

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 04-1323
)
CHARLES S. HEPBURN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on August 25, 2004.

APPEARANCES

For Petitioner: Madelyn P. Schere, Attorney for
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner may suspend Respondent for 30 days for sexual harassment.

PRELIMINARY STATEMENT

By Notice of Specific Charges served April 15, 2004, Petitioner alleged that it employed Respondent as a radio routing dispatcher, pursuant to the conditions of the collective bargaining agreement between Petitioner and the American Federation of State, County, and Municipal Employees, Local 1184. Petitioner alleged that, on October 15, 2002, Respondent, without provocation or invitation, stuck his tongue in the ear of a coworker and whispered sexual comments to her. Petitioner alleged that Respondent had previously made sexually offensive comments to the same coworker. Petitioner alleged that it suspended Respondent, without pay, for 30 days for the incident, pursuant to Section 1012.22(1)(f), Florida Statutes, and Article XI of the collective bargaining agreement.

Count I alleges that Article XI, Section 4C, of the collective bargaining agreement authorizes discipline for "cause arising from the employee's performance or non-performance of job responsibilities." Petitioner's Rule 6Gx13-4a-1.21 requires employees to conduct themselves "in a manner that will reflect credit upon themselves and the school system." Count I alleges that Respondent's failure to comply with this rule constitutes non-performance of his job duties, which is subject to discipline under Articles II and XI of the collective bargaining

agreement and Sections 1012.22(1)(f) and 447.209, Florida Statutes.

Count II alleges that Petitioner's Rule 6Gx13-4A-1.32 assures nondiscrimination in employment and the elimination of harassment, including sexual harassment. Count II alleges that Respondent's failure to comply with this rule constitutes non-performance of his job duties, which is subject to discipline under Articles II and XI of the collective bargaining agreement and Sections 1012.22(1)(f) and 447.209, Florida Statutes.

Based on these allegations, the Notice of Specific Charges requests a recommended order suspending Respondent for 30 days without pay.

Respondent timely requested a formal hearing.

At the hearing, Petitioner called seven witnesses and offered into evidence 13 exhibits: Petitioner Exhibits 1-13. Respondent called seven witnesses and offered into evidence no exhibits. All exhibits were admitted except that Petitioner Exhibit 7 was not admitted for the truth.

The court reporter filed the transcript on October 8, 2004. The parties filed proposed recommended orders by November 16, 2004.

FINDINGS OF FACT

1. Respondent has been employed by Petitioner since 1983. After six years' service as a bus driver, Respondent became a

radio dispatcher. The radio dispatchers assign drivers and attendants to specific bus routes. In doing so, the dispatcher has no authority to deviate from a seniority-based list of drivers and attendants.

2. Sandra Ann Welch has been employed by Petitioner since August 2001 as a bus attendant. A bus attendant helps the driver maintain order.

3. In the year that Ms. Welch had worked at the depot at which Respondent worked, she and Respondent had had problems. Respondent once assigned Ms. Welch to a bus with wheelchair-bound students, but Ms. Welch expressed her dissatisfaction with the assignment. She complained about several of her assignments, even though they were all based on the seniority of the available attendants.

4. For awhile, to avoid conflict with Ms. Welch, Respondent assigned her to a bus with unruly students, but no wheelchairs. However, shortly prior to the incident, Ms. Welch was removed from this assignment, which she had found satisfactory. Ms. Welch blamed Respondent for the loss of this assignment, but, with the start of the new school year, the assignment had come up for rebidding by other attendants and one with more seniority had bid for it. Ms. Welch returned to substituting for attendants who did not show up for work.

5. On the morning of October 15, 2002, which is the date of the alleged incident, Respondent was working at his usual location in the radio dispatch room. In the small room with him were three other dispatchers, all of whom are females.

6. After the bus runs that morning, Ms. Welch entered the dispatch room behind the desk of Lawanda Collins, another dispatcher who has been employed by Petitioner for 16 years. Ms. Welch stood next to Respondent's desk and spoke to him. Although only a few feet away from Ms. Welch, Ms. Collins never saw Ms. Welch bend over toward Respondent or scream. Ms. Collins never saw Respondent stick his tongue in Ms. Welch's ear, nor did Ms. Collins see Ms. Welch return to the dispatch room after her departure immediately after the alleged incident.

7. The observations of Ms. Collins, or lack of them, contradict directly the testimony of Ms. Welch, who testified that Respondent placed his tongue in her ear while she was in the dispatch room talking to him after the bus runs on the morning of October 15, 2002, and Ms. Welch screamed. Likewise, Respondent denies Ms. Welch's claim. No witness saw the tonguing incident that Ms. Welch described.

8. Ms. Welch's testimony is also undermined by her performance as a witness. When testifying, with apparent repulsion, about the tongue in her ear, Ms. Welch twice gestured, with a pained expression, to her right ear--once when she was

testifying in Petitioner's case in chief and once when she was testifying in Petitioner's rebuttal case. However, she has consistently stated that Respondent placed his tongue in her left ear.

9. Ms. Welch stumbled when she attempted to lay out the desks relative to the door that she entered. It was evident that she was not recalling the layout of the dispatch room, but was instead trying to make sure that the layout and her path were such that she would end up on the "correct" side of Respondent.

10. Respondent's testimony is further undermined by what appears to be a financial incentive for her to establish the fact of the incident. Allegedly due to the incident, Ms. Welch has been out on paid leave since January 2003. Additionally, she was irritated at Respondent for what she thought was his role in removing her from a favored assignment shortly before the alleged incident.

11. Ms. Welch's willingness to fabricate testimony about the alleged incident of October 15, 2002, undermines the credibility of her other testimony concerning sexual comments that Respondent supposedly made to her at other times while she was under his supervision. It is not as clear that Respondent never made these statements as it is that he did not stick his tongue in Ms. Welch's ear, but Petitioner has failed to prove that

Respondent is guilty of sexual harassment of Ms. Welch on these other occasions.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat.

13. Section 1012.22(1)(f), Florida Statutes, authorizes Petitioner to terminate or suspend school employees, such as Respondent.

14. Petitioner has the burden of proving the material allegations by a preponderance of the evidence. See, e.g., Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3d DCA 1990).

15. Petitioner has failed to prove the material allegations set forth in the Notice of Specific Charges.

RECOMMENDATION

It is

RECOMMENDED that the School Board of Miami-Dade County, Florida, enter a final order dismissing the Notice of Specific Charges against Respondent.

DONE AND ENTERED this 22nd day of November, 2004, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of November, 2004.

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 must be filed with the agency that will issue the final order in this case.