

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 04-4509
)
PATRICIA BANKS,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 8, 2005, in Fort Myers, Florida, before Lawrence P. Stevenson, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Paul Carland, II, Esquire
Lee County School Board
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For Respondent: Robert J. Coleman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner, the Lee County School Board, may terminate Respondent, Patricia Banks', employment as

a school bus operator based upon the conduct alleged in the Petition for Termination of Employment.

PRELIMINARY STATEMENT

On October 26, 2004, the Lee County School Board (the "School Board") issued a Petition for Termination of Employment (the "Petition") of Respondent, setting forth the allegations justifying the termination of Respondent's employment as a school bus operator:

On or about September 20, 2004, the Respondent was arrested for stealing a computer at a Wal-Mart store while wearing her District uniform. This constitutes misconduct in office and conduct unbecoming an employee of the School District and as such constitutes cause for her termination.

On November 4, 2004, counsel for Respondent filed a letter with the School Board to contest the charges and request a hearing. On December 16, 2004, the School Board suspended Respondent without pay and benefits pending termination of employment. On December 20, 2004, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge and the conduct of a formal hearing. The final hearing was scheduled for and held on March 8, 2005.

At the hearing, the School Board presented the testimony of David Heady, an employee of Wal-Mart who works in the electronics department of the store on Colonial Boulevard in

Fort Myers; Terrell Russ, the supervisor of the electronics department in the named Wal-Mart store; and Mickey Holman and Bernard "Bo" Lee, loss prevention officers at Wal-Mart. The School Board's Exhibits 1 through 6 and 10 through 11 were admitted into evidence. Respondent testified on her own behalf. Respondent's Exhibits 1 through 8 were admitted into evidence. Respondent also filed the depositions of Mr. Holman and Mr. Lee for limited impeachment purposes.

A Transcript of the hearing was filed at DOAH on April 5, 2005. The parties filed their Proposed Recommended Orders on April 15, 2005.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing and the matters officially recognized, the following findings are made:

1. The School Board is the governing body of the local school district in and for Lee County, Florida.
2. Since October 31, 2001, Respondent has been employed by the School Board as a school bus operator. Respondent's employment with the School Board is governed by a collective bargaining agreement between the Support Personnel Association of Lee County and the School Board (the "SPALC Agreement").
3. In September 2004, Respondent was assigned to drive a morning route and an afternoon route. Her morning route ended

at about 10:00 a.m., and her afternoon route commenced at about 1:30 p.m. Respondent's daughter, India Miller, also worked as a school bus operator for the School Board.

4. On September 20, 2004, between her morning and afternoon routes, Respondent drove her daughter to the Wal-Mart store on Colonial Boulevard in Fort Myers. Ms. Miller's car was not running, and she was in the process of moving into a new residence. She had asked Respondent to take her to Wal-Mart to purchase cleaning supplies and to look into buying a new computer. Respondent and Ms. Miller were wearing their School Board bus driver uniforms.

5. Respondent parked her car in front of the store, but near the garden department, which is on the side of the building along with the automotive department. Respondent and Ms. Miller entered the building through the front or "general merchandise" ("GM") entrance.

6. Respondent and Ms. Miller proceeded to the electronics department to look at computers. They were assisted by David Heady, a sales associate in the electronics department.

7. Mr. Heady testified that Respondent asked him several questions about the functionality of a certain computer, an eMachines desktop model priced at \$698.00. Each woman said she wanted one of the computers, but Mr. Heady had only one of them on the floor. He put that one in a shopping cart for

Respondent, then proceeded to the storeroom to get a second computer for Ms. Miller. When he returned with the second computer, about three minutes later, Mr. Heady noticed that Ms. Miller and the first computer were gone. Respondent told him that Ms. Miller had taken the computer to the front of the store to check out. This disturbed Mr. Heady because it is Wal-Mart's policy that all computers should be paid for in the electronics department. Mr. Heady's suspicions were also somewhat aroused by the fact that it was Ms. Miller who took the first computer out of his department, when it was Respondent who had asked for it.

8. According to Mr. Heady, Respondent started toward the front of the store with the second computer, but Mr. Heady stopped her and told her she had to pay for it in the electronics department. Respondent paid cash for the computer, a total of \$739.88, then left the electronics department. Mr. Heady then called the loss prevention office and spoke with loss prevention officer, Bernard "Bo" Lee, to inform him that a computer that had not been paid for had been removed from the electronics department. He testified that he checked out Respondent before alerting loss prevention of the missing computer because he did not want a confrontation with Respondent. Mr. Heady also informed his supervisor in the electronics department, Terrell Russ, about the missing

computer. Mr. Russ, in turn, made his own call to loss prevention and spoke with another loss prevention officer, Mickey Holman.

9. Respondent testified that she and her daughter went into the electronics department because her daughter wanted a new computer. Respondent stated that she knows very little about computers and that it was Ms. Miller who was asking technical questions of Mr. Heady. Respondent did ask if Mr. Heady had a second computer because she was interested in placing one on layaway for her sons.

10. Respondent testified that there was no computer on the floor of the electronics department. When her daughter told Mr. Heady she wanted to buy the model under discussion, he had to retrieve it from the storeroom. Respondent testified that she waited for Mr. Heady to bring the computer while Ms. Miller shopped for her cleaning supplies. Mr. Heady returned with the computer and told Respondent that she would have to pay for the computer before she could take it out of the electronics department.

11. Respondent called Ms. Miller on her cell phone and told her that she had to come back to the electronics department to pay for the computer. Respondent also asked Ms. Miller if she could afford to lend her the money to place a computer on layaway. Ms. Miller responded that she would not know until she

completed her purchases. Respondent could not recall whether Ms. Miller told her that she was coming back to purchase the computer. Respondent left the electronics department and walked to the in-store McDonalds to eat lunch. Finding the McDonalds too crowded, she went outside to smoke a cigarette.

12. The one piece of documentary evidence available at the hearing was the Wal-Mart receipt for the purchase of the computer. The receipt indicates that the computer was purchased with cash in the electronics department, though it does not establish whether it was Respondent or Ms. Miller who made the purchase.

13. Respondent's testimony agrees with that of Mr. Heady on one point: Ms. Miller left the electronics department and was separated from Respondent for at least several minutes. Messrs. Lee, Holman, and Russ all observed Ms. Miller during the time she was separated from Respondent.

14. Mr. Lee testified that he was patrolling the floors of Wal-Mart to watch for shoplifters. He noticed three black women, including Ms. Miller and two unidentified women, placing an eMachines computer in a shopping cart. Mr. Lee stated that the eMachines computers were a "hot item," and he, therefore, paid special attention when customers placed them in shopping carts. Though he had seen Respondent with the other women in

the electronics department, Mr. Lee did not see her touch the computer.

15. Mr. Lee stated that he followed Ms. Miller to the front of the store. Respondent was still in the electronics department. Mr. Lee observed Ms. Miller push the cart holding the computer to the line of cash registers, through the line, past the greeter who checked her receipt, and out the GM entrance. Though he did not specifically observe Ms. Miller pay for the computer at the front registers, Mr. Lee assumed that it had been paid for because the greeter allowed her to leave the store without incident.

16. From just inside the GM doors, Mr. Lee watched Ms. Miller walk to a car in the front parking lot. Mr. Lee did not see Ms. Miller load the computer into the car, but he did observe her re-enter the store a few minutes later, without the computer, but carrying a Wal-Mart receipt. He followed Ms. Miller to the toy department, where she met Respondent and the two unidentified women standing near a shopping cart containing a second eMachines computer.

17. Mr. Holman testified that after being radioed by Mr. Russ that a computer had been taken from the electronics department by one of two women in school bus driver uniforms, he began searching the store. He observed Ms. Miller go through the checkout area and past the greeter, who signaled that

Ms. Miller had a receipt for her computer. Mr. Holman radioed to the electronics department and told them there was no problem, that the woman had paid for the computer. The person in electronics who answered told Mr. Holman that there was a second computer. Mr. Holman went to look for the second computer while Mr. Lee maintained his surveillance on Ms. Miller.

18. Mr. Holman found the missing computer sitting in an unattended shopping cart in the toy department. After a minute or two, he saw Respondent approach the cart. Then, two other women joined her, and they began talking. Mr. Holman stated that Respondent approached the cart several times, but did not actually touch or take hold of it.

19. After a few minutes, Ms. Miller approached the group of three women. Mr. Lee followed her and maintained his surveillance apart from Mr. Holman. Both loss prevention officers were out of earshot of the four women. Mr. Lee recalled that Ms. Miller handed the receipt to Respondent at that point, though they later passed it back and forth more than once. After some conversation, the two unidentified women walked away.

20. Ms. Miller began pushing the cart containing the computer toward the automotive department called the "TLE" for "Tire and Lube Express." Respondent walked in front of the

cart. Mr. Lee noted that exiting through the TLE in the rear of the store would require Respondent and Ms. Miller to walk around the outside of the store to reach the front parking lot and that exiting through the GM entrance would be much more convenient. Mr. Lee testified that this behavior alone would have aroused his suspicions.

21. The women guided the cart out through the TLE entrance. Ms. Miller pushed the cart, and Respondent lifted the front of the cart over the metal strip in the doorway. The electronic article surveillance ("EAS") system did not sound an alarm. Mr. Lee testified that it is not unusual for the EAS system not to sound, and he attached no significance to its silence.

22. After the women were outside the store, Mr. Lee and Mr. Holman approached and asked them to return to the store. Ms. Miller told the men they had scared her. She said, "I pissed myself [sic]." Ms. Miller also told Mr. Lee that she had a receipt for a computer. Mr. Lee found it significant that she said "a computer," rather than "this computer."

23. Mr. Lee and Mr. Holman escorted the women to the loss prevention office. Ms. Miller, ultimately, admitted to stealing the computer. Respondent denied doing anything wrong and was visibly upset when she was detained. In the loss prevention office, Respondent called her employer on her cell phone to

arrange for someone to cover her afternoon bus route. None of the Wal-Mart employees present in the loss prevention office could recall Respondent's making any statement that could be construed as incriminating.

24. The local police arrived, and both women were arrested. Ms. Miller subsequently resigned her employment with the School Board. At the time of the hearing, Respondent's criminal case had not been resolved.

25. Again, Respondent told a different story. While she was smoking her cigarette outside, Respondent began to worry about finishing the shopping in time to drive her afternoon bus route. She called Ms. Miller on her cell phone and asked how much longer she would be in the store. Ms. Miller told Respondent that she was paying for her merchandise and asked Respondent whether she had seen her in-laws in the store. Respondent said that she had not seen them and asked where they were. Ms. Miller told her that she last saw them in the toy department.

26. Respondent finished her cigarette, then walked back into Wal-Mart. She walked to the toy department and found her relatives where Ms. Miller had last seen them. Respondent noted that they had a computer in a shopping cart. One of the in-laws told her that it was Ms. Miller's computer, and they were waiting there for Ms. Miller to return.

27. Ms. Miller arrived, took control of the shopping cart, and asked Respondent if she was ready to go. Respondent saw a Wal-Mart receipt in her daughter's hand. Ms. Miller told Respondent that she needed to buy something in the automotive department. Ms. Miller pushed the cart toward the rear of the store, where the TLE was located. When they reached the TLE, Ms. Miller began asking questions of the sales associate. Respondent interrupted her, saying they had to leave in order to make their afternoon bus routes.

28. Ms. Miller pushed the cart out the TLE entrance, and they were approached by Messrs. Holman and Lee, who told them they needed to come back inside. Ms. Miller said, "Oh, shit. You're gonna make me piss on myself." Respondent wondered why Ms. Miller was reacting so strongly, if she had done nothing wrong.

29. Respondent was adamant that she had no idea Ms. Miller was attempting to steal a computer. Respondent believed Ms. Miller had paid for the computer. Respondent testified that she and Ms. Miller had both worked for Wal-Mart in the past, and both knew that a customer is not allowed to take a computer from the electronics department without paying for it. Ms. Miller apparently had a receipt for the computer. Respondent testified that it never crossed her mind that Ms. Miller would steal a

computer; that she believed her daughter "had better sense than that."

30. Based upon the testimony of all the witnesses, including the deposition testimony of Messrs. Lee and Holman, and the documentary evidence, it is found that the School Board did not prove by a preponderance of the evidence that Respondent stole a computer from Wal-Mart. The evidence certainly demonstrated that Respondent's daughter, Ms. Miller, attempted to steal a computer. However, even if the testimony of the School Board's witnesses were accepted in its entirety, no witness definitively linked Respondent to the computer in such a way as to demonstrate her guilty knowledge that it was being stolen.

31. The testimony of Mr. Holman cannot be credited. After detaining Respondent and Ms. Miller, Mr. Holman prepared a written report attesting that he observed Ms. Miller purchase a computer in the electronics department and take it to her car, while Respondent selected another computer, put it in a shopping cart, and took it to the toy department. In his pre-hearing deposition, Mr. Holman testified that he saw Ms. Miller select and pay for a computer in the electronics department. During cross-examination during the final hearing, Mr. Holman conceded that he witnessed none of these events.

32. Mr. Holman's efforts to explain his misleading statements were unconvincing. He essentially stated that his reporting practice was to write a first-person narrative commingling hearsay reports from other witnesses with his own personal observations. Thus, when Mr. Holman wrote, "I observed a female (India Miller) purchase a desktop PC in the electronics [department]," he actually meant that Mr. Lee observed the purchase and later told Mr. Holman about it. Mr. Holman's testimony must be disregarded because the undersigned cannot reliably distinguish between Mr. Holman's first-hand observations and the hearsay statements that he adopted as his own.

33. The testimony of the remaining witnesses conflicted on key points. The evidence established that Mr. Heady was confused as to the time of day during which the relevant events occurred. Mr. Heady had no recollection of the two unidentified black women whom Mr. Lee stated were with Respondent and Ms. Miller in the electronics department. Mr. Lee stated that he saw Ms. Miller and the two unidentified women put a computer in a shopping cart. Mr. Heady testified that he placed the computers in the shopping carts.

34. Mr. Heady testified that Respondent paid for the first computer. However, he also testified that it was Respondent who asked him technical questions about the computer's capabilities.

Respondent credibly testified that she is ignorant about computers and that it was her daughter who was asking Mr. Heady the technical questions. It is likely that Mr. Heady's recollection was confused and that it was Ms. Miller who paid for the first computer.

35. Respondent's narrative of the relevant events was not without its inconsistencies, but the burden was not on Respondent to establish her innocence. Respondent's narrative was credible as to the key point, that she did not know her daughter was attempting to steal a computer from Wal-Mart. The evidence presented by the School Board was insufficient to demonstrate that Respondent ever gave any indication, through her words or her actions, that she knew Ms. Miller had not paid for the computer.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 1012.40(2)(c), Florida Statutes (2004).^{1/}

37. The School Board has the burden to establish by a preponderance of the evidence the grounds for disciplining Respondent. See, e.g., McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); Allen

v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

38. Subsection 1012.40(2)(b), Florida Statutes, provides that educational support employees, such as Respondent, may be terminated only "for reasons stated in the collective bargaining agreement."

39. The SPALC Agreement provides that any discipline "that constitutes a reprimand, suspension, demotion or termination shall be for just cause." SPALC Agreement at Section 7.09. The SPALC Agreement does not define "just cause" or provide for a plan of progressive discipline.

40. In a previous case, the School Board adopted the following Conclusions of Law, which is hereby adopted as the rule for the instant case:

27. The School Board construes "just cause" in [then] Section 7.094 of the SPALC Agreement in the same manner as that phrase is used in Section 1012.33 relating to instructional staff. That statute provides in pertinent part that:

Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

Section 1012.33(1)(a). See also Rule 6B-4.009 (defining the terms used in Section 1012.33(1)(a)).

Lee County School Board v. Simmons, Case No. 03-1498 (DOAH July 15, 2003)(adopted in toto by Final Order dated August 12, 2003).

41. Respondent did not challenge the assertion that the act of which she was accused, the theft of a computer from a Wal-Mart store while wearing her School Board bus driver uniform, would, if proven, constitute "misconduct in office" sufficient to justify the termination of her employment with the School Board.

42. The School Board failed to establish by a preponderance of the evidence that Respondent stole a computer. Respondent's explanation of the events in question was plausible, if not utterly convincing. Ms. Miller had taken the computer out of the electronics department and had a receipt in her hand. The School Board's evidence did not demonstrate that Respondent had knowledge that her daughter was attempting to steal the computer.

RECOMMENDATION

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

RECOMMENDED that Petitioner, the Lee County School Board, issue a final order dismissing the Petition for Termination of

Employment, reinstating the employment of Respondent, and awarding her back pay and benefits retroactive to December 16, 2004.

DONE AND ENTERED this 15th day of July, 2005, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
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this 15th day of July, 2005.

ENDNOTE

1/ Unless otherwise indicated, all citations are to Florida Statutes (2004).

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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.