

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 10-3027
)
MICHAEL L. SEPPALA,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on July 28, 2010, in Bradenton, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Martin, Esquire
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206-9069

For Respondent: Robert E. Turffs, Esquire
Robert E. Turffs, P.A.
1444 First Street, Suite B
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists to terminate Respondent's employment with Petitioner based on either of three factors: fitness for duty; being absent without leave; and gross insubordination, as defined by Section 1012.67,

Florida Statutes (2009), and Florida Administrative Code Rule 6B-4.009(1) and (4).

PRELIMINARY STATEMENT

On July 8, 2009, Tim McGonegal, Superintendent of Manatee County Schools, issued a letter to Respondent, Michael L. Seppala, indicating that Respondent was not fit for duty and that he must undergo psychological testing and psychotherapy before returning to work. That letter was followed up by a letter dated July 16, 2009, advising Respondent that failure to comply with the directive to undergo psychotherapy would constitute gross insubordination. The superintendent then issued an Administrative Complaint on April 21, 2010, recommending termination of Respondent's employment, effective May 25, 2009. Respondent requested a formal administrative hearing on the issues stated in the Administrative Complaint.

At the final hearing, Petitioner, Manatee County School Board ("School Board"), called the following witnesses: Debra A. Horne, specialist with the Professional Standards Office; Debbie Amerson, retired custodian; Francisco "Paco" Quijano, head custodian; Maria Gutierrez, lead custodian; Dr. Mary Cantrell, director of Manatee Technical Institute; Nancy Paradise, employee benefits coordinator; Rebecca Wells, director of Human Resources; and Timothy McGonegal, Superintendent of Manatee County Schools. Petitioner's

Exhibits 1 through 13 were admitted into evidence without objection. Respondent testified on his own behalf and offered no exhibits into evidence. (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 not be ordered. They were given ten days from the date of the final hearing to submit proposed recommended orders. Each party timely submitted a Proposed Recommended Order, and both parties' submissions were given due consideration in the preparation of this Recommended Order.

Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2009 codification.

FINDINGS OF FACT

1. Petitioner is the School Board responsible for hiring, firing and overseeing all employees at Manatee Technical Institute (the "School"), which is a post-secondary training center for adults. The School provides a variety of vocational training opportunities for adults.

2. At all times relevant hereto, Respondent was a custodian at the School. Respondent was at all times material hereto working the night shift. Respondent is a former construction worker whose business suffered from the bad

economy. He took the position as a custodian at the school, even though it paid less than he had been making in construction.

3. When Respondent first began working at the School, he seemed to get along well with his co-workers and did not seem to have any problems. Respondent considered his co-workers to be his friends and they seemed to like him. However, as time passed Respondent seemed to become frustrated and angry. His wife was in poor health, and Respondent was having financial difficulties, including the foreclosure of his home.

4. Respondent's primary co-workers were Amerson, Quijano, and Gutierrez, although there were approximately ten custodians in all on the main campus of the School. Gutierrez was the lead custodian on the night shift, making her Respondent's immediate supervisor. Quijano was the head custodian. Both Gutierrez and Quijano are Hispanic; Respondent is a Caucasian male.

5. In January 2009, Respondent filed a complaint against Quijano claiming racial discrimination. The complaint was investigated by the Office of Professional Standards, and the complaints were deemed unfounded. By way of a letter dated March 19, 2009, Respondent was notified that his equity complaint against Quijano was being closed. (A final investigative report was eventually published on May 11, 2009.)

6. On March 26, 2009, just a week after being notified that his complaint against Quijano was deemed unfounded, a custodian's meeting was held at the School. Such meetings were fairly common occurrences and would be scheduled so that all custodians could attend. Quijano called the meeting and addressed all of the custodians in attendance. Each custodian was handed a sheet of paper which outlined various issues to be addressed within that custodian's realm of responsibility. Some custodians had several items on their lists, others had only a few. Respondent says that his list was the longest of all the custodians.

7. When Respondent was handed his list of issues at the meeting, he was not pleased. He felt as though he was being chastised more than his co-workers. Respondent crumpled up the sheet of paper and tossed it to the floor. This action was witnessed by the other attendees. (Respondent maintains that he did not crumple and throw the paper, but the testimony of other witnesses as to that event is more credible.)

8. Upon exiting the meeting at its conclusion, Respondent walked down a hallway leading out of the building. Amerson was walking down the hallway ahead of Respondent, but she could hear him mumbling and making noise. At one point, Amerson heard a loud noise as Respondent hit a metal support pole in the hallway. To her perception, Respondent had hit the pole

extremely hard. Respondent denies he hit the pole, but Amerson's testimony is more credible. Further, Quijano testified that Respondent had a habit of hitting and kicking objects almost on a daily basis. That fact lends credence to Amerson's statement, as well.

9. As Respondent caught up to Amerson in the hallway, the following conversation occurred:

Amerson: "What"? (Because she had not heard Respondent's initial comment.)

Respondent: "I repented of all my sins last week."

Amerson: "Well then, God forgave you."

Respondent: "God isn't going to forgive me what I'm gonna do now. It's personal. I'm gonna do personal things now. The school board said there is no discrimination so they can stick it up their f---ing big fat ass."

10. Respondent denies saying anything about the matter getting personal. Nonetheless, Amerson heard the comments and took them to mean that Respondent was going to hurt someone. She believed that someone was probably Quijano. So, on the very next day, Amerson told Quijano what she had heard Respondent say. Quijano immediately reported what he had been told, first to the director's assistant, and then to the director, Cantrell.

11. Cantrell took the matter very seriously and considered Respondent's comments to be a legitimate threat against Quijano.

Cantrell was worried, in part, because "Quijano is slight in stature." Respondent, on the other hand, is an obviously stout and physically imposing person. The differences in the physical stature of Respondent and Quijano concerned Cantrell.

12. Cantrell was familiar with Respondent, although she did not regularly supervise him or view him doing his work. Part of her concern about the incident at issue was based on the fact that during Respondent's 90-day probationary period, her assistant director, Dr. Berry, had concerns about Respondent's level of anger. Cantrell advised Dr. Berry to effect some changes in that behavior or else Respondent would have to be terminated. Dr. Berry reported that Respondent had some serious financial issues and family problems which contributed to his anger. Cantrell called in Quijano to make a specific recommendation that Respondent be retained despite the anger issues. Quijano supported Respondent's continued employment, so Cantrell allowed him to stay despite her reservations.

13. Upon hearing the report about Respondent's actions after the March 26, 2009, meeting, Cantrell raised the possibility of a restraining order to protect Quijano, but no such order was ever sought. Cantrell considered Respondent to be somewhat dangerous. Quijano was worried about the alleged threat because he knew that Respondent knew where he lived.

Quijano was concerned about his wife and children. Cantrell believed Quijano's concerns to be legitimate.

14. As a result of the concerns by Cantrell, Respondent was summoned to her office the next day so that she could interview him. Based upon her conversation with Respondent, he was placed on administrative leave with pay. Respondent was directed to undergo an examination by a medical professional in order to obtain a Fitness for Duty Report, i.e., a determination that the physician believed Respondent did not have any issues which would make him a threat to co-workers. Respondent was given a list of three doctors to choose from and he selected Dr. William B. Crockett.

15. On April 23, 2009, Respondent reported to Dr. Crockett at Manatee Glens for an evaluation. Respondent says he believed the examination was to be physical in nature, rather than a psychological evaluation. However, upon reporting to Dr. Crockett, Respondent said that he was there because of his "recent behavior" and the fact that they (the School Board) "say I made a threat." He then said that he had made the following statement which concerned the School Board, "I said two words, that I repented my sins, please forgive me for what I have to go through." That statement is different from what Amerson remembered, and Respondent stated that she was simply mistaken.

Nonetheless, it is obvious Respondent knew that he was seeing Dr. Crockett for something other than a physical examination.

16. Dr. Crockett completed his evaluation of Respondent and issued a Fitness for Duty Evaluation Report on May 5, 2009. The report did not specifically say, in so many words, that Respondent was not fit for duty. Rather, the report concluded that:

Therefore, my recommendation, in order to perhaps help to further delineate [Respondent's] difficulties and personality issues or thought abnormalities, would be to get some psychological testing and I have asked that that be done and I would like to review the results of that prior to making a determination that [Respondent] could safely go back to work. The other thing I am recommending is five sessions of individual psychotherapy. . . I have no specific recommendations for any kind of medication at this time and I am not inclined to approve him or give my recommendation that he return to work until he has had the psychological testing and his sessions of individual psychotherapy and I have been apprised of the results of those. I will provide that in an addendum to this evaluation.

17. Petitioner interpreted Dr. Crockett's recommendation to be a finding that Respondent was not, at that point in time, fit for duty. That interpretation is reasonable based upon the plain meaning of Dr. Crockett's words. Respondent contends that Dr. Crockett's report is neither a finding of fitness for duty,

nor a finding of unfitness. Petitioner's interpretation is more reasonable.

18. Respondent further contends that Dr. Crockett's report includes a directive to have additional psychological evaluations by way of five personal sessions with a psychologist. If those sessions are deemed part of the overall evaluation for fitness, then the costs of the sessions would have to be borne by Petitioner. Conversely, if the sessions are a means of helping Respondent become fit for duty, then the costs would have to be borne by him. The cost of psychotherapy sessions under Respondent's insurance plan would be \$50.00 per session as long as Respondent used one of the 15 psychologists in the health insurance network.

19. On July 8, 2009, Petitioner notified Respondent that Dr. Crockett's report was being interpreted to mean that Respondent was not fit for duty. As a result, Respondent would no longer be on administrative leave, but would need to take regular leave or sick time if he wished to continue being paid. Petitioner instructed Respondent to undergo the prescribed therapy sessions and that Respondent would be responsible for the costs of those sessions. Petitioner further advised Respondent that once the psychological sessions had been completed and Dr. Crockett was made aware of that fact, Dr. Crockett could then issue a Fit for Duty Report so that

Respondent could return to work. Eight days later, Petitioner's attorney sent a letter to Respondent's attorney reiterating the need for Respondent to comply with the directive to undergo psychotherapy.

20. Approximately eight months later, Petitioner notified Respondent that there was no evidence of Respondent's having received the psychotherapy. Thus, Dr. Crockett had not yet issued a Fit for Duty Report. As a result of the time that had passed, Respondent had exhausted his annual and sick leave. He was, therefore, considered absent without leave and subject to termination. The letter then gave Respondent 12 days to submit evidence that he had "made reasonable efforts to comply with the superintendent's written directive of July 8, 2009. Otherwise, the Superintendent would recommend termination of Respondent's employment with the School District of Manatee County."

21. Reasonable efforts could be as little as scheduling one of the psychotherapy sessions. However, Respondent did not respond to Petitioner's letter and did not undertake any action to schedule an appointment. Respondent was under the mistaken belief that when he was placed on administrative leave, his insurance had been cancelled as well. In fact, while Respondent was on leave Petitioner paid the entire premium for Respondent's insurance, i.e., there was no employee share paid by Respondent.

22. As a result of Respondent's failure to comply with the directive to undergo psychotherapy and his failure to request unpaid leave after his annual leave and sick leave were exhausted, Petitioner deemed Respondent absent without leave, effective July 31, 2009, the day his other leave was used up. Further, Respondent's refusal to schedule psychotherapy was deemed insubordination by Petitioner.

23. An Administrative Complaint setting out Petitioner's intent to formally terminate Respondent's employment was then prepared and forwarded to Respondent.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract with the School District of Manatee County. The proceedings are governed by Sections 120.57 and 120.569, Florida Statutes.

25. The Superintendent of Manatee County Schools has the authority to recommend to the School Board that an employee be suspended or dismissed from employment. § 1012.27(5), Fla. Stat.

26. 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.

27. The burden of proof in this proceeding is on Petitioner to prove, by a preponderance of the evidence, 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). Preponderance of the evidence is evidence that more likely than not tends to prove the proposition set forth by a proponent. Gross v. Lyons, 763 So. 2d 276 (Fla. 2000).

28. 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. 2d 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 be in connection with inefficiency, delinquency, poor leadership, and 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).

29. Just cause for purposes of discipline is discussed in Section 1012.33, Florida Statutes:

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."

30. Gross insubordination is defined in Florida Administrative Code Rule 6B-4.009(3), in part, as the constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

31. In the instant case, Respondent's refusal to undergo psychotherapy despite being given more than ample opportunity and his implied threats of violence against co-workers would constitute just cause for termination of employment.

32. Further, Respondent's failure to undergo treatment so as to obtain a Fit for Duty Report left him without sufficient leave to remain away from work. Thus, he effectively became absent without leave and his employment could be terminated for that reason alone.

33. Respondent's actions were sufficiently egregious to warrant the termination of his contract by the School Board. The School 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, Manatee County School Board, upholding the termination of

Respondent, Michael L. Seppala's, employment for the reasons set forth above.

DONE AND ENTERED this 20th day of August, 2010, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2010.

COPIES FURNISHED:

Tim McGonegal, Superintendent
Manatee County School Board
215 Manatee Avenue, West
Post Office Box 9069
Bradenton, Florida 34206-9069

Dr. Eric Smith
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Deborah Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Scott A. Martin, Esquire
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206-9069

Robert E. Turffs, Esquire
Robert E. Turffs, P.A.
1444 First Street, Suite B
Sarasota, Florida 34236-5705

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.