

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 08-4213
)
 SAYDEL MAS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on January 30, 2009.

APPEARANCES

For Petitioner: Jean Marie Middleton, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Randy A. Fleischer, Esquire
8258 State Road 84
Davie, Florida 33324

STATEMENT OF THE ISSUE

The issue is whether Petitioner has just cause to terminate Respondent's employment as a Coordinator I in the Facilities Design and Standards Department.

PRELIMINARY STATEMENT

By Notice of Specific Charges filed September 24, 2008, Petitioner alleged that, from March to September 2007, Respondent received, in addition to his regular salary from Petitioner, checks totaling over \$17,000 directly from Morales Moving and Storage Company, a vendor of Petitioner. The Notice of Specific Charges alleges that Respondent's work computer hard drive contained "images of nude women, women in bikinis, and other pornographic photographs," and the images bore Respondent's user ID.

Count I of the Notice of Specific Charges realleges the above-cited allegation and alleges that Petitioner's Rule 6Gx13-4A-1.21 requires all School Board employees to "conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system." Count I alleges that the receipt of funds directly from a vendor while employed by the School Board does not reflect credit upon Respondent and the school system.

Count II of the Notice of Specific Charges realleges the above-cited allegations and alleges that Petitioner's Rule 6Gx13-4A-1.212(D) prohibits conflicting employment or contractual relationships.

Count III (miscited as Count IV) of the Notice of Specific Charges realleges the above-cited allegations and alleges that Section 1012.32(1), Florida Statutes, requires good moral character for continued employment. Count IV alleges that Respondent demonstrated a lack of good moral character by accepting funds directly from a vendor with whom the School Board contracted and by viewing inappropriate material on a School Board computer.

Count IV (the second Count IV) of the Notice of Specific Charges realleges the above-cited allegations and alleges that Respondent's "actions and admissions" are a violation of Petitioner's Rule 6Gx13-4A-1.213 and Florida Administrative Code Rules 6B-1.001 and 6B-1.006.

At the hearing, Petitioner called five witnesses and offered into evidence 11 exhibits: Petitioner Exhibits 1-2, 5, 7, 9-14, and 20, which were all admitted. Respondent called one witness and offered into evidence no exhibits.

The court reporter filed the Transcript on February 17, 2009. The parties filed their Proposed Recommended Orders by March 2, 2009.

FINDINGS OF FACT

1. Respondent has worked for Petitioner under two arrangements. At first, he worked part-time as Capital Improvement Project Support Clerk and received his pay checks

from Petitioner. Respondent left this employment for military service. When he returned from military service, he wanted to return to employment with Petitioner, but was unable to do so due to a hiring freeze.

2. However, Petitioner hired Respondent, arranging for a vendor, Brown & Brown Architects, to pay Respondent, who oversaw relocation crews that received and assembled new equipment. In late 2003, when the hiring freeze ended, Petitioner hired Respondent directly as a Capital Improvement Project Project Specialist. While receiving pay checks from Brown & Brown Architects and subsequently from Petitioner directly, Respondent worked under the direct supervision of Willie Lopez, an employee of Petitioner.

3. On July 1, 2005, Petitioner reassigned Respondent to Office of Facilities Design & Standards Coordinator I. At this time, Respondent began to work under the direct supervision of William Barimo. Respondent was employed in this position until his suspension without pay, as described below.

4. At some point, Mr. Lopez and Rose Diamond approached first Respondent and then Mr. Barimo and asked if Respondent could help Mr. Lopez clear backlogged work by working after regular hours. They offered to pay Respondent at his regular hourly rate. Respondent wanted the chance to earn additional money, and Mr. Barimo consented to this arrangement. Mr. Barimo

considered Respondent to be an excellent employee who had always demonstrated good moral character during the five years that Respondent worked under Mr. Barimo's supervision.

5. At the time of agreeing to this arrangement, Mr. Barimo told Respondent that he needed to complete his regular work for Mr. Barimo before performing additional work for Mr. Lopez. Mr. Barimo did not warn Respondent that he could not work for a vendor of the School Board.

6. On March 12, 2007, Respondent began performing additional work for Petitioner under the supervision of Mr. Lopez. Mostly, Respondent worked at a single facility of Petitioner, although he sometimes worked out of his home or at other facilities of Petitioner.

7. Respondent did not receive a pay check for this additional work until April 17, 2007. When Respondent received the check, he noticed that it was from Morales Moving and Storage. Only after he had begun asking about his compensation did Respondent learn, not more than one week prior to receiving the first check, that Petitioner would not be paying him. However, Respondent did not consider himself an employee of Morales Moving and Storage because he performed all of his additional work under the supervision of Mr. Lopez, an employee of Petitioner, and the work was for Petitioner.

8. Respondent performed additional work, under this arrangement, from March 2007 to September 2007, earning over \$17,000. Respondent submitted his timesheets to a colleague of Mr. Lopez, Ms. Ramos. She submitted the timesheets to Morales Moving and Storage. Toward the end of this period, Mr. Lopez died, and Ms. Ramos, assuming Mr. Lopez's responsibilities, informed Respondent that she was having problem obtaining payment for Respondent and other, similarly situated employees. Shortly after that, Petitioner's investigators contacted Respondent with respect to an investigation of the arrangement with which Mr. Lopez had been involved.

9. Respondent had become involved in some sort of fraudulent scheme in which Mr. Lopez, but not Ms. Diamond, was involved. The details of the scheme are unclear, but nothing in this record suggests that Respondent was a knowing participant in the scheme. Other of Petitioner's employees were also caught up in this scheme and also received payment from vendors while performing Petitioner's work, but not all such employees were terminated.

10. Several facts suggest that Respondent's involvement in Mr. Lopez's scheme was entirely unwitting. Mr. Lopez and Ms. Ramos approached Respondent's current supervisor, who approved the arrangement. Working under his previous supervisor, Mr. Lopez, Respondent was performing work of

Petitioner, mostly in facilities of Petitioner and at his normal rate of pay with Petitioner. Lastly, Respondent had previously been employed, legitimately, in an arrangement in which he had done Petitioner's work, but had been paid by a vendor.

11. Under these circumstances, at no time was Respondent employed or in a contractual relationship with Morales Moving and Storage. At all times, Respondent performed work of Petitioner, under the supervision of one of Petitioner's employees, and, at no time, was Morales Moving and Storage contractually obligated to pay Respondent for this work. The contractual relationship, and thus the conflict, evidently existed at the level of Mr. Lopez, not Respondent.

12. In the course of the investigation of Mr. Lopez's scheme, Petitioner's investigators inspected the hard drive of Respondent's work computer and found inappropriate sexual content. The investigators determined that the images were linked to Respondent's ID. Generally, the computer was in an area that was accessible by others. Respondent typically signed in at the start of his work shift, but often, while leaving the computer in a signed-in condition, left the building to perform work at remote school sites. Respondent denied downloading any sexually inappropriate material and, given the circumstances, it is impossible to find otherwise.

13. In August 1, 2008, Petitioner suspended Respondent without pay. He has since been employed only for a short period of time.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

15. Petitioner's Rule 6Gx13-4A-1.21(I) states:

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.

* * *

16. Petitioner's Rule 6Gx13-4A-1.212(D) states:

D. Conflicting Employment or Contractual Relationship

1. In addition to the restrictions on outside employment that School Board Rule 6Gx13-4C-1.17, Employment--Nonschool, places on employees, no School Board employee shall hold any employment or contract with any business entity or any agency that is doing business with the School Board. . . .

2. In addition to the restrictions on outside employment that School Board Rule 6Gx13-4C-1.17, Employment--Nonschool, places on employees, no School Board 6Gx13-4A-1.212 employee shall have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her

private interests and the performance of his or her public duties, or that would impede the full and faithful discharge of his or her public duties. Section 112.313.(7)(a), Florida Statute (2002).

17. Section 1012.32(1), Florida Statutes, requires "good moral character" for eligibility for appointment in any position in a school district.

18. Petitioner must prove the material allegations by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

19. Petitioner failed to prove that Respondent violated any of the cited rules or statute as to the computer pornography. As pleaded and in two extensive prehearing conferences, Petitioner's theory of the computer case has been that Respondent downloaded and viewed the sexually inappropriate material found on his computer. At the start of the hearing, Petitioner attempted to broaden this allegation to include a charge that Respondent failed to maintain computer security, but the Administrative Law Judge struck this new charge, for which Respondent had not prepared. As for the charges consistently advanced against Respondent--downloading and viewing pornography--the evidence failed to link him to such material found on his computer. As found above, Respondent frequently left his computer in a signed-in condition where other persons

had free access to the computer and could have downloaded the pornography.

20. Petitioner failed to prove that Respondent violated any of the cited rules or statute as to the additional work that he performed for Mr. Lopez. Although he obviously accepted pay checks from Morales Moving and Storage, Respondent was never employed by Morales Moving and Storage, nor was he ever in a contractual relationship with this vendor. Never having reached any sort of agreement with anyone from Morales Moving and Storage, Respondent had no enforceable contractual rights against this company, either as an employer or otherwise. It is entirely reasonable that, to Respondent, the arrangement looked like the one under which he legitimately had worked for Petitioner while being paid by Brown & Brown Architects. On this record, Respondent has not violated any rule against a conflict of interest by way of employment or contractual relationship.

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order dismissing the Notice of Specific Charges.

DONE AND ENTERED this 16th day of April, 2009, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of April, 2009.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.