

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 02-3501
)
 JUAN CARLOS LEYVA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on January 9, 2003, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Denise Wallace, Esquire
Miami-Dade County Public Schools
1450 Northeast 2nd Avenue
Suite 400
Miami, Florida 33132

For Respondent: Manny Anon, Jr., Esquire
AFSCME Council 79
99 Northwest 183rd Street, Suite 224
North Miami, Florida 33169

STATEMENT OF THE ISSUE

Whether Respondent, a maintenance technician employed by Petitioner, committed the offenses alleged in the Notice of

Specific Charges and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Jose Luis Hernandez supervises Respondent and approximately ten other maintenance technicians for WLRN, the radio/television station operated by Petitioner. Mr. Hernandez and Respondent have had a fractious working relationship for several years. The alleged incident that underpins this proceeding occurred May 1, 2001. Petitioner contends that Respondent threatened Mr. Hernandez with bodily harm on that date. Respondent denies the alleged incident included a threat.

Following an investigation by Petitioner's police department, Petitioner suspended Respondent's employment without pay for a period of 30 days. Respondent challenged Petitioner's action, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

Petitioner filed a Notice of Specific Charges containing three counts. Count One alleged a violation of School Board Rule 6Gx13-4-1.08, pertaining to violence in the workplace. Count Two alleged a violation of School Board Rule 6Gx13-4A-1.21, pertaining to expected employee conduct. Count Three alleged that Respondent engaged in "Misconduct in Office" as defined by Rule 6B-4.009(3), Florida Administrative Code. Petitioner did not pursue the theory set forth in Count Three at

the final hearing, in its Pre-hearing Stipulation, or in its Proposed Recommended Order. Consequently, Count Three is deemed abandoned.

At the final hearing, Petitioner presented the testimony of Mr. Hernandez, Respondent, Arnold C. Perez, Mario Victores, and Virginia Bradford. Mr. Perez is a maintenance technician supervised by Mr. Hernandez. Mr. Victores is a member of Petitioner's police department. Ms. Bradford is an Assistant Superintendent with Petitioner's Office of Professional Standards. Petitioner presented nine sequentially numbered exhibits, each of which was admitted into evidence.

Respondent also testified during his case in chief, and presented the additional testimony of Steve Braddy, another member of the maintenance technician crew supervised by Mr. Hernandez. Respondent offered three sequentially numbered exhibits, each of which was admitted into evidence.

A Transcript of the proceedings was filed on March 10, 2003. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Petitioner has been 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 Article IX, Florida Constitution, and Section 230.03(1), Florida Statutes (2001).

2. At all times relevant to this proceeding, Respondent was employed by Petitioner as a maintenance technician and was assigned to WLRN, the radio/television station operated by Petitioner.

3. At all times relevant to this proceeding, Mr. Hernandez supervised a work crew consisting of Respondent and ten other maintenance technicians. At the time of the final hearing, Respondent, Mr. Hernandez, and several other members of the work crew had worked together since 1990. The work crew performed maintenance work at the radio/television station and at the various schools and other facilities that received signals from the radio/television station. At the times pertinent to this proceeding, Respondent had his own truck that he used to travel to his various work assignments.

4. Respondent is a frustrated employee who does not get along well with his co-workers or with Mr. Hernandez. Respondent believes himself to be more qualified than his supervisor and his co-workers, and he is ever vigilant for improperly performed work by the maintenance crew. Respondent keeps a copy of the job description for the position held by Mr. Hernandez, which he reviews on a regular basis to determine

if Mr. Hernandez is fulfilling his responsibilities. Over the course of his employment with Petitioner, Respondent has had a history of threatening co-workers and other School Board employees. Prior to May 1, 2001, Respondent had threatened Mr. Hernandez with bodily harm on two occasions. As a result of his threats against Mr. Hernandez and other School Board employees, Respondent had been referred on more than one occasion to Petitioner's Employee Assistance Program. In 1995 Petitioner required Respondent to submit to a psychological evaluation 1/ to determine Respondent's fitness for work.

5. For the two and a half weeks immediately preceding May 1, 2001, Respondent was off work. During that time Respondent's work truck was idle. On May 1, 2001, when Respondent returned to work, an incident occurred between Mr. Hernandez and Respondent that underpins this proceeding. 2/ While making the workday assignments on the morning of May 1, 2001, Mr. Hernandez informed Respondent that his work truck had been scheduled for routine maintenance that day. Respondent became upset because the truck had been idle for the previous two and a half weeks, and he believed that the maintenance should have been performed during that period.

6. Mr. Hernandez assigned Respondent to work with Mr. Braddy, but Respondent refused that assignment. 3/

7. Respondent walked over to the maintenance garage with a tape recorder to have the mechanic state on tape when Respondent's truck would be ready.

8. Respondent then returned to the area where Mr. Hernandez was still making assignments. Mr. Hernandez told Respondent to go work with Rafael Montesino, another member of the work crew. Respondent refused that assignment. When he heard the assignment and Respondent's refusal, Mr. Montesino told Mr. Hernandez he would not work with Respondent and that he would take the day off if he had to do so.

9. By the time Mr. Hernandez began to leave the area to go to his own work assignment, the other members of the crew had left for their assignments. Respondent did not have an assignment and he remained in the area. As Mr. Hernandez was leaving the area, Respondent verbally assaulted Mr. Hernandez in a hostile, threatening manner. Respondent cursed Mr. Hernandez and threatened to kill him. Mr. Hernandez drove off from the confrontation.

10. Mr. Hernandez filed a complaint with his supervisors regarding Respondent's behavior of May 1, 2001, by Memorandum dated May 2, 2001. Following an investigation Detective Mario Victores of Petitioner's school police prepared a report styled Preliminary Personnel Investigation (the report). The report substantiated two alleged violations of School Board rules by

Respondent: Rule 6Gx13-4A-1.21, pertaining to responsibilities and duties of School Board employees and Rule 6Gx13-4.108, pertaining to violence in the workplace.

11. Victoria Bradford held a conference-for-the-record with Respondent to discuss the incident of May 1, 2001. Based primarily on Ms. Bradford's recommendation, 4/ Respondent was referred to Petitioner's Employee Assistance Program and his employment was suspended without pay for a period of 30 days.

12. 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.

13. At the times material to this proceeding, Respondent was a member of the American Federation of State, County and Municipal Employees (AFSCME) collective bargaining unit. AFSCME and Petitioner have entered into a Collective Bargaining Agreement (CBA), which in Article II, Section 3, provides that members of the bargaining unit may be disciplined for "just cause." The CBA does not define the term "just cause."

14. Article XI, Section 1A of the CBA provides for progressive discipline as follows:

A. . . . Whenever an employee . . . 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 . . . rule, regulation or policy violated. An informal discussion with the employee shall occur prior to the issuance of any written disciplinary action. Progressive discipline 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.

15. Article XI, Section 3 of the CBA provides as follows:

3. In those cases where any employee has not complied with the Board's policies and/or department regulations, but the infraction is not deemed serious enough to recommend dismissal, the department head may recommend suspension up to 30 days without pay. The Superintendent must approve all suspensions.

16. 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.

17. School Board Rule 6Gx13-4-1.08 provides as follows:

Nothing is more important to Miami-Dade County Schools (DCPS) than protecting the safety and security of its students and employees and promoting a violence-free work environment. Threats, threatening behavior, or acts of violence against any students, employee, visitors, guests, or other individuals by anyone on DCPS property will not be tolerated. Violations of this policy may lead to disciplinary action which includes dismissal, arrest, and/or prosecution.

Any person who makes substantial threats, exhibits threatening behavior, or engages in violent acts on DCPS property shall be removed from the premises as quickly as safety permits, and shall remain off DCPS premises pending the outcome of an investigation. DCPS will initiate an appropriate response. This response may include, but is not limited to, suspension and/or termination of any business relationship, reassignment of job duties, suspension or termination of employment, and/or criminal prosecution of the person or persons involved.

Dade County Public School employees have a right to work in a safe environment. Violence or the threat of violence by or against students and employees will not be tolerated.

CONCLUSIONS OF LAW

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

19. Pursuant to Section 231.3605(2)(b), Florida Statutes, Petitioner has the authority to discipline Respondent's employment for the grounds set forth in the applicable collective bargaining agreement, which is the CBA. Any such discipline must be for "just cause." 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 CBA does not impose a more stringent burden of proof on the School Board.

20. Petitioner established by the requisite standard that Respondent violated School Board Rule 6Gx13-4A-1.21 pertaining to employee conduct. Respondent's profane, threatening diatribe against Mr. Hernandez is wholly inconsistent with behavior expected of a School Board employee. That violation constitutes "just cause" to discipline Respondent's employment.

21. Petitioner also established by the requisite standard that Respondent violated School Board Rule 6Gx13-4-1.08 pertaining to violence in the workplace. Respondent's threats of bodily harm directed towards Mr. Hernandez constitute "just cause" to discipline his employment.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that Petitioner enter a final order adopting the Findings of Fact and the Conclusions of Law set forth in this Recommended Order. It is further RECOMMENDED that the final order uphold the suspension of Respondent's employment for 30 days without pay.

DONE AND ENTERED this 15th day of April, 2003, 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 15th day of April, 2003.

ENDNOTES

- 1/ The psychological evaluation is considered by the undersigned to be dated and has not been considered in determining the credibility of the witnesses to this proceeding.
- 2/ The findings that follow are based on the testimony of Mr. Hernandez, which the undersigned has credited over that of Respondent based on the demeanor of the witnesses, Respondent's pattern of disruptive, defiant, and threatening behavior over the years, and Respondent's hostility towards Mr. Hernandez. Mr. Hernandez testified, credibly, that he reported the incident of May 1, 2001, to his supervisors out of concern for his and his crew's safety. The undersigned has also considered that Mr. Hernandez declined the opportunity to file criminal charges against Respondent, which he would not have done had he been "out to get" Respondent.
- 3/ Respondent was not charged with insubordination.
- 4/ Ms. Bradford could have recommended that Respondent's employment be terminated, but she testified that she wanted to give him one more chance.

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.