STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-1065
	)	
BRENT RICH,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Miami, Florida, on August 3, 2009, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Janeen L. Richard, Esquire
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 400
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent committed the acts alleged in the Notice of Specific Charges and, if so, the discipline, if any, that should be imposed against Respondent's employment.

PRELIMINARY STATEMENT

At its regularly scheduled meeting on February 11, 2009, the School Board of Miami-Dade County, Florida (the School Board) voted to suspend the employment of Brent Rich (Respondent) and to terminate his employment, subject to his right to request a formal administrative hearing. Respondent timely requested a formal administrative hearing to challenge the School Board's action, the matter was referred to DOAH, and this proceeding followed.

On March 20, 2009, the School Board filed a Notice of Specific Charges which set forth the factual allegations against Respondent, who is an educational support employee (a school monitor). Based on those factual allegations the School Board alleged in Count I that Respondent was guilty of Misconduct in Office; alleged in Count II that Respondent had violated School Board Rule 6Gx13-4A-1.0 (pertaining to Equal Opportunity and Assignment); alleged in Count III that Respondent had violated School Board Rule 6Gx13-4A-1.21 (pertaining to Responsibilities and Duties); and alleged in Count IV that Respondent had violated School Board Rule 6Gx13-4A-1.213 (pertaining to the Code of Ethics). In taking this proposed action, the School Board relied on the applicable collective bargaining agreement and certain statutes, which will be set forth below. Unless

otherwise noted, all statutory references are to Florida Statutes (2009).

At times relevant to this proceeding, Respondent was assigned to work at the David Lawrence K-8 Center (Lawrence Center), which is a public school in Miami-Dade County.

At the final hearing, the School Board presented the testimony of Tonia Durden (formerly known as Tonia Williams[1]), Danita Staples, Cassandra Santos, Lea Coto, Deborah Johnson-Brinson, Bernard Osborn, Andrea Williams, and Dr. Jimmie Brown. All of the School Board's witnesses are School Board employees. At the times relevant to this proceeding, Ms. Durden, Ms. Staples, Ms. Santos, and Ms. Coto were educational support employees assigned to the Lawrence Center, Ms. Osborn was an assistant principal of the Lawrence Center, and Mr. Osborn was the principal of the Lawrence Center. At the times relevant to this proceeding, Andrea Williams was an investigator employed by the School Board's Office of Civil Rights Compliance and Dr. Brown was employed by the School Board's Office of Professional Standards. Ms. Durden and Andrea Williams are not related. The School Board offered 40 sequentially-numbered Exhibits, each of which was admitted into evidence.

Respondent testified on his own behalf, but he offered no other testimony and no exhibits.

A Transcript of the proceedings, consisting of one volume,

was filed on September 28, 2009. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, the School Board was the constitutional entity authorized to operate, control, and supervise the public schools in Miami-Dade County, Florida.

2. The School Board has employed Respondent for approximately 15 years as a school security monitor. As such, at all times relevant to this proceeding, Respondent was a non-probationary "educational support employee" within the meaning of Section 1012.40, Florida Statutes, whose employment can be terminated for reasons stated in the applicable collective bargaining agreement, which is the contract between the Miami-Dade County Public Schools and the United Teachers of Dade (the CBA). Article XXI, Section 3.D of the CBA provides that educational support personnel can be terminated for "just cause." The term "just cause" is defined by that provision of the CBA as follows:

> . . . Just cause includes, but is not limited to, misconduct in office, incompetency, gross insubordination, willful neglect of duty, and/or conviction of a crime involving moral turpitude. Such charges are defined, as applicable, in State

> Board Rule [Florida Administrative Code Rule] 6B-4.009.

3. During the 2007-2008 school year, Respondent was a school security monitor assigned to the Lawrence Center. Prior to that assignment, Respondent had been assigned to Miami Beach Senior High School (Beach High School). While at Beach High School, there was a probable cause finding that Respondent had engaged in an inappropriate sexual relationship with a high school student who was over 18 years of age. As a result, Respondent's employment was suspended without pay for a period of 30 days. Respondent accepted the 30-day suspension and agreed not to appeal.

4. Ms. Durden began working as a Data Input Specialist at the Lawrence Center in May of 2008. Shortly after her arrival, Respondent asked Ms. Durden (then known as Ms. Williams), who was on her way to lunch, to bring him back lunch. The request, which Ms. Durden denied, caused her to feel uncomfortable. Thereafter, Respondent came to come to Ms. Durden's work area on several occasions and asked her for the mints that she kept on her desk. Ms. Durden believed that Respondent was leering at her. Ms. Durden clearly disliked Respondent and felt uncomfortable in his presence.

5. On June 3, 2008, Respondent was in the parking lot area when Ms. Durden walked by to retrieve an object from her car.

Respondent was talking to someone in a parked vehicle. The identity of the person in the parked vehicle could not be established and there was no evidence as to the subject of the conversation between Respondent and the unidentified person in the vehicle. As Ms. Durden walked by, Respondent tried to get her attention by yelling out to her "Hey baby." Ms. Durden did not respond. When she was on her way back into the school, Respondent told her, "Ms. Williams, I know you heard me speaking to you." Ms. Durden (Williams) then told Respondent, "My name is not 'hey baby.' My name is Ms. Williams, and you address me as such." There was no evidence that Respondent continued to address Ms. Durden inappropriately.

6. On June 5, 2008, Ms. Durden walked into the after care office to speak to Ms. Staples, who was working as an After Care Specialist. Respondent was in the after care office with several other employees, both male and female. When Ms. Durden walked into the after care office, Respondent blurted out "my dick is hard." Ms. Durden immediately left the room feeling disgusted by Respondent's remark. Ms. Staples testified that Respondent made the statement "my dick is on hard." Ms. Staples and the other employees who had been meeting in the after care office also immediately left the office after Respondent's statement. Ms. Staples and her colleagues were shocked by Respondent's statement.[2]

7. On June 6, 2008, Ms. Durden and Ms. Santos passed out paychecks or pay stubs to employees. Respondent appeared at the threshold of Ms. Durden's office, which is part of the main office, and asked for his paycheck. Ms. Durden asked Respondent to leave while she sorted through the paychecks. Ms. Durden was uncertain whether Rich was Respondent's first name or last name. There was a verbal exchange between Respondent and Ms. Durden as to that issue. Respondent remained outside of Ms. Durden's office, but in a position where he could observe her. Ms. Durden testified, credibly, that Respondent was leering at her. Ms. Durden became so uncomfortable that she started shaking.

8. Prior to June 6, 2008, Ms. Durden had told Ms. Santos that she did not like Respondent and felt uncomfortable around him. Ms. Santos attempted to keep Respondent away from Ms. Durden by offering to get anything he might need from the main office and bringing it to Respondent's duty station. On one occasion, Ms. Santos observed Respondent staring at Ms. Durden's rear end.

9. On June 6, 2008, Ms. Santos observed that Ms. Durden was very uncomfortable being in Respondent's presence. She intervened by finding Respondent's paycheck and bringing it to him.

10. Ms. Durden reported these incidents first to Ms. Johnson-Brinson (an assistant principal) and then to

Mr. Osborne (the principal). Thereafter the School Board followed all relevant procedures leading up to its vote to discipline Respondent by terminating his employment.

11. Ms. Johnson-Brinson is not aware of any complaints from any Lawrence Center employees other than Ms. Durden pertaining to inappropriate behavior by Respondent.

12. Mr. Osborn testified as to the reasons he recommended the termination of Respondent's employment. Part of those reasons related to behavior by Respondent during his tenure at the Lawrence Center that was not alleged in the Notice of Specific Charges. That non-alleged behavior is irrelevant and has not been considered by the undersigned in reaching the findings and conclusions set forth in this Recommended Order.[3]

CONCLUSIONS OF LAW

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

14. Because the School Board seeks to terminate Respondent's employment and does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in its Administrative Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v.

School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So.2d 883 (Fla. 3d DCA 1990).

15. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

16. In Count I of the Notice of Specific Charges, the School Board charged Respondent with “misconduct in office.” The State Board of Education has defined the term “misconduct in office” by Florida Administrative Code Rule 6B-4.009(3), as follows:

> (3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual’s effectiveness in the school system.

17. In prosecuting Count I, the School Board relies on Florida Administrative Code Rule 6B-1.001, which sets forth the Code of Ethics of the Education Profession in Florida, as follows:

> (1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.
> (2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.
> (3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

18. In prosecuting Count I, the School Board also relies on Florida Administrative Code Rule 6B-1.006, which sets forth the Principles of Professional Conduct for the Education Profession in Florida and provides, in relevant part, as follows:

> (1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
> (2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.
>
> * * *
>
> (5) Obligation to the profession of education requires that the individual:
> (d) Shall not engage in harassment or discriminatory conduct which unreasonably

> interferes with an individual's performance of professional or work responsibilities or with the orderly process of education or which creates a hostile, intimidating, abusive, offensive or oppressive environment; and further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

19. To prove misconduct in office, the School Board must establish by a preponderance of the evidence that Respondent's conduct: (1) violated the Code of Ethics and the Principals of Professional Conduct; and (2) impaired his effectiveness in the school system.

20. Citing Mendoza v. Borden, Inc., 195 F.3d 128 (11th Cir. 1999), Respondent correctly argues that courts evaluate claims of sexual harassment by first determining whether an employee subjectively perceives behavior as sufficiently severe and pervasive to alter the terms and conditions of employment. Next, the analysis seeks to determine if that subjective perception is objectively reasonable. The environment must be one that a reasonable person would find hostile or abusive.

21. The School Board established by a preponderance of the evidence that Respondent engaged in a pattern of conduct towards Ms. Durden that created a work environment that reasonably interfered with the performance of her work. Prior to Respondent's comment in the after care office, Respondent's behavior toward Ms. Durden may be described as unwelcomed

flirting and may or may not have been found to constitute harassment. After Respondent's lewd, indecent comment in the after care office, Ms. Durden was justified in feeling "disgusted" and "uncomfortable" around Respondent. That alarming comment left no doubt that Respondent's behavior constituted sexual harassment of sufficient seriousness to impair his effectiveness in the school system.[4]

22. School Board Rule 6Gxx13-4A-1.01 is styled "Equal Opportunity Employment and Assignment" and explicitly prohibits harassment or discrimination based on an employee's gender. The School Board's proof that Respondent harassed a female co-worker established that Respondent violated that rule as alleged in Count II of the Notice of Specific Charges.

23. In Count III of the Notice of Specific Charges, the School Board has charged Respondent with violation of School Board Rule 6Gx13-4A-1.21, which sets forth policy pertaining to the responsibilities and duties of School Board employees. As a School Board employee, Respondent is expected to comply with the Rule, which provides as follows:

> 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.

24. There can be little or no doubt that Respondent's behavior described herein violated this rule as alleged in Count III of the Notice of Specific Charges.

25. School Board Rule 6Gx13-4A-1.213 sets forth a Code of Ethics which requires a school board employee, among other things, to treat all persons with respect. The School Board established by a preponderance of the evidence that Respondent's behavior violated that rule as alleged in Count IV of the Notice of Specific Charges.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the School Board enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order terminate Respondent's employment.

DONE AND ENTERED this 19th day of October, 2009, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2009.

ENDNOTES

[1]/ For ease of reference, Ms. Durden will be referred to by her married name.

[2]/ In reaching these findings, the undersigned has not ignored Respondent's version of the events. Succinctly stated, Respondent testified that the employees were having a general discussion about sex at the time Ms. Durden entered the room. Respondent's testimony is inconsistent with Ms. Durden's testimony, which was corroborated by Ms. Staples testimony. Respondent's testimony lacks credibility. The undersigned has also considered that Ms. Durden embellished the incident when she related the incident to Ms. Santos. Ms. Durden told Ms. Santos that Respondent made the objectionable remark in reference to Ms. Durden's rear end.

[3]/ Due process prohibits a district school board from disciplining an employee based on matters not alleged in the notice of charges, unless those matters have been tried by consent. See Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

[4]/ A loss of effectiveness in the school system can be inferred by the severity of the conduct. See Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000).

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.