STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-2820
	)	
PATRICIA A. HOLMES,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for final hearing on September 11, 2002, in Miami, Florida, before Administrative Law Judge Claude B. Arrington, of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Luis M. Garcia, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue
Suite 400
Miami, Florida 33132

For Respondent: Eric J. Cvelbar, Esquire
1181 Northwest 57th Street
Miami, Florida 33127

STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate Respondent's employment as a school monitor on the grounds alleged in the Notice of Specific Charges filed September 5, 2002.

PRELIMINARY STATEMENT

At the times pertinent to this proceeding, Petitioner employed Respondent as a school security monitor and assigned her to work at Horace Mann Middle School (hereinafter "Horace Mann") and at a temporary worksite within the Miami-Dade County school district. On June 19, 2002, Petitioner voted to suspend Respondent's employment without pay and to initiate proceedings to terminate her employment. Respondent timely requested a formal hearing on the matter. The matter was transferred to the Division of Administrative Hearings by letter dated July 16, 2002, and this proceeding followed.

Petitioner's Notice of Specific Charges, filed September 5, 2002, set forth certain factual allegations and asserted that the following constituted cause for its action and its proposed action: excessive absenteeism and/or abandonment of position (Count I); gross insubordination and willful neglect of duty (Count II); and conduct unbecoming a school board employee in violation of School Board Rule 6Gx13-4A-1.21 (Count III).

At the final hearing, Petitioner presented the testimony of Carolyn Blake (principal of Horace Mann); Reinaldo Benitez (Executive Director of Petitioner's Office of Professional Standards); and Susan Lilly (supervisor of Petitioner's payroll operations). Petitioner offered 15 sequentially numbered exhibits, each of which was admitted into evidence. The

undersigned granted Petitioner's unopposed motion to take official recognition of School Board Rules 6Gx13-4A-1.21 (pertaining to employee conduct) and 6Gx13-4E-1.01, (pertaining to absences and leaves). Respondent testified on her own behalf, but she called no other witness and offered no exhibit.

The transcript of the final hearing was filed on November 1, 2002. Pursuant to Petitioner's motion, the time for filing proposed recommended orders was extended up to and including November 27, 2002. Petitioner's Proposed Recommended Order, filed November 27, 2002, has been duly-considered by the undersigned in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. At all times material hereto, Petitioner was a duly-constituted school board charged with the duty to operate, control and supervise all free public schools within the school district of Miami-Dade County, Florida, pursuant to Section 4B of Article IX, Constitution of the State of Florida and Section 230.03, Florida Statutes.

2. At all times material hereto, Petitioner employed Respondent as a school security monitor and assigned her to work at Horace Mann, which is a public school located within the school district of Miami-Dade County, and, as will be discussed below, to a temporary duty location.

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

> (1) As used in this section:
> (a) "Educational support employee" means any person employed by a district school system . . . who by virtue of his or her position of employment is not required to be certified by the Department of Education or district school board pursuant to s. 231.1725. . . .
> (b) "Employee" means any person employed as an educational support employee.
> (c) "Superintendent" means the superintendent of schools or his or her designee.
> (2)(a) Each educational support employee shall be employed on probationary status for a period to be determined through the appropriate collective bargaining agreement or by district school board rule in cases where a collective bargaining agreement does not exist.
> (b) Upon successful completion of the probationary period by the employee, the employee's status shall continue from year to year unless the superintendent terminates the employee for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist . . .
> (c) In the event a superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event there is no collective bargaining agreement.

4. Respondent’s employment with Petitioner began on April 12, 1993. At the times material to this proceeding, Respondent was a member of the United Teachers of Dade (UTD) collective bargaining unit.

5. On October 22, 2001, Metro-Dade Police arrested Respondent on charges of aggravated battery and violation of probation. Respondent remained incarcerated from the date of her arrest until May 15, 2002. Respondent admitted that she had engaged in a fight while she was on probation and that she had thereby violated the terms of her probation.

6. Respondent did not report to work between October 22, 2001, and May 15, 2002.

7. Respondent sent a letter to Petitioner dated December 3, 2001, and addressed "to whom it may concern." The letter reflects that Respondent had previously entered a plea to a charge of domestic violence for which she had been placed on probation. It also reflected that that she was in jail after violating the conditions of her probation by having engaged in a fight. Respondent's letter represented that she would be released from jail on February 4, 2002, and makes it clear that she wanted to retain her employment, if possible.

8. Carolyn Blake was the principal of Horace Mann at the times material to this proceeding. Ms. Blake learned of Respondent’s arrest within days of its occurrence. Shortly

thereafter, Ms. Blake forwarded her home telephone number to Respondent and sent Respondent a message to call her collect from jail so that she and Respondent could discuss Respondent's employment intentions.

9. On December 26, 2001, Respondent placed a collect call to Ms. Blake at Ms. Blake's home. Ms. Blake accepted the collect call from Respondent. During the ensuing telephone conversation Respondent told Ms. Blake that she would be released from jail by February 4, 2002, and that she hoped to return to work. Ms. Blake told Respondent she should consider resigning from her employment with Petitioner because of the number of days she had been absent without authorized leave.

10. On January 14, 2002, Ms. Blake attempted to communicate with Respondent through a memorandum sent to Respondent's home address. The memorandum reflected that Respondent had been absent from her worksite since October 19, 2001, and that the absences had impeded the effective operation of the worksite. The memorandum requested that Respondent select from among four options and to notify her worksite within three days of the date of the notice regarding her employment intentions. The four options were to (1) notify the worksite of the date she intended to return to work; (2) apply for leave of absence; (3) resign; or (4) retire.

11. The January 14, 2002, memorandum, further advised Respondent that her absences would continue to be unauthorized until she communicated directly with Ms. Blake as to her employment intentions.

12. Petitioner's leave policies do not permit a leave of absence for an incarcerated employee. At the times material to this proceeding, Respondent was not eligible for a leave of absence under Petitioner's leave polices.

13. On March 11, 2002, Respondent was directed to report to a conference-for-the-record (CFR) scheduled for March 28, 2002, at the School Board's Office of Professional Standards (OPS) to address, among other things, Respondent's arrest; her violation of School Board rules dealing with employee conduct; her excessive absenteeism; and her future employment status with Petitioner. The notice that instructed Respondent to attend the CFR was mailed to Respondent's home address.

14. On March 28, 2002, Respondent was still incarcerated, and she did not attend the scheduled CFR scheduled for that day at OPS. On March 28, 2002, a CFR was held at OPS in Respondent's absence. At the CFR held on March 28, 2002, Respondent's employment history with the School Board was reviewed, including the number of days that Respondent had been absent from her worksite, with special emphasis on the number of days she had been absent without authorized leave.

15. On March 28, 2002, Ms. Blake recommended that Respondent's employment with the School Board be terminated due to Respondent's excessive absenteeism and because of the adverse impact Respondent's absenteeism was having on the operation of the school site. As of March 28, 2002, Ms. Blake had received no communication from Respondent since their telephone conversation on December 26, 2001. Despite having Ms. Blake's home telephone number and knowing that she would accept a collect call, Respondent made no effort to contact Ms. Blake after Respondent learned that she would not be released from jail on February 4, 2002.

16. By notice dated April 23, 2002, Respondent was directed to appear on May 8, 2002, at a meeting at OPS to address the employment action that had been recommended by Ms. Blake. This written directive was sent by mail to Respondent's home address.

17. As of May 8, 2002, Respondent was still incarcerated. Because of her incarceration, Respondent did not attend the meeting and had not reported to her worksite. On May 8, 2002, the scheduled meeting was held at OPS. As a result of the meeting, the Superintendent recommended that the School Board terminate Respondent's employment and scheduled the recommendation to be considered by the School Board at its meeting of June 19, 2002.

18. On May 16, 2002, the day after she was released from jail on May 15, 2002, Respondent called Ms. Blake, who instructed her to meet with an administrator at the regional office. Respondent complied with that directive and was ordered by the administrator to report to an alternative work site pending the School Board's action on the recommendation to terminate her employment. Respondent refused to comply with the order to report to an alternate worksite because she did not want to jeopardize her claim for unemployment compensation benefits.

19. From October 22, 2001, through May 15, 2002, Respondent was incarcerated and was absent from work without authority. From May 16, 2002, through June 19, 2002, Respondent was absent without authority and either failed or refused to report to work. For the school year 2001-2002, Respondent accumulated 142 unauthorized absences.

20. On June 19, 2002, the School Board suspended Respondent and initiated dismissal proceedings against Respondent on the following grounds: excessive absenteeism and/or abandonment of position; willful neglect of duty; and violation of School Board rules dealing with employee conduct.

21. Respondent's family received Ms. Blake's memorandum and the notices of scheduled meetings that were mailed by Petitioner to Respondent's home address while Respondent was

incarcerated. Respondent testified that she did not see the memorandum and notices until after she was released from jail.

22. There was no justification for Respondent's failure to contact Ms. Blake after Respondent learned she would not be released from jail on February 4, 2002. There was no justification for Respondent's failure to attempt to comply with Petitioner's leave policies.

23. There was no justification for Respondent's refusal to report to the alternate worksite as instructed by the administrator at the regional office.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof pursuant to Sections 120.569 and 231.3605, Florida Statutes.

25. Respondent is a non-probationary educational support employee within the meaning of Section 231.3605(1)(a), Florida Statutes. Pursuant to Section 231.3605(2)(b), Florida Statutes, Petitioner has the authority to terminate Respondent's employment for the grounds set forth in the applicable collective bargaining agreement, which is the collective bargaining agreement between Petitioner and the UTD. The School Board has the burden of proving the allegations in the Notice of Specific Charges by a preponderance of the evidence. 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). The applicable collective bargaining agreement does not impose a more stringent burden of proof on the School Board.

26. Article XXI, Section 3(D), of the UTD labor contract provides that the employment of an educational support employee may be terminated for just cause as follows:

> (D) . . . Just cause includes, but is not limited to, misconduct in office, incompetency, gross insubordination, willful neglect of duty, immorality, and/or conviction of a crime involving moral turpitude. Such charges are defined in State Board Rule 6B-4.009.

27. School Board Rule 6Gx13-4A-1.21 states in pertinent part that:

> 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.

28. Rule 6B-4.009(4), Florida Administrative Code, contains the following definitions that must be considered in determining whether Respondent is guilty of gross insubordination or willful neglect of duties:

> (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.

29. Section 231.44, Florida Statutes, a school board to terminate the employment of an employee who is willfully absent from employment without authorized leave, as follows:

> Any district school board employee who is willfully absent from duty without leave shall forfeit compensation for the time of such absence, and his or her employment shall be subject to termination by the school board.

30. Petitioner established by the requisite evidentiary burden that Respondent was guilty of gross insubordination, willful neglect of duties, and excessive absenteeism by proving that Respondent was absent without authorized leave for 142 days during the 2001-2002 school year; that Respondent failed to comply with leave procedures; failed to keep her supervisor advised as to her incarceration status; and refused her duty assignment after her release from jail.

31. Respondent failed to attend the conferences scheduled at OPS because her incarceration prevented her attendance. Consequently, her failure to attend the meetings was not an intentional refusal to comply with Petitioner's directives, and that failure does not constitute gross insubordination.

32. Petitioner established that Respondent violated School Board Rule 6Gx13-4A-1.21, by fighting while she was on probation

for aggravated battery as alleged in Count III of the Notice of Specific Charges. 1/ However, Petitioner failed to establish that the violation set forth in Count III constituted just cause to terminate Respondent's employment independent of Counts I and II. Petitioner offered no persuasive evidence and no plausible argument for the proposition that Respondent's conduct -- which occurred off school premises and did not involve an act of moral turpitude or reflect negatively on the School District -- constituted just cause to terminate her employment.

RECOMMENDATION

Based upon the foregoing findings of act and conclusions of law, it is RECOMMENDED that Petitioner enter a final order adopting the Findings of Facts and Conclusions of Law set forth herein. It is further RECOMMENDED that the final order find Respondent guilty of excessive absenteeism, gross insubordination, and willful neglect of duty as alleged in Counts I and II of the Notice of Specific Charges. It is further RECOMMENDED that the final order sustain Respondent's suspension without pay and terminate her employment as a school monitor.

DONE AND ENTERED this 10th day of December, 2002, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of December, 2002.

ENDNOTE

1/ Petitioner did not allege and did not prove that Respondent was guilty of misconduct in office as that term is used in the UTD contract. Misconduct in office is defined by Rule 6B-4.009(3), Florida Administrative Code, as follows:

> (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.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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