

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-0153  
 )  
 KAREN GADSON, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Section 120.57(1), Florida Statutes, on February 27, 2009, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Sonia E. Hill-Howard, Esquire  
Palm Beach County School Board  
3318 Forest Hill Boulevard, Suite C-302  
West Palm Beach, Florida 33406

For Respondent: Karen Gadson  
1711 Wedgewood Plaza Drive  
Riviera Beach, Florida 33404

STATEMENT OF THE ISSUE

Whether Respondent's employment should be terminated for the reasons set forth in the Petition.

PRELIMINARY STATEMENT

By letter dated November 21, 2008, the Palm Beach County Superintendent of Schools (Superintendent) notified Respondent that, at the December 3, 2008, meeting of the Palm Beach County School Board (School Board), he would be recommending to the School Board that it terminate Respondent's employment as a custodian. The letter further advised Respondent of her right to "request[] a hearing before the Division of Administrative Hearings (DOAH)." Respondent subsequently requested such a hearing. On January 12, 2009, the matter was referred to DOAH for the assignment of an administrative law judge to conduct the hearing Respondent had requested. Among the documents transmitted to DOAH by the School Board was a Petition prepared by the School Board's counsel of record and served on Respondent. The Petition alleged that Respondent's record of absenteeism warranted her termination

As noted above, the final hearing in this case was held on February 27, 2009. Five witnesses testified at the hearing: Cheryl Lombard, Robert Pinkos, Claudia Robbins, Angelette Green, and Respondent. In addition to the testimony of these five witnesses, 30 exhibits (Petitioner's Exhibits 1 through 3, 5 through 13, and 17 through 34) were offered and received into evidence.

After the close of the evidentiary portion of the hearing, the undersigned, on the record, established a deadline (15 days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on March 20, 2009.

On April 6, 2009, the School Board filed its Proposed Recommended Order. To date, Respondent has not filed any post-hearing submittal.

#### FINDINGS OF FACT

Based on the evidence adduced at the final hearing, and the record as a whole, the following findings of fact are made:

1. The School Board is responsible for the operation, control, and supervision of all public schools (grades K through 12) in Palm Beach County, including Boca Raton Community High School (BRCHS).

2. Respondent is employed by the School Board as a custodian, but is currently under suspension pending the outcome of these proceedings.

3. As a custodian employed by the School Board, Respondent is a member of a collective bargaining unit represented by the SEIU/Florida Public Services Union (SEIU) and covered by a collective bargaining agreement between the School Board and SEIU (SEIU Contract).

4. Article 7 of the SEIU Contract is entitled, "Employees Contractual Rights." Section 2 of this article provides as follows:

1. Upon successful completion of the probationary period by the employee, the employee status shall be continuous unless the Superintendent terminates the employee for reasons stated in Article 17 - Discipline of Employees (Progressive Discipline).

2. In the event the Superintendent seeks termination of a continuous employee, the 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 in accordance with Article 17 - Discipline of Employees (Progressive Discipline).

5. Article 8 of the SEIU Contract is entitled, "Management Rights," and it provides, in pertinent part, that the School Board has the right "to manage and direct its employees, establish reasonable rules and procedures, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons."

6. Article 17 of the SEIU Contract provides as follows:

1. Without the consent of the employee and the Union, disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action.

2. All disciplinary action shall be governed by applicable statutes and provisions of the Agreement. Further, an employee shall be provided with a written charge of wrongdoing, setting forth the specific charges against that employee as soon as possible after the investigation has begun.

3. Any information which may be relied upon to take action against an employee will be shared promptly with said employee and his/her Union representative as soon as possible. Copies of any written information/correspondence that is related to the action of the employee or the investigating administrator(s) will be provided promptly to the employee and his/her Union representative.

4. An employee against whom action is to be taken under this Article and his/her Union representative shall have the right to review and refute any and all of the information relied upon to support any proposed disciplinary action prior to taking such action. To this end, the employee and the Union representative shall be afforded a reasonable amount of time to prepare and present responses/refutations concerning the pending disciplinary action and concerning the appropriateness of the proposed disciplinary action. This amount of time is to be mutually agreed upon by the parties.

5. Only previous disciplinary actions which are a part of the employee's personnel file or which are a matter of record as provided in paragraph # 7 below may be cited if these previous actions are reasonably related to the existing charge.

6. Where just cause warrants such disciplinary action(s) and in keeping with provisions of this Article, an employee may be reprimanded verbally, reprimanded in writing, suspended without pay, or dismissed

upon the recommendation of the immediate supervisor to the Superintendent and final action taken by the District. Other disciplinary action(s) may be taken with the mutual agreement of the parties.

7. Except in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable School Board rules and regulations, progressive discipline shall be administered as follows:

(A) Verbal Reprimand With A Written Notation. Such written notation shall be placed in the employee's personnel file and shall not be used to the further detriment of the employee, unless, there is another reasonably related act by the same employee within a twenty four (24) month period.

(B) Written Reprimand. A written reprimand may be issued to an employee when appropriate in keeping with provisions of this Article. Such written reprimand shall be dated and signed by the giver of the reprimand and shall be filed in the affected employee's personnel file upon a receipt of a copy to the employee by certified mail.

(C) Suspension Without Pay. A suspension without pay by the School Board may be issued to an employee, when appropriate, in keeping with provisions of this Article, including just cause and applicable laws. The length of the suspension also shall be determined by just cause as set forth in this Article. The notice and specifics of the suspension shall be placed in writing, dated, and signed by the giver of the suspension and a copy provided to the employee by certified mail. The specific days of suspension will be clearly set forth in the written suspension notice which shall be filed in the affected employee's personnel file in keeping with provisions of

Chapter 119 and 231.291 of the Florida Statutes.

(D) An employee may be dismissed when appropriate in keeping with provisions of this Article, including just cause and applicable law.

8. An employee against whom disciplinary action(s) has/have been taken may appeal through the grievance procedure. However, if the disciplinary action(s) is/are to be taken by the District, then the employee shall have a choice of appeal between either the Department [sic] of Administrative Hearings in accordance with Florida Statutes or the grievance procedure outlined in the collective bargaining agreement. Such choice must be exercised within fifteen (15) days of receipt of written notification of disciplinary action being taken, and the District notified accordingly. If the grievance procedure is selected, the grievance shall be initiated at Step Three.

7. Prior to her suspension pursuant to Article 7, Section 2, of the SEIU Contract in December 2008, Respondent was assigned to BRCHS.

8. Respondent started working as a custodian at BRCHS in or around 2006. At the time, she was a full-time employee, with hours from 2:30 p.m. to 11:00 p.m.

9. Respondent had poor attendance as a full-time employee.

10. In or around December 2007, at Respondent's request, the School Board changed her status to a permanent part-time employee, with a four-hour, instead of an eight-hour, work day, five days a week. She continued to work an evening shift. It

was hoped that the change to part-time status would result in improvement in Respondent's attendance.

11. Respondent's attendance, however, did not improve.

12. Consequently, on December 3, 2007, Cheryl Lombard, an assistant principal at BRCHS, sent Respondent the following memorandum concerning "[e]mployment [e]xpectations":

In order to improve your job performance the following directives must be adhered to in order for the school operations to run efficiently:

- You are directed to report to duty at your assigned time 4:00 p.m. Monday through Friday, April 10, 2009.
- You are directed to work your complete four-hour shift from 4:00-8:00 p.m. Monday through Friday.
- You are directed to bring a doctor's note for every absence stating the dates you were under the doctor's care and that you have been released to perform all job responsibilities without restrictions.
- You are directed to notify the lead custodian/night administrator anytime you must leave campus during duty hours.
- You are directed to complete a TDE for all absences, late arrivals, and early dismissals from work.
- You are directed to follow your duty schedule.
- You are directed to clean all assigned areas in accordance with the procedures outlined by the District.
- You are directed to complete all



assignments given in accordance with directions given.

- You are directed to refrain from using your cell phone except during your fifteen-minute break. In case of emergency, please contact Dr. Lombard.
- You are to report to the head custodian/designee upon your arrival on duty.
- You are directed to sign out with the lead custodian every night.
- You are directed to speak to all staff members and others in a professional manner while on District property or on duty.
- You are directed to refrain from threatening fellow custodians.

Failure to follow any of the above mentioned directives will be considered insubordination and may result in disciplinary action up to and including termination.

13. In December 2007, Respondent was absent without leave and/or pay a total of 9.75 hours. She was also out on medical/sick leave a total of 9.5 hours.

14. On January 25, 2008, Ms. Lombard issued Respondent a verbal reprimand (which was followed-up by a "written notation"). The written notation read as follows:

This correspondence is being given to you as a Written Notation of a Verbal Reprimand for Violation of School Board Policy 1.013 as it pertains to insubordination for failure to follow Directives Re: Attendance.

Specifically, you have had excessive tardies

and absences. Furthermore, you have failed to produce a doctor's note stating that you were under his/her care, as was required per the memo you received on December 3, 2007.

You are directed to cease such conduct immediately. Further, you are to desist from engaging in the same or similar conduct in the future. Failure to do so will result in further disciplinary action up to and including a recommendation for termination.

15. In January 2008, Respondent was absent without leave and/or pay a total of 22 hours.

16. On February 6, 2008, Ms. Lombard issued Respondent a written reprimand, which read as follows:

This correspondence is being given to you as a Written Reprimand for insubordination Re: Attendance after our January 25, 2008 meeting.

Specifically, on January 28 and February 4 you were absent and on January 30 you were 30 minutes late for your four (4) hour shift.

Your conduct violated School Board Policy 1.013. Regardless of the circumstances that may have brought them about, such inappropriate actions and/or inactions on your part do not reflect positively on your position.

You are directed to cease such conduct immediately. Furthermore, you are to desist from engaging in the same or similar action in the future. Failure to do so will result in further disciplinary action up to and including termination.

17. Respondent was out on medical/sick leave for a total of approximately six weeks in February and March 2008.

18. On April 17, 2008, Ms. Lombard issued Respondent another written reprimand. This written reprimand read as follows:

This correspondence is being given to you as a Written Reprimand for insubordination regarding attendance after our April 15, 2008, meeting.

Specifically, on April 16, you were absent for two and one half hours of your four hour shift.

Your conduct violated School Board Policy 1.013. Regardless of the circumstances that may have brought them about, such inappropriate actions and/or inactions on your part do not reflect positively on your position.

You are directed to cease such conduct immediately. Furthermore, you are to desist from engaging in the same or similar action in the future. Failure to do so will result in further disciplinary action up to and including termination.

19. In April 2008, Respondent was absent without leave and/or pay a total of 21 hours.

20. In May 2008, Respondent was absent without leave and/or pay a total of 36 hours.

21. Respondent's brother and father passed away in April and May 2008, respectively.

22. In June 2008, Respondent was absent without leave and/or pay a total of 51.5 hours.

23. In July 2008, Respondent was absent without leave and/or pay a total of 21 hours. She was also out on medical/sick leave a total of 15 hours.

24. Up to and including August 6, 2008, Respondent was absent without leave and/or pay a total of 7.5 hours that month.

25. On August 6, 2008, the principal of BRCHS issued Respondent a written directive, which read as follows:

On August 6, 2008, you met with Ms. Lombard, Assistant Principal, and HR Manager Bob Pinkos to discuss the seriousness of your chronic absenteeism and tardiness. During that meeting the Written Directive provided you on December 3, 2007 addressing attendance at work and compliance [with] the duty schedule was discussed. Furthermore, the following disciplinary actions have been issued related to insubordination for failure to adhere to the December 3, 2007 directives.

- January 28, 2007 [sic] Verbal Reprimand with Written Notation issued for failure to follow the December 3, 2007 directive.

- February 6, 2008, Written Reprimand issued for insubordination for failure to follow the December 3, 2007 directive.

- April 17, 2008, a second Written Reprimand issued for insubordination for failure to follow the December 3, 2007 directive.

A copy of the December 3, 2007 directive is enclosed for your review. Although you have received several disciplinary actions advising you to comply with the December 3, 2007 [directive] your behavior with respect to attendance at work and compliance [with] your duty schedule continues to fail to meet

expectations. Future similar incidents, to include those that may occur beyond the date of this directive and related to failing to follow the December 3, 2007 directive, will be considered insubordination and subject to disciplinary action up to and including termination of employment.

Your immediate attention to this matter will be appreciated as it would positively impact the operation at Boca Raton Community High School.

26. The remainder of the month of August 2008, Respondent was absent without leave and/or pay a total of 22.25 hours and out on medical/sick leave a total of 3.5 hours.

27. In September 2008, Respondent was absent without leave and/or pay a total of 33.25 hours. She was also out on medical/sick leave a total of 4 hours.

28. In October 2008, Respondent was absent without leave and/or pay a total of 23.25 hours. She was also out on medical/sick leave a total of 5 hours.

29. At the end of October 2008, following the completion of an "administrative personnel investigation of Respondent's "behavior with respect to attendance at work and compliance [with her] duty schedule," a "pre-disciplinary meeting" was held at which Respondent was given the opportunity to "explain or rebut the outcome of the investigation." At the meeting,

Respondent acknowledged that she had "missed lots of time from work," but she claimed that she had "been trying to improve her attendance."

30. In November 2008, Respondent was absent without leave and/or pay a total of 24.25 hours.

31. Respondent was out on medical/sick leave for her entire four hour shift on December 1, 2008. On December 2, 2008, she was absent without leave and/or pay .25 hours. The following day, she was suspended.

32. Respondent's poor attendance has adversely affected others at BRCHS. Sometimes, the work Respondent was responsible for was done, in her absence, by the other custodians at the school, which "created a bit of unrest" because these custodians also had their own work to do. On other occasions, when Respondent was absent, the work she was assigned went undone, which created a "problem for teachers [and their students] when they c[a]me in the next morning" and had to deal with classrooms that were not cleaned.

#### CONCLUSIONS OF LAW

33. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto.

34. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public

schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat.

35. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See § 1001.42(5), Fla. Stat. ("The district school board, acting as a board, shall exercise all powers and perform all duties listed below: PERSONNEL.--. . . provide for the . . . suspension, and dismissal of employees subject to the requirements of chapter 1012."); § 1012.22(1)(f), Fla. Stat. ("The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees."); and § 1012.23(1), Fla. Stat. ("Except as otherwise provided by law or the State Constitution, district school boards may adopt rules governing personnel matters, including the assignment of duties and responsibilities for all district employees.").

36. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat.

37. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons." § 447.209, Fla. Stat.

38. Where the employee is an "educational support employee" who has successfully completed his or her probationary period and the adverse action sought to be taken against the employee is termination, the district school board must act in accordance with the provisions of Section 1012.40, Florida Statutes, which provides 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 teacher assistant, an education paraprofessional, a member of the transportation department, a member of the operations department, a member of the maintenance department, a member of food service, a secretary, or a clerical employee, 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 s. 1012.39. This section does not apply to persons employed in confidential or management positions. This section applies to all employees who are not temporary or casual and whose duties require 20 or more hours in each normal working week.

(b) "Employee" means any person employed as an educational support employee.

(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 district school 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 districtwide basis for financial reasons.

(c) In the event a district school 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.

39. Respondent is an "educational support employee," within the meaning of Section 1012.40, Florida Statutes, who is covered by a collective bargaining agreement (the SEIU Contract).

40. Pursuant to Section 1012.40, Florida Statutes, Respondent's employment may be terminated only "for reasons stated in th[is] collective bargaining agreement."

41. Under the SEIU Contract, "disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence." Moreover, absent compelling circumstances, the action taken must be consistent with "progressive discipline."

42. At the final hearing in the instant case, the School Board clearly and convincingly established that, over a 12-month period, Respondent was excessively absent without authorization, to the detriment of BRCHS staff and students, and that her excessive absenteeism persisted despite reprimands and warnings from her supervisors.

42. Having made such a showing, the School Board has met its burden of proving that there are grounds to terminate Respondent's employment under the SEIU Contract. Cf. Wright v. Department of Children and Families, 712 So. 2d 830, 831 (Fla. 3d DCA 1998)("[A]n essential element of employment is to be on the job when one is expected to be there."); Commercial Carrier Corp. v. LaPointe, 723 So. 2d 912, 918 (Fla. 1st DCA 1999)("Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not come to work cannot perform any of his job functions, essential or otherwise.' Therefore, a regular and reliable level of attendance is a necessary element of most jobs.")(citation omitted); Darby v. Bratch, 287 F.3d 673, 682 (8th Cir. 2002)("Presence at the job is no doubt essential, except in cases where the job could be done from home, which is not claimed here."); Nowak v. St. Rita High School, 142 F.3d 999, 1003 (7th Cir. 1998)("Obviously, an employee who does not come to work cannot perform the essential functions of his

job. . . . The undisputed facts show that Nowak was unable to perform an essential function--regular attendance--required of a teacher at St. Rita."); Tyndall v. National Education Centers, Inc., of California, 31 F.3d 209, 213 (4th Cir. 1994)("In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis. Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not come to work cannot perform any of his job functions, essential or otherwise.'"); Owens v. Unemployment Compensation Board of Review, 748 A.2d 794, 798 (Pa. Commw. Ct. 2000)("In this case, it is clear that Employer established and Claimant did not contradict that she was excessively absent and had received many warnings regarding her absenteeism according to Employer's policy. Therefore, Employer has established a prima facie case of willful misconduct."); and Falczynski v. Amoco Oil Co., 533 N.W.2d 226, 232 (Iowa 1995)("As her work had to be completed by other employees, Falczynski's chronic absenteeism plainly prevented her from performing the essential functions of her job. Indeed, she could not perform the quintessential function of regularly attending work.").

43. Accordingly, Respondent's appeal of her proposed termination must be rejected.

RECOMMENDATION

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

RECOMMENDED that the School Board issue a final order sustaining Respondent's suspension and terminating her employment with the School Board.

DONE AND ENTERED this 13th day of April, 2009, in Tallahassee, Leon County, Florida.



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STUART M. LERNER  
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Filed with the Clerk of the  
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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.