

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

RECOMMENDED ORDER ON REMAND

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
Florida Keys, P.A.
81990 Overseas Highway, Third Floor
Islamorada, Florida 33036

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 Monroe County School Board.

PRELIMINARY STATEMENT

By correspondence dated January 19, 2012, the Monroe County School Board ("Petitioner" or "School Board") notified Respondent that it intended to terminate his employment as an air-conditioning mechanic. On the same date, Petitioner filed an Administrative Complaint ("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, and, 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,^{1/} 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, followed by the parties' timely submission of proposed

recommended orders. A Recommended Order was thereafter issued on June 21, 2012, wherein the undersigned determined that the absence of record evidence concerning the terms of the collective bargaining agreement required the dismissal of the Complaint. The undersigned further concluded, in the alternative, that dismissal of the Complaint was warranted in light of Petitioner's failure to demonstrate the applicability of School Board Policy 4210—a policy that, by its express terms, applies only to support staff members with direct access to students. (No evidence was adduced during the final hearing that would support a finding that Respondent had such direct access.) In light of these deficiencies, the undersigned found it unnecessary—and therefore declined—to make specific findings concerning the underlying factual allegations.

On November 30, 2012, Petitioner remanded this matter to DOAH with instructions to "reach the merits of the case." The undersigned subsequently directed Petitioner, in an order issued December 21, 2012, to transmit the final hearing transcript and exhibits to DOAH no later than January 18, 2013. The complete record, which Petitioner filed on January 18, 2013, as well as the parties' previously-filed proposed recommended orders have been reviewed and considered in the preparation of this Recommended Order.^{2/}

FINDINGS OF FACT

A. The Parties / Background

1. Petitioner is the authorized 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. Respondent's professional duties include the maintenance and repair of air conditioning units at three schools—Plantation Key School, Coral Shores School, and Key Largo School—in the "Upper Keys" region of Monroe County. The record is devoid of evidence that Respondent's position affords him "direct access" to students, as that phrase is used in the School Board's policies.

4. On a typical workday, Respondent is expected to report by 7:00 a.m. to the school district's maintenance office (where Respondent's superintendent, Jeff Barrow, is located) in Tavernier, Florida. Generally speaking, the first 20 to 30 minutes of Respondent's day are spent at a computer terminal, where he monitors the temperatures in his assigned schools. Next, Respondent dedicates approximately 20 minutes to the completion of paperwork associated with repair tasks from the previous day. Respondent then begins work on various repair

assignments, all of which are described in written work orders. During the course of the day, Respondent is entitled to a one-hour lunch, as well as two 15-minute breaks, which are taken at approximately 9:00 a.m. and 2:00 p.m.

5. School Board maintenance employees, including Respondent, are required to complete (and submit to the supervisor) a "daily log sheet," which lists, among other things, the time spent on each work order, the work order number, and the specific action taken. In accordance with the practice and custom of Respondent's fellow employees, time intervals are recorded in the daily logs in half-hour increments.^{3/} For instance, an entry of half an hour would be made for a task completed in only ten minutes, while a 40-minute job would be recorded as one hour. As a result of this practice, the first two activities of Respondent's day—i.e., monitoring classroom temperatures and completing paperwork, which in combination take more than 30 minutes—are recorded in each of Respondent's daily logs as a single, one-hour entry.

6. In addition to the daily work logs, maintenance workers are required to keep a separate vehicle log. Each worker's vehicle log is expected to list, with respect to each workday, a beginning odometer reading and most, but not all, of the locations visited. As to the latter requirement, the credible evidence establishes that lunch or break destinations need not

be recorded in the vehicle logs,^{4/} an omission tolerated by Respondent's supervisor.^{5/} Further, it is customary that multiple visits to a particular location during the same day are recorded as a single trip.^{6/}

7. Turning to the merits, the instant charges against Respondent stem from three events, each of which is discussed separately below: Respondent's travel to Key West on October 18, 2011, to attend a grievance hearing; Mr. Barrow's sighting of Respondent on October 21, 2011, at a location where Respondent had no apparent business; and Mr. Barrow's subsequent review of Respondent's daily work logs and vehicle log for the period of October 3 through 21, 2011—an examination that, according to Petitioner, reveals numerous unaccounted-for miles.

B. Events of October 18, 2011

8. On October 18, 2011, Respondent was scheduled to travel to Key West to attend a second-level grievance hearing before the School District's director of human resources, Ms. Cheryl Allen. The grievance, which Respondent filed in an effort to challenge his job title and compensation, had been denied at the first level by Mr. Barrow. In light of Mr. Barrow's previous involvement in the grievance, as well Mr. Barrow's placement of a letter announcing the October 18 hearing's date and time in Respondent's mail folder, Respondent assumed, reasonably, that

it was unnecessary to provide Mr. Barrow with advance notification of his absence from the worksite.

9. On the date in question, Respondent reported to the maintenance office at 7:00 a.m., at which time he performed his daily check of classroom temperatures. Thereafter, at approximately 7:20 a.m., Respondent left the maintenance shop and proceeded to Plantation Key School, where he dropped off his work truck (which was experiencing mechanical issues) and exchanged it for a different vehicle.^{7/} At that point, Respondent reviewed his grievance paperwork for a short time and then departed for Key West, a destination some two hours away from Tavernier.

10. Upon his arrival in Key West, Respondent stopped at the office of Mr. Leon Fowler, a union representative, to discuss the impending grievance proceeding. Upon the conclusion of their conference, which lasted approximately 30 minutes, Respondent and Mr. Fowler drove the short distance to Ms. Allen's office, the location of the hearing.

11. The credible evidence establishes that the grievance proceeding began at 11:00 a.m. and ended 30-35 minutes later. At that point, Respondent returned to Mr. Fowler's office and discussed the events of the hearing until roughly 12:00 p.m. Immediately thereafter, Respondent began the return trip to Tavernier, which ultimately took two and one-half

hours—30 minutes more than the usual drive time—due to his unsuccessful efforts to find a suitable place to eat lunch. (As explained during the final hearing, Respondent suffers from high cholesterol and therefore avoids fast food establishments.)

12. Upon his return to Tavernier, Respondent proceeded directly to his residence (his usual lunch spot) and remained there from 2:30 p.m. until 3:45 p.m.—all to the chagrin of Mr. Barrow, who was monitoring Respondent's whereabouts from a nearby location. Respondent then returned to the maintenance office and clocked out at the customary time.

13. As noted previously, Respondent is entitled to a daily lunch period of one hour, as well as two, 15-minute breaks (for a total of 90 minutes). By spending 30 minutes looking for a place to eat on the return trip from Key West, as well as 75 minutes at home, Respondent exceeded his daily allotment of lunch and break time by a total of 15 minutes. There is a lack of credible evidence, however, that Respondent's behavior in this regard was fraudulent or motivated by any intent to steal from his employer; indeed, it is abundantly clear that October 18 was a unique day for Respondent in that he did not expect to perform any repair tasks.

14. Petitioner takes issue with one other aspect of Respondent's October 18, 2011, activities: the truck log did not list Respondent's residence as a location visited. This was

in no manner improper, however, as the undersigned credits the testimony of Respondent and several of his colleagues (namely, Carlos Polanco and Joe Etshokin) that lunch and break locations are not recorded in the vehicle logs.

C. Events of October 21, 2011

15. On October 21, 2011, at approximately 3:35 p.m., Mr. Barrow was traveling northbound on U.S. Highway 1 (near mile marker 91) when Respondent passed him heading in the opposite direction. Mr. Barrow found this odd, since Respondent's work orders for that day would not bring him to that location and the customary break time had long since passed. Further, an examination of Respondent's vehicle log listed no work-related task in that area.

16. Mr. Barrow did not immediately confront Respondent concerning his whereabouts; rather, Mr. Barrow waited until an interview for the record with Respondent on November 17, 2011. By that time, not surprisingly, Respondent had difficulty recalling his reason for being in the area. Ultimately, however, Respondent explained that he had been on a break during that period, notwithstanding the fact that afternoon breaks are expected to be taken earlier—i.e., from 2:00 to 2:15 p.m.

17. Respondent's explanation, which the undersigned credits, accounts for the lack of an entry in his vehicle log. (As noted previously, the prevailing custom is that break and

lunch locations need not be recorded.) At most, the evidence demonstrates that Respondent took a late break—an act that, although inconsistent with previous directives (notably, Respondent is not charged with insubordination in this proceeding), was in no manner fraudulent or dishonest.

D. Review of Work / Vehicle Logs

18. Following the incident detailed above, Mr. Barrow conducted a review of Respondent's work and vehicle logs for the period of October 3, 2011, through October 21, 2011. Mr. Barrow's examination raised two concerns: inconsistencies between the work and vehicle logs on many of the dates; and numerous logged miles that could not be explained from the face of the records.

19. With respect to the first issue, some discrepancies between the logs are indeed apparent. Specifically, the vehicle log entries for October 4, 10, and 11, 2011,^{8/} list school locations where Respondent had no work tasks—a fact established by the work orders and daily work logs for those dates.^{9/} In addition, Respondent's vehicle log contains no entry for October 13, 2011, despite the fact that his daily work log records maintenance tasks at two schools on that date. The undersigned is not persuaded, however, that these shortcomings were the product of fraudulent or dishonest motives, as opposed to shoddy or careless recordkeeping.

20. Turning to the second concern, Petitioner asserts that Respondent logged 205 unaccounted-for miles during the period reviewed. In an attempt to substantiate this allegation, Petitioner introduced testimony from Mr. Barrow that he compared two figures: the total number of miles Petitioner drove during the period, which was determined from the odometer entries in the vehicle log; and the number of miles Respondent "should" have driven based upon an examination of the maintenance assignments listed in the daily work logs and orders, as well as the locations recorded in the vehicle log. Significantly, Mr. Barrow admits that he calculated the second figure by relying solely upon distances obtained from the "Google Maps" website. Had printouts from Google Maps been made part of the record^{10/} (or had Respondent affirmatively stipulated to the distances), Mr. Barrow's reliance on the internet would not be fatal; all Petitioner adduced, however, was Mr. Barrow's hearsay testimony (with no applicable exception) that he derived the mileage data from the Google Maps website.^{11/}

21. Even assuming, arguendo, that Mr. Barrow's reliance on Google Maps can be brushed aside, the allegation that Respondent accumulated unauthorized, excess mileage fails nevertheless. As established during cross-examination, Mr. Barrow's "expected" mileage figures were based on his assumption that a work location listed in the vehicle log for any given day was visited

only once, unless the vehicle log expressly indicated otherwise. Mr. Barrow's assumption in this regard is, however, contrary to the prevailing custom among the maintenance employees that multiple trips to the same location, during a single day, are recorded in vehicle logs as one trip. This flaw in the analysis, combined with the fact that Mr. Barrow's calculations made no allowance for distances associated with lunch or breaks unless documented in the vehicle log (as already noted, it is common practice among employees in the maintenance department to omit lunch or break destinations), precludes any finding that Respondent utilized his assigned work vehicle for personal gain or advantage. Indeed, Mr. Barrow conceded during cross-examination that he could not foreclose the possibility that Respondent's mileage was legitimate:

Q If Mr. Amador does not list on his truck log lunch, where he goes for lunch, where he goes on breaks, if he goes to a school twice, or if he goes to a hardware store on more than one occasion in a day, that could account for the 15, approximately 15 extra miles that's indentified in those 205 excessive miles over 13 days?

A It possibly could.

Final Hearing Transcript, p. 77-78.

E. Determinations of Ultimate Fact

22. The greater weight of the evidence fails to establish that Respondent is guilty of using institutional privileges for personal gain or advantage.

23. The greater weight of the evidence does not establish that Respondent is guilty of failing to maintain honesty in all dealings.

24. The greater weight of the evidence fails to establish that Respondent submitted fraudulent information on any document in connection with his employment.

CONCLUSIONS OF LAW

A. Jurisdiction

25. 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. Notice of Charges / Burden of Proof

26. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation."

Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983) (Jorgenson, J., concurring).

27. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

28. In an administrative proceeding to suspend or dismiss an educational support employee or member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996). 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").

29. The charged employee's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

C. Alleged Grounds for Termination

30. 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).

31. 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).

32. In accordance with the plain language of 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 ("CBA").^{12/} Oddly, however, the Complaint contains no reference to the CBA, nor, more importantly, has the CBA been included as part of the record—a fatal error, as explained momentarily. Instead, Petitioner attempts 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:

* * *

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).

33. In light of Petitioner's failure to include the provisions of the CBA in the record, it is impossible to ascertain whether a violation of School Board Policy 4210 provides a valid basis upon which to terminate Respondent's employment. 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 Alvin's 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.

* * *

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).^{13/} 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.

34. Assuming for the sake of argument that the CBA's omission from the record is of no consequence, 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 access to students. The record is devoid of evidence that Respondent has such access, and the nature of his position (an air-conditioning mechanic) does not

permit the undersigned to infer as much.^{14/} Petitioner has, therefore, failed to demonstrate that Respondent is subject to the proscriptions of School Board Policy 4210.

35. Finally, Petitioner's evidence demonstrates, at most, that Respondent maintained inconsistent and incomplete records, took a late break on one occasion, and spent an extra 15 minutes away from the work site on a day—October 18, 2011, the date of his grievance hearing—when no repair tasks were to be performed. Petitioner has not proven, however, that these acts, while arguably insubordinate (a charge not brought in this proceeding), were fraudulent, dishonest, or constituted a misuse of institutional privileges for personal gain or advantage.

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 6th day of February, 2013, 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 6th day of February, 2013.

ENDNOTES

^{1/} Petitioner's Exhibit 15 consists of the deposition transcripts of Sterling Paul, Carlos Polanco, and Joe Etshokin, which have been admitted, by stipulation of the parties, in lieu of the witnesses' live testimony. Exhibit 15 also includes the transcript of Petitioner's May 2, 2012, deposition of Respondent.

^{2/} Unless otherwise noted, citations to the Florida Statutes are to the 2011 codification.

^{3/} See Deposition Transcripts of Sterling Paul, p. 7-8; Carlos Polanco, p. 7; and Joe Etshokin, p. 5; see also Final Hearing Transcript, p. 104, lines 1-3

^{4/} See Deposition Transcripts of Joe Etshokin, p. 10, lines 4-6; and Carlos Polanco, p. 8, lines 16-18.

^{5/} See Deposition Transcript of Carlos Polanco, p. 11, lines 3-8.

^{6/} See Deposition Transcripts of Sterling Paul, p. 11-12; and Carlos Polanco, p. 12, lines 3-12; see also Final Hearing Transcript, p. 99.

^{7/} See Deposition Transcript of Respondent, p. 11, lines 16-23.

^{8/} Contrary to Mr. Barrow's final hearing testimony, there are no inconsistencies between Respondent's vehicle log and the daily work log of October 12, 2011. Each indicates repair tasks at two locations: Coral Shores School and Plantation Key School. See Petitioner's Exhibits 2 & 14.

^{9/} Respondent's October 4, 2011, vehicle log lists travel to both Plantation Key School and Coral Shores School, while the daily work log (and the work order for that date) indicates no work at Plantation Key School on that date. Similarly, the October 10 and 11, 2011, vehicle log entries each record travel to an additional school location that is not justified by the daily work log or work orders.

^{10/} Judicial notice may be properly taken of distances indicated in printouts from Mapquest, Google Maps, and similar websites. See, e.g., Jianniney v. State, 962 A.2d 229, 232 (Del. 2008).

^{11/} Respondent's lack of objection to Mr. Barrow's testimony is of no moment. See Dep't of Health, Bd. of Med. v. Christensen, Case No. 11-4936, 2012 Fla. Div. Adm. Hear. LEXIS 135, *16-17 (DOAH Mar. 16, 2012) ("[I]t must be remembered that although hearsay is admissible in administrative proceedings to supplement or explain other evidence, hearsay is insufficient by itself—even where the opposing party did not object to its introduction—to sustain a finding of fact unless the hearsay evidence would be admissible over objection in a civil action."); Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 103.2, p. 10 (2008 ed.) ("[M]ost cases hold that where there is no objection to the hearsay, even when the party does not appear at the hearing, it cannot be the sole basis to support a finding.").

^{12/} 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; Petitioner's Exhibit 1(a).

13/ 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).

^{14/} Indeed, it is difficult to imagine a support employee whose contact with students is more attenuated than an air conditioning mechanic's. In contrast to many support employees, whose duties contemplate direct student contact (e.g., bus drivers, nurses, front-office workers, paraprofessionals, security monitors, etc.), it is perfectly conceivable that an air conditioning mechanic could accomplish all work-related tasks without direct student interaction.

COPIES FURNISHED:

Theron C. Simmons, Esquire
Vernis & Bowling of the
Florida Keys, P.A.
81990 Overseas Highway, Third Floor
Islamorada, Florida 33036

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

Mark T. Porter, Superintendent
Monroe County School Board
241 Trumbo Road
Key West, Florida 33040

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Tony Bennett, Commissioner
Department of Education
Turlington Building, Suite 1514
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.