

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 04-2249
)	
CYNTHIA BROWN,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Section 120.57(1), Florida Statutes, on February 16, 2005, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Denise Wallace, Esquire
Ignacio J. Vasquez, Student Legal Intern
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 400
Miami, Florida 33132

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Whether Respondent's employment should be terminated for the reasons set forth in the Notice of Specific Charges.

PRELIMINARY STATEMENT

On June 16, 2004, the Miami-Dade County School Board of (School Board) suspended Respondent from her position as a school bus aide and initiated a dismissal proceeding against her. By letter dated June 14, 2004, Respondent advised the School Board that she "would like to contest" her proposed termination. On June 28, 2004, the matter was referred to DOAH for the assignment of an Administrative Law Judge.

On or about August 3, 2004, the School Board served on Respondent (by United States Mail) its Notice of Specific Charges (Notice). The Notice alleged that, "[f]rom March 2003 through March 2004, [Respondent] ha[d] been absent from the worksite 72 days, 33.5 days LWO [Leave Without Pay Unauthorized], 29 days Leave Without Pay Authorized ("LWOA") and five and half days personal and four days sick." According to the Notice, Respondent's conduct constituted: "excessive absenteeism and violation of School Board rule regarding absences and leaves" (Count I); "willful neglect of duty" (Count II); "violation of School Board rule regarding employee responsibilities and duties" (Count III); and "deficient performance" (Count IV); and therefore there was "just cause to warrant [her] dismissal" pursuant to "Articles II and XI of the AFCSME contract."

As noted above, the hearing was held on February 16, 2005.¹ Petitioner was represented at the hearing by counsel and a certified legal intern. Respondent, on the other hand, did not make an appearance, either in person or through counsel or a qualified representative. Two witnesses, George Millar and Barbara Moss, testified at the hearing. In addition to Mr. Millar's and Ms. Moss's testimony, five exhibits (Petitioner's Exhibits 1 through 5) were offered and received into evidence.

At the close of the taking of evidence, the undersigned, on the record, established a deadline (ten days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on March 10, 2005.

On March 21, 2005, the School Board filed its Proposed Recommended Order. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing, and the record as a whole, the following findings of fact are made:

1. The School Board is responsible for the operation, control and supervision of all public schools (grades K through 12) and support facilities in Miami-Dade County.

2. Respondent is employed by the School Board as a school bus aide. She is currently assigned to the John Schee Transportation Center.

3. Respondent was initially hired by the School Board on September 8, 1992. She was terminated, effective October 31, 1995, for having been absent without authorization for three consecutive days. The School Board rehired Respondent on May 3, 2000, and assigned her to the Northwest Transportation Center. On October 11, 2002, Respondent was given her current assignment at the John Schee Transportation Center.

4. As a school bus aide employed by the School Board, Respondent is a member of a collective bargaining unit represented by the American Federation of State, County, and Municipal Employees, Local 1184 (AFSCME) and covered by a collective bargaining agreement between the School Board and AFSCME (AFSCME Contract).

5. Article II, Section 3, of the AFSCME Contract provides, in pertinent part, as follows:

ARTICLE II- RECOGNITION

SECTION 3. The provisions of this Contract are not to be interpreted in any way or manner to change, amend, modify, or in any other way delimit the exclusive authority of the School Board and the Superintendent for the management of the total school system and any part of the school system. It is expressly understood and agreed that all rights and responsibilities of the School

Board and Superintendent, as established now and through subsequent amendment or revision by constitutional provision, state and federal statutes, state regulations, and School Board Rules, shall continue to be exercised exclusively by the School Board and the Superintendent without prior notice or negotiations with AFSCME, Local 1184, except as specifically and explicitly provided for by the stated terms of this Contract. Such rights thus reserved exclusively to the School Board and the Superintendent, by way of limitation, include the following:

(2) separation, suspension, dismissal, and termination of employees for just cause;

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:

A. Discipline or discharge of any employee for just cause;

* * *

6. Article XI of the AFSCME Contract is entitled, "Disciplinary Action."

7. Section 1 of Article XI is entitled, "Due Process." It provides as follows:

A. Unit members are accountable for their individual levels of productivity, implementing the duties of their positions, and rendering efficient, effective delivery of services and support. Whenever an employee renders deficient performance, 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 deficiency or rule, regulation, or policy violated. An informal discussion with the employee shall occur prior to the issuance of any written disciplinary action. Progressive discipline steps 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.^[2]

A Conference-for-the-Record shall be held when there is a violation of federal statutes, State Statutes, defiance of the administrator's authority, or a substantiated investigation to determine if formal disciplinary action should be taken (i.e., letter of reprimand, suspension, demotion or dismissal). A Conference-for-the-Record in and of itself shall not be considered disciplinary.^[3]

B. The parties agree that discharge is the extreme disciplinary penalty, since the employee's job, seniority, other contractual benefits, and reputation are at stake. In recognition of this principle, it is agreed that disciplinary action(s) taken against AFSCME, Local 1184 bargaining unit members shall be consistent with the concept and practice of progressive or corrective discipline and that in all instances the

degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record.

C. The employee shall have the right to Union representation in Conferences-for-the-Record held pursuant to this Article. Such a conference shall include any meeting where disciplinary action will be initiated.

D. The employee shall be given two days' notice and a statement for the reason for any Conference-for-the-Record, as defined above, except in cases deemed to be an emergency. A maximum of two Union representatives may be present at a Conference-for-the Record.

E. The Board agrees to promptly furnish the Union with a copy of any disciplinary action notification (i.e., notice of suspension, dismissal, or other actions appealable under this Section) against an employee in this bargaining unit.

8. Section 2 of Article XI is entitled, "Dismissal, Suspension, Reduction-in-Grade." It provides as follows:

Permanent employees dismissed, suspended, or reduced in grade shall be entitled to appeal such action to an impartial Hearing Officer or through the grievance/arbitration process as set forth in Article VII of the Contract. The employee shall be notified of such action and of his/her right to appeal by certified mail. The employee shall have 20 calendar days in which to notify the School Board Clerk of the employee's intent to appeal such action and to select the method of appeal. If the employee when appealing the Board action, does not select the grievance/arbitration process as set forth in Article VII of the Contract[,], the Board shall appoint an impartial Hearing Officer, who shall set the date and place mutually agreeable to the employee and the Board for

the hearing of the appeal. The Board shall set a time limit, at which time the Hearing Officer shall present the findings. The findings of the Hearing Officer shall not be binding on the Board, and the Board shall retain final authority on all dismissals, suspensions, and reductions-in-grade. The employee shall not be employed during the time of such dismissal or suspension, even if appealed. If reinstated by Board action, the employee shall receive payment for the days not worked and shall not lose any longevity or be charged with a break in service due to said dismissal, suspension, or reduction-in-grade. Non-reappointments are not subject to the grievance/arbitration procedures.

9. Section 4 of Article XI is entitled, "Types of Separation." It provides, in pertinent part, as follows:

Dissolution of the employment relationship between a permanent unit member and the Board may occur by any four [sic] distinct types of separation.

A. Voluntary--

B. Excessive Absenteeism/Abandonment of Position-- An unauthorized absence for three consecutive workdays shall be evidence of abandonment of position. Unauthorized absences totaling 10 or more workdays during the previous 12-month period shall be evidence of excessive absenteeism. Either of the foregoing shall constitute grounds for termination. An employee recommended for termination under these provisions shall have the right to request of the Chief Personnel Officer for Human Resources a review of the facts concerning the unauthorized leave. Such right shall exist for a period of up to 10 working days after the first day of notification of the unauthorized absence.^[4]

C. Disciplinary-- The employee is separated by the employer for disciplinary cause arising from the employee's performance or non-performance of job responsibilities. Such action occurs at any necessary point in time.

D. Non-reappointment--

AFSCME, Local 1184 bargaining unit members employed by the school district in excess of five years shall not be subject to non-reappointment. Such employee may only be discharged for just cause.

E. Layoff--

10. As a School Board employee, Respondent is obligated to act in accordance with School Board "rule[s], regulation[s], and [p]olic[ies]. If she does not, she may be disciplined pursuant to the AFSCME Contract.⁵

11. Among the School Board's "rule[s]" are School Board Rule 6Gx13-4A-1.21 and School Board Rule 6Gx13-4E-1.01.

12. School Board Rule 6Gx13-4A-1.21 provides, in pertinent part, as follows:

Permanent Personnel

RESPONSIBILITIES AND DUTIES

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.

* * *

13. School Board Rule 6Gx13-4E-1.01 addresses the subject of "[a]bsences and [l]eaves." It provides, in pertinent part, that, "[e]xcept for sudden illness or emergency situations, any employee who is absent without prior approval shall be deemed to have been willfully absent without leave."

14. School Board bus drivers and aides are governed by the following "[a]ttendance [p]olicy" set forth in the School Board Transportation Department's Handbook for Drivers, Aides and Operations Staff:

Drivers and aides are expected to be prompt and punctual in their attendance on all workdays in accordance with the current calendar and their assigned schedule, and their contract.

9.1 AUTHORIZED ABSENCES

For absences to be authorized, they must be reported to the driver's or aide's Transportation Center Dispatch Office in advance. This notice shall be made at the earliest possible time, but no later than before the next scheduled report time. Even in an emergency, every possible effort must be made to inform the Dispatch Office. The supervisory staff evaluates the driver's adherence to this rule. Intent to return should be treated in the same manner. Leave forms must be completed promptly for payroll purposes.

9.2 UNAUTHORIZED ABSENCES

Unauthorized absences are subject to disciplinary action as prescribed under existing labor contracts. If a driver or aide does not report to work within 15 minutes after the scheduled report time, or does not call in absent before the report time, the absence will be considered unauthorized. If time off is taken during a regular working school day without a supervisor's approval, this absence may also be considered unauthorized. Additionally, any employee who does not have available sick/personal time may be charged with an unauthorized absence.

9.3 NOTIFICATION OF ABSENCES

-Drivers and aides must notify their Transportation Center[']s Dispatch Office as soon as they have determined they cannot report to work. Drivers are not to make arrangements on their own for a substitute. All arrangements must be made by the Dispatch Office.

-If a driver will not be reporting for work on regular school days, the driver must call in immediately and speak with the Dispatcher, or the Field Operations Specialist.

-If a driver cannot report to work because of an emergency situation, the driver must contact the Dispatch Office as soon as possible. If the situation requires a driver to leave the area, the driver should have a relative or friend contact the office for the driver.

-If the absence will occur sometime in the future, the Dispatch Office should be given as much advance notification as possible.

-When the Dispatch Office is contacted, an explanation for the absence should be given

along with the length of absence and estimated date of return.

-If the driver is off from work for more than one day, the driver must contact the office each day, prior to the report time, with a complete update of the situation. The only times the driver does not have to contact the office on a daily basis are as follows:

-Admission to a hospital as a patient

-Maternity leave

-A doctor's work release for a specified number of days

-Extended sick leave

-Approved leave of absence

-Out of town

9.4 CHECK-IN POLICY

-All employees are expected to arrive at work on or before their scheduled report time.

-Drivers and aides will be given a five minute grace period to report to work, during which no disciplinary nor financial actions will be taken. For example, if the driver or aide is scheduled to report for work at 6:00 a.m., but signs-in by 6:05 a.m., the driver or aide will be allowed to go out on the assigned route with no repercussions.

-Drivers and aides who report to work 6-15 minutes after the scheduled report times will be considered "tardy." Tardy drivers and aides will be permitted to work. However, the dispatch may assign a stand-by or substitute driver or aide to the route of the tardy employee. Drivers and aides who

are more than 10 minutes late, but less than 16 minutes late, will be used as substitute drivers and aides and will not be allowed to operate their regularly assigned route. For the tardy driver or aide who was replaced by a substitute or stand-by driver or aide, such driver or aide will then be assigned as substitute for other routes needing coverage, as requirements dictate. A record will be kept documenting all tardiness. Lost time will be accumulated for tardiness and employees will be docked pay in 1/2 day increments.

-Drivers and aides who report to work 16 or more minutes after the scheduled report time will be considered "absent without leave" (AWOL). These persons will not be permitted to work. They will be placed on "unauthorized leave-without pay" (ULWOP) and will be subject to disciplinary action in accordance with the American Federation of State, County, and Municipal Employees (AFSCME) Collective Bargaining Agreement

-Extenuating circumstances will be evaluated by the Center Director and, upon proper documentation, may not be held against the employee. Repeated occurrences, such as "car broke down for the third time this week," will not be considered extenuating.

9.5 DOCUMENTATION

It is the responsibility of the drivers and aides to report to the supervisor in order to complete and/or produce all required paperwork related to the absence on the first workday upon return to work. Failure to comply with this procedure may result in an unauthorized absence regardless of extenuating circumstances.

15. During the time she has been assigned to the John Schee Regional Transportation Center, Respondent has had a

history of poor attendance, which has adversely impacted the operations of the center.

16. On February 21, 2003, Respondent was issued a verbal warning for an unauthorized absence.

17. On March 20, 2003, Respondent was issued the following written warning regarding her attendance by Dr. Michael Exelbert, a Coordinator III at the John Schee Regional Transportation Center:

Payroll records indicate that you have accrued 7 days of Unauthorized Leave Without Pay and/or Tardies. Records indicate you were verbally warned regarding this issue on Feb. 21, 2003.

Article V, Section 27 of the contract between Miami-Dade County Public Schools and AFSCME 1184 states:

"Unauthorized Absence - Any absence without pay which has not been requested by the employee and approved by the supervisor, in writing, at least five days in advance.

Absences of the employee, where notice of absence is made prior to the start of the workday, but are not covered by the employee having accrued sick or personal leave, shall be charged as unauthorized absence and may result in disciplinary action in accordance with Article XI."

Article XI, Section 4B of the contract between Miami-Dade County Public Schools and AFSCME 1184 states:

"Excessive Absenteeism/Abandonment of Position - An unauthorized absence for three consecutive workdays shall be evidence of abandonment of position. Unauthorized

absences totaling 10 or more workdays during the previous 12-month period shall be evidence of excessive absenteeism. Either of the foregoing shall constitute grounds for termination. An employee recommended for termination under these provisions shall have the right to request of the Deputy Superintendent for Personnel Management and Services a review of the facts concerning the unauthorized leave. Such right shall exist for a period of up to 10 working days after the first day of notification of the unauthorized absence."

Section 9 of the M-DCPS, Department of Transportation Handbook for Drivers, Aides and Operations Staff addresses the department's **Attendance Policy**. It states:

" Drivers and aides are expected to be prompt and punctual in their attendance on all workdays in accordance with the current calendar and their assigned schedule, and their contract."

This section addresses: 9.1-Authorized Absences, 9.2-Unauthorized Absences, 9.3-Notification of Absences, and 9.4-Check-In Policy. You are instructed to review this section of your handbook.

Deficient performance exhibited by the accrual of unauthorized absences and/or tardiness negatively impacts the department, coworkers and the educational program of the students we serve. This behavior is unacceptable and must be corrected by reporting to duty when scheduled and reporting on time.

With this memorandum, you are warned that future occurrences of Unauthorized Absences and/or Tardies will lead to progressive disciplinary action compliant with District policies and procedures and the contract between M-DCPS and AFSCME Local 1184. Be advised M-DCPS has a District Support Agency

that may be able to assist you regarding attendance deficiencies and can be reached at You are encouraged to contact them for assistance in regards to your attendance deficiencies.

Please contact me if additional information is required.

Respondent signed this written warning, acknowledging receipt thereof, on March 26, 2003.

18. On October 23, 2003, Mr. Exelbert held a conference-for-the-record with Respondent to discuss "attendance requirements." The following day, Mr. Exelbert prepared a memorandum in which he summarized what had transpired at the conference. The memorandum read as follows:

A Conference-For-The-Record was held in my office on Thursday, October 23, 2003. You were asked if you were a member of the Union. You indicated that you were, but did not seek representation. Present at the meeting was Cynthia Brown, Bus Attendant, and this administrator.

You were told the purpose of today's conference was to review attendance requirements.

You were given a copy of the Notification of this Conference-For-The-Record. You acknowledged receiving and signing receipt for today's Conference-For-The-Record.

You also received: a copy of all LWOP-U absences since your written warning and a copy of your M-DCPS screen 026 leave status dates.

You received a Verbal Warning about your LWOP-U absences on February 21, 2003, and a

written warning about you[r] LWOP-U absences on March 20, 2003.

During those meeting the following LWOP-U absences were discussed.

November 22(D), 2002.
December 05(A), 06(D), 09(D), 10(D), 11(D), 20(P), 2002.
February 04(P), 06(A), 11(A), 13(A), 14(P), 20(D), 24(D), 25(A), 2003.
March 06(A), 10(D), 11(D), 12(D), 13(D), 2003.

For today, the following LWOP-U attendance days since the Written Warning on March 20, 2003 were discussed:

March 27(A), 2003.
April 11(D), 17(A), 21(A), 23(D), 24(D), 2003.
May 09, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 27, 28, 29, 30, 2003 (ALL Days).
June 02, 03, 04, 05, 2003 (ALL Days).
August 26(A), 29(A), 2003.
September 04(A), 05(A), 11(A), 2003.

A total of fifty occurrence of LWOP-U

The seriousness of missing work and good attendance was discussed. You were given copies of Section 9 (Attendance Policy) from the Handbook of School Bus Drivers, Aides and Operations Staff.

You indicated that you would bring documentation to change the unexcused absences of:

April 11, 17, 21, 23, 24, 2003,
May 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 27, 28, 29, 30, 2003,
June 02, 03, 04, 05, 2003,
(due to medical problems that you experienced at those times), and that you could bring in other documentation for:

August 26, 29, 2003 and
September 04, 05, 11, 2003,
as a result of domestic problems you
experienced at those time, from unacceptable
to LWOP-A.

You were asked if you had any other
comments. You indicated that by Friday,
October 31, 2003, you would bring in
additional documentation for other dates
listed above.

You were told that this case would now be
sent to Mr. George C. Millar, Director of
the John Schee Regional Transportation
Center and possibly to the Office of Jerry
Klein, District Director, Department of
Transportation Administration for further
review.

You were told that a summary would be
prepared of today's session. You were
apprised of your right to append, to
clarify, or to explain any information
recorded in this conference, by this
Summary. You were asked to review this
summary on Monday October 27, 2003, after
8:30AM, in Gail Allen, the Executive
Secretary's Office.

Respondent signed this memorandum, acknowledging receipt
thereof, on October 29, 2003.

19. Mr. Exelbert referred Respondent to the School Board's
Employee Assistance Program for help in dealing with problems
affecting her attendance.

20. George Millar, the Director of the John Schee Regional
Transportation Center, held a conference-for-the-record with
Respondent on February 13, 2004. On February 17, 2004,
Mr. Millar prepared a memorandum in which he summarized what had

transpired at the conference. The memorandum read, in pertinent part, as follows:

* * *

CONFERENCE DATA

It was stated that over the previous 12-month period, excluding summer, you have accrued 35.5 days of unauthorized absences. It was noted that several days previously unauthorized had been changed to authorized with a current net total of 35.5 days It was noted that the 35th day does not show on the report because the pay period just closed. A review of the record showed the following incidences attempting to assist you improve your attendance:

- Verbal Warning - February 21, 2003
- Written Warning - March 20, 2003 . . .
- Conference for the Record - October 23, 2003
- District Support Agency Referral - October 23, 2003

You were asked to present any additional documentation or response to address the issues presented. You stated that you were ill at the end of last year and you brought documentation. During a portion of that time you were hospitalized. You were instructed to submit documentation and it would be reviewed and considered for changing the identified absences to authorized. Your AFSCME Representatives were asked if they had any comment, Mr. Houghtaling said no.

Action Taken

The following section of the contract between Miami-Dade County Public Schools and AFSCME Local 1184 and Department of Transportation Handbook were reviewed and

you acknowledged understanding their meaning and intent

- Article V, Section 27
- Article XI, Section 4, Paragraph B
- Section 9 Attendance - M-DCPS, Department of Transportation Handbook for Drivers, Aides and Operations Staff

The following instructions were given at the conference:

- Report for duty each day and shift that you are scheduled to work.
- Call in or submit a leave card in advance of your reporting time when you intend to be absent.
- Present documentation for absences not covered by accrued leave time to this administrator or Dr. Michael Exelbert upon your return to duty.

Conclusion

You were instructed that this conference would be summarized and forwarded to the Administrative Director, Department of Transportation, and the Office of Professional Standards for review and subsequent disciplinary action as merited. You were informed of your right to appendage (provide a written statement), which will be attached to the conference summary if you feel any facts or information is misrepresented or statements omitted which occurred during the conference. You will have 24 hours from receipt of the conference summary to submit this appendage. These statements concluded the conference.

Respondent signed this memorandum, acknowledging receipt thereof, on February 24, 2004.

21. Barbara Moss, the School Board's Office of Professional Standards' District Director, held a conference-for-the-record with Respondent on March 16, 2004, to discuss Respondent's absenteeism and her "future employment status" with the School board. In the 12-month period prior to this conference, Respondent had been absent a total of 72 days and had 33.5 days of unauthorized absences. On March 24, 2004, Ms. Moss prepared and furnished Respondent a memorandum in which Ms. Moss summarized what had transpired at the conference. In those portions of the memorandum addressing the "action taken" and the "action to be taken," Ms. Moss wrote the following:

Action Taken

You were advised of the availability of services from the District's support referral agency.

The following directives are herein delineated which were issued to you during the conference concerning future absences:

1. Be in regular attendance and on time.
2. Intent to be absent must be communicated directly to Mr. George Millar or designee.
3. Absences for illness must be documented by your treating physician and a written medical note presented to Mr. Millar or designee upon your return to the site.

Failure to comply will result in the absence being recorded as Leave Without Pay, Unauthorized (LWOU).

During the conference, you were directed to comply and provided with a copy of School Board Rules 6Gx13-4A-1.21, Responsibilities

and Duties, and 6Gx13-4E-1.01, Absences and Leaves. You are advised of the high esteem in which employees are held and of the District's concern for any behavior, which adversely affects this level of professionalism.

Action TO Be Taken

You were advised that the information presented in this conference, as well as subsequent documentation, would be reviewed with the Assistant Superintendent in the Office of District Compliance Units, the Administrative Director of Transportation, and the Director of [the] John Schee Transportation Center.

Upon completion of the conference summary, a legal review by the School Board attorneys will be requested. Receipt of their legal review with endorsement by the Chief Communications Officer, will compel formal notification of the recommended disciplinary action. All disciplinary actions will be consistent with the concepts and practice of progressive or corrective discipline. The degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record.

You were apprised of your right to clarify, explain, and respond to any information recorded in this conference by this summary, and to have any such response appended to your record.

22. At its June 16, 2004, meeting, the School Board "took action to suspend [Respondent] and initiate dismissal proceedings against [her]."

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto.

24. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat. (formerly § 230.03(2), Fla. Stat.)

25. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See § 1001.42(5), Fla. Stat. (formerly § 230.23(5)(f), Fla. Stat.)("The district school board, acting as a board, shall exercise all powers and perform all duties listed below:
PERSONNEL.--. . . provide for the . . . suspension, and dismissal of employees subject to the requirements of chapter 1012."); § 1012.22(1)(f), Fla. Stat. ("The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees."); and § 1012.23(1), Fla. Stat. (formerly § 231.001, Fla. Stat.)("Except as otherwise provided by law or the State Constitution, district school boards may adopt rules governing personnel matters,[⁶]

including the assignment of duties and responsibilities for all district employees.").

26. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat.

27. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons." § 447.209, Fla. Stat.

28. It, however, must exercise these powers in a manner that is consistent with the requirements of law and the provisions of any collective bargaining agreements into which it has entered with the bargaining unit representatives of its employees. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); and Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a

ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment").

29. "Under Florida law, a [district] school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."⁷ Sublett v. District School Board of Sumter County, 617 So. 2d at 377.

30. The employee must be given written notice of the specific charges prior to the "formal hearing." Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [district school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring).

31. Any adverse action taken against the employee may be based only upon the conduct specifically alleged in the written notice of specific charges. See Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

32. At the "formal hearing," the burden is on the district school board to prove the allegations contained in the notice.

33. The district school board's proof need only meet the preponderance of the evidence standard, unless the collective bargaining agreement covering the bargaining unit of which the employee is a member provides otherwise (and there is no indication that the collective bargaining agreement covering Respondent's bargaining unit contains such a provision).⁸ 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."); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We agree with the hearing officer that for the School Board to demonstrate just cause for termination, it must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true"); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not involve the loss of a license and, therefore, Allen's losses are adequately protected by the preponderance of the evidence standard."); Dileo v.

School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence to support both charges by a preponderance of the evidence standard."); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute")

34. Where the employee is an "educational support employee" who has successfully completed his or her probationary period and the adverse action sought to be taken against the employee is termination, the district school board must act in accordance with the provisions of Section 1012.40, Florida Statutes (formerly Section 231.3605, Florida Statutes), which provides as follows:

(1) As used in this section:

(a) "Educational support employee" means any person employed by a district school system who is employed as a teacher assistant, an education paraprofessional, a member of the transportation department, a member of the operations department, a member of the maintenance department, a member of food service, a secretary, or a clerical employee, or any other person 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. 1012.39. This

section does not apply to persons employed in confidential or management positions. This section applies to all employees who are not temporary or casual and whose duties require 20 or more hours in each normal working week.

(b) "Employee" means any person employed as an educational support employee.

(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 district school 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, or reduces the number of employees on a districtwide basis for financial reasons.

(c) In the event a district school 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.

35. Respondent is an "educational support employee," within the meaning of Section 1012.40, Florida Statutes, who is

covered by a collective bargaining agreement (the AFSCME Contract).

36. Pursuant to Section 1012.40, Florida Statutes, Respondent's employment may be terminated only "for reasons stated in th[is] collective bargaining agreement."

37. The AFSCME Contract allows the School Board to terminate bargaining unit members for "excessive absenteeism." It also authorizes the School Board to terminate bargaining unit members for "deficient performance," "non-performance of job responsibilities," or "violat[ion of] any rule, regulation or policy," provided such disciplinary action is "reasonably related to the seriousness of the offense and the employee's record."

38. The Notice of Specific Charges served on Respondent alleges that Respondent's termination is warranted under the provisions of the AFSCME Contract because of her "excessive absenteeism and violation of School Board rule regarding absences and leaves" (Count I); "willful neglect of duty" (Count II); "violation of School Board rule regarding employee responsibilities and duties" (Count III); and "deficient performance" (Count IV).

39. The preponderance of the record evidence establishes that, during the 12-month period prior to the March 16, 2004, conference-for-the-record Ms. Moss had with Respondent,

Respondent was "absent without authorization in excess of 10 [work]days" (as alleged in paragraph 13. of the Notice of Specific Charges). These unauthorized absences (referenced in paragraph 13 of the Notice of Specific Charges, which the School Board proved by a preponderance of the evidence) constitute "excessive absenteeism," within the meaning of Article XI, Section 4B, of the AFSCME Contract. Standing alone, they provide "grounds for termination" of Respondent's employment with the School Board pursuant to Article XI, Section 4B, of the AFSCME Contract, as alleged in Count I of the Notice of Specific Charges.⁹

40. Such being the case, Respondent's appeal of her proposed termination must be rejected.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the School Board issue a final order sustaining Respondent's suspension and terminating her employment with the School Board pursuant Article XI, Section 4B, of the AFSCME Contract.

DONE AND ENTERED this 22nd day of March, 2005, in
Tallahassee, Leon County, Florida.



STUART M. LERNER
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of March, 2005.

ENDNOTES

¹ The hearing was originally scheduled for October 6, 2004, but was twice continued.

² Article XI, Section 1A, of the AFSCME Contract does not require the School Board, when taking disciplinary action against bargaining unit members, to follow the particular "progressive discipline steps" enumerated in this provision of the contract. See Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1273, 1287 (Fla. 2000) ("Whereas section 102.11 is mandatory (i.e., the Department 'shall' ignore late returns), section 102.112 is permissive (i.e., the Department 'may' ignore late returns, or the Department 'may' certify late returns and fine tardy Board members."); Dooley v. State, 789 So. 2d 1082, 1084 (Fla. 1st DCA 2001) ("[R]ule 3.170(1) is clearly permissive in that it states a defendant 'may file a motion to withdraw.'"); State v. Thomas, 528 So. 2d 1274, 1275 (Fla. 3d DCA 1988) ("As we perceive it, the State's argument is that 'should' is the equivalent of 'shall' and that 'shall' is mandatory. While we acknowledge that 'should' retains its arcane, schoolmarm meaning as a past tense of 'shall,' its modern usage is as the weaker companion to the obligatory 'ought.' Thus, it is said that '[o]ught should be reserved for

expressions of necessity, duty, or obligation; should, the weaker word, expresses mere appropriateness, suitability or fittingness.'"); Massey Builders Supply Corp. v. Colgan, 553 S.E. 2d 146, 150 (Va. App. 2001)("The word 'shall' is primarily mandatory, whereas the word 'should' ordinarily implies no more than expediency and is directory only."); and Magnuson v. Grand Forks County, 97 N.W.2d 622, 624 (N.D. 1959)("It does not seem that the word 'should' was used inadvertently. Other instructions on the back of the order contain the more compulsive word 'must,' as for example 'the original of this order must be signed by the recipient or person acting in his behalf and by the vendor.' We construe the word 'should' as used here to be persuasive rather than mandatory.").

³ Article XI, Section 1A, of the AFSCME Contract applies only when adverse action is taken against a bargaining unit member for "disciplinary cause." It does not apply to "separations" for "excessive absenteeism/abandonment of position," which are addressed in Article XI, Section 4B, of the contract and are separate and distinct from separations for "disciplinary cause" (discussed in Article XI, Section 4C, of the contract).

⁴ Article XI, Section 4B, of the AFSCME Contract makes clear that "excessive absenteeism" (evidenced by "unauthorized absences totaling 10 or more workdays during the previous 12-month period") is considered to be so deleterious to the operations of the School Board that it "shall constitute grounds for termination."

⁵ An employee who does not meet her responsibility of complying with School Board "rule[s], regulation[s], and [p]olic[ies]" is guilty of "non-performance of job responsibilities," as that term is used in Article XI, Section 4C, of the AFSCME Contract.

⁶ The "rules governing personnel matters" that have been adopted by the School Board include School Board Rules 6Gx13-4A-1.21 and 6Gx13-4E-1.01.

⁷ "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

⁸ Where the district school board, through the collective bargaining process, has agreed to bear a standard of proof more demanding than preponderance of the evidence, it must honor, and

act in accordance with, its agreement. See Palm Beach County School Board v. Auerbach, Case No. 96-3683, 1997 WL 1052595 *5 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . . However, in this case, the district must comply with the terms of the collective bargaining agreement, which, as found in paragraph 27, above, requires the more stringent standard of proof: clear and convincing evidence.").

⁹ It is therefore unnecessary to determine whether there are also grounds to terminate Respondent for "disciplinary cause," within the meaning of Article XI, Section 4C, of the AFSCME Contract, as further alleged the Notice of Specific Charges.

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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.

