

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD MIXON,)
)
 Petitioner,)
)
 vs.) Case No. 10-2338
)
 ESCAMBIA COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, a final hearing in this matter was held before the Division of Administrative Hearings by Administrative Law Judge Diane Cleavinger, on October 14, 2010, in Pensacola, Florida.

APPEARANCES

For Petitioner: H. B. Stivers, Esquire
Levine & Stivers
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Tallahassee, Florida 32301

For Respondent: Joseph L. Hammons, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether just cause exists to discipline or terminate Petitioner's employment with Respondent based on misconduct.

PRELIMINARY STATEMENT

By letter dated October 16, 2009, Malcolm Thomas, Superintendent of Escambia County Schools, notified Petitioner, Ronald Mixon, that he had recommended to the Escambia County School Board that Petitioner's employment with the Board be terminated. The School Board approved the Superintendent's recommendation terminating Petitioner's employment effective October 21, 2010. Thereafter, the Petitioner requested a formal hearing with the School Board. The matter was referred to the Division of Administrative Hearings to conduct a formal hearing.

At the hearing, Petitioner testified in his own behalf and offered seven exhibits into evidence. Respondent presented the testimony of three witnesses and offered nine exhibits into evidence. Additionally, the parties offered two joint exhibits into evidence.

After the hearing, Petitioner submitted a Proposed Recommended Order on November 24, 2010. Likewise, Respondent submitted a Proposed Recommended Order on the same date.

FINDINGS OF FACT

1. Respondent, Escambia County School Board, is responsible for grades K-12 public education in Escambia County, Florida. Many of the schools in Escambia County include cafeterias where food services are provided to students. In the schools that provide such services, cash is often received on a

daily basis from students for the meals they purchase in the cafeteria.

2. Petitioner, Ronald Mixon, was employed to work in food service by Respondent in 2000. He was first employed as a substitute employee. Eventually, he was employed on a full-time basis under the Collective Bargaining Agreement (CBA) between the School District of Escambia County and The Union of Escambia Education Staff Professionals as a Food Service Assistant II in the cafeteria at Ferry Pass Middle School.

3. As a Food service Assistant II, Petitioner was "the lead worker" responsible for the preparation and serving of food in the cafeteria, as well as, assistance in inventory, sanitization of the kitchen, and cash control. Additionally, Petitioner might be responsible for managerial or supervisory duties as assigned by his supervisor.

4. During the 2008-2009 school year, Petitioner was supervised by the Food Service Manager, Virginia Mattox. Prior to Ms. Mattox, Petitioner was supervised by Lisa Anderson.

5. When Lisa Anderson was the Food Service Manager, Petitioner was not assigned the responsibility for bank deposits of cafeteria funds. However, during the 2008-2009 school year, Petitioner was required by his supervisor to make bank deposits for the cash that was collected in the cafeteria at Ferry Pass. The evidence did not demonstrate that Petitioner was given any

instructions regarding when to make these deposits when he was first assigned this duty.

6. According to School District Policy, all funds received by a cafeteria were required to be deposited in a bank on a daily basis. Such deposits are reflected in a deposit ledger generated by the bank. The ledger shows the date, time, and location of each deposit. Initially, Petitioner was not aware of the District's policy regarding deposits.

7. During the 2008-2009 school year, Diane Boland, a financial officer with the School District responsible for accounting of cafeteria funds, noticed in her review of the bank's ledger that bank deposits of cafeteria funds from Ferry Pass were not being made on a daily basis. To address the situation, Ms. Boland contacted Ms. Mattox and told her that deposits were not being made on a daily basis from Ferry Pass. She also advised her that not making daily deposits violated District policy. However, the practice of not making daily bank deposits continued and Ms. Boland contacted Ms. Mattox several more times in an effort to resolve the problem.

8. Sometime around the first part of January, Ms. Mattox, who has poor communication skills, spoke with Petitioner about making bank deposits. Although somewhat confusing, the evidence did not demonstrate that Petitioner was told such deposits were required since Ms. Mattox, also, told Petitioner that if he

could not get by the bank to make the deposit each day, he should leave the funds in the safe located in the cafeteria office. Additionally, Ms. Mattox gave Petitioner a key to the night deposit box at the bank so that he could make the deposit after banking hours. Unfortunately, there was some difficulty with the night deposit key, which was resolved by Petitioner when he obtained a new key from the bank. Clearly Petitioner, even to the present, does not understand the District's policy regarding deposit of school funds since he states that the deposits should be made daily, but also states that he could leave them in the safe overnight. He clearly talks about the deposits without understanding and seems to use the term "daily deposit" like a name, as opposed to meaning he deposited the funds daily or that these funds should be deposited every day.

9. In late January 2009, sometime after the conversation with Ms. Mattox, Petitioner gave Ms. Mattox a handwritten travel reimbursement request for the period covering August 18, 2008 (the beginning of school) through January 23, 2009. School District policy authorizes employees to be reimbursed for mileage when they travel in personal vehicles for School District purposes as part of their job.

10. Petitioner, who has limited skills and limited communication skills, had never filled out a travel reimbursement form before and had never been instructed in how

to fill one out. The travel form reflected deposits being made on a daily basis. However, Petitioner did not fill in the number of miles he traveled because he did not know that information. Petitioner assumed someone would let him know if the handwritten form was wrong and would correct any errors or omissions he had made on the form. Unfortunately, instead of discussing or helping Petitioner with the travel form, Ms. Mattox gave Petitioner some sort of dramatic look and shook her head. She assumed and expected Petitioner to interpret her vague look and gesture as indicating she knew Petitioner's travel form was false. Petitioner left the travel form with Ms. Mattox who did not do anything with it and never communicated anything to Petitioner regarding the form. Later, in a memo dated August 31, 2009, Ms. Mattox claimed that she did not sign the travel form because it contained trips made by Petitioner on his own that were not authorized by her. Ms. Mattox did not indicate that she thought Petitioner's travel voucher was falsified. The memo forwarded the handwritten travel form to another administrator.

11. In late April 2009, Ms. Mattox showed Petitioner an email from Ms. Boland and spoke with him about making cafeteria deposits on a daily basis. She also told him he could use the safe if he could not make the deposits.

12. However, Ms. Boland continued to notice that cafeteria deposits from Ferry Pass were not being made on a daily basis. Therefore, on May 15, 2009, Ms. Boland contacted Mary Gilliard, the Food Service Area Manager, and Ms. Mattox's supervisor. Ms. Boland advised Ms. Gilliard that daily deposits of Ferry Pass cafeteria funds had not been made since the beginning of the school year in August 2008, and that she had been in contact with Ms. Mattox multiple times over the issue without results. Ms. Gilliard then contacted Ms. Mattox and instructed her to make the deposits herself or have her assistant, Juanita Forest, make the deposits. In a later memo on the subject, Ms. Mattox made it sound as if she had just learned of the deposit problem on May 15. Nevertheless, around May 15, 2009, just before the end of the school year, the task of making daily deposits was removed from Petitioner. However, this date is uncertain and Petitioner's deposit duties may have ended at a later date since the deposits continued not being made on a daily basis.

13. Sometime in early June 2009, Petitioner asked Ms. Mattox about the earlier travel form and was told that she did not have it and to prepare another travel reimbursement form. In fact, Ms. Mattox was untruthful and did have the earlier travel form. On June 17, 2009, Petitioner again prepared a handwritten request for travel reimbursement that requested reimbursement for a period running from the first day

of school on August 18, 2008, through the end of the school year. Petitioner prepared the form by looking at a calendar to determine the days that school was in session. He was claiming reimbursement for making deposits at the bank virtually every day school was in session. Again, this form did not have the miles travelled filled in and Petitioner thought that any errors or omissions would be corrected by others.

14. Petitioner called Ms. Mattox to find out when she could review and sign the form. Ms. Mattox was not at the school or her office and did not want to drive to the school to look at and sign the travel form. She told Petitioner to have the form approved by the Ferry Pass principal. Petitioner then took the form to the school office where the school secretary, Patricia Griffy, offered to type the travel reimbursement form for Petitioner because the handwritten form was messy. Ms. Griffy typed the reimbursement request form from the handwritten version provided by Petitioner. It was signed by Petitioner with the certification that it was true and just in all respects. Petitioner signed the form because he was told to. He continued to believe others would correct any errors or omissions in the travel form. The form was also signed by the Ferry Pass school principal. Once signed, Petitioner took the reimbursement request form to the District office and delivered it to Diane Boland.

15. Ms. Boland compared all the claimed trips to the bank with the bank's deposit records. According to Ms. Boland's reconciliation, there were 117 trips that bank deposit records confirmed; however, Petitioner was claiming 183 trips. Petitioner's claimed trips for which he was requesting reimbursement expenses, exceeded the bank record of deposits by 66 trips, totaling \$117.48 in reimbursement requests not supported by bank deposits. She did not authorize reimbursement for trips made prior to the last three months of the school year based on District policy that limited reimbursement to a period of 90 days prior to the submission of the travel request. She did authorize reimbursement for the final three months of the school year, paying Petitioner for travel to the bank, to the extent there were bank deposits to confirm the travel, through May 29, 2009, the last day of school.

16. As a result of Ms. Boland's audit and the review by her supervisor, Petitioner was reimbursed for 184 miles, which resulted in a check for \$81.88. He was not overpaid for his reimbursements. The difference in what was contained in the claim form and what was actually paid by Respondent was \$58.74. Petitioner did not question the amount paid; he was relying on the District to pay him what was due. At hearing, he admitted that his request for reimbursement for trips to the bank that he did not make was wrong and that he should be disciplined,

however, he did not believe that termination was appropriate since it was not his intention to falsify his travel form.

17. Petitioner received a letter dated October 16, 2009, from the Superintendent of Schools. This letter was the beginning of the disciplinary process under the CBA. The October letter advised Petitioner that he was being recommended for termination based on the submission of "false and untrue travel claims for mileage reimbursement in connection with depositing food service funds collected at Ferry Pass Middle School." The misconduct was more specifically identified as

(1) You claimed mileage reimbursement for trips to the bank to make deposits when you did not make deposits on the dates claimed.

18. The letter also asserted that Petitioner "demonstrated poor and unsatisfactory work performance." This conduct is then described as follows:

(1) You have not performed assigned tasks in a timely manner.

(2) You have previously been counseled for leaving your work site without authorization prior to scheduled departure time and not completing assigned duties.

Other than the facts regarding the bank deposits and prior counseling, no additional performance issues were alleged in the October letter.

19. Petitioner did not have any prior letters of reprimand or suspensions with or without pay. However, in August of 2008,

there was one incidence of Petitioner leaving the work site without authorization prior to the authorized departure time, not completing his assigned duties and leaving the work site in a substandard condition. On August 22, 2008, Petitioner received a disciplinary action consideration notice and was formally counseled for the August 2008 incident, along with all of the employees at the Ferry Pass cafeteria who had left early that day. Later, Petitioner received improvement strategies for the 2008-2009 school year. Petitioner satisfactorily met and completed the improvement strategies. Except for informal counseling, this is the least amount of discipline that Respondent imposes on its employees.

20. In her testimony, Ms. Mattox referenced an August 2009 "baking incident" to show that Mr. Mattox did not perform his job when he failed to comply with menu components on the first day of school due to a shortage of a certain baking ingredients to bake enough products to meet the requirements for that day's menu. However, the evidence demonstrated that, at that point in the school year, the lack of product was the responsibility of Ms. Mattox and not Petitioner. Petitioner was never disciplined for the incident and would not have been subject to discipline for the incident.

21. Moreover, Ms. Mattox completed Petitioner's annual performance evaluation. Even though Ms. Mattox testified the

Petitioner was not consistently meeting performance standards, the most recent evaluation for school year 2008-2009 completed by Ms. Mattox indicated that Petitioner met position duty requirements and states, "Ron is much improved in performance. . . ." The better evidence regarding Petitioner's past performance is the most recent employee evaluation of Petitioner. On the other hand, after this evaluation, Petitioner was instructed to deposit cafeteria funds on a daily basis. He did not consistently perform this duty; he also submitted an inaccurate travel voucher. However, the evidence did not demonstrate that he intentionally submitted a false travel form. At best, he was negligent in the preparation of the form and too reliant on others to correct the form. In this regard, Petitioner did not perform his assigned duties and should be disciplined for these non-serious infractions according to the progressive discipline policy of the CAB.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

23. In this proceeding, Respondent seeks to terminate Petitioner's employment. Respondent bears the burden of proof to establish by a preponderance of the evidence that just cause exists for Petitioner's termination or discipline. McNeill v.

Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2nd DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

24. The October 16, 2009, Notice of Recommendation letter from the Superintendent constituted the notice of charges to Petitioner. The letter advised Petitioner of the recommendation to the School Board that he be terminated from employment effective October 21, 2009, and notified him that he was being terminated for allegedly submitting false and untrue travel claims for mileage reimbursement in connection with depositing Food Service funds collected at Ferry Pass Middle School. The notice letter also advised Petitioner that he had demonstrated poor and unsatisfactory work performance in relation to those deposits and the travel voucher. The letter did not set forth the state statute, rule, regulation, policy or collective bargaining provision that the School District believed had been violated. However, the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court." Sch. Bd. of Dade Cnty. v. Jones, Case No. 96-5169 (DOAH June 12, 1997; Dade Cnty. Sch. Bd., July 15, 1997), citing Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983) (concurring opinion of Judge Jorgenson). See Luskin v. Agcy. for Health Care Admin., 731 So. 2d 67 (Fla. 4th DCA 1999);

Cottril v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996);
Klein v. Dep't of Bus. and Prof'l Reg., 625 So. 2d 1237 (Fla.
2nd DCA 1993).

25. In this case, the notice received by Respondent only referenced specific conduct related to the deposits and travel voucher submitted by Respondent. No other conduct is raised with any specificity. Thus, only conduct related to the deposits and travel voucher can form the basis for disciplinary action by the School Board in this case. In that regard, the letter of notice is sufficiently specific to put Petitioner on notice as to the charges against him. However, conduct outside of these facts is not relevant on the question of whether Petitioner is subject to discipline by Respondent.

26. In this case, where the employee is an "educational support employee" who has successfully completed his or her probationary period, and the adverse action sought to be taken against the employee is termination, the District School Board must act in accordance with the provisions of section 1012.40, Florida Statutes, which provides as follows:

(1) As used in this section:

(a) "Educational support employee" means any person employed by a district school system as a teacher assistant, an education paraprofessional, a member of the transportation 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. (Emphasis in original)

(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 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 district-wide basis for financial reasons. (Emphasis supplied).

(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 the district school board rule in the event there is no collective bargaining agreement.

27. Pursuant to section 1012.40, Petitioner is an "Educational Support Employee," who may be terminated by the School Board pursuant to the standards provided in the CBA.

28. The CBA defines discipline as "any action designed to correct behavior or bring about desired performance improvement." §IX, Master Contract between The School District of Escambia County and The Union of Escambia Education Staff Professionals, FEA NEA AFT (July 1, 2009 - June 30, 2012). Additionally, the CBA provides that "all discipline shall be progressive, fair and only for just cause." Master Contract, supra.

29. The CBA does not define "just cause." However, section 1012.33(1)(a), which adopts "just cause" as the standard for termination of instructional employees, provides guidance. The statute sets forth a non-exclusive list of factors that may constitute "just cause," including (but not limited to) "immorality, misconduct in office, incompetence, gross insubordination, and willful neglect of duty" In addition, case law establishes that "just cause for discipline is a reason which is rationally and logically related 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." Sarasota

Cnty. Sch. Bd. v. Berry, Case No. 09-3557 (DOAH Jan. 27, 2010; Sarasota Cnty. Sch. Bd. Mar. 4, 2010).

30. The CBA includes as discipline, "warning conference, counseling, written reprimand, suspension with pay, suspension without pay and dismissal." Master Contract, supra. The CBA contains no provision wherein the requirements of progressive discipline do not apply. In short, progressive discipline is required. Cf. Palm Beach Cnty. Sch. Bd. v. Schmeider, Case No. 10-1527 (DOAH Aug. 23, 2010; Palm Bch. Cnty. Sch. Bd. Oct. 26, 2010) (CBA provided that except in cases that constitute a real immediate danger to the District or other actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations, progressive discipline shall be administered as follows . . .) and Manatee Cnty. Sch. Bd. v. Rainville, Case No. 10-3355 (DOAH Oct. 28, 2010; Manatee Cnty. Sch. Bd. Dec. 16, 2010) (Petitioner's Proposed Order noting that the CBA expresses a preference for following a pattern of progressive discipline).

31. The evidence demonstrated that Petitioner was assigned the duties of making bank deposits from Ferry Pass Middle School on a daily basis. In late April 2009, he knew the deposits were required to be made on a daily basis. The deposit records from the bank demonstrated he did not do so. In that respect, he did not fulfill the work duties assigned him.

32. Petitioner also submitted a travel reimbursement request reflecting that he had made bank deposits of Ferry Pass Middle School cafeteria funds on a daily basis for every day school was in session during the 2008-2009 school year. The dates included dates on which he did not make any deposits.

33. However, the evidence did not demonstrate that Petitioner intentionally submitted false and untrue travel claims. Petitioner clearly did not know how to complete a travel reimbursement request form and mistakenly thought others would correct his submission. The form he submitted was inaccurate, but not intentionally false or fraudulent. Given these facts and Petitioner's failure to deposit cafeteria funds on a daily basis, Petitioner failed to adequately perform his job duties. However, he is not guilty of submitting a false and untrue travel reimbursement form. Therefore, Petitioner should be disciplined for failing to make deposits of cafeteria funds on a daily basis and for negligently failing to submit an accurate travel reimbursement form.

34. As indicated, the CBA applicable to Petitioner requires progressive discipline. While not specifically defined, disciplinary progression runs generally from warning conference, counseling, written reprimand, suspension with pay, suspension without pay and dismissal. However, progressive discipline does not require discipline to proceed in a step

fashion where the conduct is sufficiently egregious to support termination or otherwise skip a step on the disciplinary scale. Sarasota Cnty. Sch. Bd. v. Berry, Case No. 09-3557 (DOAH Jan. 27, 2010; Dade Cnty. Sch. Bd. Mar. 4, 2010) (Teacher's threat of violence was a flagrant violation within the meaning of the CBA justifying termination without resort to progressive discipline); Lee Cnty. Sch. Bd. v. Bergstresser, Case No. 09-2414 (DOAH Sept. 25, 2009; Lee Cnty. Sch. Bd. Oct. 20, 2009) (Respondent's refusal to do assigned tasks, harassment of co-workers, and threats of violence constituted just cause for immediate termination.).

35. The misconduct attributed to Petitioner in this case involves the failure to perform assigned duties, and dishonesty in submitting a false and untrue travel claim. While dishonesty in intentionally submitting a false and untrue claim to the School Board for monetary gain would justify termination, the evidence did not demonstrate such conduct on the part of Petitioner. The evidence did demonstrate that Petitioner failed to make the daily bank deposits as required and that he negligently filed an inaccurate travel reimbursement request. The evidence did not demonstrate conduct sufficiently egregious to justify termination without resort to any lesser discipline. Since Petitioner has been disciplined once before, the lowest level of disciplinary action is not appropriate. The next level

of discipline under the CBA is a written reprimand. Therefore, Petitioner should receive a written reprimand with appropriate employee training in the preparation of travel vouchers required.

RECOMMENDATION

Based upon the foregoing, Finding of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That Respondent, Escambia County School Board, enter a Final Order reinstating the Petitioner's employment, issuing a written reprimand to Petitioner, and requiring further employee training by Petitioner.

DONE AND ENTERED this 28th day of January, 2011, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 28th day of January, 2011.

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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.