STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MONROE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-0760TTS
	)	
THOMAS AMADOR,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Key West, Florida, on May 15, 2012, before Administrative Law Judge Edward T. Bauer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Theron C. Simmons, Esquire
Vernis & Bowling of the
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For Respondent: Mark S. Herdman, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

By correspondence dated January 19, 2012, the Monroe County School Board ("Petitioner") notified Respondent that it intended to terminate his employment as an air-conditioning mechanic. On the same date, Petitioner filed an Administrative Complaint against Respondent, wherein it alleged that Respondent was subject to discipline because he: used institutional privileges for personal gain or advantage, contrary to school board policy 4210(I); failed to maintain honesty in all dealings, in violation of school board policy 4210(L); and submitted fraudulent information on employment documents, as prohibited by school board policy 4210(Q).

Respondent timely requested a formal administrative hearing to contest Petitioner's action. On February 24, 2012, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings.

As noted above, the final hearing was held on May 15, 2012, during which Petitioner introduced 18 exhibits, numbered 1-18, and presented the testimony of Cheryl Allen and Jeff Barrow. Respondent testified on his own behalf and introduced 15 exhibits, numbered 1-15.

The final hearing Transcript was filed on June 1, 2012. On June 11, 2012, the parties requested, and the undersigned subsequently ordered, an extension of the proposed recommended

order deadline to June 13, 2012. Both parties thereafter 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

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

2. At all times material to this proceeding, Petitioner employed Respondent as a non-probationary air-conditioning mechanic in the Upper Keys.

3. As noted previously, Petitioner initiated the instant cause against Respondent on January 19, 2012. In a letter signed by the superintendent of schools on that date, Petitioner advised Respondent that it intended to terminate his employment:

> [F]or willful violation of school board policy, 4210(I), (L) and (Q), by theft of time, inappropriate use of a District owned vehicle, and by making fraudulent statements in required District paperwork, all of which are grounds for discipline up to and including termination.
>
> * * *
>
> This action is being taken in accordance with School Board Policies . . . and the Collective Bargaining Agreement.

(emphasis added).

4. The above-quoted language notwithstanding, Petitioner's Administrative Complaint ("Complaint"), filed contemporaneously with the superintendent's letter, does not purport to discipline Respondent in accordance the collective bargaining agreement,[1/] the terms of which are neither referenced in the Complaint nor included in the instant record——a fatal error, as explained later. Instead, Petitioner seeks in its Complaint to terminate Respondent's employment based solely upon alleged violations of School Board Policy 4210 (specifically, subsections I, L, and Q), which provides, in relevant part:

> 4210 - Standard for Ethical Conduct
> An effective educational program requires the services of men and women of integrity, high ideals, and human understanding. The School Board expects all support staff members to maintain and promote these essentials. Furthermore, the School Board hereby establishes the following as the standards of ethical conduct for all support staff members in the District who have direct access to students: A support staff member with direct access to students shall:
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> * * *
>
> I. not use institutional privileges for personal gain or advantage.
>
> * * *
>
> L. maintain honesty in all dealings.
>
> * * *

> Q. not submit fraudulent information on any document in connection with employment.

(emphasis added).

5. Significantly, the record is devoid of evidence that Respondent has direct access to students, and the nature of Respondent's position (an air-conditioning mechanic) does not permit the undersigned to infer as much; therefore, Petitioner has failed to demonstrate that Respondent is subject to the proscriptions of School Board Policy 4210.

6. In light of these unique circumstances——i.e., Petitioner has not proceeded against Respondent under the terms of the collective bargaining agreement (as it should have), but rather, under a school board policy that applies only to employees that have direct access to students——it is unnecessary to reach the merits of the underlying allegations of misconduct.

CONCLUSIONS OF LAW

7. 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.

8. Petitioner bears the burden of proof in this proceeding. Cisneros v. Sch. Bd. of Miami-Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008)("As the ALJ properly found, the School Board had the burden of proving the allegations . . . by a preponderance of the evidence"); McNeill v. Pinellas Cnty.

Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal").

9. As an air-conditioning mechanic, Respondent is an educational support employee as defined by section 1012.40(1)(a), Florida Statutes. See Lee Cnty. Sch. Bd. v. Rasmussen, Case No. 08-6220, 2009 Fla. Div. Adm. Hear. LEXIS 912 (Fla. DOAH June 22, 2009)(finding that a maintenance worker is an educational support employee pursuant to section 1012.40).

10. Section 1012.40(2)(b), Florida Statutes, provides that non-probationary support employees such as Respondent are entitled to maintain their employment from year to year unless:

> [T]he district school superintendent terminates the employee for the 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.

(emphasis added).

11. Pursuant to section 1012.40(2)(b), Petitioner was obligated, once it determined to pursue the termination of Respondent's employment, to proceed forward under the terms of the collective bargaining agreement. However, Petitioner did not do so——and, as a natural consequence, has not made the

bargaining agreement part of the record——which makes it impossible to ascertain whether Respondent's alleged misconduct provides a basis for discipline. This alone requires the Complaint's dismissal, as illustrated by Miami-Dade School Board v. Alvin, Case No. 03-3515, 2004 Fla. Div. Adm. Hear. LEXIS 1693 (Fla. DOAH Mar. 19, 2004), adopted in toto June 17, 2004. In Alvin, the school district sought to terminate the employment of a school security monitor based upon, among other things, the employee's pleas of no contest to several criminal drug charges. Id. Although the terms of the employment were governed by a collective bargaining agreement, the school board failed to make the contract part of the evidentiary record——a deficiency that necessitated the dismissal of the administrative complaint:

> In this case, because a collective bargaining agreement does exist, Alvin can be terminated only for reasons stated therein. Such "reasons" are matters of fact that the Board must prove as part of its case-in-chief. Usually this is done by moving the collective bargaining agreement into evidence. Here, however, the Board failed at hearing to introduce the collective bargaining agreement or offer any other competent evidence of its terms.
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> * * *
>
> By statute, the UTD Contract, as the applicable collective bargaining agreement, prescribes the standards against which the undersigned fact-finder must evaluate Alvin's conduct, to determine whether he should be fired. Thus, whether Alvin violated the applicable contractual

> standard(s) is a question of ultimate fact to be decided in the context of each alleged reason for terminating his employment.
>
> * * *
>
> Without knowing the "reasons stated in the collective bargaining agreement" as potential grounds for termination, the undersigned obviously cannot determine, as a matter of ultimate fact, whether Alvin should be terminated. To learn what those reasons are, the undersigned is required to rely "exclusively on the evidence of record and on matters officially recognized." See § 120.57(1)(j), Fla. Stat. (emphasis added). Consequently . . . the Board's failure to introduce the UTD Contract (or some competent evidence of its terms) is fatal to the Board's case.

Id. at *6-8 (emphasis in original).[2/] Persuaded by Alvin's reasoning, it is concluded that Petitioner's failure to introduce competent evidence of the terms of the collective bargaining agreement is fatal to its case.

12. Assuming arguendo that no bargaining agreement exists, Petitioner's case nevertheless fails, as the rule under which Petitioner seeks to discipline Respondent (school board policy 4210) applies, by its express terms, only to support employees who have direct contact with students. As found above, Petitioner adduced no evidence that Respondent has such contact.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the Monroe County School Board enter

a final order: dismissing the Administrative Complaint; and immediately reinstating Respondent's employment.

DONE AND ENTERED this 21st day of June, 2012, 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 21st day of June, 2012.

ENDNOTES

[1/] The existence of a collective bargaining agreement is confirmed by several brief references to the document (by Petitioner's counsel and a witness) during the final hearing. See Final Hearing Transcript, p. 23; 34; 45-46.

[2/] The administrative law judge in Alvin declined, properly, to re-open the record (which would have provided the school board an opportunity introduce the bargaining agreement) or take official recognition of the agreement's terms. As the judge in Alvin explained:

> First, . . . receiving additional evidence (or officially recognizing facts) after the record has been closed is disfavored and should be avoided.

* * *

> Second, as the Florida Supreme Court has explained, "courts should exercise great caution when using judicial notice. As has been held in this state and elsewhere, judicial notice is not intended to fill the vacuum created by the failure of a party to prove an essential fact."
>
> * * *
>
> Third, the Board will not be authorized to "reopen the record, receive additional evidence and make additional findings" when this case is again before the agency for the purposes of entering the final order. Nor will the Board be allowed to officially recognize the UTD Contract, because "[o]fficial recognition is not a device for agencies to circumvent the hearing officer's findings of fact by building a new record on which to make findings." Given these circumstances, the undersigned is reluctant to take a discretionary action on his own motion that would look to any objective observer like bending-over-backwards to rescue the Board from its failure to introduce sufficient evidence at hearing.
>
> Finally, it is concluded that giving the Board a mulligan here would require the undersigned improperly to assume a patently adversarial posture vis-à-vis Alvin.

Alvin, 2004 Fla. Div. Adm. Hear. LEXIS 1693 at *9-11 (internal citations omitted)(emphasis in original).

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.