STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3514
	)	
LINDA HOGANS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Section 120.57(1), Florida Statutes, on December 21, 2001, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, 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 2nd Avenue, Suite 400
Miami, Florida 33132

For Respondent: Manny Anon, Jr., Esquire
AFSCME Council 79
99 Northwest 183rd Street, Suite 224
Miami, Florida 33034

STATEMENT OF THE ISSUES

1. Whether Respondent engaged in the conduct alleged in the Notice of Specific Charges.

2. If so, what action, if any, should be taken against Respondent.

PRELIMINARY STATEMENT

On August 22, 2001, the School Board of Miami-Dade County (School Board) suspended Respondent from her position as a school bus driver and initiated a dismissal proceeding against her. By letter dated September 5, 2001, Respondent advised the School Board that she "wish[ed] to appeal the decision made against [her]." On September 6, 2001, the matter was referred to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge.

On or about October 22, 2001, the School Board served on Respondent (by United States Certified Mail) its Notice of Specific Charges (Notice). The Notice alleged that, "[d]uring the 12-month period between June 1, 2000, and June 1, 2001, Respondent ha[d] been absent without authorization in excess of 10 days" and "ha[d] been absent three or more consecutive days without authorization." According to the Notice, Respondent's conduct "constitute[d] excessive absenteeism and abandonment of position" (Count I); "constitute[d] deficient performance and/or non-performance of her job responsibilities" (Count II); and was in violation of School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties (Count III); and therefore there was "just cause for Respondent's suspension and dismissal pursuant

to Sections 230.03(2), 230.23(5)(f), 447.209, 231.3605, Florida Statutes, and Articles II and XI of the AFSCME Contract." The Notice further alleged that Respondent had received prior warnings "concerning her accrual of unauthorized leave" on or about February 21, 2000, and again on May 3, 2000, and that Conferences-for-the-Record were held with Respondent to address her "excessive absenteeism" in March of 1999, and on December 1, 1999, July 21, 2000, February 1, 2001, March 29, 2001, and June 7, 2001.

As noted above, the final hearing in this case was held before the undersigned on December 21, 2001. Nine witnesses testified at the final hearing: Cecelia Romero, Celeste McKenzie, Roger Cabrera, Susan Lilly, Aned Lamboglia-Candales, Mary Murphy, Barbara Moss, Shinita Collier, and Respondent. In addition to the testimony of these nine witnesses, 27 exhibits (Petitioner's Exhibits 2 through 21, and Respondent's Exhibits 1 through 7) were offered and received into evidence.

At the close of the evidentiary portion of the final hearing on December 21, 2001, the parties were advised of their right to file proposed recommended orders and a deadline was established (15 days from the date of the Division's receipt of the transcript of the final hearing) for the filing of proposed recommended orders.

On January 11, 2002, the parties filed a Stipulation, which provided as follows:

> The parties agree that Respondent was not at work as follows and that Petitioner designated Respondent as having be[en] absent without authorization as follows:
>
> 10/27/00- 1/2 day
>
> 11/17/00- 1/2 day
>
> 11/30/00- 1/2 day
>
> 12/8/00- 1/2 day
>
> 12/14/00- 1/2 day
>
> 12/19/00- 1/2 day
>
> 1/4/01- 1/2 day
>
> 1/10/01- 1/2 day
>
> 1/11/01- 1/2 day
>
> 2/8/01- 1 day
>
> 2/9/01- 1 day
>
> 2/13/01- 1/2 day
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> 2/14/01- 1/2 day
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> 3/21/01- 1 day
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> 3/22/01- 1 day
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> 3/23/01- 1 day
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> 3/26/01- 1 day
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> 4/23/01- 1 day
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> 4/26/01- 1/2 day

4/30/01- 1/2 day

5/7/01- 1 day

5/9/01- 1/2 day

5/11/01- 1/2 day

5/15/01- 1/2 day

5/16/01- 1/2 day

5/17/01- 1/2 day

5/22/01- 1/2 day

5/23/01- 1 day

5/24/01- 1 day

The Division received the Transcript of the final hearing (consisting of two volumes) on April 2, 2002. On April 19, 2002, Respondent filed an unopposed motion requesting an extension of the deadline for filing proposed recommended orders. Good cause having been shown, the undersigned, on April 23, 2002, issued an Order extending the deadline for the filing of proposed recommended orders to April 29, 2002. On April 29, 2002, and April 30, 2002, respectively, the School Board and Respondent filed their Proposed Recommended Orders. These Proposed Recommended Orders have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following findings of fact are made are made to

supplement and clarify the stipulations of fact set forth in the parties' January 11, 2002, Stipulation:

The Parties

The School Board

1. The School Board is responsible for the operation, control and supervision of all public schools (grades K through 12) in Dade County, Florida.

Respondent

2. Respondent has been employed by the School Board since October of 1992.

3. She is currently under suspension pending the outcome of this disciplinary proceeding.

4. Respondent was initially employed as a substitute bus driver.

5. Since March of 1993, she has held a regular school bus driver position.

6. At all times material to the instant case, Respondent was assigned to the School Board's Southwest Transportation Center (Center). Mary Murphy has been the director of the Center for the past seven years. Since August of 1999, Aned Lamboglia-Candales has been the Center's coordinator. As such, she "monitor[s] all attendance at the [C]enter" and assists Ms. Murphy in dealing with personnel problems at the Center.

7. At all times material to the instant case, Respondent

was scheduled to work a total of six hours a day: three hours in the morning (morning shift) and three hours in the afternoon (afternoon shift). (In between the morning and afternoon shifts, she was off duty for several hours.)

The Collective Bargaining Agreement

8. As a school bus driver employed by the School Board, Respondent is a member of a collective bargaining unit represented by the American Federation of State, County, and Municipal Employees, Local 1184 (AFSCME) and covered by a collective bargaining agreement between the School Board and AFSCME (AFSCME Contract).

9. Article II, Section 3., of the AFSCME Contract provides, in pertinent part, as follows:

> ARTICLE II- RECOGNITION
>
> SECTION 3. The provisions of this Contract are not to be interpreted in any way or manner to change, amend, modify, or in any other way delimit the exclusive authority of the School Board and the Superintendent for the management of the total school system and any part of the school system. It is expressly understood and agreed that all rights and responsibilities of the School Board and Superintendent, as established now and through subsequent amendment or revision by constitutional provision, state and federal statutes, state regulations, and School Board Rules, shall continue to be exercised exclusively by the School Board and the Superintendent without prior notice or negotiations with AFSCME, Local 1184, except as specifically and explicitly provided for by the stated terms of this

> Contract. Such rights thus reserved exclusively to the School Board and the Superintendent, by way of limitation, include the following: . . . (2) separation, suspension, dismissal, and termination of employees for just cause; . . . .
>
> 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 the agreement. These rights include, but are not limited to, the following:
>
> A. Discipline or discharge of any employee for just cause; . . . .

10. Article IX, Section 4.A., of the AFSCME Contract addresses the subject of "newly-hired employees." It provides as follows:

> 1. Newly-hired employees in the bargaining unit (except temporary, hourly, or substitute employees) shall be considered probationary for the first three calendar months; thereafter, they shall be considered annual employees, subject to annual reappointment. During such probationary period, employees may be terminated without recourse under this Contract.
>
> 2. If, at any time during the probationary period, the newly-hired employee's performance is considered unacceptable, the probationary employee shall be terminated.

11. Article IX, Section 13., of the AFSCME Contract addresses the School Board's Employee Assistance Program. It provides as follows:

A. AFSCME, Local 1184 and the Board recognize that a wide range of problems not directly associated with an employee's job function can have an effect on an employee's job performance and/or attendance.

B. AFSCME, Local 1184 and the Board agree that assistance will be provided to all employees through the establishment of an Employee Assistance Program.

C. The Employee Assistance Program is intended to help employees and their families who are suffering from such persistent problems as may tend to jeopardize an employee's health and continued employment. The program goal is to help individuals who develop such problems by providing for consultation, treatment, and rehabilitation to prevent their condition from progressing to a degree which will prevent them from working effectively.

D. Appropriate measures will be taken to ensure the confidentiality of records for any person admitted to the program, according to established personnel guidelines and federal regulations.

E. The Guidelines for the Employee Assistance Program, by reference, are made a part of this Contract.

F. Employee Rights:

1. Job security will not be jeopardized by referral to the Employee Assistance Program, whether the referral is considered a voluntary referral in which an employee elects to participate in the program, or a supervisory referral in which a supervisor uses adopted guidelines to refer an employee into the program.

2. An employee has the right to refuse referral into the program and may

> discontinue participation at any time. Failure by an employee to accept referral or continue treatment will be considered in the same manner as any factor that continues to affect job performance adversely.

12. Article XI of the AFSCME Contract is entitled, "Disciplinary Action."

13. Section 1. of Article XI is entitled, "Due Process." It provides as follows:

> A. Unit members are accountable for their individual levels of productivity, implementing the duties of their positions, and rendering efficient, effective delivery of services and support. Whenever an employee renders deficient performance, violates any rule, regulation, or policy, that employee shall be notified by his/her supervisor, as soon as possible, with the employee being informed of the deficiency or rule, regulation, or policy violated. An informal discussion with the employee shall occur prior to the issuance of any written disciplinary action. 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 (acknowledged);
>
> 3. Letter of reprimand;
>
> 4. Suspension/demotion; and
>
> 5. Dismissal.
>
> A Conference-for-the-Record shall be held when there is a violation of federal

statutes, State Statutes, defiance of the administrator's authority, or a substantiated investigation to determine if formal disciplinary action should be taken (1.e., letter of reprimand, suspension, demotion or dismissal). A Conference-for-the-Record in and of itself shall not be considered disciplinary.

B. The parties agree that discharge is the extreme disciplinary penalty, since the employee's job, seniority, other contractual benefits, and reputation are at stake. In recognition of this principle, it is agreed that disciplinary action(s) 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.

C. The employee shall have the right to Union representation in Conferences-for-the-Record held pursuant to this Article. Such a conference shall include any meeting where disciplinary action will be initiated.

D. The employee shall be given two days' notice and a statement for the reason for any Conference-for-the-Record, as defined above, except in cases deemed to be an emergency. A maximum of two Union representatives may be present at a Conference-for-the Record.

E. The Board agrees to promptly furnish the Union with a copy of any disciplinary action notification (i.e., notice of suspension, dismissal, or other actions appealable under this Section) against an employee in this bargaining unit.

14. Section 2. of Article XI is entitled, "Dismissal, Suspension, Reduction-in-Grade." It provides as follows:

> Permanent employees dismissed, suspended, or reduced in grade shall be entitled to appeal such action to an impartial Hearing Officer or through the grievance/arbitration process as set forth in Article VII of the Contract. The employee shall be notified of such action and of his/her right to appeal by certified mail. The employee shall have 20 calendar days in which to notify the School Board Clerk of the employee's intent to appeal such action and to select the method of appeal. If the employee when appealing the Board action, does not select the grievance/arbitration process as set forth in Article VII of the Contract the Board shall appoint an impartial Hearing Officer, who shall set the date and place mutually agreeable to the employee and the Board for the hearing of the appeal. The Board shall set a time limit, at which time the Hearing Officer shall present the findings. The findings of the Hearing Officer shall not be binding on the Board, and the Board shall retain final authority on all dismissals, suspensions, and reductions-in-grade. The employee shall not be employed during the time of such dismissal or suspension, even if appealed. If reinstated by Board action, the employee shall receive payment for the days not worked and shall not lose any longevity or be charged with a break in service due to said dismissal, suspension, or reduction-in-grade. Non-reappointments are not subject to the grievance/arbitration procedures.

15. Section 4. of Article XI is entitled, "Types of Separation." It provides, in pertinent part, as follows:

> Dissolution of the employment relationship between a permanent unit member and the Board may occur by any four [sic] distinct types of separation.
>
> A. Voluntary-- . . . .

> B. Excessive Absenteeism/Abandonment of Position-- An unauthorized absence for three consecutive workdays shall be evidence of abandonment of position. Unauthorized absences totaling 10 or more workdays during the previous 12-month period shall be evidence of excessive absenteeism. Either of the foregoing shall constitute grounds for termination. An employee recommended for termination under these provisions shall have the right to request of the Deputy Superintendent for Personnel Management and Services a review of the facts concerning the unauthorized leave. Such right shall exist for a period of up to 10 working days after the first day of notification of the unauthorized absence.
>
> C. Disciplinary-- 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.
>
> D. Non-reappointment-- . . . .
>
> AFSCME , Local 1184 bargaining unit members employed by the school district in excess of five years shall not be subject to non-reappointment. Such employee may only be discharged for just cause.
>
> E. Layoff-- . . . .

16. According to Article V, Section 18., of the AFSCME Contract, the term "workday," as used in the agreement, means "the total number of hours an employee is expected to be present and performing assigned duties."

17. The definition of "unauthorized absence," as used in the AFSCME Contract, is found in Article V, Section 27., of the contract, which provides as follows:

> Unauthorized Absence-- Any absence without pay which has not been requested by the employee and approved by the supervisor, in writing, at least five days in advance.
>
> Employees are required to notify the work location, prior to the beginning of the workday, when they are unable to report to work or intend to be absent.
>
> Absences of the employee, where notice of absence is made prior to the start of the workday, but are not covered by the employee having accrued sick or personal leave, shall be charged as unauthorized absence and may result in disciplinary action in accordance with Article XI. Upon the employee reporting back to work, the employee shall be apprised of the unauthorized leave status; however, if the employee can demonstrate that there were extenuating circumstances (e.g., hospitalization or other unanticipated emergency), then consideration will be given to changing the status of leave. The work location supervisor has the authority to change an unauthorized leave; however, nothing herein precludes requested leave being determined to be unauthorized where the employee does not have available sick or sufficient personal leave.

School Board "[R]ule[s], [R]egulation[s], [and] [P]olic[ies]"

18. As a School Board employee, Respondent is obligated to act in accordance with School Board "rule[s] regulation[s], and [p]olic[ies]" and, if she does not, she may be disciplined.[1]

19. Among the School Board's "rule[s]" are School Board Rule 6Gx13-4A-1.21 and School Board Rule 6Gx13-4E-1.01.

20. School Board Rule 6Gx13-4A-1.21 provides, in pertinent part, as follows:

> Permanent Personnel
>
> RESPONSIBILITIES AND DUTIES
>
> 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 presence of students is expressly prohibited. . . .

21. School Board Rule 6Gx13-4E-1.01 addresses the subject of "[a]bsences and [l]eaves." It provides, in pertinent part, that, "[e]xcept for sudden illness or emergency situations, any employee who is absent without prior approval shall be deemed to have been willfully absent without leave."

22. School Board drivers and aides are governed by the following "[a]ttendance [p]olicy":

> Drivers and aides are expected to be prompt and punctual in their attendance on all workdays in accordance with the current calendar and their assigned schedule, and their contract.

9.1 AUTHORIZED ABSENCES

For absences to be authorized, they must be reported to the driver's or aide's Transportation Center Dispatch Office in advance. This notice shall be made at the earliest possible time, but no later than before the next scheduled report time. Even in an emergency, every possible effort must be made to inform the Dispatch Office. The supervisory staff evaluates the driver's adherence to this rule. Intent to return should be treated in the same manner. Leave forms must be completed promptly for payroll purposes.

9.2 UNAUTHORIZED ABSENCES

Unauthorized absences are subject to disciplinary action as prescribed under existing labor contracts. If a driver or aide does not report to work within 15 minutes after the scheduled report time, or does not call in absent before the report time, the absence will be considered unauthorized. If time off is taken during a regular working school day without a supervisor's approval, this absence may also be considered unauthorized.

9.3 NOTIFICATION OF ABSENCES

-Drivers and aides must notify their Transportation Center[']s Dispatch Office as soon as they have determined they cannot report to work. Drivers are not to make arrangements on their own for a substitute. All arrangements must be made by the Dispatch Office.

-If a driver will not be reporting for work on regular school days, the driver must call in immediately and speak with the Dispatcher, or the Field Operations Specialist.

-If a driver cannot report to work because

of an emergency situation, the driver must contact the Dispatch Office as soon as possible. If the situation requires a driver to leave the area, the driver should have a relative or friend contact the office for the driver.

-If the absence will occur sometime in the future, the Dispatch Office should be given as much advance notification as possible.

-When the Dispatch Office is contacted, an explanation for the absence should be given along with the length of absence and estimated date of return.

-If the driver is off from work for more than one day, the driver must contact the office each day, prior to the report time, with a complete update of the situation. The only times the driver does not have to contact the office on a daily basis are as follows:

-Admission to a hospital as a patient

-Maternity leave

-A doctor's work release for a specified number of days

-Extended sick leave[2]

-Approved leave of absence

-Out of town

9.4 CHECK-IN POLICY

-All employees are expected to arrive at work on or before their scheduled report time.

-Drivers and aides will be given a five minute grace period to report to work, during which no disciplinary nor financial actions will be taken. For example, if the

driver or aide is scheduled to report for work at 6:00 a.m., but signs-in by 6:05 a.m., the driver or aide will be allowed to go out on the assigned route with no repercussions.

-Drivers and aides who report to work 6-15 minutes after the scheduled report times will be considered "tardy." Tardy drivers and aides will be permitted to work. However, the dispatch may assign a stand-by or substitute driver or aide to the route of the tardy employee. Drivers and aides who are more than 10 minutes late, but less than 16 minutes late, will be used as substitute drivers and aides and will not be allowed to operate their regularly assigned route. For the tardy driver or aide who was replaced by a substitute or stand-by driver or aide, such driver or aide will then be assigned as substitute for other routes needing coverage, as requirements dictate. A record will be kept documenting all tardiness. Lost time will be accumulated for tardiness and employees will be docked pay in 1/2 day increments.

-Drivers and aides who report to work 16 or more minutes after the scheduled report time will be considered "absent without leave" (AWOL). These persons will not be permitted to work. They will be placed on "unauthorized leave-without pay" (ULWOP) and will be subject to disciplinary action in accordance with the American Federation of State, County, and Municipal Employees (AFSCME) Collective Bargaining Agreement

-Extenuating circumstances will be evaluated by the Center Director and, upon proper documentation, may not be held against the employee. Repeated occurrences, such as "car broke down for the third time this week," will not be considered extenuating.

> 9.5 DOCUMENTATION
>
> It is the responsibility of the drivers and aides to report to the supervisor in order to complete and/or produce all required paperwork related to the absence on the first workday upon return to work. Failure to comply with this procedure may result in an unauthorized absence regardless of extenuating circumstances.

Pre-2000-2001 Regular School Year Warnings and Conferences-for-the-Record Regarding Respondent's Attendance and Leave

23. On December 1, 1999, Ms. Lamboglia-Candales held a Conference-for-the-Record with Respondent to discuss Respondent's "unauthorized absences since March of 1999." Ms. Lamboglia-Candales subsequently prepared and furnished to Respondent a memorandum in which she summarized what had transpired at the conference and what "action [would] be taken." Ms. Lamboglia-Candales' memorandum read, in pertinent part, as follows:

> CONFERENCE DATA
>
> This is your second Conference-For-The-Record during this year and it was held to review your unauthorized absences since March of 1999 when the first conference was held. . . . During this conference you were provided with a copy of your leave history and this administrator reviewed it with you. . . . Since the conference in March of 1999 you have incurred approximately thirty (30) days of unauthorized leave without pay. This administrator also informed you that this is considered excessive since the number of days worked by employees in your bargaining unit is approximately 181 days in ten months.

> You stated that these unauthorized absences were due to the fact that you suffer from migraine headaches, high blood pressure as well as another medical condition that requires surgery to remove some growths. The medication that you take prevents you from driving since it makes you drowsy. You also stated that you do not always go to your physician's office for treatment. You provided this administrator with documentation of one of the medications you take as well as the names of the physicians that treat you. . . .
>
> ACTION TAKEN
>
> This administrator reviewed with you Article V, Section 27 and Article XI, Section 4 of the bargaining agreement between M-DCPS and AFSCME and informed you that failure to show improvement could lead to further disciplinary action. . . .
>
> You were also instructed to provide this administrator with documentation regarding your condition or treatments. Also, whenever you have a medical appointment to provide documentation verifying those.
>
> ACTION TO BE TAKEN
>
> This administrator will continue to monitor your attendance. A supervisory referral to the district support office was not done on your behalf since Ms. Ramsby, AFSCME Representative stated on your behalf that it was not necessary.
>
> Also please remember that you have the right to append, to clarify, or to explain any information recorded in this conference by this summary.

Among the documents appended to the memorandum were copies of the provisions of the collective bargaining agreement between

the School Board and AFSCME that were referenced in the memorandum.

24. On March 1, 1999, Respondent received a verbal warning from Ms. Lamboglia-Candales concerning Respondent's "unauthorized leave." That same day, Respondent was presented by Ms. Lamboglia-Candales with a written Transportation Operations Procedures Reminder reflecting that Respondent had received the aforementioned verbal warning and directing Respondent to review Article V, Section 27., and Article XI, Section 4.B., of the collective bargaining agreement between the School Board and AFSCME.

25. On May 3, 2000, Ms. Lamboglia-Candales issued Respondent a written warning concerning Respondent's "unauthorized leave." When the written warning was presented to Respondent on May 23, 2000, she refused to sign it.

26. On July 21, 2000, Ms. Lamboglia-Candales held another Conference-for-the-Record with Respondent to again discuss Respondent's "unauthorized absences." Ms. Lamboglia-Candales subsequently prepared and furnished to Respondent a memorandum in which she summarized what had transpired at the conference and what "action [would] be taken." Ms. Lamboglia-Candales' memorandum read, in pertinent part, as follows:

CONFERENCE DATA

This Conference-For-The-Record was held to review your unauthorized absences since . . . August 30, 1999. It was originally scheduled for June 9, 2000 but since you were not available that day it was re-scheduled for this day. During this conference you were provided with a copy of your leave history and this administrator reviewed it with you. . . . You received a verbal warning on March 1, 2000 and a written warning on May 23, 2000. . . . Since August 30, 1999 you have incurred approximately thirty-five unauthorized days (35) of leave and twenty-five (25) authorized days. You have been absent from work a total of seventy (70) days in one school year which is approximately ten months or 181 work days for employees in your bargaining group.

You stated that many of your unauthorized absences were due to the fact that you have medical problems (high blood pressure). You also stated that the medication you are taking is not keeping it under control but your physician was going to change it to see if it helped. You also mentioned that you were considering taking a temporary demotion to a bus aide position until you felt better. You presented documentation for some of the days you have been absent and this administrator reviewed it. She reminded you that all documentation regarding absences should be brought in as soon as the absence occurs and not months later. . . .

ACTION TAKEN

This administrator reviewed with you Article V, Section 27 and Article XI, Section 4 of the bargaining agreement between M-DCPS and AFSCME and informed you that failure to show improvement could lead to further disciplinary action. . . . She also

> informed you that if you decided to take the voluntary demotion to bus attendant you could discuss this with her at a later date.
>
> ACTION TO BE TAKEN
>
> This administrator will do a supervisory referral to the district support agency at this time and will continue to monitor your attendance. Also you are informed that you have the right to append, clarify, or explain any information recorded in this conference by this summary.

Among the documents appended to the memorandum were copies of the provisions of the AFSCME Contract that were referenced in the memorandum.

27. As promised, Ms. Lamboglia-Candales referred Respondent to the School Board's Employee Assistance Program on July 25, 2000, and advised Respondent of the referral on that same date.

28. Approximately a week after the July 21, 2000, Conference-for-the-Record, Respondent told Ms. Lamboglia-Candales that her physician had changed her medication and that the new medication "was working" and her "blood pressure was fine." As a result, she told Ms. Lamboglia-Candales, she was not going to pursue the temporary demotion to bus aide that she had previously discussed with Ms. Lamboglia-Candales.

The 2000-2001 School Year

29. On February 1, 2001, Ms. Lamboglia-Candales, along with Charlie Horn, an administrative assistant at the Center,

held another Conference-for-the-Record with Respondent to again discuss Respondent's "unauthorized absences." Mr. Horn subsequently prepared and furnished to Respondent a memorandum in which he summarized what had transpired at the conference and what "action [would] be taken." Mr. Horn's memorandum read, in pertinent part, as follows:

> CONFERENCE DATA
>
> This is your second Conference-For-The-Record in the past twelve months during this year and it was held to review your unauthorized absences since July 21, 2000 when the other conference was held. . . . During this conference you were provided with a copy of your leave history and Ms. Candales reviewed it with you. . . . Since the conference on July 21, 2000 you have incurred approximately fifteen (15) days of unauthorized leave without pay. Ms. Candales informed you that this is considered excessive since the number of days worked by employees in your bargaining unit is approximately 181 days in ten months.
>
> You stated that these unauthorized absences were due to dentist and court appointments. You provided Ms. Candales with documentation to review. . . . Ms. Candales reviewed it in your presence and determined that approximately 15 days of unauthorized leave could have been authorized had you presented the documentation at the time the absence occurred.
>
> ACTION TAKEN
>
> Ms. Candales reviewed with you Article V, Section 27 and Article XI, Section 4 of the bargaining agreement between M-DCPS and AFSCME and informed you that failure to show

> improvement could lead to further disciplinary action. . . .
>
> You were once again instructed to provide Ms. Candales with documentation regarding your appointments and/or absences. It is important that you present your documentation in a timely manner meaning as soon as the absence occurs and not months later.
>
> ACTION TO BE TAKEN
>
> Ms. Candales will continue to monitor your attendance. A supervisory referral to the district support agency will not be done at this time. Also, please remember that you have the right to append, to clarify, or to explain any information recorded in this conference by this summary.

Among the documents appended to the memorandum were copies of the provisions of the AFSCME Contract that were referenced in the memorandum.

30. On March 29, 2001, the Center's director, Ms. Murphy, held a Conference-for-the-Record with Respondent to discuss "her job performance as related to [her] attendance." Ms. Murphy subsequently prepared (on April 23, 2001) and furnished to Respondent (on May 3, 2001) a memorandum in which she summarized what had transpired at the conference. Ms. Murphy's memorandum read as follows:

> A Conference-For-The-Record was held in the office of the director of Southwest Regional Transportation Center on Thursday, March 29, 2001. The following were in attendance, Ms. Linda Hogans, Bus Driver, Ms. Joyce Moore, AFSCME, Ms. Carolyn Ransby, AFSCME, Ms.

Dorothy Ferguson, Administrative Assistant, and Ms. Mary E. Murphy.

The purpose of this conference was to review your job performance as related to your attendance. You were given a copy of your leave history, which was reviewed during the conference. Since the beginning of this school year, you have accumulated 27 unauthorized absences. The original total was 44 days and after reviewing the medical documentation you provided during the conference, the amount of days was changed to a total of 27 unauthorized days. Ms. Moore questioned the conference held by Mr. Horn and Ms. Candales when you presented documentation but Ms. Candales did not accept the documents. The days have been approved and the total days have changed again to 15 and a half unauthorized days without pay.

You were asked why you had accumulated so many unauthorized days? Ms. Moore stated that at one time you were caring for a cousin who could not care for [her]self. This cousin later died. Also, you had [a] death in the family and you have been injured on the job, which plays a big part with your absences.

You indicated that you have high blood pressure and you doctor tried several different medications to maintain control. You indicated that there are times when you do not feel well so you stay home. I asked if your doctor supplied you with notes? You indicated that the doctor would give you some notes but not all of the time. I explained that when you present documentation, those days would be authorized.

Ms. Moore asked if you had previous conferences. I answered yes that Ms. Hogan[s] has had a couple of conferences. During one of the conferences held by Ms.

Candales, you were advised to present documentation directly to her so your absences could be authorized. Ms. Candales held a conference with Ms. Hogan[s] on July 21, 2000. This conference was held during the summer months but the conference did not include unauthorized days accumulated during the summer. Ms. Ferguson stated that the conference was held in July because several attempts were made to have the conference in June and Ms. Candales was not able to conduct the conference due to the amount of days you were off.

During the conference you were directed to:

1. To come to work and be on time.

2. If you need to be off, present documentation to Ms. Candales or myself.

3. If either the Coordinator or Director is not available, give the documentation to the Administrative Assistant on duty.

You signed a supervisory referral to the District Support Agency. You were told that the summary of this conference would be forwarded to Mr. Jerry Klein, Administrative Director and the Office of Professional Standards for review for possible disciplinary actions not excluding dismissal. Also you were informed that you have the right to append, clarify, or explain any information recorded in this conference by this summary.

Ms. Moore stated that going to District support is not all bad [in] that the district has many programs to help employees. It is not just for disciplinary problems. I mentioned that during the yearly in-service District Support is discussed and explained to the employees. Ms. Moore stated that in the in-service meeting there is so much noise that no one can hear. Ms. Hogan[s] said that she was

> not aware of the program. I checked her file and found out that Ms. Candales referred Ms. Hogan[s] in July 5, 2000. Ms. Hogan[s] declined to participate.

31. By signing (on March 29, 2001) the "supervisory referral to the District Support Agency" mentioned in Ms. Murphy's memorandum, Ms. Hogans signified that she had "been advised of the referral."

32. Following the March 29, 2001, Conference-for-the-Record, Respondent continued to have unauthorized absences.

33. On June 7, 2001, Barbara Moss, a district director in the School Board's Office of Professional Standards, held a Conference-for-the-Record with Respondent to discuss her absenteeism and her "future employment status" with the School Board. Ms. Moss subsequently prepared and then mailed to Respondent a memorandum in which she summarized what had transpired at the conference. In the "Action To Be Taken" portion of the memorandum, Ms. Moss stated the following:

> Action To Be Taken
>
> You were advised that the information presented in this conference, as well as subsequent documentation, would be reviewed with the Assistant Superintendent in the Office of Professional Standards, the Associate Superintendent of School Operations, the Administrative Director of Transportation, and the Director of Southwest Transportation Center.
>
> Upon completion of the conference summary, a legal review by the School Board attorneys

> will be requested. Receipt of their legal review, with endorsement by the Associate Superintendent, will compel formal notification of the recommended disciplinary action. All disciplinary action(s) shall be consistent with the concepts and practice of progressive or corrective discipline. The degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record.
>
> You were apprised of your right to clarify, explain, and/or respond to any information recorded in this conference by summary, and to have any such response appended to your record.

34. Ms. Moss provided Respondent the opportunity, following the Conference-for-the Record, to present documentation concerning any unauthorized absence that Respondent believed should be excused.

35. Respondent took advantage of this opportunity and provided Ms. Moss with five or six letters from the Office of the Miami-Dade State Attorney asking that Respondent's absence from work on various dates be excused because she was "subpoenaed to the Office of the State Attorney" on those dates in connection with a criminal case, State v. China Wilson, Case No F00-21153, in which she was an "essential witness."

36. Upon reviewing the letters, Ms. Moss noticed that there were "obvious" alterations on "a couple of the letters." Dates had been typed in over "white-out" and they "were jammed together." Ms. Moss faxed to the Office of the Miami-Dade State

Attorney copies of all of the letters she had received from Respondent following the June 7, 2001, Conference-for-the-Record and inquired whether these letters were authentic. Ms. Moss was told by the assistant state attorney assigned to the State v. China Wilson case that "there was only one letter that was authentic."

37. Ms. Moss subsequently met with Respondent, who was accompanied during the meeting by the senior vice president of AFSCME, Christine Harris, and an AFSCME shop steward, Charlie Lynch. Ms. Moss "showed them the [letters she had received from Respondent] and let them know that [the School Board was] moving forward with dismissal."

38. In response to this advisement, either Respondent or Ms. Harris indicated that Respondent wanted to resign in lieu of being terminated and that she would like to have the aforementioned letters returned to her.

39. Ms. Moss gave Respondent back the letters (without making copies of them). Respondent then left.

40. A few minutes later, Respondent returned and indicated that she was "rescind[ing] her offer to resign."

41. On August 10, 2001, the Superintendent of Schools sent a letter to Respondent advising her that he was recommending that the School Board, at its scheduled meeting on August 22, 2001, "suspend [her] and initiate dismissal proceedings against

[her] effective the close of the workday, August 22, 2001, for just cause, including, but not limited to: excessive absenteeism; non-performance and deficient performance of job responsibilities; and violation of School Board Rules 6Gx13-4A-1.21, Responsibilities and Duties; and 6Gx13-4E-1.01, Absences and Leaves."

42. At its August 22, 2001, meeting, the School Board took the action recommended by the Superintendent of Schools.

43. On more than one occasion during the 2000-2001 regular school year, Respondent had three or more consecutive workdays of unauthorized absences.

44. The regular school year workdays during the 12-month period ending June 1, 2001, on which Respondent had unauthorized absences include (in addition to those set forth in the parties' January 11, 2002, Stipulation) the following: June 6, 2000 (whole day); June 9, 2000 (whole day); November 9, 2000 (whole day); December 15, 2000 (whole day); January 30, 2001 (half day); February 5, 2001 (whole day); May 25, 2001 (half day); May 30, 2001 (whole day); May 31, 2001 (whole day); and June 1, 2001 (whole day).

45. Respondent also had numerous authorized absences (with and without pay) during the 12-month period ending June 1, 2001. From August 24, 2000, through May 24, 2001, she had 41 1/2

workdays of authorized absences without pay and ten and a half workdays of authorized absences with pay.

46. Many of the authorized absences without pay were initially unauthorized absences, but they were converted to authorized absences without pay following the review of documentation provided by Respondent.

47. The refusal of School Board administrators to excuse any additional unauthorized absences was within their sound discretion.

48. They were under no obligation to do so.

49. They acted reasonably, given Respondent's failure to present in a timely manner credible documentation demonstrating that these additional unauthorized absences were the result of extenuating circumstances and further considering Respondent's pattern of excessive absences.

50. Respondent's excessive absences had an adverse impact on the Center's operations. As Ms. Murphy explained during her testimony (at page 158 of the hearing transcript):

> "[W]henever . . . a driver has a route and [the driver] take[s] off, then we have to place a substitute or a stand-by driver on it. And whenever that occurs, the route automatically runs late, because the regular driver[] knows the route better than the substitute driver or stand-by driver[].

CONCLUSIONS OF LAW

51. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." Section 230.03(2), Florida Statutes.

52. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. Section 230.23(5)(f), Florida Statutes ("The school board, acting as a board, shall exercise all powers and perform all duties listed below: PERSONNEL.--. . . [P]rovide for the . . . suspension, and dismissal of employees . . ."); and Section 231.001, Florida Statutes ("Except as otherwise provided by law or the State Constitution, district school boards are authorized to prescribe rules governing personnel matters, including the assignment of duties and responsibilities for all district employees.").

53. The "rules governing personnel matters" that have been adopted by the School Board include School Board Rules 6Gx13-4A-1.21 and School Board Rule 6Gx13-4E-1.01.

54. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." Section 447.203(2), Florida Statutes.

55. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons." Section 447.209, Florida Statutes.

56. It, however, must exercise these powers in a manner that is consistent with the requirements of law and the provisions of any collective bargaining agreements into which it has entered with the bargaining unit representatives of its employees. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment . . . ."); and Palm Beach County School Board v. Auerbach, Case No. 96-3683, 1997 WL 1052595 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . . However, in this case, the

district must comply with the terms of the collective bargaining agreement, which, as found in paragraph 27, above, requires the more stringent standard of proof: clear and convincing evidence.").

57. "Under Florida law, a [district] school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."[3] Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

58. The employee must be given written notice of the specific charges prior to the "formal 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 [district school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J. concurring).

59. Any adverse action taken against the employee may be based only upon the conduct specifically alleged in the written notice of specific charges. See Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla.

1st DCA 1996); and Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

60. At the "formal hearing," the burden is on the district school board to prove the allegations contained in the notice.

61. Unless the collective bargaining agreement covering the bargaining unit of which the employee is a member provides otherwise (which the AFSCME Contract does not),[4] the district school board's proof need only meet the preponderance of the evidence standard. See McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal."); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We agree with the hearing officer that for the School Board to demonstrate just cause for termination, it must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true . . . ."); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not

involve the loss of a license and, therefore, Allen's losses are adequately protected by the preponderance of the evidence standard."); and Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence to support both charges by a preponderance of the evidence standard.").

62. Where the employee is an "educational support employee" who has successfully completed his or her probationary period and the adverse action sought to be taken against the employee is termination, the district school board must act in accordance with the provisions of Section 231.3605, Florida Statutes,[5] which provides 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. This section does not apply to persons employed in confidential or management positions. This section applies to all employees who are not temporary or casual and whose duties

require 20 or more hours in each normal working week.

(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, or reduces the number of employees on a districtwide basis for financial reasons.

(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.

63. Respondent is an "educational support employee," within the meaning of Section 231.3605, Florida Statutes, who is

covered by a collective bargaining agreement (the AFSCME Contract).

64. Pursuant to Section 231.3605, Florida Statutes, her employment may be terminated only "for reasons stated in the collective bargaining agreement."

65. An examination of the provisions of the AFSCME Contract reveals that it allows the School Board, among other things, to terminate a bargaining unit member covered by the agreement on the grounds of "abandonment of position" and "excessive absenteeism" and to take disciplinary action against a bargaining unit member, including discharge, where the bargaining unit member is guilty of "deficient performance," "non-performance of job responsibilities," or "violat[ion of] any rule, regulation or policy," provided the disciplinary action is "reasonably related to the seriousness of the offense and the employee[']s record."

66. The Notice of Specific Charges served on Respondent alleges that Respondent's termination is warranted under the provisions of the AFSCME Contract because of her "excessive absenteeism and abandonment of position," as those terms are described in Article XI, Section 4.B., of the AFSCME Contract (Count I); her "deficient performance and/or non-performance of her job responsibilities" (Count II); and her "violation of School Board Rule 6Gx13-4A-1.21" (Count III).

67. The preponderance of the record evidence establishes that, during the 12-month period ending June 1, 2001, Respondent was "absent without authorization in excess of 10 [work]days" (as alleged in paragraph 17. of the Notice of Specific Charges) and was "absent three or more consecutive [work]days without authorization" (as alleged in paragraph 18. of the Notice of Specific Charges). These unauthorized absences (referenced in paragraphs 17. and 18. of the Notice of Specific Charges, which the School Board proved by a preponderance of the evidence) constitute "excessive absenteeism" and "abandonment of position," respectively, within the meaning of Article XI, Section 4.B., of the AFSCME Contract. Standing alone, they provide "grounds for termination" of Respondent's employment with the School Board pursuant to Article XI, Section 4.B., of the AFSCME Contract, as alleged in Count I of the Notice of Specific Charges.[6]

68. In her Proposed Recommended Order, Respondent argues that "[e]mployees who are mentally incapacitated and who are disciplined for absences will often be treated leniently by arbitrators, especially if the employee, similarly to HOGANS, is in a treatment program"; and that "several arbitrators have also reduced discipline on the basis that severe depression and post-traumatic stress disorder can be so debilitating that the employee is unable to notify the employer of an absence." These

arbitration cases relied upon by Respondent, however, are inapposite.

69. There is no persuasive competent substantial record evidence in the instant case that Respondent is now, or was at any time material to the instant case, "mentally incapacitated," suffering from "severe depression" or a "post-traumatic stress disorder," or participating in a "treatment program" to help her deal with these problems.[7] Respondent presented no expert testimony concerning her mental or emotional health. The only testimony she presented linking her absences with her mental or emotional health was her own self-serving testimony that, if she was absent on May 25, 2001, May 30, 2001, and June 1, 2001, it was because she "ha[d] to go to the doctor[] because of [her] illness or [she was] just depressed over the situation [she had] been going through." Even if this testimony is to be believed (and its credibility is extremely suspect[8]), it is insufficient to support a finding that Respondent was, on May 25, 2001, May 30, 2001, and June 1, 2001, or at any other time, suffering from a depressive or other mental or emotional illness or disability. Cf. Matter of Disciplinary Proceeding Against Petersen, 846 P.2d 1330, 1354 (Wash. 1993)("The diagnosis of depression is not a simple process of encyclopedic reference. Although some symptoms may be observable by lay witnesses, the entire diagnostic process involves 'medical matters which cannot

be evaluated by the observation of lay witnesses.' Expert testimony must therefore be used to determine whether a respondent attorney in a disciplinary proceeding had a mental disability if the attorney claims mental disability as a mitigating circumstance."); and Matter of Disciplinary Proceedings Against Thompson, 508 N.W.2d 384, 386-87 (Wis. 1993)("Likewise without merit is Attorney Thompson's position that the referee was required to find that his misconduct resulted from his claimed medical condition. The only evidence he presented on that issue was his own testimony of the symptoms and the effect of his claimed depression and anxiety on his work in the matters under consideration in this proceeding. Because she considered depression a recognized medical condition or illness, the referee stated that she could not take what would amount to judicial notice that Attorney Thompson suffered from depression and anxiety without expert testimony to that effect. The referee properly determined that there was no competent evidence to establish either the existence of the claimed illness or a causal connection between it and the misconduct.").

70. Moreover, even if Respondent had proven that she was suffering from a mental or emotional disorder that had led to her unauthorized absences, there is nothing in the AFSCME Contract that would require the School Board to now treat these

absences as authorized or as if, for purposes of Article XI, Section 4.B., of the AFSCME Contract, they had never occurred.

71. Respondent further contends in her Proposed Recommended Order that the "School Board failed to cumulatively and progressively discipline [Respondent]." According to Respondent, if any action can be taken against her by the School Board, it can be no more severe than the issuance of a letter of reprimand inasmuch as she has "never received any formal discipline other than a verbal and written warning" and a letter of reprimand is the "next step of discipline" (after a written warning) under Article XI, Section 1.A., of the AFSCME Contract. The argument is unpersuasive.

72. A reading of Article XI, Section 1.A., of the AFSCME Contract reveals that it does not require the School Board, when taking disciplinary action against bargaining unit members, to follow the particular "progressive discipline steps" enumerated in this provision of the contract. See Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1273, 1287 (Fla. 2000)("Whereas section 102.11 is mandatory (i.e., the Department 'shall' ignore late returns), section 102.112 is permissive (i.e., the Department 'may' ignore late returns, or the Department "may" certify late returns and fine tardy Board members."); Dooley v. State, 789 So. 2d 1082, 1084 (Fla. 1st DCA 2001)("[R]ule 3.170(1) is clearly permissive in that it states a

defendant 'may file a motion to withdraw.'"); State v. Thomas, 528 So. 2d 1274, 1275 (Fla. 3d DCA 1988)("As we perceive it, the State's argument is that 'should' is the equivalent of 'shall' and that 'shall' is mandatory. While we acknowledge that 'should' retains its arcane, schoolmarm meaning as a past tense of 'shall,' its modern usage is as the weaker companion to the obligatory 'ought.' Thus, it is said that '[o]ught should be reserved for expressions of necessity, duty, or obligation; should, the weaker word, expresses mere appropriateness, suitability or fittingness.'"); Massey Builders Supply Corp. v. Colgan, 553 S.E. 2d 146, 150 (Va. App. 2001)("The word 'shall' is primarily mandatory, whereas the word 'should' ordinarily implies no more than expediency and is directory only."); and Magnuson v. Grand Forks County, 97 N.W.2d 622, 624 (N.D. 1959)("It does not seem that the word 'should' was used inadvertently. Other instructions on the back of the order contain the more compulsive word 'must,' as for example 'the original of this order must be signed by the recipient or person acting in his behalf and by the vendor.' We construe the word 'should' as used here to be persuasive rather than mandatory.").

73. Moreover, Article XI, Section 1.A., of the AFSCME Contract applies only when adverse action is taken against a bargaining unit member for "disciplinary cause." It does not apply to "separations" for "excessive absenteeism/abandonment of

position," which are addressed in Article XI, Section 4.B., of the contract and are separate and distinct from separations for "disciplinary cause" (discussed in Article XI, Section 4.C., of the contract).

74. Article XI, Section 4.B., of the AFSCME Contract makes clear that "excessive absenteeism" (evidenced by "unauthorized absences totaling 10 or more workdays during the previous 12-month period") and "abandonment of position" (evidenced by "[a]n unauthorized absence for three consecutive workdays") are considered to be so deleterious to the operations of the School Board that they "shall constitute grounds for termination."[9]

75. The School Board has shown by a preponderance of the record evidence that, as alleged in Count I of the Notice of Specific Charges, "Respondent's conduct [involving her unauthorized absences during the 12-month period ending June 1, 2001] constitutes excessive absenteeism and abandonment of position," as those terms are described in Article XI, Section 4.B., of the AFSCME Contract, and therefore there exist "grounds for [her] termination" pursuant to this provision of the collective bargaining agreement.

RECOMMENDATION

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

RECOMMENDED that the School Board issue a final order

sustaining Respondent's suspension and terminating her employment with the School Board pursuant Article XI, Section 4.B., of the AFSCME Contract.

DONE AND ENTERED this 16th day of May, 2002, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2002.

ENDNOTES

1/ An employee who does not meet his responsibility of complying with School Board "rule[s] regulation[s], and [p]olic[ies]" is guilty of "non-performance of job responsibilities," as that term is used in Article XI, Section 4.C., of the AFSCME Contract.

2/ Article XIII, Section 6., of the AFSCME Contract discusses "extended sick leave without pay." It provides as follows:

> Extended leave without pay for illness of the employee constitutes a protection of one's employment rights. Such leave shall be granted only for health of self or family member, provided the following requirements are met:

> A. Employees seeking such leave must make application on the form provided by Personnel Management and Services.
>
> B. Such application must be supported and accompanied by the following:
>
> 1. identity of person in ill health;
>
> 2. statement from physician explaining why such leave is necessary; and
>
> 3. effective dates of requested leave (beginning and ending).
>
> C. Such leave shall not exceed a year in duration.
>
> D. Employees on leave may, upon expiration of leave, apply for an extension. The employer may grant such extension as warranted; however, the maximum time an employee may be absent on leave for illness of self, illness of relative, or any combination thereof shall be three years.

There is no indication in the record that Respondent at any time applied for "extended sick leave without pay."

3/ "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

4/ Where the district school board, through the collective bargaining process, has agreed to bear a more demanding standard, it must honor, and act in accordance with, its agreement.

5/ Notwithstanding the holding in Rosario v. Burke, 605 So. 2d 523, 524 n.1 (Fla. 2d DCA 1992), the termination of a non-certified School Board employee is not governed by the provisions of Section 231.36(6)(b), Florida Statutes. In Rosario, the Second District Court of Appeal provided the following explanation for its holding that the provisions of Section 231.36(6)(b), Florida Statutes, were applicable to non-certified district school board personnel:

> We are not completely convinced that the legislature initially intended the narrow grounds for dismissal described in section 231.36(6)(b) to apply to nonprofessional supervisory staff, as compared to principals, assistant superintendents and other certified positions. Nevertheless, the statute was interpreted to include such public employees in 1981, after the enactment of section 447.201-.609, which applies generally to public employees. See Smith v. School Bd. of Leon County, 405 So. 2d 183 (Fla. 1st DCA 1981). Section 231.36 was amended after the Smith decision without any disapproval of that decision. If the statute requires modification or clarification concerning nonprofessional supervisory school personnel, that change should occur in the legislature.

Subsequent to the Second District's decision in Rosario, the 1994 Florida Legislature enacted Section 231.3605, Florida Statutes, which provides that an "educational support employee" may be terminated "for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist" and further prescribes the procedure that must be followed "[i]n the event a superintendent seeks termination of an [educational support] employee." In view of the enactment of Section 231.3605, Florida Statutes, the provisions of Section 231.36(6)(b), Florida Statutes, can no longer be reasonably construed as being directly applicable to non-certified school board personnel.

6/ It is therefore unnecessary to determine whether there are also grounds to terminate Respondent for "disciplinary cause," within the meaning of Article XI, Section 4.C., of the AFSCME Contract, as further alleged in Counts I and II of the Notice of Specific Charges.

7/ While the evidentiary record does establish that Respondent was referred to the School Board's Employee Assistance Program, it is silent as to whether she "accepted" or "refused" the referral (as was her choice under Article IX, Section 13.F.2., of the AFSCME Contract).

8/ Respondent was not a credible witness. The School Board presented convincing evidence that not only established that Respondent's testimony regarding the letters she claimed to have received from the Office of the Miami-Dade State Attorney was contrived, but also cast serious doubt on the credibility of the remaining portions of her testimony that were not directly contradicted by the School Board's evidentiary presentation. Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Dauksch, J., specially concurring)("[T]he trier of fact is never bound to believe any witness, even a witness who is uncontradicted."); Maurer v. State, 668 So. 2d 1077, 1079 (Fla. 5th DCA 1996)("A judge acting as fact-finder is not required to believe the testimony of police officers in a suppression hearing, even when that is the only evidence presented; just as a jury may disbelieve evidence presented by the state even if it is uncontradicted, so too the judge may disbelieve the only evidence offered in a suppression hearing."); and Bellman v. Yarmark Enterprises, Inc., 180 So. 2d 663, 664 (Fla. 3d DCA 1965)("The two principal witnesses relied upon by appellant for the proof of usury were substantially impeached and we cannot say that the trial court was bound to accept their testimony. A chancellor as the 'finder of fact' may find a witness who has been impeached completely unworthy of belief, and in such circumstances it is within his province to reject such testimony.").

9/ The Florida Supreme Court has observed that "excessive unauthorized absenteeism presumptively hampers the operation of a business and is inherently detrimental to an employer." Tallahassee Housing Authority v. Florida Unemployment Appeals Commission, 483 So. 2d 413, 414 (Fla. 1986); see also Pericich v. Climatrol, Inc., 523 So. 2d 684, 685 (Fla. 3d DCA 1988)("Employers still retain their traditional right to terminate employees for legitimate business reasons, such as . . . excessive absenteeism.").

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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.

[1] An employee who does not meet his responsibility of complying with School Board "rule[s] regulation[s], and [p]olic[ies]" is guilty of "non-performance of job responsibilities," as that term is used in Article XI, Section 4.C., of the AFSCME Contract.

[2] Article XIII, Section 6., of the AFSCME Contract discusses "extended sick leave without pay." It provides as follows:

> Extended leave without pay for illness of the employee constitutes a protection of one's employment rights. Such leave shall be granted only for health of self or family member, provided the following requirements are met:
>
> A. Employees seeking such leave must make application on the form provided by Personnel Management and Services.
>
> B. Such application must be supported and accompanied by the following:
>
> 1. identity of person in ill health;
>
> 2. statement from physician explaining why such leave is necessary; and
>
> 3. effective dates of requested leave (beginning and ending).
>
> C. Such leave shall not exceed a year in duration.
>
> D. Employees on leave may, upon expiration of leave, apply for an extension. The employer may grant such extension as warranted; however, the maximum time an employee may be absent on leave for illness of self, illness of relative, or any combination thereof shall be three years.

There is no indication in the record that Respondent at any time applied for "extended sick leave without pay."

[3] "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

[4] Where the district school board, through the collective bargaining process, has agreed to bear a more demanding standard, it must honor, and act in accordance with, its agreement.

[5] Notwithstanding the holding in Rosario v. Burke, 605 So. 2d 523, 524 n.1 (Fla. 2d DCA 1992), the termination of a non-certified School Board employee is not governed by the provisions of Section 231.36(6)(b), Florida Statutes. In Rosario, the Second District Court of Appeal provided the following explanation for its holding that the provisions of Section 231.36(6)(b), Florida Statutes, were applicable to non-certified district school board personnel:

> We are not completely convinced that the legislature initially intended the narrow grounds for dismissal described in section 231.36(6)(b) to apply to nonprofessional supervisory staff, as compared to principals, assistant superintendents and other certified positions. Nevertheless, the statute was interpreted to include such public employees in 1981, after the enactment of section 447.201-.609, which applies generally to public employees. See Smith v. School Bd. of Leon County, 405 So. 2d 183 (Fla. 1st DCA 1981). Section 231.36 was amended after the Smith decision without any disapproval of that decision. If the statute requires modification or clarification concerning nonprofessional supervisory school personnel, that change should occur in the legislature.

Subsequent to the Second District's decision in Rosario, the 1994 Florida Legislature enacted Section 231.3605, Florida Statutes, which provides that an "educational support employee" may be terminated "for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist" and further prescribes the procedure that must be followed "[i]n the

event a superintendent seeks termination of an [educational support] employee." In view of the enactment of Section 231.3605, Florida Statutes, the provisions of Section 231.36(6)(b), Florida Statutes, can no longer be reasonably construed as being directly applicable to non-certified school board personnel.

[6] It is therefore unnecessary to determine whether there are also grounds to terminate Respondent for "disciplinary cause," within the meaning of Article XI, Section 4.C., of the AFSCME Contract, as further alleged in Counts I and II of the Notice of Specific Charges.

[7] While the evidentiary record does establish that Respondent was referred to the School Board's Employee Assistance Program, it is silent as to whether she "accepted" or "refused" the referral (as was her choice under Article IX, Section 13.F.2., of the AFSCME Contract).

[8] Respondent was not a credible witness. The School Board presented convincing evidence that not only established that Respondent's testimony regarding the letters she claimed to have received from the Office of the Miami-Dade State Attorney was contrived, but also cast serious doubt on the credibility of the remaining portions of her testimony that were not directly contradicted by the School Board's evidentiary presentation. Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Dauksch, J., specially concurring)("[T]he trier of fact is never bound to believe any witness, even a witness who is uncontradicted."); Maurer v. State, 668 So. 2d 1077, 1079 (Fla. 5th DCA 1996)("A judge acting as fact-finder is not required to believe the testimony of police officers in a suppression hearing, even when that is the only evidence presented; just as a jury may disbelieve evidence presented by the state even if it is uncontradicted, so too the judge may disbelieve the only evidence offered in a suppression hearing."); and Bellman v. Yarmark Enterprises, Inc., 180 So. 2d 663, 664 (Fla. 3d DCA 1965)("The two principal witnesses relied upon by appellant for the proof of usury were substantially impeached and we cannot say that the trial court was bound to accept their testimony. A chancellor as the 'finder of fact' may find a witness who has been impeached completely unworthy of belief, and in such circumstances it is within his province to reject such testimony.").

[9] The Florida Supreme Court has observed that "excessive unauthorized absenteeism presumptively hampers the operation of a business and is inherently detrimental to an employer." Tallahassee Housing Authority v. Florida Unemployment Appeals Commission, 483 So. 2d 413, 414 (Fla. 1986); see also Pericich v. Climatrol, Inc., 523 So. 2d 684, 685 (Fla. 3d DCA 1988)("Employers still retain their traditional right to terminate employees for legitimate business reasons, such as . . . excessive absenteeism.").