

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 09-4304
)
 JORGE GONZALEZ,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 16, 2010, by video teleconference with connecting sites in West Palm Beach and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Corey M. Smith, Esquire
Palm Beach County School District
Post Office Box 19239
West Palm Beach, Florida 33416-9239

For Respondent: No Appearance

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent should be suspended without pay and terminated from employment with Petitioner.

PRELIMINARY STATEMENT

On August 13, 2009, the Palm Beach County School Board (School Board) issued a Petition for Suspension without Pay and Dismissal from Employment (Petition) against Jorge Gonzalez, a non-instructional employee, for ethical misconduct, failure to exercise best professional judgment, misuse of School Board property, and conversion of School Board funds and/or property. The Petition set forth allegations against Mr. Gonzalez and asserted that just cause existed to suspend him for 15 days without pay and terminate his employment pursuant to Sections 1012.22(1)(f), 1012.27(5), and 1012.40, Florida Statutes; School Board Policies 1.013 and 3.27; and Article 17, Section 6 of the Collective Bargaining Agreement between the Service Employees International Union, Florida Public Services Union, and the School Board. Mr. Gonzalez challenged the action and requested a hearing. On August 14, 2009, this matter was referred to the Division of Administrative Hearings.

At hearing, the School Board presented the testimony of five witnesses and entered 23 exhibits (Petitioner's Exhibits numbered 1 through 10, 13, 14, 16 through 21, and 23 through 27) into evidence. Additionally, at the request of the School Board, official recognition was taken of the plea agreement, Judgment, and Order for Restitution in the case of the State of Florida v. Jorge E. Gonzalez, Case No.2009CF005648AXX, Criminal

Division, Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida.¹ Neither Mr. Gonzalez nor any representative on his behalf appeared at the hearing.²

A transcript of the hearing was ordered. At the request of the School Board, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on May 10, 2010. The School Board timely filed its post-hearing submission, which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Gonzalez was a non-instructional employee with the School Board at Liberty Park Elementary School (Liberty Park), employed as a Paraprofessional II. Prior to that position, he was employed as an Instructional Technologist Specialist at Liberty Park.

2. Before working at Liberty Park, Mr. Gonzalez was employed with the School Board at S.D. Spady Elementary School (S.D. Spady) as an Instructional Technology Assistant for approximately 90 days. He was responsible for the computer hardware and software at S.D. Spady, including maintaining the inventory and repairing the hardware and software.

3. During Mr. Gonzalez's probationary period at S.D. Spady, the principal gave him a computer to place in the Exceptional Student Education (ESE) Department.

4. Before the end of his probationary period at S.D. Spady, Mr. Gonzalez was released from his employment by the principal. The principal was having continuous problems with him; many times, Mr. Gonzalez was not coming to work or calling-in to advise that he was not coming into work, and the principal could not locate him.

5. After Mr. Gonzalez was released by the principal at S.D. Spady, the principal discovered that the computer was never delivered to the ESE Department. The computer was never seen at S.D. Spady again.

6. Subsequently, Mr. Gonzalez was employed at Liberty Park. During his tenure at Liberty Park, the principal requested an investigation by the School Board's School Police Department (School Police) of Mr. Gonzalez regarding a parent's complaint against him. Allegedly, Mr. Gonzalez borrowed money from a student and promised to repay the student more money than he borrowed on his (Mr. Gonzalez's) payday, but failed to do so. The student told his mother, and the student's mother reported the incident to the principal. The investigation began in February 2009.

7. During the investigation of the parent's complaint, Mr. Gonzalez became the subject of a separate investigation by the School Police due to a background check of Mr. Gonzalez by the investigator, using the PAWN system of the Palm Beach County Sheriff's Office (Sheriff's Office). The PAWN system is used by the Sheriff's Office to track pawn transactions in local pawn shops. The background check showed Mr. Gonzalez's name appearing 63 times in the PAWN system from June 2006 through March 2009.

8. As to the separate investigation, the PAWN system revealed that a computer on the list of items pawned by Mr. Gonzalez matched the missing computer from S.D. Spady. The manufacturer of the pawned computer confirmed that the service code number on the pawned computer indicated that the pawned computer was purchased by the School Board from the manufacturer. The pawn ticket for the pawned computer, maintained by the pawn shop, contained Mr. Gonzalez's identifying information, including his name, address, driver's license number, signature, and fingerprint, all of which were required by the pawn shop.

9. The School Police arrested Mr. Gonzalez and charged him with grand theft, dealing in stolen property, and false verification of ownership of property. He was transferred to the Sheriff's Office.

10. Mr. Gonzalez's fingerprints were taken when he was arrested. The fingerprint on the pawn ticket, maintained by the pawn shop, was confirmed by a latent print specialist at the Sheriff's Office as matching Mr. Gonzalez's fingerprint taken at the time of his arrest.

11. The School Board's Superintendent decided to recommend suspension without pay and termination of Mr. Gonzalez to the School Board. The Superintendent notified Mr. Gonzalez of his (the Superintendent's) recommendation. Mr. Gonzalez notified the School Board of his challenge to the recommendation and requested a hearing.

12. On November 16, 2009, Mr. Gonzalez pled guilty to one count of dealing in stolen property (stemming from the School Police's case), a second degree felony, in State of Florida v. Jorge E. Gonzalez, Case No.2009CF005648AXX, Criminal Division, Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida. Among other things, the court withheld adjudication, placed him on probation, and ordered restitution to the School Board.

CONCLUSIONS OF LAW

13. 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 (2009).

14. Section 1012.40, Florida Statutes (2008), provides in pertinent part:

(1) As used in this section:

(a) "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. This section does not apply to persons employed in confidential or management positions. This section applies to all employees who are not temporary or casual and whose duties require 20 or more hours in each normal working week.

(b) "Employee" means any person employed as an educational support employee.

(2)(a) Each educational support employee shall be employed on probationary status for a period to be determined through the appropriate collective bargaining agreement or by district school board rule in cases where a collective bargaining agreement does not exist.

(b) Upon successful completion of the probationary period by the employee, the employee's status shall 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, or reduces the

number of employees on a districtwide basis for financial reasons.

(c) In the event a district school superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event there is no collective bargaining agreement.

15. Mr. Gonzalez is an educational support employee and is non-instructional.

16. The Collective Bargaining Agreement, effective January 1, 2009 - December 31, 2011, between the Service Employees International Union, Florida Public Services Union, and the School Board (Agreement) at Article 17, titled "Discipline of Employees (Progressive Discipline)," provides in pertinent part:

1. Without the consent of the employee and the Union, 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.

2. All disciplinary action shall be governed by applicable statutes and provisions of the Agreement. . . .

* * *

5. Only previous disciplinary actions which are a part of the employee's personnel file or which are a matter of record as provided

in paragraph #7 below may be cited if these previous actions are reasonably related to the existing charge.

6. Where just cause warrants such disciplinary action(s) and in keeping with provisions of this Article, an employee may be reprimanded verbally, reprimanded in writing, suspended without pay, or dismissed upon the recommendation of the immediate supervisor to the Superintendent and final action taken by the District. Other disciplinary action(s) may be taken with the mutual agreement of the parties.

7. Except in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable School Board rules and regulation, progressive discipline shall be administered as follows:

(A) Verbal Reprimand With A Written Notation. Such written notation shall be placed in the employee's personnel file and shall not be used to the further detriment of the employee, unless there is another reasonably related act by that same employee within a twenty-four (24) month period.

(B) Written Reprimand. A written reprimand may be issued to an employee when appropriate in keeping with provisions of this Article. . . .

(C) Suspension Without Pay. A suspension without pay by the School Board may be issued to an employee, when appropriate, in keeping with the provisions of this Article, including just cause and applicable laws. The length of the suspension also shall be determined by just cause as set forth in this Article. . . .

(D) An employee may be dismissed when appropriate in keeping with the provisions

of this Article, including just cause and applicable laws.

17. The School Board has the burden of proof to show by clear and convincing evidence that Mr. Gonzalez should be suspended for 15 days without pay and terminated. See Agreement, Art. 17, § 1.

18. Upon the recommendation of the Superintendent and final action taken by the School Board, an employee of the School Board may be disciplined where just cause warrants. See Agreement, Art. 17, § 6.

19. Section 1012.27, Florida Statutes (2008), provides in pertinent part:

The district school superintendent is responsible for directing the work of the personnel, subject to the requirements of this chapter, and in addition the district school superintendent shall perform the following:

* * *

(5) Suspension and dismissal. --Suspend members of the instructional staff and other school employees during emergencies for a period extending to and including the day of the next regular or special meeting of the district school board and notify the district school board immediately of such suspension. When authorized to do so, serve notice on the suspended member of the instructional staff of charges made against him or her and of the date of hearing. Recommend employees for dismissal under the terms prescribed herein.

The evidence fails to demonstrate that an emergency existed for the Superintendent to suspend or dismiss Mr. Gonzalez without the School Board's approval and afterwards notify the School Board of the suspension or dismissal. The evidence demonstrates that the Superintendent recommended to the School Board the suspension of 15 days without pay and dismissal to the School Board. Consequently, Section 1012.27(5), Florida Statutes (2008), is not applicable to the instant case.

20. Section 1012.22, Florida Statutes (2008), provides in pertinent part:

The district school board shall:

(1) Designate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees as follows, subject to the requirements of this chapter:

* * *

(f) Suspension, dismissal, and return to annual contract status. --The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed, or returned to annual contract except as provided in this chapter.

The School Board has the authority to suspend or dismiss Mr. Gonzalez. See Agreement, Art. 17, § 6; §§ 1012.22(1)(f) and 1012.40(2)(c), Fla. Stat. (2008).

21. The evidence demonstrates clearly and convincingly that Mr. Gonzalez stole the computer from S.D. Spady and pawned it. Furthermore, the evidence demonstrates clearly and convincingly that he pled guilty in criminal court to dealing in stolen property, a second degree felony, and was ordered by the court, among other things, to pay restitution to the School Board for the computer.

22. Hence, the evidence demonstrates clearly and convincingly that the School Board established just cause to take disciplinary action against Mr. Gonzalez.

23. School Board Policy 1.013, titled "Responsibilities of School District Personnel and Staff," provides in pertinent part:

1. It shall be the responsibility of the personnel employed by the district school board to carry out their assigned duties in accordance with federal laws, rules, state statutes, state board of education rules, school board policy, superintendent's administrative directives and local school and area rules.

School Board Policy 1.013 is a reasonable policy.

24. School Board Policy 3.27, titled "Suspension and Dismissal of Employees," provides in pertinent part:

1. The purpose of this section is to promulgate rules regarding the suspension and dismissal of employees. These rules shall be read in conjunction with the procedures established for administrative hearings

2. Upon a finding of probable cause by the Superintendent sufficient to warrant a recommendation to the School Board for suspension without pay and dismissal, the Superintendent shall communicate in writing to the employee

3. All employees recommended for suspension without pay and dismissal shall have the right to request a hearing provided such a request is made in writing . . . within 15 days of the receipt of the Superintendent's written notice.

* * *

5. In the event a request for a hearing is timely made . . . by a noninstructional employee . . . the procedure for conducting a hearing, unless otherwise determined by the School Board, is as follows:

a. The Superintendent will file a petition for dismissal with the Division of Administrative Hearings (DOAH). . . .

* * *

c. The hearing shall be conducted in accordance with Chapter 120, Florida Statutes.

25. The evidence demonstrates clearly and convincingly that Mr. Gonzalez violated School Board Policy 1.013. At S.D. Spady, he was responsible for the computer hardware and software, including maintaining the inventory and repairing the hardware and software. The principal at S.D. Spady gave

Mr. Gonzalez a computer to place in the ESE Department; instead, he intentionally disregarded his responsibility and pawned the computer.

26. Hence, the evidence demonstrates clearly and convincingly that Mr. Gonzalez's conduct constituted a "clearly flagrant and purposeful" violation of School Board Policy 1.013, which is a reasonable policy.

27. As a result, progressive discipline need not be followed. See Agreement, Art. 17, § 7.

28. Hence, the evidence demonstrates clearly and convincingly that Mr. Gonzalez should be suspended for 15 days without pay and terminated.

RECOMMENDATION

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

RECOMMENDED that the Palm Beach County School Board enter a final order suspending Jorge Gonzalez for 15 days without pay and terminating his employment.

DONE AND ENTERED this 17th day of June, 2010, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of June, 2010.

ENDNOTES

- ^{1/} The School Board submitted certified copies of the documents.
- ^{2/} The hearing was delayed approximately 30 minutes to provide additional time for the appearance of Mr. Gonzalez or any representative on his behalf.

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.