

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 09-2414
)
CHARLES BERGSTRESSER,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on July 17, 2009, in Fort Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire
School District of Lee County
2855 Colonial Boulevard
Fort Myers, Florida 33966

For Respondent: Robert J. Coleman, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists to terminate Respondent's employment with Petitioner based on misconduct and gross insubordination as defined by Florida Administrative Code Rule 6B-4.009(3) and (4).

PRELIMINARY STATEMENT

On April 13, 2009, James W. Browder, Ed.D., Superintendent of Schools, issued a Petition for Termination of Employment directed against Respondent. The Petition cited several bases for taking the action against Respondent, including gross insubordination and misconduct in the performance of his duties as a custodian for the Lee County School Board (the "Board").

Petitioner then forwarded the Petition to the Division of Administrative Hearings (DOAH) on May 8, 2009, citing Respondent's request for a formal administrative hearing. At the final hearing, Petitioner called the following witnesses: Ranice Monroe, director of Professional Standards and Equity for the Board; Maribel Cardentry,¹ custodian at Lehigh Senior High School (Lehigh); Maria Herrera, head night custodian at Lehigh; Humphrey Nanan, building supervisor at Lehigh; Henry Macardy, sites worker at Lehigh; and Jeffrey Spiro, principal at Lehigh. Petitioner's Exhibits 1 through 12 were accepted into evidence. Respondent called the following witnesses: Dr. Edward Berla, a psychologist; Judith Munro, counselor from the Children's Home Society; and Darlene Palmer, friend of Respondent. Respondent offered Exhibits 1 through 9 into evidence, each of which was accepted. (All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent

such hearsay was not corroborated, it will not be used as a basis for any finding herein.)

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 at DOAH on August 7, 2009. On that date, Respondent filed a motion seeking to extend the time for filing proposed recommended orders until September 4, 2009. Petitioner filed its Proposed Recommended Order on September 4, 2009 (a Friday). Respondent's Proposed Recommended Order was filed at 8:00 a.m. on September 7, 2009 (the following Monday). No objection to Respondent's late-filed Proposed Recommended Order was filed, and both parties' submissions were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the school board responsible for hiring, firing, and overseeing all employees at Lehigh.

2. At all times relevant hereto, Respondent was a custodian at Lehigh and a member of the Support Personnel Association of Lee County (the "Union"). Respondent was at all times material hereto working the day shift, i.e., from 10:00 a.m. until 6:00 p.m. Respondent is 30 years of age. He completed twelfth grade in the Special Education Program.

Respondent has been diagnosed as mildly mentally retarded (having obtained IQ scores of 44 and 59 pursuant to testing). He also has an "adjustment disturbance," which affects his ability to properly respond to persons around him in certain situations. Respondent is easily provoked by others and engages in impulsive verbal reactions to situations that are not warranted. Respondent has a limited ability to learn and has about a second-grade reading level.

3. Dr. Edward Berla, a psychologist, has seen Respondent on three or four occasions following recent incidents (see more below) at Lehigh. Based on his study of Respondent's mental health history and interview with Respondent, Dr. Berla does not think Respondent is capable of carrying out threats to kill or injure someone. Rather, Dr. Berla believes that Respondent responds verbally in a manner that he later knows to have been wrong. Respondent has difficulty properly responding to outside influences on the spur of the moment.

4. Dr. Berla says that his treatment of Respondent has ended. He did not know why Respondent no longer comes to see him, but assumed it was due to insurance issues or that maybe Respondent simply did not like him (Dr. Berla). At any rate, Respondent stopped coming to see Dr. Berla. It should be noted, however, that Respondent's social worker, Judith Munro, testified that Dr. Berla himself terminated the relationship due

to the fact that Respondent needed to be treated by a psychiatrist. Respondent received samples of some medications (Zyprexa) while seeing Dr. Berla, but he has run out of those and does not have money to purchase more. The medication seemed to make Respondent less angry and agitated, and more relaxed. However there was no competent expert testimony to that effect.

5. Respondent was hired at Lehigh in April 2007, by its principal, Jeffrey Spiro, who had met Respondent while working at another school some years earlier. A position opened up at Lehigh and Spiro entertained Respondent's application despite knowing that Respondent's prior work history was not stellar.² Spiro genuinely liked Respondent and wanted to give him a chance despite his mental shortcomings. At the outset, Spiro knew that Respondent would have to be given very specific instructions and kept on task in order to do his job.

6. The position for which Respondent was hired had well defined duties. Respondent was responsible for cleaning restrooms, picking up and disposing of trash, mopping floors, and other janitorial type duties. Respondent was also responsible for monitoring the cafeteria (along with his co-workers) during the student lunch periods.

7. Respondent officially began work at Lehigh in May 2007. His supervisors' opinions were that Respondent was a nice person, but that he had periods of moodiness that adversely

affected his work. Respondent has received performance assessments from his supervisors during each school year since 1999-2000. His assessments for school years 1999-2000, 2000-2001, and 2001-2002 indicated an effective level of performance. Beginning in the 2002-2003 school year, Respondent's assessments began to note problems in some areas, including: use of tools and equipment; cooperating with and supporting co-workers; communicating effectively with co-workers, supervisors, and school-based staff; and demonstrating flexibility in responding to stressful situations and changes in work environment.

8. Since commencing work at Lehigh, Respondent's record includes the following:

- December 2007--A written reprimand including an admonition for Respondent to refrain from making threatening comments to co-workers.
- March 2008--A performance evaluation which addresses Respondent's displays of anger in the workplace.
- May 2008--A written reprimand issued after instances of misconduct that included references to a gun, a strict zero tolerance topic at Lehigh.
- July 2008--A letter issued to address Respondent's request for Americans With Disabilities Act (ADA) accommodations.
- October 2008--A written reprimand concerning two incidents: Respondent told a co-worker to "F**Off;" and Respondent refused to do his assigned tasks, resulting in more work for his co-workers.

- January 2009--Respondent refused to do a job (oiling of door hinges) he was asked to do. He responded loudly and angrily, demanding payment of overtime. A letter of reprimand was issued.
- February 2009--Respondent again refused to do an assigned task. Once again, he responded loudly and inappropriately to his superior. A letter was issued to Respondent's personnel file.

9. Respondent is generally described by his co-workers and supervisors as a nice young man. However, he becomes moody and often gets angry when his routine is changed in any way. When he is moody, he will simply refuse to work; and there is no way to entice him until his mood changes. When he is angry, his co-workers just try to stay away from him.

10. While he is verbally aggressive at times, Respondent has never been known to physically abuse anyone. He and his caregiver's son will sometimes push and shove, but nothing out of the ordinary for boys. (Respondent acts much younger than his biological age.)

11. Another tactic employed by Respondent when he is angry is to threaten to contact the Union and make a complaint. He is on a first-name basis with Union representatives and frequently calls them.

12. A disconcerting behavior of Respondent has been his interaction with a particular co-worker, Maribel Cardentry. Respondent will call Cardentry names, follow her to the restroom, and refuse to assist her with work that should be

done. Respondent has attempted to hug and kiss Cardentry and other females inappropriately. Whenever Cardentry talked to other Hispanic workers in Spanish, Respondent would rebuke her and make racial comments. Respondent has said that he does not like people who do not speak English well.

13. Neither Cardentry, nor any other co-worker or supervisor, was ever told that Respondent suffered from mental retardation or any other condition. Each staff member seemed to ascertain this fact for him or herself, but none were told by administration that such a condition existed for Respondent. There is no indication that knowledge of this fact would change how the other staff interacted with Respondent.

14. The May 2008, letter of reprimand received by Respondent (see paragraph 8, above) was a sanction considerably less than called for by Board policies. His actions would have justified termination of his employment. However, the Lehigh administration, in deference to Respondent's limited mental capacity, decided to impose a less severe punishment. Respondent had said he was "going to f**ing shoot everybody." That kind of language would normally invoke a zero tolerance response from the Board.

15. In July 2008, Respondent requested, and Lehigh agreed, to provide certain ADA accommodations. A committee was established to address Respondent's needs and come up with a

plan for helping him cope with the daily regimen of his job. After much discussion, the ADA committee decided to establish a "daily checklist of [Respondent's] work assignments. This checklist [would] include written information, pictures and/or symbols to assist [him] in performing [his] duties." The checklist was never implemented. Instead, Spiro, based on his long relationship with Respondent, unilaterally decided that a better plan would be for him (Spiro) to verbally direct Respondent to his tasks whenever necessary.³ So instead of issuing a daily checklist with words, pictures, and symbols, Spiro would walk the halls and point Respondent towards work that needed to be done. This process was implemented and seemed to work, at least from Spiro's perspective. (Respondent did not testify at final hearing, so it is not known whether he felt the plan was effective or helpful.)

16. The latest incident at Lehigh involving Respondent occurred on March 4, 2009. Respondent acted in an insubordinate fashion to his supervisor, Humphrey Nanan. Mr. Macardy, a part-time instructor at Lehigh, witnessed the verbal exchange between Respondent and Nanan and then followed Respondent outside. Macardy attempted to engage Respondent in conversation (as he frequently did) in order to find out if there was a problem with which he could help. Respondent stated that, "[i]f

I get fired, I'm gonna kill [Vice Principal] McKeever and [Principal] Spiro."

17. Macardy was very familiar with Respondent and had seen him act aggressively and in anger on previous occasions, though he had never seen Respondent act violently toward anyone. However, the statements made on this day were much angrier and more aggressive than Macardy had witnessed before. Respondent then repeated his threats against McKeever and Spiro. When Macardy attempted to talk to Respondent to calm him down, Respondent advised Macardy that he (Respondent) could do whatever he wants, and the Union representative would save his job for him. Macardy's testimony concerning this incident is credible.

18. There is no dispute that Respondent made the threats about killing McKeever and Spiro. Those kinds of comments made people nervous, whether or not they believed Respondent actually meant to carry out the threat literally. There is no indication in Respondent's history that he acted violently toward anyone or physically hurt anyone. Nonetheless, these threats were taken seriously and were the ultimate basis for the Board's decision to terminate Respondent's employment.

19. Respondent's continued employment as a custodian at Lehigh would require constant monitoring, described by Spiro as "purposeful supervision." However, there is not enough staff

available at Lehigh to provide that kind of one-on-one supervision for Respondent.

20. Respondent implies that a transfer to the night shift would allow him to do his work with less interaction with others and, conversely, less agitation or anger.⁴ However, there are as many custodians on the night shift as on the day shift. Further, there is no indication that a position is available on the night shift.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract with the Lee County School Board. The proceedings are governed by Sections 120.57 and 120.569, Florida Statutes (2009).⁵

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

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

24. The burden of proof in this proceeding is on Petitioner to prove, by a preponderance of the 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).

25. "Just cause" is the standard of discipline applied to actions against support personnel. See Support Personnel Association of Lee County (SPALC) Agreement, Provision 7.10. However, just cause is not defined in the Agreement.

26. In the absence of a rule or written policy defining just cause, Petitioner has discretion to set standards which subject an employee to discipline. See Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2nd DCA 1994). Nonetheless, just cause for discipline must rationally and logically relate to an employee's conduct in the performance of the employee's job duties and which is concerned with inefficiency, delinquency, poor leadership, lack of role modeling, or misconduct. State ex rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948); In re Grievance of Towle, 665 A. 2d 55 (Vt. 1995).

27. Petitioner has construed just cause for purposes of discipline pursuant to the SPALC Agreement in the same manner as that phrase is used in Section 1012.33, Florida Statutes, viz:

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 and found guilty of, or entering a plea of

guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

28. Gross insubordination is defined in Florida Administrative Code Rule 6B-4.009(3) as a violation of the Code of Ethics and Education Profession, as adopted in Florida Administrative Code Rule 6B-1.001, and the Principles of Professional Conduct for the Education Profession, as adopted in Florida Administrative Code Rule 6B-1.006, which is so serious as to impair the individual's effectiveness in the school system. These rules further define gross insubordination as a constant or continuing intentional refusal to obey a direct order, reasonable in nature and given by, and with, proper authority.

29. In the instant case, Respondent's refusal to do his assigned tasks, harassment of co-workers and threats of violence would constitute just cause for termination of employment.

30. There is some question as to the authority of orders given to Respondent due to the fact that the ADA accommodations created for Petitioner were never put into place. However, absent any testimony from Petitioner as to whether he needed those specific accommodations in order to do his work, Lehigh's principal had the apparent authority to direct Respondent to do his work assignments.

31. Lehigh's failure to implement the ADA accommodations was not shown to be a factor in causing Respondent's behavior. Respondent's anger and threatening comments were made despite Spiro's efforts to make Respondent's assignments more understandable. There is no indication in the record that the ADA accommodations were set aside for any malicious, unkind, or adverse reasons. Rather, Spiro acted in good faith to do what he thought best for Respondent. The failure to accommodate Respondent as agreed to by the ADA committee is, therefore, not significant for purposes of the ruling in this Recommended Order.

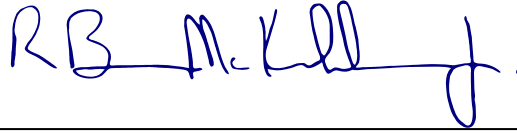
32. Respondent's actions were sufficiently egregious to warrant the termination of his contract by the Board. The Board has met its burden of proving, by a preponderance of the evidence, that termination is warranted.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Lee County School Board, upholding the termination of Respondent, Charles Bergstresser's, employment for the reasons set forth above.

DONE AND ENTERED this 25th day of September, 2009, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 2009.

ENDNOTES

^{1/} Cardentry, who is Hispanic, testified through an interpreter, Enrique Diaz.

^{2/} Respondent had worked for the Board since 2000 in several different jobs. His early evaluations were good, but in the 2002-2003 school year, the evaluations began to show problem areas.

^{3/} Spiro said he put a lot of thought into the matter and used his best professional judgment, tempered by his genuine sense of affection for Respondent, to rethink the best plan of action. He did not advise the ADA committee of his change to their plan, but implemented it unilaterally.

^{4/} Again, this was simply an implied suggestion taken from Respondent's counsel's questioning of witnesses at final hearing. Respondent did not testify himself as to this desire.

^{5/} Unless specifically stated otherwise herein, all references to Florida Statutes are to the 2008 version.

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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.