

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SCHOOL BOARD OF SARASOTA)
COUNTY, FLORIDA,)
)
Petitioner,)
)
vs.) Case No. 08-6420
)
TIMOTHY GILL,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Sarasota, Florida, on March 13, 2009.

APPEARANCES

For Petitioner: Hunter W. Carroll
Matthews, Eastmoore, Hardy,
Crauwels & Garcia, P.A.
1777 Main Street, Suite 500
Sarasota, Florida 34236

For Respondent: Lisa J. Kleinberg
Law Offices of Kleinberg,
Ingram & Murphy, P.L.
2189 Ringling Boulevard
Sarasota, Florida 34237

STATEMENT OF THE ISSUE

The issue is whether Respondent is guilty of insubordination for the use of excess leave and sleeping in his vehicle during working hours.

PRELIMINARY STATEMENT

By July 3, 2008, Petitioner's superintendent mailed a letter to Respondent informing him that he had recently had two separate meetings to discuss employment-related issues. In the first meeting, Petitioner's Director of Facilities Services spoke with Respondent and his union representative about insubordination by using excess leave. In the second meeting, Petitioner's Director of Facilities Services spoke with Respondent and his union representative about insubordination for twice sleeping in his vehicle when he should have been working. The letter concludes that the superintendent will recommend the termination of Respondent's employment to the school board. After completion of a grievance process, the superintendent sent Respondent a letter to the same effect, dated December 9, 2008.

At the hearing, Petitioner called four witnesses and offered into evidence eight exhibits: Petitioner Exhibits 1-3, 4-5, 6 (only letter of July 11, 2008), and 9-10. Respondent called two witnesses and offered into evidence two exhibits: Respondent Exhibits 1-2. All exhibits were admitted, except Petitioner Exhibit 6 was not admitted for the truth of its contents.

The court reporter filed the Transcript on March 27, 2009. The parties filed proposed recommended orders by April 16, 2009.

FINDINGS OF FACT

1. On or about April 21, 2004, Petitioner hired Respondent as a school custodian. Starting on December 11, 2007, Petitioner transferred Respondent to Toledo Blade Elementary School. One year later, Petitioner transferred Respondent to the Transportation Department, which is the building housing the transportation offices.

2. As a custodian, Respondent is a "classified" employee. He is covered by the Classified Bargaining Unit Collective Bargaining Agreement between the Sarasota Classified/Teachers Association and Petitioner (the contract).

3. Twice on the morning of April 25, 2008, during working hours and not while on a break, Respondent walked from his worksite to his vehicle, climbed into the vehicle, and nodded off to sleep. The first nap lasted for about one hour, and the second nap lasted about one and one-quarter hours. The second nap ended when Respondent's boss and the boss's boss walked out to the vehicle where they found Respondent, who had put the driver's seat down, laid out in the front driver's seat, with the radio on, sound asleep. They woke him and ordered him back to work.

4. Respondent's defenses are: 1) he was not asleep; he was unconscious; and 2) he was suffering from extreme drowsiness due to medications that he was taking following his recovery

from a three-month coma into which he had fallen two years earlier.

5. Both of Respondent's defenses are makeshift. According to Webster's online dictionary, "sleep" is the "natural periodic suspension of consciousness during which the powers of the body are restored." (<http://www.merriam-webster.com/dictionary/sleep>, as found on June 17, 2009) If he had suddenly lost consciousness at the worksite, no one would claim he was sleeping on the job. Instead, without reporting any difficulties to anyone, he walked out to his vehicle, made himself comfortable, and fell asleep. The problem was that his natural period of suspended consciousness coincided with time during which Petitioner was paying him. The requisite restorative effect is inferred. Nor is there any credence to the claim of a medical condition or effect of a medication that would leave Respondent unable to resist falling asleep while on duty. Although ample opportunity existed, Respondent failed, on the day in question, to bring to the attention of his supervisor any medical reason for sleeping on the job, which was exactly what he was doing.

6. Article XXI of the contract authorizes discipline for "just cause." Sleeping while on duty, for over two hours prior to lunch, constitutes insubordination and just cause for discipline.

7. The leave issue is more complicated. Petitioner is on a fiscal year starting July 1. For the entire year, classified, 12-month, hourly employees, such as Respondent, accrue six personal days on July 1. For sick days, these employees accrue one day at the end of July and three advance days. They then accrue a day at the end of each following month through March. Unused sick days rollover to the next year, but unused personal days do not. Personal days count against the sick days. In other words, if an employee has five sick days and six personal days and uses a personal day, he will then have four sick days and five personal days. Employees also earn vacation days.

8. As explained by Petitioner's payroll supervisor, the payroll system facilitated recharacterizations between sick and personal days. However, the system did not incorporate vacation days in the same fashion. Thus, if an employee took off one day, without claiming sick leave, and lacked one day of personal time, the system would dock his pay, even though he might still have had sufficient vacation time to absorb the time that he had taken off.

9. For the 2007-08 school year, Respondent used "personal leave charged to sick" as follows: September 12--8.0 hours; September 24--8.0 hours; December 20--8.0 hours; December 21--8.0 hours; January 30--0.5 hours; February 15--8.0 hours; and February 27--7.5 hours.

10. On February 27, Respondent missed the entire day of work. Consistent with acceptable practices, on the next day, he submitted a form entitled, "Certificate of Absence." In it, Respondent requested approval for 8.0 hours of "personal leave charged to sick," rather than one of the other categories, such as sick leave or vacation leave. His supervisor signed the form. When the payroll supervisor checked his balances, she saw that he only had 7.5 hours of personal leave charged to sick, so, on May 2, 2008, Respondent had to sign a form entitled, "Request for Personal/Sick/Vacation Leave in Excess of Earned Leave." This form requested approval for the use of 0.5 hours of personal leave in excess of earned leave. The request was disapproved by the Director of Facilities Services with a signature bearing a date of March 13, 2008.

11. The payroll department's practice was not to deduct personal leave charged as sick against vacation leave, if an employee consumed all of his personal leave charged as sick.

12. On March 14, Respondent again requested 2.5 hours of personal leave charged to sick. His supervisor noted on the form that he "cautioned Tim to make sure he has the time available--Tim told me that he does. 3-14-08." By this time, it is unlikely that Respondent had received a new statement of leave balance reflecting the 0.5 hours that he had been short two weeks earlier. On May 2, 2008, Respondent signed another

request for permission to use personal leave in excess of earned leave, and the Director of Facilities denied the request with a signature bearing a date of March 27, 2008.

13. The same process took place again on April 11 for 8.0 hours on April 7. Petitioner notes that this request also violated policy regarding custodial leave on the day immediately after spring break, for which leave requests must be submitted well in advance of the leave sought. Article XVII of the contract requires a special procedure for leave on days immediately preceding and following a school holiday, but the emphasis in testimony was on the importance of adequate custodial staff on such days. However, the purpose of this policy is to address the needs of schools with respect to returning students. Because Respondent was not assigned to a school, nor had he been assigned to one temporarily for returning students, he was not undermining this policy by conforming to general policy, which allowed after-the-fact requests.

14. In any event, as the payroll supervisor testified, it is possible that Respondent still had vacation time each time that Petitioner docked him for requesting personal leave charged as sick when he had already exhausted his personal leave.

15. On these facts, Petitioner does not have just cause to discipline Respondent on the ground of insubordination or any

other ground. There is no doubt that Respondent understood the interplay between personal leave charged to sick and sick leave, but there is considerable doubt as to, on the first two occasions on which he overdrew on his balance of personal leave charged to sick that he knew that he was doing so.

Additionally, there is a reasonable possibility that he had available vacation leave, against which all of this time could have been charged; absent proof from Petitioner precluding this possibility, the entire dispute is reduced to the level of finding the proper account to debit these relatively few hours of missed work. This does not rise to insubordination, nor does it constitute just cause for discipline.

16. Article XXI of the contract requires progressive discipline, which constitutes a verbal reprimand, written reprimand, suspension with or without pay, and dismissal. The next step in progressive discipline for Respondent is suspension with or without pay, not dismissal.

CONCLUSIONS OF LAW

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

18. As an "educational support employee," pursuant to Section 1012.40(1)(a), Florida Statutes, Respondent is subject

to termination for the reasons stated in the contract.

§ 1012.40(2)(b), Fla. Stat. (2008)..

19. Petitioner has the burden of proving the material allegations of the charges by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

20. For the reasons set forth above, Petitioner has proved just cause, in the form of insubordination, to discipline Respondent for sleeping while on duty, but has failed to prove just cause for disciplining Respondent for excessive use of leave. Pursuant to the contract's requirements of progressive discipline, Petitioner may not terminate or dismiss Respondent; the most severe discipline that Petitioner may impose is suspension with or without pay.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that the School Board of Sarasota County, Florida, enter a final order dismissing the charge of excessive use of leave and finding Respondent guilty of the charge of sleeping while on duty and suspending him, without pay, for five working days.

DONE AND ENTERED this 18th day of June, 2009, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of June, 2009.

COPIES FURNISHED:

Hunter W. Carroll, Esquire
Matthews, Eastmoore, Hardy
Crauwels & Garcia, P.A.
1777 Main Street, Suite 500
Sarasota, Florida 34236

Lisa J. Kleinberg, Esquire
Law Offices of Kleinberg,
Ingram & Murphy, P.L.
2189 Ringling Boulevard
Sarasota, Florida 34237

Mrs. Lori White, Superintendent
Sarasota County School Board
1960 Landings Boulevard
Sarasota, Florida 34231-3365

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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 must be filed with the agency that will issue the final order in this case.