

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-2748  
 )  
 OSMEL GONZALEZ-ESCALONA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on September 22, 2009, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Elizabeth T. McBride, Esquire  
Palm Beach County School District  
3318 Forest Hill Boulevard,  
Suite C-302  
West Palm Beach, Florida 33462

For Respondent: Osmel Gonzalez-Escalona, pro se  
1228 Highview Road  
Lantana, Florida 33462-5912

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, a noninstructional employee of Petitioner's, should be fired for theft.

PRELIMINARY STATEMENT

By letter dated March 24, 2009, Respondent Osmel Gonzalez-Escalona was informed that the Superintendent of the Palm Beach County School District would recommend to the School Board, at its meeting on April 8, 2009, that he be suspended without pay from his job as a custodian—and then be dismissed from employment. As the basis for this action, the Superintendent alleged that Mr. Gonzalez-Escalona had stolen a co-worker's property.

Mr. Gonzalez-Escalona requested a hearing, stating in his letter, dated April 14, 2009, that he had "found a cellular phone and made several calls" to persons in Cuba and other places, unaware that the phone "belonged to one of [his] co-workers."

Thereafter, Petitioner Palm Beach County School Board, acting through its Superintendent, issued a Petition for Suspension Without Pay and Dismissal From Employment. On May 15, 2009, the matter was referred to the Division of Administrative Hearings, where it was assigned to an Administrative Law Judge.

The undersigned convened the final hearing, as scheduled, on September 22, 2009. (The hearing had been continued once, from July 8, 2009, at Petitioner's request.) Petitioner presented the following witnesses during its case-in-chief:

Britoni Garson, administrator; Eulises Munoz, school detective; Elisa Ramon, retired teacher; and Mr. Gonzalez-Escalona.

Petitioner offered Petitioner's Exhibits 2, 11, 12, 13, 14, 15, 17, 18, and 19, each of which was received into evidence.

Respondent testified on his own behalf and presented no other evidence.

The final hearing transcript was filed on November 6, 2009. Petitioner filed a Proposed Recommended Order before the deadline established at the close of the hearing, which was November 16, 2009. Respondent did not file any post-hearing papers.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

#### FINDINGS OF FACT

1. At all times material to this case, Respondent Osmel Gonzalez-Escalona ("Gonzalez") was a custodian in the Palm Beach County School District ("District"), assigned to work at Berkshire Elementary School ("Berkshire"). Petitioner Palm Beach County School Board ("School Board") operates the schools within the District and has authority over all District personnel, including Gonzalez.

2. As a noninstructional employee of the District, Gonzalez was subject to the collective bargaining agreement

entered into between the School Board and the Service Employment International Union, Florida Public Services Union ("SEIU").

3. Elsa Ramon was a teacher at Berkshire during the 2007-08 school year. Gonzalez cleaned her classroom as part of his regular duties.

4. Some time in May 2008, Mrs. Ramon realized that she had not seen her cellular phone since using it on May 6 to call her husband. She recalled having placed a call to her husband that morning and leaving the phone on a table in her classroom. Because Mrs. Ramon did not use her phone frequently, she initially thought she had simply lost or misplaced it.

5. When the phone did not turn up after a diligent search, Mrs. Ramon and her husband obtained a replacement phone from their carrier, T-Mobile. Mrs. Ramon's existing number was assigned to the replacement cell phone.

6. Mrs. Ramon immediately began receiving calls on the new phone for a woman whose name she did not recognize. The frequency of these calls caused Mrs. Ramon to suspect that someone was using her old phone. She and her husband went to the T-Mobile store to report their concern about this possibility. They learned that a huge bill of approximately \$3,300 had been run up on Mrs. Ramon's account, the result of numerous phone calls, including many international calls to persons in Cuba. T-Mobile promptly deactivated the phone

number; it had been used without Mrs. Ramon's permission for about two weeks.

7. Although Mrs. Ramon had not placed the many, expensive phone calls that produced the charges totaling several thousand dollars, T-Mobile nevertheless demanded that she pay the bill, pursuant to the contract between them. After some negotiation, T-Mobile reduced the charges to about \$2,600, which Mrs. Ramon paid.

8. Meantime, on June 2, 2008, Mrs. Ramon reported the theft of her cell phone to the School Police Department, because she believed that the phone had been taken from her classroom. After an investigation that lasted several months, the school police identified Gonzalez as the culprit. On October 3, 2008, Gonzalez was arrested on a charge of grand theft.

9. On January 23, 2009, Gonzalez pleaded guilty, in the Circuit Court in and for Palm Beach County, to grand theft, a third-degree felony. He was sentenced to 12 months' probation and ordered to make restitution to Mrs. Ramon. As of the final hearing in this case, Gonzalez had reimbursed Mrs. Ramon for the loss she had incurred as a result of his unlawful use of her cell phone.

10. At the hearing, Gonzalez admitted using Mrs. Ramon's phone, without her permission, to call friends and family in Cuba and other places. He denied having stolen the phone,

however, claiming that he had found it in a store. The undersigned rejects this claim, which is not really exculpatory in any event, as being too implausible to believe. The simplest and best explanation for Gonzalez's having come into unauthorized possession of the cell phone of a teacher whose classroom he regularly entered for work related reasons, which phone was last seen and used by its rightful owner in said classroom, is that Gonzalez himself took the phone from the classroom. This, the undersigned finds, is almost certainly what occurred.

11. Assuming Gonzalez's testimony about finding the phone were credible, however, which it was not, the undisputed fact remains that Gonzalez stole lots of expensive airtime, running up a bill of more than three thousand dollars in just two weeks by making numerous international phone calls, among others, for which Mrs. Ramon was liable. Thus, even in Gonzalez's telling, he committed a crime (to which he pleaded guilty), albeit one whose victim was a stranger rather than a co-worker.

#### Ultimate Factual Determinations

12. Gonzalez stole property from a teacher in whose classroom he worked as a custodian. As a result of this criminal behavior, he was arrested and accused of committing felony grand theft, a charge to which he eventually pleaded guilty. Having admitted to the commission of a felony that

victimized an employee of the District, Gonzalez has given the School Board just cause to terminate his employment. Therefore, it is determined that the School Board has sustained its burden of proving, by clear and convincing evidence, the allegations forming the basis for dismissal.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

14. Pursuant to Section 1012.40(2)(b), Florida Statutes, the employment status of an "educational support employee," such as Gonzalez,<sup>1</sup> must 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 . . . ." If the superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee is entitled to contest the termination pursuant to the appeals process provided for in the collective bargaining agreement, if applicable, or by district school board rule. § 1012.40(2)(c), Fla. Stat.

15. The final authority with regard to the suspension and termination of school employees rests with the district school

board. § 1012.22(1)(f), Fla. Stat. A district school board has the burden of proving the alleged grounds for dismissal of an employee by a preponderance of the evidence, see, e.g., McNeill v. Pinellas County School Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996), unless, through the collective bargaining process, it has agreed to a more demanding standard, in which case the district school board must act in accordance with the applicable contract, see Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993).

16. Article 17, paragraph 1, of the collective bargaining agreement between SEIU and the School Board provides that "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." The School Board's burden, accordingly, is to prove the facts alleged as grounds for dismissing Gonzalez—which grounds must constitute "just cause"—by clear and convincing evidence.

17. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:



clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]llthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

18. The applicable collective bargaining agreement does not provide a definition of "just cause." The term, however, is not ambiguous and can be applied according to its plain meaning. A dictionary is the appropriate reference to consult when the plain meaning of a word or phrase is wanted. See, e.g., Winn-Dixie Stores, Inc. v. 99 Cent Stuff - Trail Plaza, LLC, 811 So. 2d 719, 722 (Fla. 3d DCA 2002)("Unless the document in question contains a glossary of terms requiring a different meaning,

. . . which is not the case here, to find the plain and ordinary meaning of words, one looks to the dictionary.").

19. The ordinary meaning of the term "just" is "having a basis in or conforming to fact or reason." See Merriam-Webster Dictionary Online <<http://www.merriam-webster.com/dictionary/just>>. The term "cause" is commonly understood to mean a "sufficient reason" for "an action or condition." Id. at <<http://www.merriam-webster.com/dictionary/cause>>.

20. Black's Law Dictionary offers several definitions that capture the essential meaning of the term "just cause":

A cause outside legal cause, which must be based on reasonable grounds, and there must be a fair and honest cause or reason, regulated by good faith. . . . Legitimate cause; legal or lawful ground for action; such reasons as will suffice in law to justify the action taken.

See Black's Law Dictionary (5th Ed.) at p. 775.

21. Based on the plain meaning of the language employed, the undersigned apprehends the term "just cause" as used in Article 17 of the union contract to mean an objectively reasonable basis in fact or logic, which provides sufficient grounds, under the circumstances, for a good-faith, fair-minded decision to impose discipline.

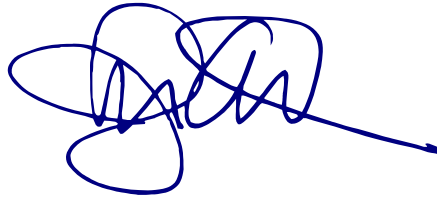
22. No legal analysis is required to support the conclusion, which is self-evident, that an employee's commission

of a felony grand theft provides "just cause" for that employee's dismissal, especially (though not only) where the victim of the crime was a fellow employee.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order dismissing Gonzalez from his position as a custodian in the Palm Beach County School District.

DONE AND ENTERED this 3rd day of December, 2009, in Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of December, 2009.

ENDNOTE

<sup>1/</sup> The term "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." § 1012.40(1)(a), Fla. Stat. As a custodian, Gonzalez falls within this definition.

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 must be filed with the agency that will issue the final order in this case.