

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 09-0497
)
 STEVE E. MONTGOMERY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on August 24, 2009, in Miami, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes.¹

APPEARANCES

For Petitioner: Jean Marie Middleton, Esquire²
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 430
Miami, Florida 33132

For Respondent: Randy Fleischer, Esquire³
8258 State Road 84
Davie, Florida 33761

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Steve E. Montgomery, committed the violations alleged in the Second

Amended Notice of Specific Charges and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On January 14, 2009, Petitioner, Miami-Dade County Public School Board ("School Board" or "Petitioner") suspended Respondent, Steve E. Montgomery ("Montgomery" or "Respondent"), without pay and initiated termination proceedings for Montgomery who failed to maintain a valid Florida driver's license and Certificate of Competency as a Licensed Journeyman ("Certificate of Competency"). Respondent elected to dispute the reasons for his dismissal stemming from allegations that he failed to maintain his qualifying documents in violation of School Board Rules. Because Montgomery requested a formal proceeding, the matter was referred to the Division of Administrative Hearings.

At hearing, Petitioner presented the testimony of five witnesses: Abby Walker, Director Employee Resources, Facilitates Operations and Maintenance; Steve Montgomery; Ignacio Palacio, Director, Facilities Operations and Maintenance; and Robert Brown, Administrative Director, Office of Professional Standards. Petitioner's Exhibits numbered 1 through 24 and 26 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of Robert Kuse, Electrician II, and Benjamin Fullington, Jr.,

Plumber II, Journeyman. Respondent's Exhibits numbered 1 through 8 were admitted into evidence.

The proceedings were transcribed and the parties availed themselves of the right to submit proposed recommended orders after the filing of the transcript. A two-volume Transcript of the final hearing was filed with the Division of Administrative Hearings on October 19, 2009. Upon granting several extensions to the proposed recommended order filing time, both Petitioner and Respondent filed timely Proposed Recommended Orders on January 4, 2010, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Steve Montgomery has been employed with the School Board since May 13, 1988. He last held the position of a Plumber II Journeyman in Miami-Dade County Florida.

2. Montgomery's job description and the maintenance employee's handbook mandated that he maintain a valid driver's license and Certificate of Competency in order to remain employed by the School Board. During the hearing, Montgomery admitted that he was aware that he had to maintain such minimum qualifications for his job.

3. Montgomery started a pattern in 2003 of his driver's license getting suspended and then being reinstated again. Montgomery admitted during hearing that his driver's license had

been suspended at least four times. Each time, the School Board notified Montgomery that his license was not valid and provided him five working days to get a valid license. Montgomery was placed in an alternative work assignment whenever he did not have the valid credentials. The School Board kept a record of the occurrences in Montgomery's personnel file.

4. The file contained a December 15, 2003, memorandum entitled "FAILURE TO MAINTAIN QUALIFYING DOCUMENTS REQUIRED BY JOB DESCRIPTION" directing Montgomery that his license was suspended and/or revoked and detailing that his job description requires that he maintain a valid State of Florida Class D license as one of the minimum qualifications of the position. The memorandum also stated that Montgomery had five days until December 22, 2003, to present evidence of a valid license.

5. A May 24, 2004, memorandum almost identical to the one dated December 15, 2003, except for the deadline dates, was also in Montgomery's personnel file. The memorandum provided a deadline of June 1, 2004, to present evidence of a valid driver's license and indicated that, if there was a failure to satisfy the requirement in the allotted time period, a Conference-for-the-Record ("CFR") would be scheduled to discuss the matter further.

6. A July 26, 2005, memo identical to the two previous memorandums except for the dates was also in Montgomery's

personnel file. The memorandum gave a deadline of August 2, 2005, to present evidence of a valid driver's license.

7. Mr. Palacio personally gave the invalid driver's license memorandums to Respondent and verbally notified Montgomery of the requirement to get a valid license.

8. Montgomery signed the memorandum dated September 15, 2005, entitled "FAILURE TO MAINTAIN QUALIFYING DOCUMENTS REQUIRED BY JOB DESCRIPTION." As in the previous memos, it stated:

Attached please find a report dated September 15, 2005 that indicates your driver's license has been suspended and/or revoked. Your official job description requires you to maintain a valid State of Florida CDL Class D* driver's license as one of the minimum qualifications of this position. (Effective July 1, 2005, Class D licenses were converted to Class E.)

You are advised that this requirement is a condition of your continued employment with Miami-Dade County Public Schools. Without a valid driver's license you are no longer qualified to perform the requirements of your position with the District. Effective immediately, you are being placed on an alternate work assignment.

Accordingly, you are directed to present evidence of this required license to your Satellite Director or designee within five (5) working days from the date of this memorandum, which will be September 23, 2005. Until such time, you are not authorized to operate any District vehicle or motorized equipment that requires possession of a driver's license.

If you fail to satisfy this requirement within the allotted time period, a

Conference-for-the-Record will be scheduled to address this matter further. Please review your Maintenance Operations handbook (Trades Chapter, Page 4) for further details.

9. A CFR was held with Montgomery on September 30, 2005, because he did not obtain a valid driver's license by September 23, 2005. Montgomery was provided a copy of the job description for plumber II and the September 15, 2005, memorandum. At the CFR, Montgomery was again informed that maintaining his valid driver's license is a minimum qualification of his position and that "Without a valid driver's license, you are no longer qualified to perform the requirements of your position with the District." Montgomery signed the summary of the CFR on October 3, 2005.

10. On October 13, 2005, the School Board notified Montgomery by memorandum that he had failed to maintain his Certificate of Competency and it had expired on August 31, 2005. Montgomery signed the memorandum and was instructed to present a valid certificate no later than October 17, 2005, at 8:00 a.m. Montgomery was aware that it was his responsibility to know when his qualifying documents expired and keep them valid as a minimum requirement for his job.

11. A CFR was held on February 11, 2006, regarding Montgomery not possessing a renewed Certificate of Competency and a valid driver's license. At the CFR, Montgomery produced a

renewed certificate but did still did not have a valid license.

12. On May 4, 2006, Montgomery still did not have a valid driver's license and Mr. Palacio recommended Montgomery's termination. In Palacio's memorandum, the grounds for such discipline were as follows:

Mr. Montgomery is in violation of School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties, members of the non-instructional staff shall maintain all certifications, licenses and job requirements as a condition of employment. Failure to do so shall warrant disciplinary action.

13. On May 9, 2006, Mr. Brown and the maintenance officer signed a memo entitled Recommendation for Termination Mr. Steve E. Montgomery Employee # 169252 Plumber II, Region Maintenance Center II providing grounds for disciplinary measures inasmuch as Montgomery was unable to produce a valid Florida's driver's license, a condition of employment. The memo stated:

As a Plumber II, Mr. Montgomery must maintain all certifications, licenses and job requirements. Failure to comply with minimum job requirements warrants dismissal.

14. Montgomery let the Certificate of Competency expire again on August 31, 2007.

15. Subsequently, on September 17, 2008, another CFR was held with Montgomery notifying him of the recommendation for suspension and termination because Montgomery's license and Certificate of Competency were not valid. During the CFR,

Montgomery did not offer any explanation as to why his license was still suspended or submit proof of his Certificate of Competency but only commented he "will have [both] soon."⁴ Montgomery also did not complain about any working conditions during the CFR.

16. At a regularly scheduled meeting on January 14, 2009, the School Board suspended Montgomery without pay and initiated dismissal proceedings against him from all employment with Miami-Dade County Public Schools for just cause, including, but not limited to: violation of School Board Rules 6Gx13-4A-1.21 Responsibilities and Duties, 6Gx13-4A-1.213 Code of Ethics, and Sections 1001.32(2), 1012.22(1)(f), 1012.40, and 447.209, Florida Statutes.

17. Montgomery's license was suspended at the time of his suspension and termination. Likewise, Montgomery's Certificate of Competency had still not been renewed at the time of his suspension and termination.

18. No other School Board employee had his/her license suspended as many times as Montgomery with an expired Certificate of Competency at the same time. Further, the School Board has disciplined employees by termination for having a suspended driver's license.

19. Montgomery had a valid Florida driver's license and a renewed valid Certificate of Competency at the hearing.

20. On August 20, 2009, the School Board filed its Second Amended Notice of Specific Charges charging Respondent with violating School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties, School Board Rule 6Gx13-4A-1.213, Code of Ethics, and State Board Rules 6B-1.001 and 6B-1.006 by failing to maintain a valid driver's license and Certificate of Competency.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

22. Petitioner's burden to prove the charges against Respondent and that he was rightfully suspended and terminated must be made by a preponderance of the evidence. Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

23. The Second Amended Notice of Charges filed against Respondent alleges the following:

Montgomery's failure to maintain a valid driver[']s license and Certificate of Competency does not reflect credit upon himself or the community and violates School Board Rule 6Gx13-4A-1.21.

* * *

Montgomery's driver[']s license has been suspended approximately 6 times. His actions demonstrate his failure to obey local, state and national laws, codes and regulations. Furthermore, his actions demonstrate that he has failed to take responsibility and be accountable for his or her actions. His failure to maintain his Certificate of Competency demonstrates a lack of efficient and effective delivery of his job duties. The totality of Montgomery's actions constitutes a violation of the School Board Rule 6Gx13-4A-1.213.

24. Based upon these allegations, Respondent is charged with the following two counts: violation of School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties and 6Gx13-4A-1.213, Code of Ethics.

I. Responsibilities and Duties

25. At all times material to the instant case, School Board Rule 6Gx13-4A-1.21 has provided as follows:

RESPONSIBILITIES AND DUTIES

I. Employee Conduct

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. Unseemly conduct or the use of abusive and/or profane language in the workplace is expressly prohibited.

* * *

VI. Non-Instructional Personnel

Members of the non-instructional staff shall maintain all certifications, licenses and job requirements as a condition of employment. Failure to do so shall warrant disciplinary action up to and including dismissal from all employment.

A loss of certification, license or other job requirement shall immediately be reported by the non-instructional staff member to his/her site supervisor. Failure to do so shall constitute a violation of this rule.

26. This is a de novo proceeding for the purpose of formulating agency action, and not to determine whether the School Board's decision was correct at the time that it made the decision. The findings of fact "shall be based exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j) and (k), Fla. Stat.

27. Petitioner has failed to sustain the charges against Respondent in this case for Count I. The record demonstrates that Montgomery had a valid driver's license and Certificate of Competency at the hearing.

II. Code of Ethics

28. At all times material to the instant case, School Board Rule 6Gx13-4A-1.213 has provided in relevant part:

CODE OF ETHICS

* * *

I. Employee Conduct

Each employee agrees and pledges:

1. To abide by this Code of Ethics, making the well-being of the students and the honest performance of professional duties core guiding principles.

2. To obey local, state and national laws, codes and regulations.

* * *

5. To take responsibility and be accountable for his or her actions.

* * *

7. To cooperate with others to protect and advance the District and its students.

8. To be efficient and effective in the delivery of job duties.

29. The evidence, taken as a whole, demonstrated that over the years Montgomery engaged in the repetitious conduct of not having a valid driver's license and Certificate of Competency, in violation of School Board regulations, even though he knew that each was a minimum requirement for his job and was told repeatedly to maintain them. Even if Montgomery was placed on alternative assignments while getting his qualifications in order, Montgomery's performance of duties was interrupted time and time again. The record demonstrates that the last period

Montgomery was without a license was approximately 120 days starting from the CFR date of September 17, 2008, to the termination date of January 14, 2009. Thus, Montgomery's pattern of irresponsible behavior made him ineffective in the delivery of his job because he was unable to perform the duties of the job description, thereby violating the Code of Ethics.

30. Montgomery asserted that his termination was based on racial discrimination from some allegations of harassment around February 2006 and February 2007. The undersigned finds that Montgomery's discrimination defense must fail because no credible evidence was presented of disparate treatment to make a prima facie case.⁵

31. Moreover, even if discrimination had taken place, the alleged incidents would have taken place too remote in proximity to be a motivating factor for the termination of January 14, 2009.⁶ Additionally, the School Board provided a legitimate non-discriminatory reason for recommending termination of Montgomery's employment in that Montgomery repeatedly failed to maintain his required driver's license and Certificate of Competency throughout his employment.

32. Thus, as found above, the Petitioner has met its burden and demonstrated that Montgomery engaged in violation of the Code of Ethics School Board Rule 6Gx13-4A-1.213 by failing

to maintain his requirements of employment and such a pattern of behavior warrants discipline.

RECOMMENDATION

Upon consideration of the Findings of Fact and the Conclusions of Law reached, it is

RECOMMENDED that Petitioner, Miami-Dade County School Board, enter a final order that: (a) dismisses Count I; (b) finds Respondent in violation of Count II as charged; and (c) upholds Respondent's suspension without pay and termination.

DONE AND ENTERED this 26th day of February, 2010, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2010.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

^{2/} Attorney Middleton represented the School Board at hearing. Attorney Janeen Richard submitted the Proposed Recommended Order.

^{3/} On October 27, 2009, Respondent's counsel filed a Motion to Withdraw from this case, which the undersigned granted. David Nevel, Esquire, entered a Notice of Appearance on Respondent's behalf on November 5, 2009.

^{4/} Montgomery asserted at hearing that he faced challenges getting his driver's license back with the steep fines and community service. He further stated he didn't know where some tickets came from because he didn't go in the areas where the tickets were issued. However, such testimony is not deemed credible because he never informed the School Board of such problems.

^{5/} The undersigned accepts the School Board's position is credible in that no other employee ever had both repeated driver's license suspensions combined with a certificate of competency expirations at the same time for which to compare Montgomery actions. Additionally, Montgomery's proposition that Clive Nelson was an example is rejected because he only had a license suspension and he was African-American, a member of the same race of Respondent. Thus, Respondent also failed to present evidence that he was treated less favorably than a similarly situated employee who was not a member of a minority class.

^{6/} Montgomery's failure to complain about any working conditions during the CFR further supports the undersigned's rejection of such allegations.

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.