STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-4922TTS
	)	
MOLINA MCINTYRE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Miami, Florida, on November 21, 2011, before Administrative Law Judge Edward T. Bauer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Teddra J. Gadson, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

For Respondent: Mark S. Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761

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 September 7, 2011, Petitioner School Board of Miami-Dade County voted to suspend Respondent Molina McIntyre without pay and to initiate proceedings to terminate her employment.

Respondent timely requested a formal administrative hearing to contest Petitioner's action. On September 22, 2011, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. Thereafter, on October 10, 2011, Petitioner filed its Notice of Specific Charges, wherein it alleged that Respondent failed to report to work on numerous occasions, notwithstanding several administrative directives to discontinue the behavior. Based upon the allegations, Petitioner charged Respondent with gross insubordination (Count I), violation of responsibilities and duties (Count II), and violation of the School Board's Code of Ethics (Count III).

As noted above, the final hearing was held on November 21, 2011, during which Petitioner called the following witnesses: Sabrina Montilla, Melissa Mesa, Portia Burch-Oliver, and Joyce Castro. Petitioner's Exhibits 1 through 26 were admitted into evidence. Respondent testified on her own behalf, but called no other witnesses. Respondent offered no exhibits.

At the conclusion of the final hearing, the undersigned granted Petitioner's unopposed request for an extended deadline

of January 5, 2012, for the submission of proposed recommended orders.

The final hearing Transcript was filed on December 2, 2011. On January 5, 2012, both parties submitted proposed recommended orders, which have been considered in the preparation of this Recommended Order.

Unless otherwise noted, citations to the Florida Statutes refer to the 2011 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 security monitor at Crestview Elementary School in the Miami-Dade County School District.[1/]

3. Respondent's employment is governed by the collective bargaining agreement between Petitioner and United Teachers of Dade ("UTD"). Pursuant to Article XXI, Section 3.D of the UTD contract, Respondent may be discharged only for "just cause," which includes, but is not limited to, "misconduct in office, incompetency, gross insubordination, willful neglect of duty,

immorality, and/or conviction of a crime involving moral turpitude."

B. 2009-2010 School Year

4. During the 2009-2010 academic year, Respondent was assigned to Crestview Elementary School ("Crestview") as its school security monitor.

5. At the beginning of the year, Melissa Mesa, Crestview's principal at that time, provided Respondent with a schedule that detailed her responsibilities and duties as a monitor. In particular, Ms. Mesa advised Respondent that she was required to report to work at 7:30 a.m. and ensure that students unloaded from the buses safely. Respondent was further informed that she was required, among other tasks, to watch the students in the cafeteria during breakfast and lunch, direct visitors to the front office, patrol the hallways, and ensure that Crestview's gates were locked. Finally, Respondent was clearly instructed that her workday did not end until 3:30 p.m.

6. Almost immediately, Respondent began to exhibit a pattern of excessive absenteeism. Specifically, during her first month of work, Respondent was absent three times. Over the next two months (October and November), Respondent was absent without authorization on eight occasions.

7. In response to these repeated absences, Ms. Mesa provided an "Absence from Worksite Directive" to Respondent on

December 3, 2009. In the directive, Ms. Mesa informed Respondent, in relevant part, that "[a]ttendance and punctuality are essential functions of [the] job . . . . [and that Respondent's] absence from duties adversely impacts the educational / work environment, particularly in effective operation of [the] worksite." The directive further provided that failure to be "in regular attendance and on time" would be considered insubordination and a violation of professional responsibilities.

8. Notwithstanding the December 3, 2009, directive, Respondent failed to report for work——without authorization——on: December 17, 2009; January 11, 12, and 19, 2010; and February 11, 12, and 16, 2010.

9. On February 19, 2010, a conference for the record was held with Respondent to discuss her repeated, unexcused absences. Three days later, Respondent was provided with a summary of the conference for the record, as well as a written reprimand from Ms. Mesa.

10. Despite the February 19, 2010, meeting and the issuance of a reprimand, Respondent missed an additional three days of work, without authorization, over the next three months.

11. In all, Respondent accumulated in excess of 30 absences (18 of which were unexcused) during the 2009-2010 school year, which adversely affected Crestview's operations.

In particular, Ms. Burch-Oliver, an assistant principal at Crestview, was often required to assume Respondent's duties on the days Respondent failed to report for work.

C. 2010-2011 School Year

12. On August 20, 2010, Sabrina Montilla, Crestview's new principal, met with Respondent and explained her schedule and duties——that were identical to Respondent's responsibilities during the previous year——as a security monitor for 2010-2011.

13. Notwithstanding the August meeting, Respondent was absent a total of nine times (three of which were unauthorized) between September 8, 2010, and December 8, 2010. During that same span, Respondent left early three times and was tardy on 12 occasions.

14. As a result, a conference for the record was held on December 14, 2010, to discuss Respondent's attendance and her noncompliance with worksite directives. Ms. Montilla issued a written reprimand to Respondent on the following day.

15. Nevertheless, between December 14, 2010, and April 11, 2011, Respondent was tardy 12 more times, often by substantial amounts of time (on three occasions, Respondent was at least 90 minutes late). In addition, Respondent missed two and one-half days of work without authorization: a half day on March 25 and full days on January 31 and April 6.

16. A conference for the record was scheduled for April 22, 2011, to discuss, once again, Respondent's attendance issues. Respondent failed to appear, however, and was issued a reprimand shortly thereafter.

17. Regrettably, Respondent's noncompliance with her work schedule continued. Specifically, Respondent was tardy on May 2, 9, 12, and 18, 2011, left work early on May 11, 2011, and was absent without authorization on May 3, 12, and 19, 2011 (absent a full day on May 3, and half days on the other dates).

18. Subsequently, on May 24, 2011, a conference for the record was held with Respondent at Petitioner's Office of Professional Standards. During the conference, Respondent was provided with, but declined, an opportunity to respond to the allegations of gross insubordination, noncompliance with professional responsibilities, and violations several School Board Rules.

19. On August 23, 2011, Respondent was informed that the Superintendent of Schools would make a recommendation at the September 7, 2011, School Board meeting that she be dismissed from her employment as a security monitor.

D. Respondent's Final Hearing Testimony

20. During the final hearing in this cause, Respondent attributed her failure to adhere to Crestview's schedule during the 2009-2010 school year to the fact that she was pregnant with

her third child——she gave birth on June 13, 2010——and frequently suffered from morning sickness.

21. Respondent further testified that as a single parent with two other children (ages five and eight), she was responsible for dropping her middle child off at Charles Drew Elementary School——located some distance from Crestview——at the same time that she was scheduled to report for work. While Respondent indicates that, "in the beginning," she was paying "someone" to take her child to work, the person she hired would often leave her in the lurch. However, Respondent failed to explain why she was unwilling or unable to find a more reliable individual to take her child to school.

22. With respect to the 2010-2011 school year, Respondent testified that her attendance problems continued due to her newborn's medical issues———asthma and heart murmurs——and the need to transport her baby to daycare. Although Respondent concedes that School District provided her with information about Family Medical Leave Act, Respondent admits that she made no effort to secure medical leave to be with her son.

23. Finally, Petitioner testified that her childcare issues have been solved by her use of a daycare facility near Crestview and the transfer of her daughter to Crestview from Charles Drew Elementary. As a result, Petitioner believes that

should her employment be reinstated, she would now be able to comply with the attendance requirements of her position.

24. While the undersigned credits the portions of Respondent's testimony discussed above, which no doubt reveal that she was dealing with challenging issues as a single parent, the fact remains that Respondent failed——on repeated occasions—— to reconcile the tension between her family responsibilities and the demands of her employment. Although Respondent made a decision that many parents would in her situation (to prioritize family over her job duties), the fact remains that she made a deliberate, knowing choice to be absent and tardy on numerous occasions during two different school years.

E. Ultimate Findings

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

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

27. 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

28. 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

29. As a school security monitor, Respondent is a non-probationary educational support employee as defined by section 1012.40(1)(a), Florida Statutes. See Miami-Dade Cnty. Sch. Bd. v. Rich, Case No. 09-1065, 2009 Fla. Div. Adm. Hear. LEXIS 785 (Fla. DOAH Oct. 19, 2009)(noting that a school security monitor is an educational support employee pursuant to section 1012.40).

30. 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 previously, Article XXI, Section 3.D of the UTD agreement provides that educational support personnel may be terminated only for "just cause," which is defined by that provision of the contract as follows:

> Just cause includes, but is not limited to, misconduct in office, incompetency, gross insubordination, willful neglect of duty, immorality, and/or conviction of a crime involving moral turpitude. Such charges are defined, as applicable, in State Board [Florida Administrative Code] Rule 6B-4.009.

C. The Standard and Burden of Proof

31. 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).

32. 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

33. 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.

34. 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), failed to appear for work on multiple occasions without permission. Further, the evidence demonstrates that Respondent, on numerous instances and without prior approval, did not arrive at Crestview on time. Notwithstanding Respondent's family issues, it was not up to her to set her own schedule, and her continued defiance rises to the level of gross insubordination. See Miami-Dade Cnty. Sch. Bd. v. Stephens, Case No. 10-10589, 2011 Fla. Div. Adm. Hear. LEXIS 28 (Fla. DOAH Mar. 16, 2011)(finding gross insubordination where school district employee repeatedly failed to adhere to his work schedule); Miami-Dade Cnty. Sch. Bd. v. Bell, Case No. 05-2367, 2006 Fla. Div. Adm. Hear. LEXIS 238 (Fla. DOAH June 5, 2006) (finding violation of rule 6B-4.009(4) where employee, following warnings from his principal not to leave work early, continued to do so without permission); Sch. Bd. of Dade Cnty. v. Ingber, Case No. 93-3963, 1994 Fla. Div. Adm. Hear. LEXIS 5333 (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); Sch. Bd. of Dade Cnty. v. Wiener, Case No. 93-1345, 1993 Fla. Div. Adm. Hear. LEXIS 5633 (Fla. DOAH Aug. 24, 1993)(finding teacher guilty of gross insubordination based upon

repeated, unauthorized absences). Accordingly, Respondent is guilty of Count I.

E. Count II: Responsibilities and Duties

35. Count II 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.

(emphasis added).

36. For a violation of Rule 6Gx13-4A-1.21 to provide just cause to terminate Respondent's employment, it is insufficient for Petitioner to prove that her behavior——multiple unexcused absences and tardy arrivals——failed to reflect credit upon herself and the school system. Rather, Petitioner must also demonstrate that the behavior impaired Respondent's effectiveness as an employee. Miami-Dade Cnty. Sch. Bd. v. Singleton, Case No. 07-559, 2006 Fla. Div. Adm. Hear. LEXIS 614 (Fla. DOAH June 21, 2007)("The undersigned has repeatedly held, and concludes again here, that violations of school board rules,

to warrant termination of employment, must rise to the level of misconduct in office"), adopted in toto Aug. 10, 2007; Miami-Dade Cnty. Sch. Bd. v. Brenes, Case No. 06-1758, 2007 Fla. Div. Adm. Hear. LEXIS 122 (Fla. DOAH Feb. 27, 2007)("[T]o justify termination, a violation of School Board Rule 6Gx13-4A-1.21 must be 'so serious as to impair the individual's effectiveness in the school system'"), adopted in toto Apr. 25, 2007; Miami-Dade Cnty. Sch. Bd. v. Depalo, Case No. 03-3242, 2004 Fla. Div. Adm. Hear. LEXIS 1684 (Fla. DOAH May 20, 2004)(same as Singleton and Brenes), adopted in toto July 15, 2004; Miami-Dade Cnty. Sch. Bd. v. Wallace, Case No. 00-4392, 2001 WL 335989 (Fla. DOAH Apr. 4, 2001), adopted in toto May 17, 2001.

37. Based upon the findings of fact herein, both elements have been satisfied. First, Respondent clearly failed to reflect credit upon herself and the school system through her repeated (and unauthorized) absences and late arrivals. See Sch. Bd. of Miami-Dade Cnty. v. Li, Case No. 07-3792, 2008 Fla. Div. Am. Hear. LEXIS 18 (Fla. DOAH Jan. 15, 2008)(finding that excessive absenteeism constituted a violation of Rule 6Gx13-4A-1.21); see also Miami-Dade Cnty. Sch. Bd. v. Stephens, Case No. 10-10589, 2011 Fla. Div. Adm. Hear. LEXIS 28 (Fla. DOAH Mar. 16, 2011). Further, Respondent's behavior made it impossible for her to discharge her assigned duties (which Crestview's assistant principal often assumed by necessity), and as such,

her effectiveness as an employee was impaired. For these reasons, Respondent is guilty of Count II.

F. Count III: Code of Ethics

38. Finally, in Count III 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.
>
> * * *
>
> 8. To be efficient and effective in the delivery of job duties.

39. Respondent failed to take responsibility for her actions through her numerous, unexcused absences and tardy arrivals at Crestview. Such behavior, which impaired her effectiveness as an employee, constitutes a violation of the Code of Ethics. See Sch. Bd. of Miami-Dade Cnty. v. Li, Case No. 07-3792, 2008 Fla. Div. Adm. Hear. LEXIS 18 (Fla. DOAH Jan. 15, 2008)(finding that employee violated the Code of Ethics through excessive absenteeism). Thus, Respondent is guilty of Count III, as alleged in the Notice of Specific Charges

G. Appropriate Discipline

40. As Petitioner correctly alleges, just case exists to terminate Respondent's employment based upon the violations found above.

41. In the undersigned's judgment, however, it would not be inappropriate for the school board to consider a sanction short of Respondent's termination (e.g., probation or a suspension) in light of her family circumstances——that have now been alleviated——during the 2009-2010 and the 2010-2011 school years.

RECOMMENDATION

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

RECOMMENDED that the School Board enter a final order finding Respondent guilty of Counts I, II, and III of the Notice of Specific Charges. It is further recommended that the final order terminate Respondent's employment, or, in the alternative, impose a penalty other than Respondent's dismissal.

DONE AND ENTERED this 12th day of January, 2012, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
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 12th day of January, 2012.

ENDNOTE

[1/] Petitioner hired Respondent as a part-time food service worker in September 2006. Several months later, Respondent was reassigned to a school security monitor position at Miami Edison Senior High School, where she remained until her transfer to Crestview Elementary School in September 2009.

COPIES FURNISHED:

Teddra J. Gadson, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761

Alberto M. Carvalho, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 912
Miami, Florida 33132-1308

Gerard Robinson, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Charles M. Deal, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.