

Classified/Teachers Association (of which Respondent is a member).

PRELIMINARY STATEMENT

By certified letter dated January 21, 2009, the Superintendent of Sarasota County Public Schools notified Respondent that probable cause to terminate Respondent's employment had been found and that a recommendation to that effect would be made to Petitioner. Respondent timely filed a letter denying all allegations of wrongdoing and specifically challenging the decision to terminate his employment. The matter was forwarded to the Division of Administrative Hearings ("DOAH") for purposes of conducting a formal administrative proceeding. The undersigned Administrative Law Judge was assigned to the case.

At the final hearing, held at the place and date set forth above, Petitioner called 12 witnesses: Joanne Townsend, human resources director for Sarasota County Public Schools (the "District"); Ron Corso, assistant principal at North Port High School (the "School"); Jacqueline Pollard, director of the Performance Based Diploma Program at the School; Wesley Johnson, head custodian at the School; Paul Paquette, assistant principal at the School; Kathleen Moren, media aide at the School; Kathy Wilks, assistant principal at the School; Domingo Rivera, School police officer; Dr. George Kenney, principal at the School;

Samuel Wilson, north regional monitor for school security in the District; Steven Hazuda, assistant principal at McIntosh Middle School ("McIntosh"); and Larry Leon, chief of school police and director of security for the District. Petitioner offered 16 exhibits into evidence, each of which was received.

Respondent testified on his own behalf, but did not call any other witnesses. Respondent's Exhibits 1, 3, 4 and 6 were admitted into evidence.

The parties advised the undersigned that a transcript of the final hearing would be ordered. They were given ten days from the date the transcript was filed at DOAH to submit proposed recommended orders. The Transcript was filed on May 28, 2009; Petitioner filed its Proposed Recommended Order on June 8, 2009. On June 5, 2009, Respondent filed a request for additional time to file its post-hearing submittal. Petitioner indicated its acquiescence to some additional time. The request was granted, and Respondent filed his Proposed Recommended Order on June 18, 2009. Each party's Proposed Findings of Fact and Conclusions of Law was carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the Sarasota County School Board, the entity responsible for operating, monitoring, staffing, and maintaining the public schools of Sarasota County. The School

is a public high school established in 2001. It is located at 6400 West Price Boulevard, North Port, Florida. The school had a student body in excess of 2,600 students at the beginning of the current (2008-2009) school year, but that has declined to 2,500 as of the date of the final hearing in this matter.

2. Respondent, Ronald Davenport, was employed at the School as a campus security monitor (also known as a security aide) from 1988 until December 5, 2008. Respondent is an African-American male. Respondent is a "classified" employee under the Classified Bargaining Unit Collective Bargaining Agreement between the Sarasota Classified/Teachers Association and the District (the "Collective Bargaining Agreement").

3. On December 5, 2008, Respondent was reassigned or transferred from the School to McIntosh. The reasons for the transfer will be more fully discussed below.

4. During Respondent's tenure as a security monitor at the School, he received a number of written disciplinary letters or memoranda. Under the District disciplinary policies, written reprimands are issued only after verbal reprimands have been issued and proven ineffective. Respondent's discipline to-date has included the following:

- On November 22, 2004, Respondent was given a Record of Verbal Reprimand concerning his failure to responsibly monitor students while on duty.

- A written reprimand was given to Respondent on January 4, 2005, concerning improper contact with students and work performance.
- In April 2005, Respondent was suspended without pay for a period of three days. The basis of the suspension was Respondent's insubordination to superiors.
- In January 2006, Respondent was again suspended without pay, this time for a period of ten working days. This suspension was based on Respondent's failure to perform his work responsibly, use of school computers for personal reasons, and insubordination.
- A letter of instruction (which is not technically a disciplinary action) was given to Respondent on April 12, 2007, concerning his actions while driving on campus.

5. Respondent received other verbal reprimands and letters (memoranda) of instruction in addition to those set forth above. It is noted that two suspensions for a single employee is very unusual; grounds for a second suspension would normally warrant termination of employment. However, Principal Kenney stated that at the time of the second suspension, he wanted to give Respondent another opportunity, even though dismissal was probably warranted. (Likewise, the aforementioned transfer from

the School to McIntosh was another effort by Kenney to sanction Respondent without resorting to termination of employment.)

6. In the Fall of 2008, a student at the School spat water on Respondent. The student received a three-day suspension and a deferred expulsion¹ for his actions. A few weeks later, a different student spat water on a Caucasian security monitor. That student received a five-day suspension and a deferred expulsion for the remainder of the year. The student in the second incident, however, had a disciplinary history while the student who spat on Respondent did not. That is the reason for the slight disparity in punishment.

7. Respondent was unhappy about the second student being treated more harshly and surmised that the reason for the difference in punishment was that he (Respondent) was African-American while the other security monitor was Caucasian. That being the case, Respondent contacted Mr. Trevor Harvey, president of the local NAACP chapter, to complain. Harvey contacted Principal Kenney, and the two agreed to meet at Kenney's office on December 5, 2008, to discuss possible racial issues at the School.

8. On December 4, 2008, Respondent was observed handing out a note or flyer to students. The flyer, which was copied from a handwritten original, included the following bullet points:

- An instruction asking the reader to make a copy and tell a friend about the contents of the flyer.
- A request to have parents and students call various news agencies (whose telephone numbers were listed at the bottom of the flyer) and request that reporters be sent to the School the following day (December 5) to attend an NAACP meeting at the School.
- A statement of the writer's belief that the District and the School promote intolerance, bias, and double standards concerning people of color.
- A statement specifically addressing Respondent's confrontation with a student earlier in the year.
- Another statement urging the reader to submit their own concerns to administration that day or early on the following day.

9. Respondent denies writing the flyer or having anything to do with its distribution to students. However, he does admit distributing copies of the flyer to other employees at the school, including Jacqueline Pollard, a teacher, and Wesley Johnson, the senior head custodian at the School. Both Pollard and Johnson are African-Americans. Other employees, including Mr. Johnson, saw Respondent handing out a sheet of paper to

students on December 4, 2008, which they presumed to be copies of the flyer.

10. The flyer had been discovered by administrative staff at the School on December 4, 2008, after an altercation between some girls on campus. While the girls were being questioned in the administrative offices, one of them provided staff with a copy of the flyer. The student did not know from whom she had received the flyer, but said it was being distributed around campus. At least one teacher told the administrative office that a student in her class received the flyer from Respondent.

11. Respondent was seen distributing an unidentified sheet of white paper to students on the afternoon of December 4, 2008, and the morning of December 5, 2008. Respondent maintains that all he gave students was a handwritten Christmas greeting which said, "Happy Holidays and [peace sign] on Earth. God bless Obama & God bless the U.S.A. Mr. Ron, Security."

12. On the morning of December 5, 2008, Respondent was observed by Assistant Principal Wilks talking to a group of students. Wilks heard Respondent tell the students to go to the Performing Arts Center ("PAC") for the purpose of attending the NAACP meeting. Many of the students then headed toward the PAC. Wilks then redirected the students toward their assigned classrooms. Respondent denies he told students to go to the PAC for a meeting; he says he directed them all to return to class.

Based on Wilks' interaction with students shortly thereafter in the area of the PAC, her testimony on this point is more credible.

13. After hearing Respondent talking to the students, Wilks went to the PAC, which is located at the front of the campus. Several groups of students showed up at the PAC and said they wanted to attend the NAACP meeting. They were told that there was no meeting at the PAC that day in which students were authorized to attend. One of the students advised Wilks that her "uncle" had told her to go to the PAC for the meeting. Respondent concedes that the student was referring to him (although she is not actually his niece). Respondent denies telling her to go to the PAC for a meeting.

14. There was in fact a meeting at the School on December 5, 2008, between the principal, Dr. Kenney, and the NAACP representative, Mr. Harvey. However, that meeting was held in the principal's office, not at the PAC. The meeting went well and Mr. Harvey left the campus seemingly in agreement with how the School was handling interactions between racial groups.²

15. It was determined by the School administration that Respondent's apparent involvement in the effort to disrupt the NAACP meeting made his continued employment at the School impractical. However, rather than seeking to terminate

Respondent, it was decided that he could be transferred to McIntosh to serve as a security monitor at that school.³ On the evening of December 5, 2008, after school hours, Respondent was called at home and told that he was being reassigned.

16. On December 6, 2008, Respondent came to the School to empty out his employee locker and retrieve his personal items. He asked that this process be supervised and/or taped, so there were persons observing him as he did so. Respondent then reported to McIntosh for duty.

17. Employees are not allowed to use school copying machines for personal use (without prior approval from administration). Each employee is assigned a code to use when making copies so that the School can monitor the use of copy machines.

18. On the Monday following Respondent's reassignment to McIntosh, a media specialist printed out a "user chart" for one of the school copy machines located in the mailroom. The user chart showed that Respondent had made 465 copies on that machine since the beginning of the 2008-2009 school year.

19. Principal Kenney could not think of any justification for Respondent making that many copies. Respondent does not remember what he copied, but notes that another security monitor made many more copies than Respondent did. Respondent did not

deny making the copies, but was unaware of the requirement to get permission first.

20. Just three weeks before the NAACP meeting incident, while Respondent was still working at the School, his supervisor was looking for him on campus. Respondent did not respond to calls over the walkie-talkie (radio) system used for communication purposes. Respondent had not signed out in accordance with the well-known policy to do so, but was observed off-campus at a gas station. The failure to sign out is an actionable violation of Respondent's employment.

21. On December 18, 2008,⁴ Larry Leon (chief of school police and director of safety and security) and Sam Wilson went to McIntosh to provide Respondent a sealed envelope. The envelope contained a notice concerning an upcoming meeting. After Respondent failed to answer numerous radio calls from Wilson, Wilson asked McIntosh's assistant principal, Hazuda, to make an attempt to call Respondent.

22. Hazuda called Respondent, who showed up at Hazuda's office in a matter of minutes. Upon seeing Wilson in the office, Respondent was visibly upset. He said something to Hazuda about being "set up" and that he was being harassed. Respondent refused to accept the envelope, said he was sick, and left Hazuda's office to go to the school clinic where he signed out for the day. When Wilson tried to talk to him, Respondent

simply raised his hands above his head and walked away.

Hazuda's efforts to make Respondent remain at the school and go back to work were not successful. Hazuda's testimony on this point is extremely credible.

23. As Respondent was leaving the clinic, Leon called out to him. Respondent ignored Leon and continued to leave the building. Leon followed and called out loudly to Respondent, asking him to stop. Respondent swore at Leon, saying "F**k you" and continued to walk toward his car. At no time did Respondent turn around and engage in face-to-face conversation with Leon.⁵

24. On January 5, 2009, Police Chief Leon and Wilson returned to McIntosh with another written notice to be delivered to Respondent. Letters had been sent to Respondent about the upcoming meeting, but no response had been received.

(Respondent had signed one copy of a notice, but left it on the counter in the administration offices rather than returning it as asked.) So, Wilson and Leon again tried to hand-deliver a copy of the notice to Respondent.

25. Numerous attempts to contact Respondent via radio on January 5, 2009, were unsuccessful. Finally, someone who had heard the radio calls advised Respondent that he was being summoned to the front office. Respondent surmises that his radio might not have been functioning properly at that time, so he didn't hear the calls. When Respondent got to the office, he

decided to check out for the day because he was feeling ill. He left without accepting delivery of the written notice.

26. Subsequently, on January 15, 2009, a Weingarten hearing was conducted on the issues relating to the December 5, 2008, NAACP meeting at the School and the two incidents at McIntosh. Respondent attended the hearing and presented responses to the allegations of misbehavior.

27. Based upon the information gathered at the Weingarten hearing, the District decided that termination of Respondent's employment was warranted.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract with the Sarasota County School Board. The proceedings are governed by Chapter 120.57 and 120.569, Florida Statutes (2008).⁵

29. The Superintendent of Schools for Sarasota County, Florida has the authority to recommend to the School Board that an employee be suspended or dismissed from employment.
§ 1012.27, Fla. Stat.

30. Petitioner has the authority to terminate the employment of or to suspend non-instructional (classified) personnel without pay and benefits. See §§ 1012.22(1)(f) and 1012.40(2)(c), Fla. Stat.

31. The burden of proof in this proceeding is on Petitioner to prove, by a preponderance of evidence, that just cause exists to suspend or terminate the employment of Respondent. McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996).

32. "Just cause" is the standard applied to discipline cases under the Collective Bargaining Agreement. See Article XXI--Disciplinary Actions.

33. Just cause is not defined in the Collective Bargaining Agreement, but Subsection 1012.33(1), Florida Statutes, offers the following definition:

Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

34. Respondent has clearly committed misconduct in office and gross insubordination by his actions. The evidence as to those violations is clearly established in the record.

35. Respondent has experienced a number of disciplinary actions under the Collective Bargaining Agreement. He has, in fact, been suspended twice based on findings of just cause.

36. The Collective Bargaining Agreement follows a theory of "progressive discipline." This means that an employee

receiving disciplinary sanctions will receive the least severe kind of sanction first, followed by a more severe type, up to and including dismissal from employment. Respondent has experienced each of the various degrees of sanctions under the Collective Bargaining Agreement. In fact, Respondent has twice received the next-to-highest standard of discipline, suspension with or without pay. Thus, the disciplinary sanction of dismissal would be procedurally correct for Respondent.

37. Petitioner proved, by a preponderance of the evidence, that Respondent was insubordinate to his superiors, failed to follow proper sign-out procedures (although he may have believed that signing out in the clinic would suffice), used school property (a copier) for unauthorized purposes, and inappropriately encouraged students to skip class. The evidence concerning these matters is competent and substantial.

38. As to the issue of making and/or distributing the flyer, which if true would be a clear violation of Respondent's duties and responsibilities, the evidence is less clear. The evidence is circumstantial concerning this issue. It is clear Respondent was handing out pieces of paper to students on the day before the upcoming meeting between the principal and the NAACP representative. It is undisputed that Respondent gave pieces of paper to other employees that were, in fact, the flyer at issue. It is certain that the flyer addresses an issue

directly related to Respondent and about which he was extremely emotional.

39. Based upon clear circumstantial evidence, the ultimate fact of Respondent's actions, vis-à-vis the flyer, may be inferred. As stated in Davis v. State, 90 So. 2d 629, 631 (Fla. 1956):

Circumstantial evidence is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. The conclusion as to the ultimate facts must be one which in the common experience of man may reasonably be made on the basis of the known facts and circumstances.

40. Or, as stated in Procacci Commercial Realty v. DHRS, 690 So. 2d 603, 608 (Fla. 1st DCA 1997):

The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." Pelletier v. Zweifel, 921 F. 2d 1465, 1515 (11th Cir. 1991).

41. Under the circumstances presented, it is easily and reasonably inferred that Respondent not only created the flyer, but that he passed it out to students and urged them to engage in an improper demonstration. An objective review of what transpired would easily result in such a conclusion.

42. Petitioner has met its burden of proof in this case and has proven, by a preponderance of evidence, that just cause exists to warrant the termination of Respondent's employment as a security monitor for the School Board.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Sarasota County School Board terminating the employment of Respondent effective February 18, 2009.

DONE AND ENTERED this 26th day of June, 2009, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of June, 2009.

ENDNOTES

^{1/} A deferred expulsion essentially places a student on probation. Any serious infraction during the probationary period would automatically result in immediate expulsion from

school. The student at issue was on deferred expulsion for the remainder of that school year, but did not engage in any further offenses.

^{2/} The School is a very diverse campus. Approximately 21 percent of the students are minorities. There is a large number of European students at the School, and 13 different languages are spoken by students and faculty. The principal says there is no evidence of extraordinary racism on campus.

^{3/} Coincidentally, McIntosh had just lost a security monitor to retirement, and there was a slot available for Respondent.

^{4/} There were then two incidents which occurred at McIntosh involving Respondent. One was on December 18, 2008, and the other was on January 5, 2009. Each of the witnesses and Respondent seemed confused about what exactly happened on each of the specific days, but the facts are fairly consistent. Thus, what one witness remembers happening on the first date, another witness remembers on the latter date. Nonetheless, the things that transpired are material regardless of which day they actually occurred. The facts will be discussed below, but the actual dates may not be accurate.

^{5/} This fact is mentioned only because Respondent was adamant at final hearing that he had never spoken directly to Leon during this encounter. The fact that Respondent's comments were made with his back to Leon is not material.

^{6/} All references to the Florida Statutes herein shall be to the 2008 codification.

COPIES FURNISHED:

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

Dr. Eric Smith
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

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

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

Ronald Davenport
Post Office Box 203
Nokomis, Florida 34274

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.