STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1343
	)	
RAFAEL N. MEJIA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on August 27, 2004, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Melinda L. McNichols, Esquire
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For Respondent: David H. Nevel, Esquire
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STATEMENT OF THE ISSUES

The basic issues in this case are whether the Respondent committed the violations alleged in the Petitioner's Notice of Specific Charges and, if so, whether such violations warrant a ten-day suspension from work.

PRELIMINARY STATEMENT

At the final hearing on August 27, 2004, the Petitioner, Miami-Dade County School Board (School Board or Petitioner) presented the testimony of the following witnesses: Christopher Pecori; Carl Krome; Lieutenant Leon Sczepanski; Juan Seabolt; Howard Giraldo; Major John Hunkiar; Danysu Pritchett; and Major Claudia Milton. The School Board's Exhibits numbered 1, 3, 4, 6, 7, 10, 11, 12, 13, 14, 15, and 16 were received in evidence.

The Respondent testified on is own behalf and also presented the testimony of Captain Dorene Baker and Caridad Mejia.[1] The Respondent's Exhibit numbered 1 was received in evidence.[2]

At the conclusion of the hearing the parties requested, and were granted, 45 days from the filing of the hearing transcript within which to file their proposed recommended orders. For reasons not explained in the record of this case, the hearing transcript was not filed until November 18, 2004. Thereafter, the Petitioner filed a motion seeking an extension of the deadline for filing proposed recommended orders. The motion was granted, and January 25, 2005, was established as the new deadline. Both parties filed timely Proposed Recommended Orders containing proposed Findings of Fact and Conclusions of Law. Those proposals have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent, Rafael M. Mejia, is presently employed as a police officer by the School Board. He has been so employed at all times material to this case, having been first employed in that position on or about January 27, 1999.

2. As a general matter, the Respondent is regarded by his immediate supervisors (his supervising sergeant, lieutenant, and captain) as being a good policeman. During the course of his present employment he has received a number of commendations. On at least one occasion, he was selected as "officer-of-the-month." Even though the Respondent generally does good police work, his disciplinary record is not without blemish.

3. On June 5, 2001, a conference-for-the-record (CFR) was held to address the Respondent's non-compliance with School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties, School Police Departmental policies, the Respondent's failure to attend scheduled court dates, and the Respondent's pattern of sick leave abuse.

4. As a result of the June 5, 2001, CFR referenced above, the Respondent was issued a verbal warning and a written reprimand, and was directed as follows:

> 1. You are directed to adhere to all departmental rules and directives.
> 2. You are directed to follow all lawful orders given to you by one with proper authority.

The Respondent was further advised in writing as follows:

> You were directed to follow the proper procedures by notifying the clerk of the court when unable to attend court. You were also verbally warned concerning your abuse of sick leave. You are expected to conduct yourself professionally with a positive demeanor that is consistent with the position of police officer.

5. On July 11, 2002, the Respondent was involved in a motor vehicle accident while on duty. He was injured in the accident and was treated at the scene of the accident by fire rescue personnel who then took him to the emergency room at Baptist Hospital. At Baptist Hospital the Respondent was examined, evaluated, and treated by a physician's assistant named Christopher Pecori. Mr. Pecori concluded that the Respondent had contusions to his chest and to his right forefinger. Mr. Pecori also concluded that the Respondent was experiencing mild to moderate pain at that time. Mr. Pecori wrote prescriptions for small amounts of several pain medicines, enough to control pain for four or five days. Mr. Pecori advised the Respondent that the Respondent did not require hospitalization, but that the Respondent should seek follow-up care by a physician the next day.

6. Mr. Pecori also arranged for a note entitled "Return to Work Instructions" to be prepared. That note included the opinion that the Respondent "should be able to return to work in

4-5 days." That note was supposed to be included in the paperwork that was given to the Respondent when he was discharged from the emergency room.[3]

7. Mr. Pecori's opinion that the Respondent "should be able to return to work in 4-5 days," was an estimate, perhaps best described as an experience-based approximation. Mr. Pecori could not state with any certainty that it would take at least four days for the Respondent to be able to return to work. Similarly, he could not state with any certainty that by the fifth day the Respondent would surely be able to return to work.

8. Two of the Respondent's supervisors, Acting Lieutenant Juan Seabolt and Acting Sergeant Howard Giraldo, responded to the scene of the Respondent's accident on July 11, 2002, and saw the Respondent lying on the ground being attended by fire rescue personnel. Seabolt then went to the hospital for a few minutes while the Respondent was being treated in the emergency department. Giraldo also went to the emergency department at Baptist Hospital and stayed there for a couple of hours. Later that evening Giraldo called the Respondent at home to see how he was doing. Based on their observations of the Respondent at the scene of the accident and at the emergency room, Acting Lieutenant Seabolt and Acting Sergeant Giraldo both knew that the Respondent had been injured in the line of duty and they both expected the Respondent would miss several days of work

while recuperating from his injuries. As far as these two supervisors were concerned, it was not necessary for the Respondent to call in each day to remind them that he was still recuperating from his injuries, because they already had a pretty good idea of what his circumstances were, and it was primarily just a matter of waiting until the Respondent felt good enough to return to work.

9. On more than one occasion after the accident, Acting Sergeant Giraldo called the Respondent's house by telephone to inquire as to how the Respondent was doing. On those occasions Acting Sergeant Giraldo spoke to the Respondent's wife and was advised by her of the Respondent's condition.

10. From July 11, 2002, until July 22, 2002, the Respondent recuperated at home from his injuries. During that time period he did not call his supervisors to advise them of his condition because they were aware of his basic condition and Acting Sergeant Giraldo was calling the Respondent from time-to-time. The Respondent did not think he needed to call in each day. Similarly, his immediate supervisors saw no need for daily calls and his immediate supervisors were not concerned about the Respondent's failure to call in daily.[4]

11. About ten days after the Respondent's accident, top management in the police department began to make inquiries about the Respondent's status. Major Claudia Milton called

Lieutenant Leon Sczepanski, who at that time was Acting Captain for Stations 5 and 6, and asked him to advise her of the Respondent's current status. After some difficulty locating the Respondent's residence, on July 22, 2002, a note was left at the Respondent's residence asking him to contact Lieutenant Leon Sczepanski. Later that same day, the Respondent contacted Sczepanski and asked what Sczepanski needed to see him about.

12. Acting Captain Sczepanski asked the Respondent what his status was. The Respondent stated that he was out on workers' compensation. However, when Sczepanski asked the Respondent if he had consulted with the workers' compensation doctor, the Respondent stated that he had not. Sczepanski told the Respondent that it was the Respondent's responsibility to contact the Office of Risk Management in order to get an appointment to see a workers' compensation doctor. During the morning of the next day the Respondent was seen by an approved workers' compensation doctor and sometime near noon on July 23, 2002, the Respondent reported to Acting Captain Sczepanski and gave Sczepanski a note from the workers' compensation doctor stating that the Respondent was fit to return to duty with some work limitations. On or about July 24, 2002, the Respondent failed to report to work. Sczepanski telephoned the Respondent to inquire why he had failed to report to work. The Respondent indicated that since the workers' compensation doctor's note

stated that the Respondent was not to lift anything over ten pounds, the Respondent could not return to work. Sczepanski informed the Respondent that the workers' compensation note cleared the Respondent to return to work on light-duty status, and instructed the Respondent to promptly report to work.

13. In the meantime, Major Milton had asked Acting Captain Sczepanski to arrange for a CFR. The purpose of the CFR was to address the fact that the Respondent had been out on leave and had failed to follow the workers' compensation rules. The CFR was scheduled for August 8, 2002.

14. On or about July 24, 2002, after a twelve-day absence, the Respondent returned to work. Upon his return, Acting Captain Sczepanski requested that the Respondent provide medical documentation to support his twelve-day absence. The Respondent stated that he would provide the medical documentation requested.[5]

15. The School Board's Rule 6Gx13-4E-1.13 addresses the subject of illness or injury that occur in the line of duty. The rule provides that employees injured while on duty are entitled to leave. With regard to the duration of that leave, subsection I.A. of that rule provides, in pertinent part:

> A medical evaluation conducted by a physician approved by the Office of Risk and Benefits Management will be the determining factor as to when the employee is able to return to duty. If the physician indicates

> that the employee is not able to assume his/her regular duties, but is able to return to a less strenuous work assignment, the employee may be directly appointed to the Workers' Education and Rehabilitation Compensation Program (W.E.R.C.) or to a job commensurate with his/her medical and educational capabilities.

16. Consistent with the above-quoted language of Rule 6Gx13-4E-1.13, as well as with the emergency room discharge instructions that he follow-up with a physician the next day, it would have been in the Respondent's best interests (in more ways than one) for him to have been seen promptly by "a physician approved by the Office of Risk and Benefits Management." Yet, for reasons not adequately explained in the record in this case, the Respondent did not go to an approved physician until July 23, 2002.[6]

17. On August 8, 2002, in an effort to comply with the instructions that he provide medical documentation to support his twelve-day absence from work, the Respondent returned to the emergency room at Baptist Hospital to request another return-to-work note from Christopher Pecori, the physician assistant who had attended the Respondent when the Respondent was seen in the emergency room on July 11, 2002. The Respondent told Mr. Pecori that he had lost the original return-to-work note that had been issued to him and that he needed another one for work.

Mr. Pecori instructed a nurse, Carl Krome, to issue Respondent a copy of the original return-to-work note.

18. Instead of simply locating and copying the original return-to-work note, Mr. Krome embarked upon the process of preparing a new return-to-work note for the Respondent, because the Respondent explained to Mr. Krome that it had taken him twelve days to recover from the injuries resulting from the July 11, 2002, motor vehicle accident, and the Respondent needed to have some sort of documentation to support the time he was unable to report to work. Mr. Krome took the Respondent at his word and, against his better judgment, agreed to prepare a return-to-work note reflecting twelve days of recuperation, because the Respondent was insisting that he needed a note that covered all twelve of the days he was absent from work. The Respondent conducted himself in a pleasant manner while communicating with Mr. Krome.

19. Mr. Krome prepared the substitute return-to-work note on a hospital computer. What he prepared on the computer reads as follows:

Patient: RAFAEL MEJIA, Date 08/08/2002 Time: 15:02

Baptist Hospital of Miami
8900 N. Kendall Drive
Miami, FL 33176
(305) 596-6556

RETURN TO WORK INSTRUCTIONS

We saw RAFAEL MEJIA in our Emergency Department on 08/08/2002. RAFAEL should be able to return to work in 1 days [sic].

RAFAEL needs the following work limitations: OUT OF WOR [sic] FROM 7/12/02-7/23/02 DUE TO INJURIES FROM MVA.

Thank you for allowing us to care for your employee.

_____

CHRISTOPHER PECORI, PA-C

20. After Mr. Krome had printed the document, the Respondent pointed out that the first sentence had an incorrect date and a number of days that was inconsistent with the second sentence. Rather than correct the document in the computer and re-print it, Mr. Krome made the corrections by hand. He crossed out the date 08/08/2002, handwrote above it "07/11/02," and placed initials next to the handwritten date. Near the end of the sentence, Mr. Krome added a "2" after the 1 and again placed initials next to the change. As corrected by hand by Mr. Krome, the first sentence of the substitute return-to-work note read as follows: "We saw RAFAEL MEJIA in our Emergency Department on 07/11/02. RAFAEL should be able to return to work in 12 days."

21. The Respondent took the substitute return-to-work note provided to him by Mr. Krome and presented it at the CFR that was held later on August 8, 2002. Representatives of the School Board management became concerned about whether the Respondent

had modified the substitute return-to-work note and they were also concerned about the fact that the substitute note mentioned twelve days, but the original note mentioned only four or five days. Because of those concerns an investigation was conducted to determine the circumstances under which the Respondent obtained the substitute note. The results of that investigation revealed that the circumstances were essentially as described above.

22. A suspension of the Respondent on the basis of the conduct described in the foregoing findings of fact would be inconsistent with prior disciplinary practices of the Miami-Dade School Police Department. In the past, conduct of the type described in the foregoing findings of fact has not resulted in the suspension of the officer who performed the acts. The Respondent's failure to call in during the twelve days following the July 11, 2002, accident and the Respondent's conduct while requesting a substitute return-to-work note do not constitute misconduct that warrants disciplinary action.[7]

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.567 and 120.57(1), Fla. Stat.

24. In cases of this nature, in order to prevail the School Board must prove the allegations in the Notice of

Specific Charges by a preponderance of the evidence. The "preponderance of the evidence" standard requires proof by "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a fact at issue. And in cases of this nature, an employee cannot be suspended or dismissed for any reasons other than those alleged in the Notice of Specific Charges. Also, it is well-settled that once an employee has been disciplined for past misconduct, he cannot be again disciplined for that same past misconduct. Under principles of progressive discipline an employee's prior disciplinary history may be considered in determining the appropriate discipline to be imposed for a new episode of misconduct, but the prior discipline is not a proper consideration in determining whether the conduct under review in this case is, in fact, a violation.

25. The Notice of Specific Charges in this case is by no means a model of clarity and the undersigned has had some difficulty in attempting to determine precisely what misconduct the Respondent is alleged to have engaged in on and after July 11, 2002, the date of his injury in a motor vehicle accident. It is clearly alleged that during the twelve days following the July 11, 2002, accident, the Respondent failed to call in on a regular basis and advise his supervisors as to the status of his recuperation. That failure is well-established by the evidence in this case. But equally well-established is the

fact that the Respondent's supervisors neither required nor expected that he would call in on a daily basis. Under the circumstances of this case, the Respondent's supervisors thought it would be sufficient if he simply advised them when he was sufficiently recovered to return to work. Such being the case, it can hardly be appropriate to take disciplinary action against the Respondent on the basis of his failure to do something his supervisors did not expect or require him to do.[8]

26. With somewhat less clarity, the Notice of Specific Charges alleges that the Respondent engaged in some form of misconduct on August 8, 2002, when he went to Baptist Hospital to ask to ask for another return-to-work note. The Notice of Specific Charges does not, however, allege what specific act of the Respondent was improper. Some witnesses familiar with the investigation of that incident seem to suggest that the Respondent coerced Mr. Krome or intimidated Mr. Krome. Mr. Krome recalls that the Respondent was polite, and other supervisors familiar with the facts developed during the investigation of the August 8, 2002, incident opined that there was nothing to suggest any improper conduct by the Respondent on that occasion.

27. The August 8, 2002, substitute return-to-work note was also viewed with suspicion because it stated that the Respondent would be able to return to work in twelve days, whereas the

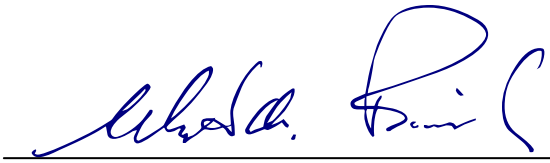
original return-to-work note estimated only four or five days. As noted in the Findings of Fact, the original estimate of four or five days was only an estimate, not a science-based prediction. Similarly, the substitute return-to-work note with its twelve-day estimate was only an estimate based on some additional information; the additional information being that the Respondent told Mr. Krome that it took him twelve days to recuperate from his injuries.[9] Mr. Krome, like Mr. Pecori before him, was at most merely expressing an experience-based approximation. At this point it is also important to note that the attention given to the Pecori and Krome return-to-work notes is somewhat misplaced. This is because, in the final analysis, neither note is of any significance in determining how much leave the Respondent was entitled to or in determining when the Respondent should have returned to work. As noted in the findings of fact, pursuant to School Board Rule 6Gx13-4E-1.13, the determining factor is a medical evaluation "conducted by a physician approved by the Office of Risk and Benefits Management." Neither Pecori nor Krome is such a physician, so their estimates are, in the final analysis, irrelevant.

28. On the basis of the findings and conclusions set forth above the undersigned is of the view that the Petitioner has not shown good cause for a ten-day suspension of the Respondent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the charges in the Notice of Specific Charges be dismissed and that the Respondent not be suspended. If the Respondent has already served the suspension, it is RECOMMENDED that the School Board take appropriate action to restore the Respondent to the status he would have been in but for the suspension.

DONE AND ENTERED this 1st day of April, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2005.

ENDNOTES

1/ Caridad Mejia is the Respondent's wife.

2/ The Respondent's Exhibit number 1 is a composite exhibit consisting of the transcript of the deposition testimony of Major Milton and a copy of a memorandum dated November 4, 2003,

from Captain Baker to the Chief of the Miami-Dade Schools Police Department.

3/ It is not clear from the record in this case whether the Respondent received the original return to work instructions and then misplaced them or whether he never received the original instructions.

4/ As Acting Lieutenant Seabolt explained at the hearing regarding the Respondent's on-duty injury:

> I knew it happened. I had no concern. I figured he was injured and would call me when he was well enough to call me.
>
> * * *
>
> I'm not exactly sure of the--what the regulation states in writing. I know that it's a practice with myself and in my region that if an officer is out injured, and that we know he's out injured, and as long as somebody casually checks on him he doesn't have to call in every single day, that's my practice, that's what I practiced in the past, and I never received any directions from the administration that that was incorrect.

To similar effect, Acting Captain Sczepanski testified that officers recovering from on-duty injuries were not required or expected to call in each day.

5/ The record in this case does not indicate what specific instructions were given to the Respondent regarding what type of documentation he was expected to produce to support his twelve-day absence from work.

6/ With regard to advising the Respondent that he needed to see an approved physician, Acting Lieutenant Seabolt stated that he ". . . made contact through his sergeant, and I instructed him on how to go about going to workman's compensation doctor and get a release to come back to work." The record in this case does not reflect whether the Respondent's sergeant (Acting Sergeant Giraldo) passed Seabolt's instructions along to the Respondent.

7/ The findings of fact in paragraph 22 are based on the testimony of Acting Captain Sczepanski and Acting Sergeant Giraldo, who were clearly of the view that a suspension of the Respondent on the facts in this case was unwarranted and was inconsistent with the police department's prior disciplinary practices. It is also noticed with interest that Captain Baker who, at the request of Major Milton, signed a memorandum recommending that the Respondent be suspended, has "no opinion" as to whether the suspension was appropriate. Captain Baker signed the memorandum because ". . . it was my understanding that's what Chief Cacaro wanted."

8/ Although the matter is not entirely free from doubt, it appears that at least some of the upper management of the Miami-Dade School Police Department are of the view that an employee recuperating from a line-of-duty injury should call in daily to report his status. But so long as the sergeants, lieutenants, and captains are telling their subordinate officers that they do not need to call in daily, there is no proper basis for discipline of such officers for failing to call in.

9/ The “statement of facts” portion of the notice of Specific Charges (paragraphs 5 through 27) does not contain any allegation that the Respondent was abusing sick leave during the twelve days following the July 11, 2002, accident by pretending to be incapacitated when, in fact, he was able to work. But a “repeated pattern of sick leave abuse” is mentioned in paragraph 30 of the Notice of Specific Charges. The brief reference in paragraph 30 is insufficient to put the Respondent on notice to defend against “sick leave abuse” and, in any event, the evidence is insufficient to support a finding that during any of the twelve days following the subject accident the Respondent was sufficiently recuperated to report to work. In other words, there is no evidence in the record sufficient to support a finding that during the twelve days following the subject accident the Respondent was malingering or "gold-bricking."

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.