STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SEMINOLE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-1138
	)	
DOUGLAS PORTER,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 7, 2007, in Sanford, Florida, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ned Julian, Jr., Esquire
Seminole County School Board
400 East Lake Mary Boulevard
Sanford, Florida 32773-7127

For Respondent: Pamela Hubbell Cazares, Esquire
Chamblee, Johnson & Haynes, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent, Douglas Porter, should be terminated for his third absence without leave in violation of the Collective Bargaining Agreement between Petitioner, Seminole

County School Board, and the non-instructional personnel of Seminole County.

PRELIMINARY STATEMENT

On or about February 6, 2007, Respondent received a letter from Bill Vogel, Superintendent of Seminole County Public Schools, advising him that he, as Superintendent of Seminole County Public Schools, would be recommending to the School Board that it terminate Respondent's employment based on Respondent's third occurrence of being absent from duty without approved leave, violation of work rules, and insubordination. By letter dated February 22, 2007, Respondent, through his attorneys, requested an administrative hearing.

On March 9, 2007, Petitioner forwarded a Petition For Termination to the Division of Administrative Hearings and served same on Respondent's attorneys. The Petition for Termination, charges that "respondent be terminated for just cause do [sic] to third absence without approved leave pursuant to Article VII, Sections 5, 11, and 15 of the Official Agreement Between Non-Instructional Personnel of the Seminole County Board of Public Instruction Association, Inc. [NIPSCO], and The School Board of Seminole County Florida, Sanford, Florida [SCSB]" ("Collective Bargaining Agreement").

On March 12, 2007, an Initial Order was sent to both parties. Based on the parties' joint response, the case was

scheduled for final hearing on May 7 and 8, 2007, in Sanford, Florida.

The final hearing was conducted on May 7, 2007. Petitioner presented four witnesses: Douglas Porter, Denis Quagliani, David Steindl and John Reichert. Petitioner's Composite Exhibit 1, a loose-leaf notebook containing numerous documents, was received into evidence.

Respondent testified in his own behalf and presented the testimony of Craig Hope. Respondent's Exhibits 44 and 50 were received into evidence.

In addition, Respondent and Petitioner offered Joint Exhibits 2 through 15 and 22, which were received into evidence and marked accordingly.

The agreement of the parties to submit their proposed recommended orders within 30 days of the transcript being filed was ratified. The Transcript was filed on June 7, 2007. Motions were filed and granted for an extension of time to file proposed recommended orders to August 1, 2007. Both parties timely filed Proposed Recommended Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing in this matter and the joint stipulation submitted April 24, 2007, the following Findings of Facts are made:

1. Respondent, Douglas Porter, is, and has been, employed by the School Board of Seminole County since July 13, 1993.

2. Paul Hagerty and William Vogel have been Superintendents of Public Schools for the School District of Seminole County, Florida, for all times material to the occurrences relevant to this case.

3. Pursuant to Section 4, Article IX, Florida Constitution, and Sections 1001.30, 1001.31, 1001.32, 1001.33, 1001.41, and 1001.42, Florida Statutes (2006), the School Board of Seminole County, Florida, is the governing board of the School District of Seminole County, Florida.

4. The relationship of the parties is controlled by Florida Statutes, the Collective Bargaining Agreement, and School Board policies.

5. Respondent is an employee of Petitioner's Grounds Maintenance Department, 100 Division ("maintenance department"). He began his employment in that division at the entry level position of Grounds Laborer I and worked his way up to Grounds Laborer II, prior to becoming a mechanic crew leader. As a mechanic crew leader, Respondent supervised three employees on his crew and interacted with principals and assistant principals to determine the landscaping needs of various schools. Respondent held the position of mechanic crew leader for approximately two years.

6. Respondent has been employed by Petitioner for more than three years and is a "regular" employee and subject to the Collective Bargaining Agreement, copies of which he receives annually.

7. Article VII, Section 15, of the Collective Bargaining Agreement, provides, in pertinent part:

> Employees shall report absences and the reason for such absences prior to the start of their duty day in accordance with practices established at each cost center. An employee who has been determined to have been AWOL shall be subject to the following progressive discipline procedures:
>
> 1st Offense - Written reprimand and one day suspension without pay.
> 2nd Offense - Five day suspension without pay.
> 3rd Offense - Recommended for termination.
>
> Each day that an employee is AWOL shall be considered a separate offense. However, any documentation of offenses in this section shall be maintained in the employee's personnel file.

8. Article VII, Section 15, has consistently been construed to apply to an employee's absence from his or her assigned duties for any portion of the day, as well as the entire day.

9. An employee who is absent from his or her assigned work duties without the permission of the employee's supervisor is considered to be absent without leave.

10. The Collective Bargaining Agreement requires that an employee call in before the start of the work day if he or she is going to be absent; historically, maintenance department employees are given a 15-minute grace period after the start of the work day to call in. Although not reduced to a written directive, this practice is well-known within the maintenance department.

11. An employee in the maintenance department who calls in sick, is reported to the payroll clerk who checks the employee's timesheet; if the employee has time on the books, he or she is approved for pay for the sick time. If the employee does not have time on the books, he or she is charged with a sick day with no pay.

12. An employee who fails to call in, or calls in late, is considered absent without leave if he or she does not physically report for work that day or for the portion of the day missed due to tardiness. If the employee reports for work, he or she is subject to discipline, but is paid for the hours worked. If the employee calls in during the 15-minute grace period and is late, he or she is not subject to discipline, but is paid only for the time worked.

13. Respondent had used 13 days of annual leave, 16 days of sick and personal leave, and 27 days of unpaid leave in the 2000 school year. This prompted Respondent's supervisor to

indicate that his attendance needed improvement in Respondent's annual evaluation.

14. As reflected in each of Respondent's annual assessments during his employment, Respondent's absenteeism created a hardship on his department and his attendance needed improvement.

15. Normally, an employee is not required to provide proof of illness. In instances where an employee has excessive sick days, validation of illness is required. Concern with Respondent's excessive sick days prompted his supervisor to require, by letter dated October 1, 2001, medical certification of future illness that required missing work.

16. By October 1, 2001, for the 2001 school year, which began on July 1, 2001, Respondent had used six days of vacation, eight days of paid leave, and four and a-half days of leave without pay. This "abuse of sick leave" resulted in a letter of reprimand dated October 1, 2001, which was clearly intended to warn Respondent to improve his attendance and required validation of illness as referenced in the preceding paragraph.

17. Respondent was absent on September 1, 2002. He did not provide a medical validation of the illness causing the absence and, as a result, the absence was treated as an absence without leave. On September 18, 2002, Respondent received a letter of reprimand and a one-day suspension without pay due to

his failure to provide medical verification for this unpaid leave day. This invoked the first step of progressive discipline as contained in the Collective Bargaining Agreement.

18. On March 20, 2005, Respondent called in during the late evening and left a message on his supervisor's voicemail stating that he would not be at work the following day. The message was vulgar and unacceptable. Respondent did not report to work on March 21, 2005, and did not produce medical verification for his absence.

19. On March 28, 2005, his supervisor recommended that he be suspended from work without pay for this absence without leave, his second offense in the progressive discipline system. On April 7, 2005, Respondent received a letter from the Superintendent notifying him that he would be following the supervisor's disciplinary recommendation for Respondent's absence without leave. The Superintendent's letter clearly references Respondent's failure to give appropriate prior notice of absences "in accordance with practices established at each cost center," and warns that future failure to comply "with procedures established at the Facilities Center to properly report and receive approval for future absences" would result in discipline in accordance with the Collective Bargaining Agreement.

21. On September 7, 2006, Respondent voluntarily entered South Seminole hospital, a psychiatric facility. He was discharged on or about September 25, 2006. Respondent's condition required that he again be hospitalized on October 31, 2006, for four days. Respondent was diagnosed as suffering from bipolar disorder.

22. During his hospitalizations, Respondent was administered various medications to treat his condition. Following release from his second hospitalization, Respondent's prescriptions were changed due to adverse side effects he was experiencing.

23. In addition to being diagnosed with bipolar disorder, Respondent also voluntarily sought treatment for substance abuse at the Grove Counseling Center through the outpatient drug/substance abuse program.

24. Respondent returned to work in November 2006, but was still suffering from problems related to his medication. He was late on November 8, 2006, and absent on November 9, 2006. Respondent had a meeting with his supervisor on November 10, 2006; it was the supervisor's intention to recommend Respondent for termination for the tardiness of November 8, 2006, and absence of November 9, 2006. On November 10, 2006, Respondent advised his supervisor that he had been diagnosed with bipolar disorder in September 2006 and that he was having problems with

his medication. As a result of this conversation, instead of being recommended for termination, Respondent was given time off to adjust his medications, and it was agreed that Respondent would return to work on January 2, 2007.

25. On January 9, 2007, approximately a week after returning to work, Respondent called in at approximately 7:10 a.m., his work day begins at 6:30 a.m., to advise that he had overslept and would be late to work. Respondent arrived at work at 7:28 a.m., 58 minutes after the start of his work day.

26. As a result of this tardiness, Respondent's supervisor recommended suspension and termination to the Superintendent for a third offense of being absent without leave.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction of the parties and subject matter. § 120.57(1), Fla. Stat. (2007).

28. The burden of proof is on Petitioner to establish by a preponderance of the evidence the allegations for termination for just cause that are alleged in the Petition For Termination dated March 9, 2007. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 1996).

29. Because the statute and rules providing grounds for terminating Respondent's contract are penal in nature, they must be construed in favor of the employee. See Rosario v. Burke,

605 So. 2d 523 (Fla. 2d DCA 1992); Lester v. Department of Professional Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977).

30. Where the employee sought to be terminated is an "educational support employee," Petitioner must act in accordance with the provisions of Section 1012.40, Florida Statutes (2006), which provides, in part, 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 member of the maintenance department, . . . 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 §1012.39.
>
> * * *
>
> (b) "Employee" means any person employed as an educational support employee.
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> * * *
>
> (2)(a) Each educational support employee shall be employed on probationary status for a period to be determined through the appropriate collective bargaining agreement or by district school board rule in cases where a collective bargaining agreement does not exist.
>
> (b) Upon successful completion of the probationary period by the employee, the employee's status shall continue from year to year unless the superintendent terminates the employee for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not

> exist, or reduces the number of employees on a district wide basis for financial reasons.
>
> (c) In the event a superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event there is no collective bargaining agreement.

31. Respondent, having completed his probationary period, is a regular employee and is subject to discipline pursuant to Article VII, Sections 5, 11, and 15 of the Collective Bargaining Agreement dated July 1, 2006, through June 30, 2010.

32. The referenced Collective Bargaining Agreement, states, in pertinent part, as follows:

> ARTICLE VII – EMPLOYMENT CONDITIONS
>
> DISCIPLINE AND TERMINATION
>
> <u>Section 5.</u>
>
> A. Regular employees who have been hired for a minimum of three (3) continuous years (without a break in service) shall not be disciplined (which shall include reprimands), suspended or terminated except for just cause.
>
> * * *
>
> C. An employee may be suspended without pay or discharged for reasons including, but not limited to, the following providing just cause is present:

1. Violation of School Board Policy
2. Violation of work rules.

* * *

8. Excessive tardiness

Section 11. Absence Without Leave

A. Employees will be considered absent without leave if they fail to notify their principal, appropriate director or supervisor that they will be absent from duty and the reason for such absence.

B. Absence without leave is a breach of contract and may be grounds for immediate dismissal.

* * *

Section 15.

Employees shall report absences and the reason for such absences prior to the start of their duty day in accordance with practices established at each cost center. An employee who has been determined to have been AWOL shall be subject to the following progressive discipline procedures:

1st Offense - Written reprimand and one day suspension without pay.
2nd Offense - Five day suspension without pay.
3rd Offense - Recommended for termination.

Each day that an employee is AWOL shall be considered a separate offense. However, any documentation of offenses in this section shall be maintained in the employee's personnel file.

32. "Just cause" is some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as a good cause for dismissal.

A discharge for just cause will be upheld if it meets two criteria: (1) it is reasonable to discharge the employee because of misconduct; and (2) the employee had notice, express or fairly implied, that such conduct would be grounds for discharge. In Re Grievance of Towel, 655 A.2d 55 (Vt. 1995).

> The criteria for determining just cause for dismissal must be based on merit. The standards must be job-related and in some rational and logical manner touch upon competency and ability. All that just cause requires is that the cause for dismissal not be religious or political, but concerned solely with the inefficiency, delinquency, or misconduct of the employee. Civil Service Commission v. Poles, 573 A.2d 1169 (Pa. Commw. Ct. 1990).

33. The maintenance department has established a practice, as contemplated in Article VII, Section 15 of the Collective Bargaining Agreement, which gives an employee a 15-minute grace period after the start of the work day to call in if he or she is going to be late or absent. In the event an employee fails to call in prior to the start of the work day or within the 15-minute grace period, tardiness or absence is considered absence without leave. These practices are consistently applied to all maintenance department employees. As a general principle, the construction of a statute or regulation by the administrative agency charged with its enforcement and interpretation is entitled to great weight and persuasive force, and the courts will not depart from that interpretation unless it is clearly

erroneous. United States v. Seaboard Coast Line R.R., 368 F. Supp. 1079 (M.D. Fla. 1973); Daniel v. Florida State Turnpike Authority, 213 So. 2d 585 (Fla. 1968); Cohen v. School Board of Dade County, 450 So. 2d. 1238 (Fla. 3rd DCA 1984).

34. Respondent's excessive absenteeism has been adequately documented, as was the potential for his termination from employment. He was aware of the established notification procedure utilized in the maintenance department in the event of prospective absence or tardiness. He was put on notice in each of his annual assessments that his absenteeism was burdensome to his department and that his performance in that regard needed improvement or was unsatisfactory. He was the subject of progressive discipline, receiving a one-day and five-day suspension. Under the terms of the Collective Bargaining Agreement, a third offense would warrant termination. He was reminded of the probability of termination for a third absence without leave by the Collective Bargaining Agreement, his supervisor and the Superintendent of Schools. When he revealed a medical condition and counseling for substance abuse, he was given more than a month off to adjust his medication and "get it together."

35. As previously stated, Petitioner has established that it was the practice in the maintenance department to allow employees to call in prior to the start of the work day and up to

15 minutes after the start of the work day to avoid discipline for an absence or tardiness; that failure to do so would result in an absence without leave. Respondent called in 58 minutes after the start of the work day and was, therefore, absent without leave. He had been given notice that a third absence without leave could lead to additional discipline as contemplated by the Collective Bargaining Agreement. If this was the sole reason for termination, it would be questionable, but after Respondent's seven-year history of absenteeism, Petitioner's cautionary counsel, its consideration of Respondent's medical problem, and progressive discipline, termination for this third offense is appropriate. Petitioner has met its burden of proof by showing a preponderance of competent, substantial evidence to support termination for just cause as contemplated by the Collective Bargaining Agreement. Cf. Industries, Inc. v. Long, 364 So. 2d 864 (Fla. 2d DCA 1978); Johnson v. School Board of Dade County, 578 So. 2d 387 (Fla. 3d DCA 1991.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding Respondent, Doug Porter, guilty of the allegations stated in the Petition for Termination and that his employment be terminated.

DONE AND ENTERED this 31st day of August, 2007, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of August, 2007.

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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.