STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-10589
	)	
HENRY STEPHENS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Miami, Florida, on February 2, 2011, before Administrative Law Judge Edward T. Bauer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Arianne B. Suarez, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

For Respondent: Henry Stephens, pro se
536 Northwest 49th Street
Miami, Florida 33127

STATEMENT OF THE ISSUE

Whether there is just cause to terminate Respondent's employment with the Miami-Dade County School Board.

PRELIMINARY STATEMENT

At its regular meeting on November 24, 2010, Petitioner School Board of Miami-Dade County voted to suspend Respondent Henry Stephens without pay and to initiate proceedings to terminate his employment.

Respondent timely requested a formal administrative hearing to contest Petitioner's action. On December 13, 2010, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. Thereafter, on January 14, 2011, Petitioner filed its Notice of Specific Charges, wherein it alleged that Respondent left his work site early on numerous occasions, notwithstanding multiple administrative directives to discontinue the behavior. Based upon the allegations, Petitioner charged Respondent with gross insubordination (Count I), non-performance of job duties (Count II), violation of responsibilities and duties (Count III), and violation of the School Board's Code of Ethics (Count IV).

At the final hearing, which took place on February 2, 2011, Petitioner called the following witnesses: Adrianne Leal, Principal, Coral Reef Senior High School; Alvaro Mejia, Assistant Principal, Coral Reef Senior High School; Helen Pine, District Director, Office of Professional Standards; and Pedro Abreu, Department of Plant Operations. Petitioner's Exhibits 1 through 24 and 26 through 31 were received in evidence.

Respondent testified on his own behalf, but called no other witnesses. Respondent offered no exhibits.

The final hearing transcript was filed on March 4, 2011. Petitioner timely filed a Proposed Recommended Order that has been considered in the preparation of his order. Respondent did not file a post-hearing submittal.

Unless otherwise noted, citations to the Florida Statutes refer to the 2010 version.

FINDINGS OF FACT

A. The Parties

1. Petitioner is the authorized entity charged with the responsibility to operate, control, and supervise the public schools within Miami-Dade County, Florida.

2. At all times material to this proceeding, Respondent was employed by Petitioner as a school custodian.

3. Respondent's employment is governed by the collective bargaining agreement between Petitioner and the American Federation of State, County, and Municipal Employees ("AFSCME"). Pursuant to the AFSCME contract, Respondent may only be discharged for "just cause."

B. Background

4. From May 2000 through August 2008, Respondent was assigned to the Department of Plant Operations.

5. During that period of time, two conferences for the record were held to discuss Respondent's insubordinate conduct. The first, which was held on June 30, 2005, addressed various concerns, which included Respondent's failure to follow directives, insubordination, and failure to follow procedures. During the second conference for the record, conducted on September 30, 2005, Respondent's superiors again admonished him for insubordinate acts and his failure to follow directives.

6. On August 1, 2008, Respondent was reassigned to Coral Reef Senior High School ("Coral Reef"). Respondent was supervised by a head custodian, who in turn reported to Alvaro Mejia, one of Coral Reef's assistant principals.

7. At the beginning of each school year relevant to this proceeding, Coral Reef administration provided Respondent with typed schedules, which clearly provided, in relevant part, that from 3:00 p.m. to 4:00 p.m., Respondent would "clean all hallways and stairwells . . . . Clean first floor restrooms of main building **and any other assigned duty deemed necessary by supervisor**." (Emphasis in original). The schedule further provided that Respondent's work day concluded at 4:00 p.m.

8. Almost immediately, administrators noticed that Respondent would often leave work early without permission. As a result of this conduct, two conferences for the record were held with Respondent during September 2008. Respondent's

behavior persisted, and a third conference for the record was conducted in March 2009.

C. Instant Allegations

9. During the 2009-2010 academic year, Coral Reef administration again discovered that Respondent was regularly leaving work early without authorization. As a result, on October 14, 2009, Respondent was suspended for 10 days without pay for gross insubordination and refusal to follow payroll procedures.

10. Undeterred by the discipline, Respondent continued to leave campus early upon his return from the suspension. This was confirmed by Mr. Mejia, who reviewed video surveillance footage of the custodial work area. In particular, Mr. Mejia learned that Respondent left work 29 minutes early on October 29, 2009, 93 minutes early on October 30, 26 minutes early on November 2, 29 minutes early on November 4, and 30 minutes early on November 5. Compounding the problem, the sign-out log reveals that on each of these five occasions, Respondent falsely recorded 4:00 p.m. as the time he left work.

11. On November 6, 2009, Ms. Adrianne Leal, the principal of Coral Reef, provided Respondent with a professional responsibilities memorandum, wherein she admonished him for continuing to leave early and for falsifying the payroll record by recording inaccurate sign-out times. The memorandum further

reminded Respondent that his work day did not end until 4:00 p.m.

12. Although Respondent ended his practice of recording inaccurate sign-out times, he continued to leave work early, including the very day he received the professional responsibilities memorandum. Specifically, Mr. Mejia's review of the video footage demonstrated that Respondent left 31 minutes early on November 6, 2009, 27 minutes early on November 9, 32 minutes early on November 10, 34 minutes early on November 12, 32 minutes early on November 13, 30 minutes early on November 16, and 31 minutes early on November 17 and 18.

13. Respondent's behavior continued over the course of the next several months, during which he left work early without authorization on 11 occasions. In particular, Mr. Mejia confirmed that Respondent left work 24 minutes early on December 16, 2009, 20 minutes early on January 7, 2010, 31 minutes early on January 8, 26 minutes early on January 20, 30 minutes early on January 21, 92 minutes early on January 22, 12 minutes early on January 25, 34 minutes early on January 26, 29 minutes early on January 27, 26 minutes early on January 28, and 64 minutes early on January 29.

14. Subsequently, on February 3, 2010, Ms. Leal issued Respondent a memorandum titled, "Accrued Leave Without Pay," which notified Respondent that he had been docked one day

without pay based upon his early departures from campus during December 2009 and January 2010.

15. On February 18, 2010, Ms. Leal held a conference for the record with Respondent, during which she discussed his history of misbehavior, reminded him of his responsibilities, and emphasized the fact that his work day did not end until 4:00 p.m.

16. Nevertheless, Respondent persisted with his misconduct and failed to work until 4:00 p.m. on approximately 30 occasions during the months of February, March, and April 2010. On March 12, April 21, and May 17, 2010, Ms. Leal issued Respondent "Accrued Leave Without Pay" notices.

17. As the months passed, Mr. Mejia continued to document numerous instances where Respondent departed campus prior to 4:00 p.m. without permission. In particular, from July 27, 2010, through October 21, 2010, Respondent left work at 3:40 p.m. or earlier on no fewer than 28 occasions.

18. On November 2, 2010, its benevolence finally exhausted, Petitioner summoned Respondent to the School Board's Office of Professional Standards for a final conference for the record. Subsequently, Petitioner notified Respondent in writing that it intended to suspend him without pay and initiate dismissal proceedings.

D. Ultimate Findings

19. The greater weight of the evidence establishes that Respondent is guilty of gross insubordination.

20. The greater weight of the evidence establishes that Respondent is guilty of non-performance of job duties.

21. The greater weight of the evidence establishes that Respondent is guilty of failing to behave in such a manner that reflects credit upon himself and the school system.

22. The greater weight of the evidence establishes that Respondent is guilty of violating the School Board's Code of Ethics.

CONCLUSIONS OF LAW

A. Jurisdiction

23. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

B. Basis for Discipline

24. As a custodian, Respondent is an "educational support employee" as defined by section 1012.40(1)(a), Florida Statues. See Lee Cnty. Sch. Bd. v. Taylor, Case No. 04-2757 (Fla. DOAH Nov. 12, 2004) (noting that a custodian is an educational support employee pursuant to section 1012.40(1)(a)).

25. Section 1012.40(2)(b), Florida Statutes, provides that educational support employees may be terminated only "for

reasons stated in the collective bargaining agreement." As noted above, the AFSCME agreement provides that educational support employees such as Respondent, who have been employed by Petitioner for five years or more, may only be discharged for "just cause." See Miami-Dade Cnty. Sch. Bd. v. Morgan, Case No. 03-1334 (Fla. DOAH Oct. 24, 2003).

26. Pursuant to Article XI of the AFSCME agreement, the violations alleged in Counts I thorough IV of the Notice of Specific Charges, if proven, each constitutes "just cause" for terminating Respondent.

C. The Standard and Burden of Proof

27. Petitioner has the burden of proving the material allegations by a preponderance of the evidence. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990).

28. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000); see also Williams v. Eau Claire Pub. Sch., 397 F.3d 441, 446 (6th Cir. 2005) (holding trial court properly defined the preponderance of the evidence standard as "such evidence as, when considered and compared with that opposed to it, has more convincing force and

produces . . . [a] belief that what is sought to be proved is more likely true than not true").

D. Count I: Gross Insubordination

29. In Count I of the Notice of Specific Charges, Petitioner alleges that Respondent is guilty of insubordination, contrary to Florida Administrative Code Rule 6B-4.009(4), which provides:

> Gross insubordination or willful neglect of duties is defined as a constant or continuing refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

30. As detailed in the findings of fact above, the evidence demonstrates that Respondent, notwithstanding repeated verbal and written admonitions (that were both reasonable and proper), left the work site early on numerous occasions without authorization. For whatever reason, Respondent refused to accept the fact that it was not up to him to set his own work schedule, and his continued defiance plainly rises to the level of gross insubordination.[1] See Miami-Dade Cnty. Sch. Bd. v. Bell, Case No. 05-2367 (Fla. DOAH June 5, 2006) (finding violation of rule 6B-4.009(4) where custodian, following warnings from his principal not to leave work early, continued to do so without permission); see also Lee Cnty. Sch. Bd. v. Taylor, Case No. 04-2757 (Fla. DOAH Nov. 12, 2004) ("Respondent's position as a custodian did not give her the

discretion to leave early when she decided her work was finished. Her contract called for her to work from 3:00 p.m. to 11:00 p.m."); Sch. Bd. of Dade Cnty. V. Ingber, Case No. 93-3963 (Fla. DOAH Jan. 12, 1994) (finding gross insubordination where, among other acts of misconduct, employee repeatedly failed to stay at work for the entire day). Accordingly, Respondent is guilty of Count I.

E. Count II: Non-Performance of Job Duties

31. In Count II of the Notice of Specific Charges, Petitioner alleges that Respondent is guilty of failing to perform his job duties, contrary to Article XI, Section 4C of the collective bargaining agreement.

32. It is axiomatic that in order for Respondent to fulfill his responsibilities as a school custodian, he was required to be physically present on campus during his allotted work hours. By habitually leaving work early (30 minutes or more on many occasions) Respondent failed to properly discharge his duties. See Miami-Dade Cnty. Sch. Bd. v. Bell, Case No. 05-2367 (Fla. DOAH June 5, 2006) (finding just cause for dismissal based upon nonperformance of job responsibilities, where custodian repeatedly failed to work his entire shift). As such, Respondent is guilty of Count II.

F. Count III: Responsibilities and Duties

33. Count III of the Notice of Specific Charges alleges that Respondent violated School Board Rule 6Gx13-4A-1.21, which pertains to duties and responsibilities of School Board employees, and provides, in relevant part:

I. Employee Conduct

> All persons employed by The School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

34. By falsifying the sign-out log on five occasions and defying repeated admonitions to adhere to his work schedule, Respondent failed to conduct himself in a manner that reflected credit upon himself and the school system, and is therefore guilty of Count III.

G. Count IV: Code of Ethics

35. In Count IV of the Notice of Specific Charges, Petitioner contends that Respondent violated School Board Rule 6Gx13-4A-1.213, Code of Ethics, which provides, in pertinent part:

> Each employee agrees and pledges:
>
> 1. To abide by this Code of Ethics, making the well-being of the students and the honest performance of professional duties core guiding principles.

* * *

5. To take responsibility and be accountable for his or her actions.

* * *

7. To cooperate with others to protect and advance the District and its students.

8. To be efficient and effective in the delivery of job duties.

36. The evidence demonstrates that Respondent, instead of cooperating with his administrators and adhering to the assigned work schedule, chose to come and go from Coral Reef as he wished. Such a complete lack of accountability on Respondent's part rendered him ineffective in his own duties and needlessly consumed a great deal of his administrators' time and attention. Thus, Respondent violated the Code of Ethics and is guilty of Count IV.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is

RECOMMENDED that the School Board enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order terminate Respondent's employment.

DONE AND ENTERED this 16th day of March, 2011, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2011.

ENDNOTE

[1] Respondent apparently believed that he was entitled to be paid for his 30 minute lunch period, and that Petitioner's refusal to do so constituted an injustice that permitted him to unilaterally cut short his work day by that same amount of time. Respondent is mistaken, as the Fair Labor Standards Act, which governs non-exempt workers such as custodians, provides that meals are not "work time" and are not compensable. See 29 C.F.R. § 785.19(a) ("Bona fide meal periods are not work time . . . . Ordinarily 30 minutes or more is long enough for a bona fide meal period.").

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.