petitioner from dismissing him for just cause based upon one or more prior incidents, is not legally supportable.

43. The School Board alleged four independent grounds for termination: (1) violation of School Board Rule 6Gx13-4.108 (prohibiting violence in the workplace); (2) gross insubordination and willful neglect of duty; (3) deficient or non-performance of job responsibilities; and (4) violation of School Board Rule 6Gx13-4A-1.21 (prohibiting conduct unbecoming a School Board employee). With the exception of workplace violence, the evidence supports termination on each of the enumerated grounds.

44. School Board Rule 6Gx13-4-1.08 provides:

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 it 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 by or against students and employees will not be tolerated.

45. Nairn's approach to leaving the workplace to deal with his son's accident was boorish and inappropriate. Nairn had not been given to understand that his son's life was in danger, and even if he had been, such news would have justified leaving without permission, but not acting out in the workplace.

46. Given Nairn's long history of going "awol" when he pleased, it is not likely that he would have hesitated to do so had he been told of genuine cause for concern about his son's status following the accident. Instead, he created a scene in Carlo's office.

47. Nairn's conduct was boorish and ungentlemanly, and Carlo was unquestionably upset, but it is not violence within the meaning of the School Board's rule. The evidence fails to establish that Nairn made threats, engaged in threatening, as opposed to infantile, behavior, or committed any acts of violence against Carlo or any other individual.

48. Rather, this incident was just the latest in Nairn's long history of being unapologetically and grossly insubordinate to his supervisors, particularly Carlo, and willfully neglecting various duties for his own convenience, or simply to demonstrate his disrespect for workplace authority.

49. Nairn's most serious offenses, failing to consistently and reliably account for his time, and failing to use his School Board owned truck for business purposes only, could well justify termination had they occurred only once. Nairn has provided no credible explanation or justification for any of the documented incidents of failing to check in as required and personal use of his vehicle. The fact that the School Board could have fired Nairn for any or all of these incidents in years past and chose not to do so does not preclude the School Board from deciding that it no longer wishes to tolerate Nairn's volatility. See Seminole County School Board v. Marku, 1997 Fla. Div. Adm. Hear. LEXIS 5390 (1997) (single act of insubordination can lead to dismissal).



50. Nairn's behavior on February 16, 2001, was not an out-of-character outburst provoked by his concern for his son. Rather, he had grown accustomed to thumbing his nose at supervisors without meaningful consequence. Given Nairn's history, it is well within the School Board's discretion to terminate Nairn, if it chooses to do so, for that single act of insubordination.

51. Article XI of the AFSCME Contract provides that an employee may be separated for disciplinary cause related to non-performance or deficient performance of job responsibilities. Respondent's conduct, as well as his record, demonstrate non-performance and deficient performance of his job responsibilities. Respondent's non-performance and deficient performance of his job responsibilities also constitute just cause for dismissal.

52. School Board Rule 6Gx13-4A-1.21 provides:

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.

53. Based upon all of the foregoing findings of fact and conclusions of law, it requires no additional discussion to determine that Nairn has, on too many occasions, conducted

himself in a manner which does not reflect credit upon himself and upon the system which employs him. Thus, School Board Rule 6Gx13-4A-1.21 provides an independent, albeit superfluous, basis for a finding of just cause for dismissal.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered terminating Respondent's employment and denying Respondent back pay.

DONE AND ENTERED this 25th day of February, 2002, in Tallahassee, Leon County, Florida.

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FLORENCE SNYDER RIVAS  
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Filed with the Clerk of the  
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NOTICE OF RIGHT TO FILE 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