

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY	)	
SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-0664
	)	
BENJAMIN FULLINGTON,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 2 and 3, 2002, by video teleconference, with the parties appearing in Miami, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

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

For Respondent: David H. Nevel, Esquire  
Law Office of David H. Nevel  
11900 Biscayne Boulevard  
Suite 806  
North Miami, Florida 33181

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the letter dated February 14, 2002, and in the Notice of

Specific Charges filed April 3, 2002, and, if so, whether the Respondent should be dismissed from his employment with the Petitioner.

PRELIMINARY STATEMENT

In a letter dated February 14, 2002, the Miami-Dade County School Board ("School Board") notified Benjamin Fullington that it had taken action to suspend him and to initiate employment dismissal proceedings against him. In the letter, the School Board stated that the basis for its decision was "just cause, including but not limited to: non-performance and deficient performance of job responsibilities; misconduct in office; immorality; lack of good moral character, and violation of School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties." Mr. Fullington timely requested an administrative hearing, and the School Board transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. The final hearing was scheduled for May 2 and 3, 2002.

On April 3, 2002, the School Board filed a Notice of Specific Charges, in which it included the following pertinent "Facts Common to All Counts":

4. On November 30, 1994, Petitioner charged Respondent with forging the signatures of his supervisors on school district documents in order to obtain job advancement and an increase in his salary. In particular, Petitioner charged Respondent with misconduct in office and conduct unbecoming

a School Board employee. Thereafter, Respondent requested an administrative hearing.

5. On May 3, 1995, the hearing officer entered an order recommending that Petitioner impose a four-month suspension without pay upon Respondent. In particular, the hearing officer found that Respondent "committed a wrongful act of dishonesty and should not escape the consequences of his actions[.]" On August 23, 1995, Petitioner adopted the recommendation of the hearing officer and entered a final order suspending Respondent without pay for four months.

6. On or about August 18, 2001, Respondent solicited prostitution from an undercover police officer. As a result, Respondent was arrested. This conduct was committed while working overtime for Petitioner and while driving a School Board vehicle. After the arrest, the School Board vehicle was impounded. Respondent falsely reported that he worked ten hours on that date.

7. On or about October 31, 2001, Respondent reported that he worked at Barbara Goleman Senior High School from 7:30 am to 1:00 pm. However, during that time, Respondent used a School Board vehicle to drive to a post office for the purpose of conducting personal business.

8. On or about November 2, 2001, Respondent approached his supervisor and a co-worker concerning a work assignment given to Respondent. Respondent's words and tone were inappropriate, threatening, and disrespectful. Immediately thereafter, Respondent exited by forcefully striking and/or kicking a door open.

9. Based on a review of the above facts and Respondent's work history, Administration recommended that Respondent's employment be terminated. As a result, on February 13,

2002, Petitioner, at its regularly scheduled meeting, took action to suspend without pay and initiate dismissal proceedings against Respondent for just cause.

The School Board identified in the Notice of Specific Charges five grounds to support its decision to suspend Mr. Fullington from his employment and initiate dismissal proceedings against him: Count I, gross insubordination and willful neglect of duty; Count II, misconduct in office; Count III, violation of School Board Rule 6Gx13-4A-1.21; Count IV, lack of good moral character, and Count V, immorality. With respect to each count, the School Board alleged that "Respondent's conduct, as set forth herein, constitutes just cause for Respondent's suspension without pay and dismissal pursuant to Sections 230.03(2), 230.23(5)(f), 447.209, [and] 231.3605, Florida Statutes, and Article IV of the DCSMEC [Dade County School Maintenance Employee Committee] Contract."

As a preliminary matter at the hearing, counsel for Mr. Fullington moved to strike paragraph 4 from the Notice of Specific Charges, arguing that it is improper for the School Board to make substantive allegations in the Notice of Specific Charges related to a matter that had previously been tried and for which Mr. Fullington had already been disciplined. Mr. Fullington's counsel argued that the inclusion of paragraph 4 in the Notice of Specific Charges as a substantive

allegation would require that the previous case be retried as part of the hearing in the instant case. Counsel for the School Board responded that the previous discipline was mentioned in the Notice of Specific Charges only because it is relevant to the consideration of the discipline that should be imposed in this case. The motion to strike was denied, with the understanding that any evidence relating to the allegations in paragraph 4 of the Notice of Specific Charges action would be offered only to establish that the School Board had previously disciplined Mr. Fullington.

At the hearing, the School Board presented the testimony of Officer Robin Starks, Robert Brown, Max Metzger, Paul Akers, John DiGregorio, and Reinaldo Benitez. Petitioner's Exhibits 1 through 12 were offered and received into evidence.<sup>1</sup> Mr. Fullington testified in his own behalf and presented the testimony of Steven Montgomery. Respondent's Exhibits 1 through 3 were offered and received into evidence.

The three-volume transcript of the proceedings<sup>2</sup> was filed with the Division of Administrative Hearings on July 8, 2002. Two extensions of time for filing Proposed Recommended Orders were granted, and the School Board and Mr. Fullington filed their proposed findings of fact and conclusions of law on August 30, 2002.

## FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The School Board is responsible for operating, controlling, and supervising the free public schools in the Miami-Dade County school district and has the power to suspend and dismiss employees. Article IX, Section 4(b), Florida Constitution; Sections 230.03(2) and 230.23(5)(f), Florida Statutes (2001).

2. Mr. Fullington is employed by the School Board as a journeyman Plumber II, and, prior to his suspension in February 2002, he was assigned to the North Satellite office of the School Board's Maintenance Department. He is represented by the Dade County School Maintenance Employee Committee, which has a contract with the Miami-Dade County public school system ("DCSMEC Contract") effective June 2001 through September 30, 2002.<sup>3</sup>

3. Mr. Fullington has worked for the School Board for 19 years; he began in 1983 as a laborer and worked his way up to journeyman plumber, which requires a five-year apprenticeship.

4. In 1994, the School Board suspended Mr. Fullington and initiated proceedings to dismiss him from his employment, alleging that he had committed misconduct in office by forging

the signatures of two of his supervisors on school district documents. After an evidentiary hearing, a Recommended Order was entered by a School Board hearing officer, who noted that Mr. Fullington admitted the charges but was remorseful and presented evidence of mitigating factors. The hearing office concluded that Mr. Fullington should not be dismissed from employment and recommended that Mr. Fullington be suspended without pay for four months. The School Board entered a Final Order on August 23, 1995, in which it adopted the hearing officer's Recommended Order and imposed the penalty recommended by the hearing officer.

5. Mr. Fullington was promoted from an apprentice plumber to a journeyman Plumber II in January 1998.

6. Leo Akers has been Mr. Fullington's foreman for seven or eight years.<sup>4</sup> According to Mr. Akers, Mr. Fullington's job performance was, until his suspension, adequate, although his work was excellent when he was an apprentice. In Mr. Akers' experience working with Mr. Fullington, he has always performed his job assignments. Mr. Akers has never reported Mr. Fullington to his superiors for a discipline problem, he has had no difficulties working with Mr. Fullington, and he has received no complaints about Mr. Fullington from his co-workers.

7. Prior to the incidents giving rise to this proceeding, the only disciplinary action taken by the School Board against Mr. Fullington was the four-month suspension in 1995.

8. In June 1997, Mr. Fullington and his co-worker Steven Montgomery were commended by the principal of a Miami-Dade County elementary school, who wrote a letter to Max Metzger, the Director of the North Satellite of the Maintenance Department, praising Mr. Fullington and Mr. Montgomery for their work re-piping the school's broken water system. The principal stated among other things that "[t]he actions, behavior and cooperativeness of these two men deserve great recognition and applause, because our school operation was normal and free of major disruption as they worked."

A. Solicitation for prostitution.

9. Mr. Fullington was assigned overtime work on Saturday, August 18, 2001. When he reported to work at approximately 6:00 a.m., Mr. Akers, his foreman, met Mr. Fullington and told him to drive a School Board van to a plumbing supply house to pick up a load of pipe needed for the job. Mr. Fullington was then to meet Mr. Akers and two other plumbers at the job site, where they were installing the plumbing for a kitchen at one of Miami-Dade County's trade schools.

10. On the way to the supply house, Mr. Fullington initially drove down Interstate 95, but he decided to avoid the



traffic and take Second Avenue. As he drove down Second Avenue, he saw a young woman standing on the corner of Northwest 79th Street and Second Court, and he thought he recognized her as someone he knew in high school and from his neighborhood.

11. Mr. Fullington turned the van around and drove back to speak to the woman. He pulled the van over to the side of the street, and he and the young woman engaged in a short conversation.

12. According to Mr. Fullington, the encounter consisted of the following: He approached the young woman in the School Board van and told her that she looked familiar and that he thought he knew her. She responded that he looked familiar, and she asked him what he was doing. He responded that he was working; she responded that she was working, too.

13. Mr. Fullington testified that, when he realized what the woman meant, he began to laugh because he was embarrassed that he had stopped, and he drove away.

14. The young woman was actually Officer Robin Starks, an undercover police officer working on a "prostitution detail," posing as a decoy. During her time with the Miami Police Department vice unit, Officer Starks has participated in at least 200, and maybe more, prostitution details. On August 18, 2001, she was assigned to work on the prostitution detail from

4:00 a.m. to 9:00 a.m., during which time she made five or more arrests.

15. Officer Starks testified that, when she is working as a decoy on a prostitution detail, she does not do anything that would make a person think she was a prostitute: She does not walk provocatively or wave at passers-by but just stands on a corner; she normally wears shorts or a skirt, and she never dresses like a prostitute but always dresses the way she would normally dress at home. She did not recall specifically what she was wearing on August 18, 2001.

16. After the short conversation, Officer Starks turned and walked away from Mr. Fullington, who had remained seated in the van, and he drove away. She gave a signal to another person on the detail that Mr. Fullington should be arrested, and she proceeded to a nearby police vehicle and completed the narrative portion of an arrest affidavit with the following information:

While working in an undercover capacity, defendant drove up in a large silver utility van bearing tag 100195 and M-768 affixed on the back of the vehicle. Defendant called this officer over and offered \$10.00 dollars for some head. Take down signal was provided, units were notified and the defendant was apprehended.<sup>[5]</sup>

The Arrest Affidavit was not signed by a notary in Officer Starks' presence, and Officer Starks' did not participate further in the events surrounding Mr. Fullington's arrest.

17. According to that portion of the Arrest Affidavit completed by the officer who actually took him into custody, Mr. Fullington was arrested at 7:48 a.m. at Second Avenue and Northwest 75th Street and charged with soliciting to commit prostitution. He was taken in a police car to a substation, and the School Board's utility van was impounded.

18. Mr. Fullington was in a panic after his arrest. The police officer tried to calm him and explained that he would not be put in jail but that he must sign the Arrest Affidavit before he could be released to return to work. Mr. Fullington signed the arrest affidavit, indicating that he would appear in court, and the police officer then told him he would have to pay \$1,000.00 to get the School Board's vehicle out of the impoundment lot.

19. The police officer drove Mr. Fullington to a Publix supermarket in his squad car so that Mr. Fullington could get cash from his savings account from the ATM. Mr. Fullington had only \$860.00 in his savings account, and the police officer loaned him the additional \$140.00.

20. Mr. Fullington paid the \$1,000.00 and got the School Board van out of impoundment.

21. Before he left the substation, Mr. Fullington called Mr. Akers and told him he had an emergency and could not pick up

the plumbing supplies. Mr. Akers told Mr. Fullington to report to the work site when he had taken care of the emergency.

22. He reported for work at around 11:00 a.m. and told Mr. Akers a totally fabricated story to explain his absence. At the hearing, Mr. Fullington expressed remorse for having told Mr. Akers a lie but explained that, at the time, he was not thinking rationally and did not want anyone to know that he had been arrested for soliciting prostitution.<sup>6</sup>

23. On October 2, 2001, the criminal case against Mr. Fullington on the charges of offering to commit prostitution was closed with adjudication withheld and community service.

B. Overtime hours.

24. In accordance with the usual procedure, Mr. Akers completed a Facilities Support Services Weelky [sic] Overtime Report for each of the plumbers working on August 18, 2001, and left the forms at the job site. Each plumber was to sign his form at the end of the day to certify the number of overtime hours he had worked; the forms were then to be submitted to Mr. Akers for his review. Mr. Fullington signed the Weekly Overtime Services form with his name on it, which reflected that, on August 18, 2001, he had worked at the "Dorsey Skill" site from 6:00 a.m. until 4:30 p.m., for a total of 10 hours of overtime. Above his signature, was the following statement:  
"I certify that the work and hours indicated above are true and

correct." It was Mr. Fullington's responsibility to ensure that the correct number of overtime hours was reported on the form.

25. Mr. Fullington also signed a Daily Status Form for Maintenance and Operations on August 18, 2001, that showed that he had worked a total of 10 hours overtime, consisting of one hour of overtime travel and 9 hours of overtime.

26. At the hearing, Mr. Fullington explained that he was so distracted by the events of August 18, 2001, that he signed both forms without looking at them.

27. After Maintenance Department administrators learned that Mr. Fullington had inaccurately reported his overtime hours for August 18, 2001, he was advised that he could submit a Weekly Overtime Report and a Daily Status Report reflecting the number of hours that he had actually worked on August 18, 2001, and that he would get paid for those hours. Mr. Fullington did not submit the corrected forms and has not been paid for the hours of overtime that he actually worked on August 18, 2001. Additionally, Mr. Fullington never asked for, or received, reimbursement from the School Board for the \$1,000.00 he paid to recover the School Board van from the impoundment lot.

C. Post Office incident

28. At around 12:30 p.m. on October 31, 2001,<sup>7</sup> during their lunch hour, Robert Brown, the District Director of Maintenance Operations for the Miami-Dade County public school system, and

Peter Vadas, Mr. Brown's co-worker, stopped at a post office so Mr. Vadas could purchase stamps.

29. Mr. Brown saw a School Board van parked in the post office parking lot, and he waited in the car while Mr. Vadas went into the post office so he could keep the van under observation.

30. After a few minutes, Mr. Vadas returned to the car. While Mr. Vadas was buckling his seat belt, Mr. Brown saw Mr. Fullington walking across the post office parking lot with a letter in his hand. The letter Mr. Fullington picked up was a certified letter from the School Board's Office of Professional Standards.

31. Mr. Fullington was in the post office approximately 10 minutes.

32. Mr. Brown observed Mr. Fullington get into the School Board van, where he sat and read the letter.

33. As he and Mr. Brown sat in the post office parking lot observing Mr. Fullington read his letter, Mr. Vadas telephoned Kenny McFarland to report that Mr. Fullington was at the post office in a School Board van. Mr. McFarland, a Coordinator II at the North Satellite of the Maintenance Department, is a senior administrator who was in the supervisory chain-of-command for Mr. Fullington.<sup>8</sup>

34. After reading the letter, Mr. Fullington drove off, and Mr. Brown and Mr. Vadas returned to their office.

35. Mr. Fullington's regular, assigned lunch half-hour was 11:30 a.m. to 12:00 p.m. This time could be changed with permission from his foreman.

36. The post office that Mr. Fullington visited was located approximately 10 miles from the schools at which he was assigned to work that day.

D. Incident involving Mr. Akers.

37. On November 2, 2001, Mr. Fullington picked up his work assignments as usual from the "foreman's table" in the large office in which a number of maintenance foremen had their desks and work areas. At the time, there were perhaps 15 or 20 people in the foremen's office. The paperwork for Mr. Fullington's work assignments was affixed to a clipboard made of aluminum.

38. Mr. Fullington was assigned to work with Steven Montgomery and, as they were walking to the truck with their assignments, Mr. Montgomery told Mr. Fullington that he overheard Mr. Akers telling someone that Mr. Fullington never showed up at a particular school to complete a work order. Mr. Montgomery believed that Mr. Akers was repeating something that someone else had told him about Mr. Fullington, and Mr. Montgomery told Mr. Fullington that he needed to clear up the misunderstanding.

39. Mr. Fullington was upset to hear that Mr. Akers believed he had not completed a work assignment, and he wanted Mr. Akers to know that the information he was repeating was not correct. Mr. Fullington asked Mr. Montgomery to go back to the foremen's office with him so he could resolve the matter immediately.

40. Mr. Fullington and Mr. Montgomery went back into the foremen's office area. Mr. Akers was sitting at his desk, which was made of metal. Mr. Fullington approached the desk and dropped the metal clipboard he was carrying onto the top of Mr. Aker's desk, next to his computer, in such a manner that it made a loud noise. Mr. Fullington began "hollering" at Mr. Akers, saying something about Mr. Akers trying to set him up.<sup>9</sup>

41. It was clear to Mr. Akers that Mr. Fullington was upset and angry, but Mr. Akers did not have any idea what Mr. Fullington was talking about. At the time, Mr. Akers felt threatened by Mr. Fullington; he was caught off guard by the outburst and does not recall saying anything in response to Mr. Fullington's accusations.

42. When Mr. Fullington left the foremen's office, he forcefully kicked or pushed open the door to the hallway.

43. Although Mr. Akers considered the incident very serious, he did not report the incident to his supervisor or



call the police or security. Another foreman, John DiGregorio, who was in the room at the time of the incident, became nervous during the incident, primarily because of Mr. Fullington's size.<sup>10</sup> Mr. DiGregorio immediately called his supervisor, Frank Brighton, whose office was on the floor above that of the foremen. Mr. Brighton came down to the foremen's office and questioned Mr. DiGregorio and Mr. Akers about the incident. Mr. Brighton reported the incident to Mr. Akers supervisor, Anthony Adams.

44. Several days after the incident, Mr. Fullington asked Mr. Akers if he had felt threatened during the incident; Mr. Akers responded in the affirmative, and Mr. Fullington apologized.

45. At the hearing, Mr. Fullington testified that he felt very badly about having raised his voice to Mr. Akers in anger. He explained that, at the time, he was under a lot of pressure because the Conference-for-the-Record to discuss the events of August 18, 2001, was scheduled for November 6, 2001, and he was concerned that his job with the School Board was in jeopardy.

46. Mr. DiGregorio, who has been a maintenance foreman with the School Board for 10 years, had never previously seen Mr. Fullington act in any way that could be considered hostile or threatening. Mr. DiGregorio described Mr. Fullington's demeanor as generally gentle and non-threatening.

47. In the years that Mr. Akers has worked with Mr. Fullington as his foreman, the only time Mr. Fullington ever raised his voice in Mr. Akers' presence was during the November 2, 2001, incident. Subsequent to the incident, Mr. Akers did not feel that he needed any protection from Mr. Fullington, they continued their usual good working relationship, and Mr. Fullington's job performance continued to be satisfactory.

November 6, 2001, Conference-for-the-Record.

48. On November 6, 2001, Reinaldo Benitez, an Executive Director of the School Board's Office of Professional Standards, held a Conference-for-the-Record with Mr. Fullington to address Mr. Fullington's arrest for offering to commit prostitution, to review his record with the School Board, and to discuss his future employment status with the Miami-Dade County public school system. Mr. Fullington's inaccurate reporting of the overtime hours he worked on August 18, 2001, was also discussed.

49. Mr. Fullington's prior disciplinary record was set forth in the Summary of the Conference-for-the-Record. With the exception of the four-month suspension in 1995, the only disciplinary action taken against Mr. Fullington was a verbal reprimand in 1990 for improper conduct.

50. Mr. Fullington was given an opportunity at the Conference-for-the-Record to consider resigning his position; he refused.

51. The following directives were given to Mr. Fullington on November 6, 2001:

1. Adhere to all M-DCPS School Board Rules at all times, especially 6Gx13-4A-1.21, Responsibilities and Duties/Employee Conduct.
2. Honor your work hours from 7:00 a.m. to 3:30 p.m.
3. Adhere to all maintenance procedures and regulations at all times.
4. Adhere to the most direct route when traveling from location to location, unless you obtain authorization from your supervisor.
5. Refrain from submitting any fraudulent documents to M-DCPS at any time.

52. Mr. Fullington was advised that dismissal from his employment was a potential disciplinary action.

53. After the November 6, 2001, Conference-for-the-Record, Mr. Vadas, District Director of Maintenance Operations; Max Metzger, the Director of Maintenance Operations at the North Satellite; and James Monroe, Executive Director of Facilities Operations, met and reviewed the data submitted at the conference. As a result of their deliberations, Mr. Vadas sent a memorandum, dated November 13, 2001, to the Office of Professional Standards recommending that Mr. Fullington be terminated from his employment with the School Board.<sup>11</sup>

54. No one asked for Mr. Akers' input on the recommendation, discussed the recommendation with him, or explained to him the reasons for the recommendation that Mr. Fullington's employment be terminated.

55. There is no evidence that, prior to his suspension in February 2002, Mr. Fullington violated any of the directives given on November 6, 2001.

November 16, 2001, Conference-for-the-Record.

56. On November 16, 2001, Mr. Metzger, held a Conference-for-the-Record, the purpose of which was "to address your [Mr. Fullington's] failure to follow the Maintenance Department's policies and procedures as they pertain to the use of M-DCPS vehicles, your verbal abuse towards your foreperson, and other performance-related issues."<sup>12</sup>

57. The administrators at the Conference-for-the-Record discussed a number of the issues with Mr. Fullington, including Mr. Fullington's use of a School Board vehicle to visit a post office on personal business and Mr. Fullington's angry confrontation with Mr. Akers.<sup>13</sup>

58. No formal directives were given to Mr. Fullington as a result of this Conference-for-the-Record. Mr. Fullington was, however, reminded of the School Board policy that School Board vehicles are not to be used for personal business,<sup>14</sup> of the

School Board rules relating to employee conduct and to violence in the workplace, and of several other concerns.<sup>15</sup>

59. On January 15, 2002, a meeting was held during which Mr. Fullington was advised of the recommendation that he be dismissed from his employment with the School Board. Mr. Fullington was again offered the option of resigning his position.

60. In a letter dated January 30, 2002, the Superintendent of Schools for Miami-Dade County notified Mr. Fullington that he was recommending to the School Board that, at its February 13, 2002, meeting, it suspend and initiate dismissal proceedings against him for "just cause." A letter to Mr. Fullington dated February 14, 2002, contained confirmation that the School Board had followed the Superintendent's recommendation.

#### Summary

##### A. Offering to commit prostitution.

61. In the Notice of Specific Charges, the School Board included the allegation that Mr. Fullington "solicited prostitution from an undercover police officer."<sup>16</sup> The School Board has, however, failed to establish by the greater weight of the evidence that Mr. Fullington solicited prostitution from Officer Starks. The testimony of Officer Starks and Mr. Fullington has been carefully considered, and there is nothing in either the testimony or the demeanor of

Mr. Fullington and Officer Starks or in the other evidence presented on this issue that offers a cogent reason to accept Officer Starks' version of the incident over that of Mr. Fullington. This finding is based on a careful consideration of the totality of the evidence presented in this case relevant to the issue of whether Mr. Fullington solicited prostitution and a careful assessment of the credibility of Officer Stark and Mr. Fullington and of the persuasive value of their testimony.<sup>17</sup>

62. Consequently, discipline cannot be imposed on Mr. Fullington based on the allegations in the Notice of Specific Charges that he solicited prostitution. Additionally, the allegations that Mr. Fullington committed the offense while working overtime and while driving a School Board vehicle and that the School Board vehicle was impounded cannot form the basis for the imposition of discipline because the underlying allegation that he solicited prostitution has not been established.<sup>18</sup>

B. Reporting incorrect number of overtime hours worked on August 18, 2001.

63. In the Notice of Specific Charges, the School Board alleged that Mr. Fullington "falsely reported that he worked ten hours on that date [August 18, 2001]." Mr. Fullington does not dispute that he signed the Weekly Overtime Report and the Daily

Status Report on August 18, 2001, certifying that he had worked 10 hours of overtime on that date and that the actual amount of time he worked on that day was not accurately reported on the forms.

64. Even though credence is given to Mr. Fullington's explanation that he was so distraught by the events of August 18, 2001, that he did not look at the number of hours included on the forms, by signing the forms, Mr. Fullington certified that the number of overtime hours shown on the forms was correct. Mr. Fullington, therefore, submitted false information to the School Board, and he was not honest in his dealings with the School Board with respect to the overtime hours he worked on August 18, 2001. There was, however, no evidence presented by the School Board to support a finding that Mr. Fullington's inaccurate reporting of his hours for August 18, 2001, was so serious that his effectiveness as a School Board employee was impaired, and the totality of the evidence is insufficient to support a factual inference of impaired effectiveness.

65. The School Board has failed to prove by the greater weight of the evidence that Mr. Fullington intentionally misrepresented the number of overtime hours that he worked on August 18, 2001. There is no evidence that Mr. Fullington intended to submit inaccurate information or that he engaged in

any type of deceitful conduct in an attempt to ensure that he was paid for more overtime hours than he actually worked on August 18, 2001. And, given his many years of employment in the School Board's Maintenance Department, it is reasonable to infer that Mr. Fullington knew that Mr. Akers would have noted the discrepancy before submitting the forms to payroll.

C. Use of the School Board van to go to the post office on personal business.

66. The School Board has proven by the greater weight of the evidence that Mr. Fullington used a School Board vehicle for personal business when he went to the post office at about 12:30 p.m. on October 31, 2001, to collect a certified letter from the School Board. In doing so, Mr. Fullington violated the School Board's policy, set forth in the Maintenance Handbook that expressly prohibits the use of a School Board vehicle for personal business. Under the circumstances, Mr. Fullington committed a minor violation of Maintenance Department policy.

67. Nonetheless, even though a minor offense, Mr. Fullington's use of the School Board's vehicle to go to the post office on October 31, 2001, constitutes the use of his access to School Board vehicles for his personal advantage. There was, however, no evidence presented by the School Board to support a finding that Mr. Fullington's use of a School Board vehicle for personal business on this occasion was so serious



that his effectiveness as a School Board employee was impaired, and the totality of the evidence is insufficient to support a factual inference of impaired effectiveness.

68. The School Board failed to present any creditable evidence to support its allegation in paragraph 7 of the Notice of Specific Charges that Mr. Fullington reported that he had worked at Barbara Goleman Senior High School from 7:30 a.m. to 1:00 pm. on October 31, 2001.<sup>19</sup>

D. Confrontation with Mr. Akers.

69. Mr. Fullington did not controvert the evidence presented by the School Board that, on the morning of November 2, 2001, he confronted his foreman, Mr. Akers, about a negative comment Mr. Akers reportedly made about Mr. Fullington to other School Board employees; that he was angry and upset; that he shouted at Mr. Akers; and that he angrily and forcefully pushed the door open when he left the foremen's office. The evidence presented by the School Board is also sufficient to establish that Mr. Akers and Mr. DiGregorio perceived Mr. Fullington's behavior as threatening and that Mr. Akers felt fear during the confrontation. The impact of Mr. Fullington's conduct on this occasion is, however, mitigated by the testimony of Mr. Akers that he and Mr. Fullington worked together in a satisfactory supervisor-employee relationship after the November 2, 2001, incident and by the testimony of both

Mr. Akers and Mr. DiGregorio that they have never felt threatened by or nervous around Mr. Fullington before or since the November 2, 2001, incident.

70. The School Board has, therefore, established by the greater weight of the evidence that Mr. Fullington committed three offenses: He submitted two forms containing an inaccurate statement of his overtime hours on August 18, 2001; he used a School Board vehicle for personal business; and he confronted Mr. Akers in anger. However, none of the three offenses is inconsistent with the standards of public conscience and good morals or impaired Mr. Fullington's service in the community; none of the three offenses involves the constant or continuing intentional refusal to obey a direct order; none of the three offenses constitutes repeated violations of the law or repeated acts of indiscretion that persisted over an extended period of time, and none of the offenses was so serious that it impaired Mr. Fullington's effectiveness as a School Board employee. In light of Mr. Fullington's 19-year employment record with the School Board, which is marred by only one verbal reprimand and one four-month suspension, these three offenses, whether considered separately or cumulatively, are not sufficient to constitute "just and good cause" to suspend and dismiss Mr. Fullington from his employment with the School Board.

CONCLUSIONS OF LAW

71. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2002).

72. Pursuant to Section 230.03(2), Florida Statutes (2001), the School Board has "the authority to operate, control, and supervise the free public schools" in its district.

73. Pursuant to Section 230.23(5)(f), Florida Statutes (2001), the School Board has the authority to

[s]uspend, dismiss, or return to annual contract the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed, or returned to annual contract except as provided in chapter 231.

74. Pursuant to Section 447.209, Florida Statutes (2001), the School Board has the right "to direct employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or other legitimate reasons." Section 447.209, Florida Statutes (2001).

75. Section 231.3605, Florida Statutes (2001), provides in pertinent part:

(1) As used in this section:

(a) "Educational support employee" means any person employed by a district school

system who is so employed as a . . . member  
of the maintenance department . . . .

\* \* \*

(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 school board rule 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 appeal 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.

Mr. Fullington is a permanent "educational support employee," as that term is defined in Section 231.3605(1)(a), Florida Statutes (2001).

76. Article IV of the DCSMEC Contract, which is the collective bargaining agreement that governs Mr. Fullington's employment relationship with the School Board, provides in pertinent part:

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:

- Discipline or discharge of any employee for just and good cause.

77. There is no definition of "proper cause" in Section 447.209, and there is no definition of "just and good cause" in the DCSMEC Contract.

78. In Counts I, II, and V of its Notice of Specific Charges, the School Board asserts that it has "just cause" to suspend and dismiss Mr. Fullington based on the charges of gross insubordination and willful neglect of duty, misconduct in office, and immorality, respectively. These "instances" are all identified in Section 231.36(1)(a), (4)(a), and (6)(b), Florida Statutes (2001), as "just cause" for suspension or dismissal of instructional, administrative, and supervisory personnel.

79. In the absence in the DCSMEC Contract of a definition of "just and good cause" for the suspension or dismissal of educational support employees in the School Board's Maintenance Department, it is acceptable to refer, "as useful analogues," to conduct that would support the suspension or dismissal of instructional, administrative, and supervisory personnel in Section 231.36, Florida Statutes. See Smith v. School Board of

Leon County, 405 So. 2d 183, 184 (Fla. 1st DCA 1981).

Accordingly, "just and good cause" to support the suspension and dismissal of Mr. Fullington from his employment with the School Board may appropriately include gross insubordination and willful neglect of duty, misconduct in office, and immorality.

80. In Count III of its Notice of Specific Charges, the School Board asserts that it has "just cause" to suspend and dismiss Mr. Fullington based on the charge that he violated School Board Rule 6Gx13-4A-1.21, and in Count IV of its Notice of Specific Charges, the School Board asserts that it has "just cause" to suspend and dismiss Mr. Fullington based on the charge that he lacks good moral character because Section 231.02, Florida Statutes, and School Board Rule 6Gx13-4C-1.021 require that a person must be of good moral character to be employed by the School Board.

81. Neither the violation of a School Board rule nor the lack of good moral character is included in the list of offenses that constitute "just cause" to suspend or dismiss instructional, administrative, and supervisory personnel identified in Section 231.36, Florida Statutes (2001), and no definition of "just cause" that includes the violations alleged in Counts III and IV of the Notice of Specific Charges has been cited by the School Board. Nonetheless, the court in Jacker v. School Board of Dade County, 426 So. 2d 1149, 1150 (Fla. 3d DCA

1983), affirmed the dismissal of a non-instructional employee of a school board for making disparaging racist remarks about his supervisor to another supervisor, in the presence of a co-worker, even though there was no specific rule of conduct prohibiting a show of disrespect to a supervisor. The court in Jacker reasoned that "such a requirement is inherent in the employment relationship . . . , and the right of a public employer to discipline an employee for 'proper cause,'" as provided in Section 447.209, Florida Statutes. Id. (citations omitted.) See also Rosario v. Burke, 605 So. 2d 523, 542 (Fla. 2d DCA 1992). Therefore, in the absence of a definition of "just and good cause" in the DCSMEC Contract, the School Board is not barred from proceeding against Mr. Fullington for violation of School Board Rule 6Gx13-4A-1.21 and the charge of lack of good moral character.

82. The terms "gross insubordination and willful neglect of duty," "misconduct in office," and "immorality," are not defined in Section 231.36, Florida Statutes (2001), but are defined in the Department of Education's Rule 6B-4.009, Florida Administrative Code, as follows:

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or

disrespect and impair the individual's service in the community.

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC., which is so serious as to impair the individual's effectiveness in the school system.

(4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

83. School Board Rule 6Gx13-4A-1.21 provides in pertinent part:

I. Employee conduct.

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

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

84. The School Board has not cited any statutory or rule definition for good moral character or the lack thereof. However, the court in Zemour, Inc. v. State, Division of Beverage, 347 So. 2d 1102, 1103 (Fla. 1st DCA 1977), observed in a case involving the application for liquor license:



Moral character, as used in this statute,<sup>[20]</sup> means not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence. An isolated unlawful act or acts of indiscretion wherever committed do not necessarily establish bad moral character. But, as shown by the evidence here, repeated acts in violation of law wherever committed and generally condemned by law abiding people, over a long period of time, evinces the sort of mind and establishes the sort of character that the legislature . . . has determined should not be entrusted with a liquor license.

85. Because this case is a proceeding to terminate Mr. Fullington's employment with the School Board and does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in the Notice of Specific Charges by a preponderance of the evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

86. As set forth in the findings of fact, the School Board failed to prove by the greater weight of the evidence that Mr. Fullington offered to commit prostitution. As set forth in the findings of fact, the School Board has, however, proven by the greater weight of the evidence that Mr. Fullington

inaccurately reported the number of hours of overtime he worked on August 18, 2001; that Mr. Fullington used a School Board vehicle for personal business when he went to the post office to pick up a certified letter from the School Board; and that Mr. Fullington shouted at his foreman and kicked open a door when leaving the foreman's office. These are the only three offenses that can be considered in determining whether the School Board has "just and good cause" to suspend and dismiss Mr. Fullington from his employment.

87. Based on consideration of the elements that must be proven to establish gross insubordination and willful neglect of duty, and on the findings of fact herein, it is concluded that the School Board has failed to satisfy its burden of proof by a preponderance of the evidence that Mr. Fullington committed gross insubordination or willful neglect of duty, as alleged in Count I of the Notice of Specific Charges. The record is devoid of evidence that Mr. Fullington engaged in a "constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority" with respect to any of the offenses proven by the School Board.

88. Based on consideration of the elements that must be proven to establish misconduct in office, and on the findings of fact herein, it is concluded that the School Board has failed to satisfy its burden of proof by a preponderance of the evidence

that Mr. Fullington committed misconduct in office, as alleged in Count II of the Notice of Specific Charges. The School Board has proven by the greater weight of the evidence that Mr. Fullington used a School Board vehicle for his personal advantage and that he signed and submitted two forms that inaccurately reflected the number of overtime hours he worked on August 18, 2001. These offenses constitute violations of Department of Education Rule 6B-1.006(4)(c) and (5)(a), Florida Administrative Code, which constitute the Code of Ethics of the Education Profession in Florida and the Principles of Professional Conduct for the Education Profession in Florida.<sup>21</sup> Rule 6B-1.006(4)(c) sets forth the obligation of School Board employees not to "use institutional privileges for personal gain or advantage"; Rule 6B-1.006(5)(a) sets forth the obligation of School Board employees "to maintain honesty in all professional dealings."

89. The offense of misconduct in office has two elements, however. In order to prove that Mr. Fullington is guilty of misconduct in office, the School Board must also prove that the violations of Rule 6B-1006(4)(c) and (5)(a), Florida Administrative Code, were so serious that the violations caused Mr. Fullington's effectiveness as an employee of the School Board to be impaired. 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.") Based on the findings of fact herein, the School Board has failed to carry its burden of proof by a preponderance of the evidence that Mr. Fullington's offenses were so serious that his effectiveness as a plumber employed by the School Board was impaired, and neither the nature of the two offenses nor the circumstances in which they were committed can reasonably support an inference that Mr. Fullington's effectiveness as a School Board employee was impaired. Cf. Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000) (The misconduct of Purvis, who "lied under oath and resisted arrest" rose to a "level of misconduct which would support the inference that Purvis's effectiveness as a teacher had been impaired.").

90. Based on consideration of the elements that must be proven to establish conduct unbecoming a School Board employee, and on the findings of fact herein, it is concluded that the School Board has satisfied its burden of proof by a preponderance of the evidence that the three offenses committed by Mr. Fullington each constitute conduct that does not reflect credit on Mr. Fullington as a School Board employee, contrary to the standard of employee conduct set forth in School Board Rule 6Gx13-4A-1.21(I). In addition, by confronting Mr. Akers in a loud and threatening manner, Mr. Fullington engaged in

unseemly conduct that is expressly prohibited by School Board Rule 6Gx13-4A-1.21(I). The seriousness of Mr. Fullington's conduct in confronting Mr. Akers is mitigated, however, by the uncontroverted evidence that Mr. Fullington felt remorse for his outburst and apologized to Mr. Akers and that Mr. Fullington had enjoyed for many years a good working relationship with Mr. Akers that was not marred by any threatening or hostile behavior on Mr. Fullington's part either before or after the incident.

91. Based on consideration of the elements that must be proven to establish lack of good moral character, and on the findings of fact herein, it is concluded that the School Board has failed to satisfy its burden of proof by a preponderance of the evidence that Mr. Fullington lacks good moral character. The findings of fact herein support the conclusion that the offenses committed by Mr. Fullington do not demonstrate a lack of good moral character, as defined by the court in Zemour.

92. Based on consideration of the elements that must be proven to establish lack of good moral character, and on the findings of fact herein, it is concluded that the School Board has failed to satisfy its burden of proof by a preponderance of the evidence that Mr. Fullington committed an act of immorality. The three offenses that the School Board has proven by the greater weight of the evidence, considered cumulatively, fall

far short of conduct that is inconsistent with the standards of public conscience and good morals, and no evidence whatsoever was presented that these three offenses caused Mr. Fullington to be so notorious that either he or the education profession was brought into public disgrace or that his service in the community was impaired.

93. Accordingly, the only one of the violations alleged in the Notice of Specific Charges that the School Board has proven by a preponderance of the evidence is that Mr. Fullington engaged in conduct that was contrary to the standards established in School Board Rule 6Gx13-4A-1.21(I) and, with respect to his confrontation with Mr. Akers, engaged in unseemly conduct expressly prohibited by the rule. After consideration of all of the evidence presented in this case, including the circumstances surrounding Mr. Fullington's inaccurate reporting of his overtime hours for August 18, 2001, his anxiety regarding the contents of the certified letter sent by the School Board's Office of Professional Standards, his remorse and subsequent apology to Mr. Akers, as well as the previous disciplinary action taken against Mr. Fullington in 1995, the commendation he received from Myrtle Grove Elementary School, and his generally unblemished employment record with the School Board, it is concluded that, based on the findings of fact and conclusions of law herein, the School Board has not shown "just and good cause"

to suspend and dismiss Mr. Fullington from his employment. Rather, based on a consideration of all of the factors enumerated above, the recommended penalty in this case is the issuance of a written reprimand to be placed in Mr. Fullington's personnel file.<sup>22</sup>

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order

(1) Dismissing Counts I, II, IV, and V of the Notice of Specific Charges against Benjamin Fullington;

(2) Finding that Mr. Fullington engaged in conduct unbecoming a School Board employee, in violation of School Board Rule 6Gx13-4A-1.21(I);

(3) Reinstating Mr. Fullington to his position as a Plumber II with the School Board's Maintenance Department, with full back pay and benefits; and

(4) Issuing a written reprimand to be placed in Mr. Fullington's personnel file.

DONE AND ENTERED this 30th day of September, 2002, in  
Tallahassee, Leon County, Florida.

---

PATRICIA HART MALONO  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of September, 2002.

ENDNOTES

<sup>1/</sup> Petitioner's Exhibit 7 consists of the Recommended Order and Final Order entered in the 1995 disciplinary action taken by the School Board against Mr. Fullington, offered to prove only that the School Board had suspended Mr. Fullington without pay for four months.

<sup>2/</sup> There are several errors in the third volume of the transcript filed with the Division of Administrative Hearings on July 8, 2002. This volume of the transcript is denominated "Volume II" when it is actually Volume III; the date of the hearing noted on the cover page is May 10, 2002, but the hearing date was actually May 3, 2002; and the first page in the volume is numbered page 244 even though the last page of the previous volume is page 256. Over the last month, the undersigned has made numerous attempts to obtain a corrected Volume III but has been unsuccessful.

<sup>3/</sup> See the 2001-2002 Addendum to the Contract, executed January 16, 2002.

<sup>4/</sup> Although it is not directly relevant to the issues presented herein, there is evidence in the record to suggest that Mr. Akers has been Mr. Fullington's foreman for approximately 10 years.



<sup>5/</sup> The Arrest Report was admitted into evidence as Petitioner's Exhibit 1, with Mr. Fullington's counsel stating that he had no objection to the report coming into evidence. Nonetheless, the Arrest Report is hearsay as defined in Section 90.801, Florida Statutes, and Rule 28-106.213(3), Florida Administrative Code, provides: "Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S."

Because there was no objection to the admission of the Arrest Report, counsel for the School Board did not identify the exception to the hearsay rule that would permit the document to come into evidence over objection in a civil action. See Section 120.57(1)(c), Florida Statutes. Having considered the exceptions to the rule excluding hearsay contained in Section 90.803, Florida Statutes, it is apparent that the Arrest Report could come into evidence as a public record pursuant to Section 90.803(8), Florida Statutes, since this is a contract, rather than a penal, matter. It could also fall within the exception for recorded recollection pursuant to Section 90.803(5), Florida Statutes, since it is apparent from the record that Officer Starks' independent memory of the events at issue was very sketchy at the time of the hearing. The express statement by Mr. Fullington's counsel that he had no objection to the admission of the report in effect renders nugatory the limitation that permits the document itself to be admitted only if offered by the adverse party.

<sup>6/</sup> On Monday, August 20, 2001, administrators in the Maintenance Department were aware that Mr. Fullington had fabricated the story that he told Mr. Akers to explain his absence from the job site on the morning of August 18, 2001. This conduct was not, however, included in the factual allegations in the School Board's Notice of Specific Charges, and cannot, therefore, be the basis for a finding that Mr. Fullington violated the statutes and rules cited in the Notice of Specific Charges. See Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996)(Even though an Administrative Complaint contains reference to a particular statutory violation, facts or conduct warranting disciplinary action must be alleged in the Administrative Complaint; the fact that evidence was introduced that "might well support a violation" does not provide basis for finding violation when the facts or conduct are not pled in the Administrative Complaint.)

7/ In Petitioner's Exhibit 4, the Conference for the Record Summary - Revised, dated November 21, 2001, the specific day is noted as October 31, 2001. Mr. Brown testified only that he observed Mr. Fullington at the post office in October 2001, but the date of October 31, 2001, is not inconsistent with any of the evidence presented herein.

8/ Mr. McFarland reported directly to Max Metzger, the Director of Maintenance Operations at the North Satellite, and Anthony Adams, Mr. Akers' supervisor, reported to Mr. McFarland.

9/ Transcript at 185.

10/ Mr. Fullington weighs 280 pounds and stands six feet, one inch tall.

11/ It is of some interest that Mr. Metzger, who has worked for the Miami-Dade County public school system for 42 years, testified that he is not aware of any employee being dismissed from employment for having been arrested for soliciting prostitution.

One non-instructional School Board employee was arrested for lewd and lascivious conduct in a public place; this employee was not suspended from his employment with the School Board. Two non-instructional School Board employees were arrested for soliciting prostitution; one was disciplined by being called to a Conference-for-the-Record and issued directives, and the other was demoted. This latter employee worked in the School Board's Office of Professional Standards.

The School Board distinguishes Mr. Fullington's situation from that of the other employees on the grounds that none of the three arrests occurred during the time the School Board employee was working, nor was a School Board vehicle involved. In addition, the charges against two of these employees were dropped; for one employee, the charges were dropped before the Conference-for-the-Record was held.

12/ Petitioner's Exhibit 4.

13/ The Conference for the Record Summary - Revised dated November 21, 2001, Petitioner's Exhibit 4, included reference to a discussion of several other issues related to Mr. Fullington's job performance. The School Board's counsel did not lay the

foundation for admission of this document as a business record of the School Board, but even if he had done so and the document was admitted as an exception to the hearsay rule, much of the information contained in the document is, itself, hearsay. Consequently, because no testimony was elicited at the hearing regarding these other issues, the hearsay contained in the conference summary cannot be used to prove the truth of the matters asserted in the document and cannot support findings of fact with respect to these issues. See Section 120.57(1)(c), Florida Statutes (2002).

<sup>14/</sup> The policy relating to the use of vehicles owned by the Miami-Dade County public school system is set out in Petitioner's Exhibit 5, the School Board's Maintenance Handbook, which provides in pertinent part on page 11 of the Supplemental Procedures for Trade Employees:

#### VEHICLES

The use of authorized vehicles is restricted to the transportation of Miami-Dade County Public Schools personnel, equipment, and supplies to and from authorized work locations. Vehicles WILL NOT be used for personal business, i.e., going home for lunch, to the bank, or to any point to conduct personal business of any kind.

<sup>15/</sup> Mr. Fullington has not been charged in the Notice of Specific Charges with having violated the rule against violence in the workplace, nor was the rule offered into evidence at the hearing. Consequently, a violation of the rule dealing with violence in the workplace cannot be a basis for Mr. Fullington's dismissal from employment.

According to the November 21, 2001, Conference for the Record Summary - Revised, Mr. Fullington was also reminded during the November 16, 2001, Conference-for-the-Record of other policies and procedures with which he was expected to comply. As noted in endnote 12, supra, no non-hearsay evidence was presented at the hearing to support a finding that Mr. Fullington committed any acts referred to in the Conference for the Record Summary - Revised other than the trip to the post office and the incident involving Mr. Akers. In addition, the charge against Mr. Fullington in Count I of the Notice of Specific Charges is that he committed gross insubordination

because he "refused to comply with School Board rules, work-site procedure, and directives"; no specific rule, procedure, or directive was identified in the Notice of Specific Charges, and none was identified at the hearing or in the School Board's Proposed Recommended Order.

<sup>16/</sup> Notice of Specific Charges, paragraph 6.

<sup>17/</sup> Officer Starks' demeanor during her testimony was closely observed, and consideration was given to the difficulty Officer Starks exhibited throughout her testimony in determining whether her recollection of her encounter with Mr. Fullington on August 18, 2001, was refreshed when she saw him at the hearing or whether her recollection of the encounter was based exclusively on the statement she included in the Arrest Affidavit setting forth Mr. Fullington's alleged offer of money for sex.

At her deposition, Officer Starks stated that she had no recollection of the encounter, and yet she vacillated during her testimony at the hearing between claiming no independent recollection of the encounter and describing specific details of the encounter. In light of the number of times Officer Starks has worked as a decoy on a prostitution detail and the number of arrests she made on August 18, 2001, the undersigned is not persuaded that, one year after her encounter with Mr. Fullington, Officer Starks' memory of the incident could be sufficiently refreshed by the sight of Mr. Fullington that she testified to the alleged offer of money for sex based on her own independent recollection of the encounter. Given the conflicting statements in Officer Starks' testimony regarding her recollection of Mr. Fullington alleged offer, it is more likely than not that her testimony was based on the statement she included in the Arrest Affidavit and not on personal knowledge. As a result, Officer Starks' testimony regarding the offer is generally unpersuasive and, therefore, has been given virtually no weight.

The only other piece of evidence introduced by the School Board to establish that Mr. Fullington offered to commit prostitution is the narrative in the unsworn Arrest Affidavit completed by Officer Starks shortly after her encounter with Mr. Fullington. As discussed in endnote 4, supra, although this report is admissible under the "recorded recollection" exception to the rule excluding hearsay evidence, see Section 90.803(5), Florida Statutes, and can be the basis for a finding of fact

pursuant to Section 120.57(1)(c), Florida Statutes, it is simply one piece of evidence to be evaluated with respect to its persuasive value.

Officer Starks completed the narrative in the Arrest Affidavit in her role as the arresting officer and not in the role of a disinterested witness. The Arrest Affidavit is nothing more than a type of charging document that contains allegations that would have to be proven in a criminal case to sustain a conviction. As a result, while Officer Starks' statement in the Arrest Affidavit that Mr. Fullington's offered money for sex has been considered, it is not sufficiently persuasive to provide the sole basis for a finding that Mr. Fullington did, indeed, offer to solicit prostitution.

Mr. Fullington testified at length regarding the details of his encounter with Officer Starks, and his version of events understandably differs completely from hers. Mr. Fullington's demeanor during his testimony was closely observed and the testimony regarding Mr. Fullington's version of the conversation with Officer Starks has been carefully considered in light of his credibility as a witness. On balance, it is as likely as not that Mr. Fullington's version of events is accurate.

<sup>18/</sup> The School Board also did not suffer any adverse effects from Mr. Fullington's arrest because it did not pay the \$1,000.00 to have the School Board van released from impoundment.

<sup>19/</sup> This issue was one of the issues referred to in endnote 12 that was reportedly discussed during the Conference-for-the-Record on November 16, 2001. The Conference for the Record Summary - Revised attributed the discussion of this issue to a person who participated in the conference but was not called as a witness. Although Mr. Metzger testified that Mr. Fullington had reported that he worked until 1:00 p.m. on October 31, 2001, the record is inconclusive with respect to whether Mr. Metzger was testifying of his own personal knowledge, and the form Mr. Fullington allegedly submitted was not offered into evidence.

Apparently, the School Board intended for this factual allegation to support a charge that Mr. Fullington falsely reported his work hours on October 31, 2001, but this conduct was not identified in the Notice of Specific Charges as a basis for disciplinary action, nor was there any direct testimony, as

opposed to innuendo, that Mr. Fullington was at the post office during work hours rather than during the 30 minutes allotted for his lunch.

<sup>20/</sup> "Section 561.15(1), Florida Statutes, limits the issuance of a beverage license to persons of good moral character . . . ." Zemour, 347 So. 2d at 1103.

<sup>21/</sup> Because the School Board did not identify in its Notice of Specific Charges or in its Proposed Recommended Order the sections of the Department of Education's Rules 6B-1.001 and 6B-1.006, Florida Administrative Code, on which it based its charge that Mr. Fullington committed misconduct in office, it has been necessary to surmise that the referenced rules are those on which the School Board wishes to rely.

<sup>22/</sup> A final observation: Consideration of the charges against Mr. Fullington has been made substantially more difficult than necessary because the School Board's Notice of Specific Charges barely satisfies even the relaxed standards acceptable in actions under Section 120.57(1), Florida Statutes. Although the School Board included specific factual allegations in paragraphs 4 through 9 of the Notice of Specific Charges, little more is included in the five counts of the Notice of Specific Charges to support the violations alleged than the following phrase, a variation of which is repeated as the substantive allegation in each of the five counts of the Notice of Specific Charges: "Respondent's conduct, as described herein, constitutes just cause for Respondent's suspension without pay and dismissal from employment pursuant to Sections 230.03(2), 230.23(5)(f), 447.209, and 231.3605, Florida Statutes, and Article IV of the DCSMEC Contract." In addition, no citation is included in the Notice of Specific Charges to the legal source and description of the substantive charges in Counts I, II, and V; no basis was cited for the imposition of discipline for violation of a School Board rule or the requirement that a School Board employee be of good moral character; and the rules underlying the charge of "misconduct in office" in Count II are not identified. Furthermore, the weaknesses in the Notice of Specific Charges are compounded by the School Board's recitation in its Proposed Recommended Order of nothing more than the allegations in the five counts of the Notice of Specific Charges as "conclusions of law" with respect to each violation charged. Perhaps some of the weaknesses of the Notice of Specific Charges could have been cured had the Respondent made the appropriate motion.

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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.