

employment, related to alleged excessive absences, during the 2007-2008 school year.

PRELIMINARY STATEMENT

This cause arose when the Board advised the Respondent that her employment was being terminated based upon alleged excessive absenteeism and failure to follow board policies with regard to absences. The Respondent availed herself of the right to a formal proceeding and hearing to contest the position of the Board. The Petition was referred to the Division of Administrative Hearings and ultimately to the undersigned Administrative Law Judge. After a continuance was granted, for good cause, the matter was scheduled for final hearing on August 29, 2008.

The cause came on for hearing as noticed. The Petitioner presented the testimony of two witnesses at hearing: Mr. Charles Johnson and Ms. Heather Martin. Mr. Johnson is the principal of Westside Elementary School and Ms. Martin is the executive director of the Office of Business Services and Human Resources for the Board. The Petitioner had Exhibits 1 through 31 received into evidence.

The Respondent presented the testimony of Jennifer Gallagher as the only witness. The Respondent offered Exhibits one through three which were received into evidence. Upon conclusion of the hearing the parties determined to have the

evidence transcribed and to submit proposed recommended orders. The Proposed Recommended Orders were timely received and have been considered in the rendition of this Recommended Order. All references are to the 2007 version of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. The Petitioner Board is charged with operating and administering the Hernando County School District. Through its principals and human resources personnel the Board is charged with operating and regulating all personnel matters, including the monitoring of attendance for all employees at each school operated by the Board.

2. Mr. Charles Johnson was the Principal at Westside Elementary School (WES) for the 2007-2008 school year at issue in this case. He had been the principal at that school since 1988 and it was his duty, among other personnel matters, to monitor the attendance of his employees at the school.

3. The Respondent was employed at WES during the 2007-2008 school year. She had been hired to work there for the first time that year. She had, however, been employed by the Board as a teacher since 1997. Prior to the school year in question, the Respondent had a very favorable record as a teacher for the Board.

4. Soon after the Respondent came to work at WES for the 2007-2008 school year she began to exhibit a pattern of frequent absences. The principal, Mr. Johnson, became concerned with Respondent's absences in late September of 2007 because a parent-teacher conference was imminent and report cards or progress reports were due for the first nine-week grading period around that time.

5. The principal maintained a record of the teachers' attendance, including the Respondent. He created a log documenting the Respondent's absences from August 2007 through January 2008. The Respondent was absent five days in August and present for ten days. She was present for ten days and absent for nine days in September. The Respondent was absent on both October 1 and 2, 2007, as well.

6. The Respondent called the principal's secretary on October 2nd to advise that she had a doctor's appointment on the third and would return to work on the fourth. The Respondent did not return to work on October 4th, however. The principal thereupon sent the Respondent a letter advising her that her absences were excessive and she needed to report to work by October 10th. He gave her some lead time in getting back to work because he was unaware of the reasons why she was missing so much work. He also wanted to allow for any delays due to mailing time for his letter, which was mailed on October 4th.

7. The Respondent called the principal and spoke with him on October 8th and advised him that she had been sick and had been "beaten-up." She assured him that she would return to work the next day. The Respondent, however, did not return to work the next day and also failed to come to work on October 10, 2007, as directed in the principal's letter. She did call the school office and leave a voice mail on the principal's phone that morning assuring him that she would be at work the next day, which was October 11th.

8. The Respondent did not return to work on October 11th as promised. Because of her failure to return to work, the principal sent a letter to her dated October 15, 2007, advising her that he had scheduled a "pre-disciplinary hearing" for October 19, 2007, which she should attend. The purpose of that hearing was to give her an opportunity to explain her "excessive absenteeism."

9. The Respondent thereupon was absent from work every day during the week of October 15th, and then failed to attend the scheduled hearing or meeting on October 19th. Moreover, she did not call or otherwise communicate with the principal that week to explain her absences or why she had missed the meeting.

10. Thereafter, the Principal sent the Respondent a letter dated October 23, 2007, again scheduling a pre-disciplinary hearing. The hearing was scheduled for October 30th. The

letter was both mailed and personally delivered to the Respondent. Upon receipt of the hand-delivered copy of the letter, the Respondent phoned the principal and spoke to him. According to Mr. Johnson, the Principal, the Respondent told him in this conversation that she had not opened his previous letters, but she assured him she would be at work the following day. The Respondent, however, did not return to work on the following day, which was October 25, 2007, nor did she attend the pre-disciplinary hearing on October 30th, which Mr. Johnson had scheduled. Mr. Johnson, therefore, sent a letter to the Respondent on October 31st advising her that he was recommending to the Superintendent that she be suspended with pay. He sent a letter to the School District office of Labor Relations and Professional Standards on the same day referring the matter to that office, along with copies of all the relevant documents he had which evidenced what he believed were excessive absences.

11. Because of her 10 days or more of consecutive absences, under Board policy, the Respondent was administratively placed on unpaid leave of absence, instead of being suspended with pay as recommended by her principal. The unpaid leave of absence had an effective date of October 15, 2007. Such a leave of absence is designed to enable a principal to replace a teacher in the situation of the Respondent with a

permanent certified teacher, to assure continuity of effective instruction.

12. The Respondent was sent instructions regarding her leave of absence by mail on October 15, 2007, from the Human Resources Department of the District. She was thus informed that she could elect to go on extended personal leave or on family medical leave. No information was received from the Respondent in response to this communication, however. The Respondent maintains that she provided a document concerning family medical leave. That form, however, was merely a medical certification statement and not an actual application or request for family medical leave. Moreover, the evidence shows that the Respondent was not qualified for family medical leave, even had a proper application been submitted, because she had not worked a sufficient number of hours in the preceding school year to establish her entitlement to family medical leave under the relevant rules and policies.

13. An employee conference was held with the Respondent on November 2, 2007. The Respondent, the principal, and Ms. Barbara Kidder, who is the Director of Labor Relations and Professional Standards for the School District, were in attendance at the meeting. The Respondent assured them at the meeting that she would return to work the following Monday, November 5th and thereafter maintain satisfactory attendance.

She also agreed to seek assistance through the Employee Assistance Program (EAP) and agreed to advise the school when she had appointments with that program.

14. It was not unusual for Mr. Johnson to have continued the disciplinary process and communication with the Respondent about her absenteeism throughout the month of October, even though she was on a leave of absence. She had been placed on that leave of absence by the District so that it could hire a replacement teacher. It was not a leave she had voluntarily requested. Moreover, even without considering the days of absence while she was on her administrative leave of absence, the principal had a basis for pursuing disciplinary action for the absences she had previously incurred.

15. November 5, 2007, was approved by the District as the Respondent's "early return date" from that leave of absence, which had started on October 15th. Indeed, the Respondent came to work on Monday, November 5th. She was, however, absent for the rest of that week. She did not contact either the principal or his secretary concerning those absences. She called the automated system for assigning substitute teachers (SEMS), which does not constitute nor grant any excuse for an absence. It is merely a means of scheduling or assigning substitute teachers.

16. School did not meet on November 12th, a Monday. On Tuesday, November 13th the Respondent called and left a voice

mail message for the principal advising that she had been to the doctor on the Friday before for strep throat and a respiratory infection. She assured him that she would be back the following day November 14, 2007.

17. The Respondent, however, did not report to work on November 14th, but instead called and spoke with the principal around 10:00 a.m., advising him that she just left the doctor's office. She advised him that she had a note indicating she would be clear to report to work on the following Monday. The Principal reminded her that the next week was Thanksgiving week and no school met that week. The Respondent then agreed to come to work on Monday, November 26th and advised that she would have the doctor's note with her at that time.

18. The Respondent failed to report to work on November 26th, as she had promised and did not contact the Principal or his secretary concerning that absence. She also missed work November 27th through the 30th, and did not call the principal or his secretary to explain those absences.

19. The principal accordingly sent her another letter on November 29th advising her that a pre-disciplinary meeting was again scheduled for December 4th to discuss her absences. She did not attend the pre-disciplinary meeting on December 4th nor did she report to work that entire week. She failed to contact

the principal or his secretary and explain her absences from work that week and her absence from the scheduled meeting.

20. On December 5, 2007, the principal sent another letter to the Respondent advising her that he was referring her case or situation to the labor relations office. On that same date he sent a memorandum to the director of the labor relations office enclosing all the relevant documentation he had regarding the absences. That office then sent the Respondent a letter on December 5th which advised her that a pre-disciplinary meeting was scheduled for December 12th.

21. The pre-disciplinary meeting was held on December 12th and the Respondent and Ms. Kidder were in attendance. Ms. Kidder gave the Respondent information on the EAP and advised her that she would be reviewing the Respondent's case with the Human Resources Office and the Petitioner's attorney.

22. On December 14th the Respondent met with Ms. Kidder and the principal. The Respondent on this occasion was given a "letter of direction," advising her that she would be assigned a "mentor" and advising her of procedures for absences. The procedures she was directed to follow for absences included a stipulation that a doctor's note would be required for all future absences.

23. The letter of direction given to the Respondent on December 14th contained the following requirements or procedures

for the Respondent to follow with regard to her work and her absences:

A. She was be assigned a "mentor" teacher to assist her with transitioning back to work.

B. She was to report to administration each day before reporting to her classroom.

C. She was to meet weekly with administration to review her attendance and her progress.

D. She was expected to be in attendance each day starting Monday, December 17, 2007, and was to follow the Principal's specific directions regarding the process for obtaining approval for sick leave.

E. She was to contact the principal if she had any questions concerning working hours, timesheets, absences, tardiness, sickness at work, leaving the building or related employee issues.

F. She was being placed on probationary status for one year and any future violations of Petitioner's policies or procedures or any administrative directives would constitute "just cause" for disciplinary action up to and including termination.

G. She was expected to contact EAP and attend counseling sessions as recommended by the staff. She was then to document the completed counseling sessions to her principal.

24. During the December 14, 2007, meeting, the Respondent agreed to return to work as directed. She gave no indication that she would be unable to return to work or perform her duties or that there would be any restrictions on her ability to return to work.

25. The Respondent provided no doctor's notes explaining illnesses or absences during either the December 14th meeting or the November 2nd meeting with the Principal.

26. In fact, the Respondent did not return to work the following Monday, December 17th. She also missed the rest of that week and did not contact administration directly about her absences as she had been directed to do on December 14th and as the "letter of instruction" had directed her to do.

27. The Respondent produced phone records at the hearing and testified that certain calls represented conversations with either the Principal or his secretary. This was in an effort to show that she had properly explained her absences. She did not, however, provide corroborating testimony as to which of the calls on the records were specific to a person as opposed to simply leaving a voice mail for that number or receiving no answer at all.

28. In any event, Ms. Kidder sent the Respondent a letter on December 20th reminding her that it was her responsibility to provide a doctor's note in explanation of her absences and that she was supposed to return to work on December 17, 2007. The letter reminded the Respondent that her attendance was critical.

29. The last week of December 2007 and the first week of January 2008, constituted the District's school Christmas Break.

30. The first day of school following Christmas Break was Monday, January 7, 2008. The Respondent did not return to work that day, even though she later presented notes from Doctors Khalil and Alshaar indicating that she was able to work that day. The Respondent did report for work on January 8th, but then was absent for January 9th and 10th. She reported for work on January 11th, but later produced a note from Dr. Alshaar indicating that she should be excused for that day.

31. Ms. Kidder sent the Respondent another letter on January 25, 2008, advising her that a "pre-determination hearing" had been scheduled for February 1, 2008, to again review her absences since January 7, 2008.

32. The Respondent acknowledges that she received the correspondence from the Petitioner referenced above. She was also aware of the Petitioner's policies and procedures on attendance and leaves of absence. She signed a receipt indicating that she had received the Staff Handbook which

outlines specific policies and references the School Board Policy Manual in general. Additionally, the Respondent acknowledged to the Principal that "time and attendance" were reviewed during her "new employee orientation" at the school.

33. Teacher absences have a negative impact on the classroom, the students and the school. The principal had to ask other teachers to cover the Respondent's classroom and to use substitutes. A teacher's credibility and the trust of students is impaired when the teacher is constantly absent or alternately appearing or being absent from the classroom on a frequent basis.

34. Mr. Johnson established that the Respondent had the worst attendance record he had experienced with a teacher in his 20 or so years as a principal. Her absences for the 2007-2008 school year far exceeded that of any other teacher at the school.

35. The Collective Bargaining Agreement covering teachers in Hernando County, including the Respondent, provides that sick leave is allowable without loss of pay as provided for by Florida Law and that personal leave should be approved by work site administrators, except in cases of substantial emergency. The Hernando County Staff Handbook is in evidence as Petitioner's Exhibit 24. It provides the details of the Board's policies and procedures on absences, leaves of absence, sick

leave and leaves made necessary by sudden emergencies, etc. The general information concerning leaves of absence, the policies and procedures concerning family medical leave, notification of absence, absence without leave, sick leave, depicted in that exhibit are incorporated in these Findings of Fact by reference. Those policies and procedures include the requirement that where there is any doubt as to the validity of a sick leave claim, the superintendent may require the filing of a written certification of illness from a licensed physician or other supporting evidence if personal illness is not involved. It then provides the consequences of false claims for sick leave, proceeding to list cancellation of a teacher's contract or for action seeking revocation of a teaching contract. It also includes a provision that an application for sick leave due to extended illness shall have attached to it a statement from a practicing physician certifying that such leave is essential and indicating the probable duration of the illness and the needed leave.

36. There is no question, given the pattern of extensive absences, and given the Respondent's lack of communication with the principal, or even the principal's secretary, concerning the reason for her absences or the legitimacy of any illness, that the Principal could have doubts as to the validity of any sick leave or illness claims. He was thus proceeding within the appropriate policies contained in the Manual and Handbook in

requiring physician certification or proof concerning illness or absences, which mostly was not provided by the Respondent.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

38. The Respondent is an instructional employee of the above-named School District, as defined by Section 1012.01(2), Florida Statutes. In accordance with Section 1012.27, Florida Statutes, the superintendent is authorized to recommend to the Board that instructional employees be suspended or dismissed from employment. The Board has the authority to terminate or suspend such employees, pursuant to Sections 1012.22(1)(f) and 1012.33(6)(a), Florida Statutes.

39. Section 1012.33(1)(a), Florida Statutes, establishes the standard for termination of instructional personnel as being for "just cause." That concept is not defined in a detailed fashion in the statutes. The Petitioner has discretion, subject to review by formal proceeding, in setting standards which constitute just cause to discipline employees, including termination. See Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2nd DCA 1994).

40. It is the Board's burden to establish just cause by a preponderance of the evidence. McNeill v. Pinellas County

School Board, 678 So. 2d 476 (Fla. 2nd DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990); see also § 120.57(1)(j), Fla. Stat.

41. A preponderance of evidence has established that the Petitioner herein has "just cause" to terminate the Respondent. The Respondent has a record of excessive absences over an extensive period during the 2007-2008 school year, which are without proper authorization. Indeed, even in testimony at hearing the Respondent gave little explanation of the reason for the absences which might have helped to justify some lesser disciplinary measure.

42. The Petitioner presented ample evidence of the absences as to the school year in question and the Respondent clearly failed to follow procedures outlined in School Board policies, as well as in specific directions given to her by her principal upon her return from leave in November 2007 (even without considering the frequent, unexplained absences before the administrative leave started October 15, 2007). She further failed to follow procedures outlined in the letter of direction of December 14, 2007.

43. The Respondent was clearly aware of the applicable procedures or requirements for the use of sick leave or personal leave. She signed for the receipt of the staff handbook that outlines the relevant procedures and references the applicable

School Board policies. She also acknowledged in writing upon her beginning of employment at the school that she had discussed time and attendance procedures with her supervisors. Moreover, even the union contract advises teachers that sick leave shall be administered in accordance with Florida Law and mirrors certain provisions from the staff handbook or School Board policies regarding leave.

44. The Respondent attempted to justify some of her absences through testimony about various doctor's appointments and diagnoses, but she failed to rebut the evidence adduced by the Board that her absenteeism was excessive, that she failed to comport with established procedures in the way she handled her absences, and that it was detrimental to the school, as well as to her students. Further, she failed to present evidence that each absence documented by the Petitioner was excused by a doctor's note. Even in those situations where an absence was covered by a doctor's note, she failed to show that the absence had indeed been excused by her Principal. It is elementary and indeed the Respondent was on notice, that in addition to having a doctor's note justifying an illness absence, the note must be shown to a supervisor or Principal and approval of the absence must be obtained. Merely obtaining the note and failing to communicate about it does not constitute excusing an absence.

45. Concerning her position regarding her phone calls to the school, based upon her evidence of phone bills, the Respondent did not prove those calls resulted in excused absences nor that they resulted in actual conversations with the principal, a person who could excuse absences or who could report that a justification for the absence had been provided by the Respondent by phone or even that a message had been left on voice mail.

46. The Respondent contends that she should be on an extended leave of absence from October 2007 through the filing date of the subject Petition. That has not been proven to be the case, however. The extended leave she was placed on as of October 15, 2007, was done by the Petitioner in accordance with its regularly established policies, because it needed to obtain another teacher to cover the Respondent's classes. The administrative leave was not because the Respondent had requested it or for some reason had shown entitlement to it. The leave of absence was initiated by the Petitioner because the Respondent had been absent at that point for at least 10 consecutive days, as envisioned in the School Board's leave policy. The Respondent's potential entitlement to an extended leave of absence was not demonstrated to the Petitioner at that time because of her lack of communication with her supervisors concerning her absences and the reasons for them. In a de novo

context, she also did not adequately explain a reasonable and appropriate justification for most of her absences during her testimony at hearing.

47. The Respondent also maintained at hearing that the Petitioner should not have pursued this disciplinary action against her during the extended leave of absence. There was shown to be no policy, rule or current procedure preventing the Board from doing so, however, and the Respondent did not raise an objection to returning to work during the meeting she had with the principal and Ms. Kidder on November 2, 2007. In fact, she agreed to return to work on the following Monday, November 5th, without condition, and indeed returned to work on that day. She thus had to have known that her leave of absence was finished by virtue of her return to work on November 5th. Whether or not the Board should have pursued (in the Respondent's view) disciplinary action during her leave of absence period from October 15th to November 5th, 2007, the fact remains that the preponderant evidence establishes that more than enough absences had occurred prior to October 15th and after November 5th to justify disciplinary action.

48. In fact, the Respondent missed half of the school days in August and almost half of the school days in September of 2007. She also missed all but one of the days in November after she returned to work November 5, 2007. She did not work any

days in December and only worked 2 days in January 2008. The Respondent simply failed to explain to the Petitioner at the time, or in her testimony at hearing, the reasons and concerning the reason for the absence justification for all those missed days, even for those that were covered by doctor's note. She failed to demonstrate that the days of absence arguably justified by a doctor's note had actually been excused by the Petitioner, primarily because she had failed to show that she had communicated that fact to the Petitioner, to her supervisors.

49. The Respondent's contention that, because she had made application for family medical leave, the termination or disciplinary action should have been abated is without merit. First, it was uncontroverted that the form she used to file with the Petitioner was not an application for family medical leave but simply a certification by her physician. Secondly, it was uncontroverted that the Respondent was not entitled to family medical leave, even had she properly applied for it, because she had not worked the requisite number of hours in the preceding school year.

50. The Respondent has predicated her defense on her position that her illness or illnesses justified her absences and were evidenced by physician's notes providing medical reasons for the absences. However, there were at least two

occasions when she acted contrary to the advice of her physicians. She was absent on January 7, 2008, despite the fact that two treating physicians indicated in writing that she was fit to work on that date. Conversely, she was able to come to work on January 11, 2008, despite the fact that Dr. Alshaar had provided her with a note indicating that she should have been excused from work starting on January 9th and continuing through that date. These revelations, upon cross-examination, tend to render her testimony that her absences were justified due to health problems, as buttressed by physicians' notes, less than persuasive. Her absences seem more dictated by her personal wishes than based upon actual illness supported by physicians' notes.

51. There is no question that the preponderant, persuasive evidence shows that the Respondent received both verbal and written instructions concerning how to properly report and justify her absences and yet she failed to follow those directions repeatedly. The conclusion is inescapable that she was less than candid with her supervisors concerning how truly ill or incapacitated she was by alleged illness during the course of these absences. The vast majority of her absences were not shown to have been based upon instructions from her physicians, but rather upon her personal wishes.

52. A number of cases in Florida have held that the termination of teachers was justified based upon unexcused and excessive absenteeism. See Seminole County School Board v. Andrews, DOAH Case No. 07-2486 (RO: September 20, 2007); Duval County School Board v. Johnson, DOAH Case No. 04-2138 (RO: March 2, 2005).

53. In summary, the Petitioner has demonstrated by preponderant, persuasive evidence that it has good cause to terminate the Respondent under the circumstances delineated in the Findings of Fact and discussed in the Conclusions of Law above. It is unfortunate that the Respondent was not more forthcoming with her supervisors and the Petitioner during the course of the incurrence of these absences. Had she been so, she might have had more success in justifying the absences. Sadly, the same is true of her testimony at hearing, in the de novo context of this proceeding. The Respondent had a good record during 10 years of employment by the Petitioner, prior to the school year in question. Based upon the evidence in this case one must still wonder what happened to change that.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the School Board of Hernando County Florida terminating the Respondent from her position as a teacher with that School District.

DONE AND ENTERED this 4th day of December, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 4th day of December, 2008.

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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.