

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENDRY COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-2519TTS
)
JENNIFER LYNN ROBERTSON,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on October 25, 2012, in LaBelle, Florida, before Thomas P. Crapps, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Robert C. Shearman, Esquire
Henderson, Franklin, Starnes
and Holt, P.A.
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For Respondent: Robert J. Coleman, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner established "just cause" to terminate Respondent's employment as a custodian.

PRELIMINARY STATEMENT

On June 12 2012, the Petitioner, Hendry County School Board (School Board), voted to terminate its employment of Respondent, Jennifer Lynn Robertson (Ms. Robertson), "for willful neglect of her duties."

On July 10, 2012, Ms. Robertson, through counsel, disputed the School Board's allegation and demanded an administrative hearing. On July 23, 2012, the School Board transmitted Ms. Robertson's administrative hearing request to DOAH, and the undersigned was assigned the case. Based on the parties' responses to an initial scheduling order, the case was set for September 19, 2012. Following a request for a continuance, the case was rescheduled for October 25, 2012.

At the October 25, 2012, hearing, the School Board presented the testimony of Lucinda Kelley (Principal Kelley), Maria Gonzalez (Ms. Gonzalez), Richard Carter (Mr. Carter), John O'Ferrell (Mr. O'Ferrell), Ms. Robertson, and Debbie Steelman (Ms. Steelman). Joint Exhibits numbered 1 through 24 were received into evidence. Ms. Robertson testified in her own behalf, and presented the testimony of Crystal Kirtley (Ms. Kirtley) and Ty Randall Marshall (Deputy Marshall). She also introduced Respondent's Exhibit 1 into evidence.

On November 14, 2012, the two-volume Transcript was filed with DOAH. On November 26, 2012, the parties filed proposed recommended orders which the undersigned has considered in the preparation of this Recommended Order. The parties also provided the undersigned with a joint pretrial stipulation. The undersigned has incorporated portions of the pretrial stipulation into this Recommended Order.

FINDINGS OF FACT

1. Ms. Robertson, a custodian, began her employment with the School Board in the 2008. For school years 2008-2009 and 2009-2010, Ms. Robertson received satisfactory evaluations concerning her job performance. She was praised by Principal Kelley as a hard worker and a good addition to the LaBelle High School custodial staff.

2. In the beginning of the 2010-2011 school year, Principal Kelley and Mr. O'Ferrell, the head custodian for LaBelle High School and Ms. Robertson's direct supervisor, noticed a marked difference in Ms. Robertson's work performance. Specifically, Ms. Robertson began taking too many breaks, leaving campus, taking longer lunch hours, failing to be in her assigned work areas, and failing to properly clean her assigned rooms.

3. Both Principal Kelley and Mr. O'Ferrell verbally counseled Ms. Robertson on several occasions about improving her work, and staying in her assigned work area. Principal Kelley

credibly testified that she initially provided Ms. Robertson with verbal consultations, rather than a written reprimand, as a means to encourage Ms. Robertson. Principal Kelley decided to use verbal consultations initially because she believed that Ms. Robertson had been a good employee in the past, and that Ms. Robertson would correct her behaviors with the verbal counseling. Similarly, Mr. O'Ferrell credibly testified that he had spoken to Ms. Robertson four or five times about improving her work.

4. During the fall of 2010 and spring 2011, rumors circulated at LaBelle High School that Ms. Robertson had begun or was developing an inappropriate relationship with a male student. The student, T.L., was a 17-year-old senior, whose classes were in the Building and Trade class areas. The Building and Trade class area was outside of Ms. Robertson's assigned work area; however, she was spending an inordinate amount of time there.^{1/}

5. Principal Kelley and Mr. O'Ferrell became aware of the rumors concerning Ms. Robertson and T.L., and asked her about it. Ms. Robertson stated that the relationship was one of guidance, rather than inappropriate.

6. On March 10, 2011, Principal Kelley decided to change Ms. Robertson's work hours. At the time, Ms. Robertson had worked the "day shift" which consisted of a 6:00 a.m. to 2:00 p.m. work schedule. Principal Kelley determined to change

Ms. Robertson's work hours to the "night shift" which consisted of a 2:00 p.m. to 10:00 p.m. work schedule. Principal Kelley's reasons for changing Ms. Robertson's work schedule concerned meeting the school's needs, and Principal Kelley's desire to address the rumors around Ms. Robertson and T.L. Principal Kelley wanted to separate Ms. Robertson and T.L. before a problem developed. Pursuant to the Collective Bargaining Agreement, Principal Kelley provided Ms. Robertson with a required 21-day notice and met with Ms. Robertson. Ms. Robertson expressed that she was unhappy with the change in her work hours, and that it would cause a hardship with her children, ages 17, 16, and 11. Although unhappy with her re-assignment, Ms. Robertson did not file a grievance challenging the change. Beginning on March 31, 2011, Ms. Robertson started working the 2:00 p.m. to 10:00 p.m. shift.

7. That same date, March 31, 2011, Principal Kelley provided Ms. Robertson with an annual evaluation. Overall, Principal Kelley found Ms. Robertson's work to be satisfactory, but indicated that Ms. Robertson's "work attitude" needed improvement.

8. After the change in her work schedule, Ms. Robertson's work attendance began to deteriorate, as her use of sick leave increased. Further, Ms. Robertson's work performance deteriorated.

9. Some time during the summer of 2011, after T.L. graduated from the high school, Principal Kelley had a "no trespass" warning served on T.L. The "no trespass" warning was to keep T.L. off of the campus because he was coming to visit Ms. Robertson during her work hours.

10. The beginning of the 2011-2012 school year did not see an improvement in Ms. Robertson's work performance. Mr. O'Ferrell credibly described Ms. Robertson's work performance as "steady downward." She was leaving the school campus to smoke, not cleaning her assigned rooms, and her attendance became "deplorable" according to Mr. O'Ferrell.

11. The record clearly shows that Ms. Robertson's attendance and use of sick leave became excessive. Most of her sick leave was not supported by any medical documentation. Moreover, many of the dates that Ms. Robertson called in sick occurred on Thursdays, Fridays, and Mondays. For example, the record shows that Ms. Robertson used sick leave on September 29, 30, and October 3, 2011, for a corresponding long weekend. Ms. Robertson's explanation at the hearing that the dates corresponded with her children's medical needs is not credited. The medical records introduced into evidence by the parties showed, at best, that Ms. Robertson's children received influenza vaccinations on October 3, 2011. There is nothing to suggest that the children's vaccinations required three full work days.

Similarly, the record shows that on the week of October 31, 2011, through November 4, 2011, Ms. Robertson called in sick for what she described as the "stomach flu." Yet, there were no corresponding medical records supporting Ms. Robertson's testimony.

12. After Ms. Robertson's absences in the week of October 31, 2011, Principal Kelley provided Ms. Robertson with a written reprimand, an special evaluation, and documentation of Ms. Robertson's absences. The written reprimand dated November 4, 2011, informed Ms. Robertson that her excessive absenteeism created a hardship for her co-workers, and was unacceptable. On November 8, 2011, Ms. Robertson signed that she received the reprimand and that she understood the contents. The fact that Ms. Robertson understood the seriousness of this written reprimand was corroborated by Ms. Steelman, the union representative for the Hendry School District support personnel.

13. Ms. Steelman credibly testified that she was present when Ms. Robertson received the written reprimand from Principal Kelley, and that Ms. Robertson understood the concerns outlined in the reprimand.

14. The special evaluation, dated November 8, 2011, showed that Ms. Robertson needed to improve her quantity of work, her dependability, attendance/punctuality, and work attitude.

15. Following the November 8, 2011, special evaluation, Ms. Robertson's attendance marginally improved, but the quality and quantity of her performance decreased.

16. Ms. Robertson's work in cleaning her assigned areas was inadequate. Mr. Carter, a custodian who worked the night shift with Ms. Robertson, credibly testified that other custodians were required to do Ms. Robertson's work. Ms. Robertson would be visiting friends or family members during the work times or taking smoking breaks. Similarly, Mr. O'Ferrell credibly testified that Ms. Robertson was not "dependable" and failed to properly clean her assigned area. Ms. Robertson's failure to properly clean restrooms and the library led to complaints, and a second written reprimand dated December 6, 2011. The December 6, 2011, reprimand was signed by Ms. Robertson, and Principal Kelley. Again, the testimony showed that Ms. Robertson's union representative was present when the reprimand was given.

17. Unfortunately, after the December 6, 2011, reprimand, Ms. Robertson's work performance did not improve. The record shows that Ms. Robertson received two more written evaluations from Principal Kelley, one February 29, 2012, and the other April 1, 2012. They documented that Ms. Robertson's work continued to be unsatisfactory. In the comments for the April 1, 2012, evaluation, Principal Kelley noted that Ms. Robertson's work had not improved and that issues concerning her work

remained unresolved. On the checklist for each evaluation, Principal Kelley indicated that Ms. Robertson needed to improve the quantity of her work, quality of her work, dependability, attendance/punctuality, and work attitude. Mr. O'Ferrell and co-worker, Ms. Gonzalez, credibly described Ms. Robertson's continued work performance problems.

18. Although Mr. O'Ferrell did not work on the night shift with Ms. Robertson, he would inspect the areas and rooms that Ms. Robertson had been assigned to clean. Mr. O'Ferrell credibly testified that Ms. Robertson had not properly cleaned the rooms. Similarly, Ms. Gonzalez, a custodian on the day shift, credibly testified that when she got to work in the morning she would receive teachers' complaints, and that she had to clean and pick up trash from rooms that Ms. Robertson should have cleaned the night before.

19. As a result of Ms. Robertson's failure to do her job, teachers complained about their rooms not being cleaned, and other custodial staff had to clean the rooms assigned to Ms. Robertson. Furthermore, Mr. O'Ferrell described that Ms. Robertson's poor work resulted in morale problems with some of the custodial staff, who resented having to do Ms. Robertson's work.

20. In the April 1, 2012, evaluation, Principal Kelley checked a box indicating that Ms. Robertson should continue on

probationary status. Ms. Robertson acknowledged receipt of the document on April 9, 2012, and that she understood the evaluation.

21. From April 25, 2012, through May 8, 2012, the record shows that Ms. Robertson was on leave for a worker's compensation injury. Medical records introduced into evidence show that Ms. Robertson reported to a health care provider that on March 28, 2012, she had been "pushing a vacuum cleaner at work and felt something pop around her lumbar spine." Ms. Robertson reported that she was experiencing lower back and hip pain. The medical records show that she received physical therapy and was released to return to work without limitation on May 9, 2012.

22. Ms. Robertson returned to work on May 9, 2012.

23. On May 18, 2012, Principal Kelley informed Ms. Robertson that she was being suspended with pay, and that Principal Kelley would recommend to the School Board that Ms. Robertson's employment be terminated. At the June 12, 2012, meeting, the School Board terminated Ms. Robertson's employment.

24. There was no credible evidence that the School Board or Principal Kelley decided to terminate Ms. Robertson's employment based on Ms. Robertson's leave of absence based on the worker's compensation injury leave of absence.

25. Ms. Robertson's explanation, that her work difficulties were tied to Principal Kelley changing Ms. Robertson's work

hours, is not credible. Ms. Robertson testified that some of her absences occurred because her children's doctor's appointments could only be made after 3:00 p.m., when she was at work. This explanation was not credible for two reasons: first, one would expect that a doctor's appointment could be scheduled in a morning; and, second, there was scant medical record evidence to support her claim that her absences were tied to doctor appointments. Ms. Robertson also testified that the night shift caused her hardship in that she could not properly supervise her 17-year-old son, who was getting into trouble with the law. It was undisputed that her son was having difficulties, and had even been removed from the high school. Those difficulties, however, cannot explain Ms. Robertson's poor work performance when she was at work. The credible testimony from Mr. O'Ferrell, her supervisor, and two co-workers showed that Ms. Robertson did not properly clean the classrooms and areas assigned to her because she was taking too many breaks and not working. Sadly, the evidence presented showed that Ms. Robertson's difficulties stem not from her work hours, but from her poor choices.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties and subject matter of this proceeding. § 120.57(1), Fla. Stat.^{2/}

27. The School Board has the authority to operate, control and supervise the public schools in its district. See Art. IX,

§ 4(b), Fla. Const. This authority includes the termination or suspension of educational support personnel. § 1012.27, Fla. Stat. State law permits school districts to adopt rules governing personnel matters. § 1012.23(1), Fla. Stat. The law provides that a school district may terminate a person's employment "for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist[.]"

§ 1012.40(2)(b), Fla. Stat.

28. The School Board here entered into a Collective Bargaining Agreement, titled Hendry Educational Support Personnel Agreement (Collective Bargaining Agreement). The Collective Bargaining Agreement governs educational support personnel, like custodians, and provides that these employees can only be terminated for "just cause." § 1012.40(2)(b). The term "just cause" is not defined in the Collective Bargaining Agreement. Further, the School Board does not have a policy specifically defining "just cause." However, School Board Policy 218, concerning suspension and dismissal of non-instructional staff, provides that an employee may be suspended or dismissed for excessive absenteeism or failure to perform assigned duties in a satisfactory manner. Consequently, this School Board Policy is instructive for determining what facts constitute "just cause" for termination of a non-instructional

employee, like a custodian. Finally, the law is clear that the School Board has the burden of proving by the preponderance of the evidence that "just cause" exists. McNeill v. Pinellas Cty Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

29. Applying the rules of law to the facts here, the undersigned finds that the School Board has shown by a preponderance of the evidence that Ms. Robertson failed to perform her assigned duties in a satisfactory manner. As set out in the factual findings, Ms. Robertson repeatedly failed to perform her custodial work in a satisfactory manner. The facts showed that Ms. Robertson was counseled by Mr. O'Ferrell and Principal Kelley to improve her work performance both verbally and in writing. Unfortunately, Ms. Robertson's work performance continued to deteriorate with her leaving the school campus for smoke breaks, for failing to complete her work, and for abusing her sick leave. Although Ms. Robertson's absenteeism did improve after the November 8, 2011, written reprimand, the testimony clearly showed that Ms. Robertson's work performance both in quantity and quality was poor. Clearly, she failed to perform her assigned tasks in a satisfactory manner, as shown by the testimony and job performance evaluations. Therefore, the undersigned finds that the School Board proved by the preponderance of the evidence that "just cause" exists to terminate Ms. Robertson's employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board terminate Ms. Robertson's employment.

DONE AND ENTERED this 18th day of December, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 18th day of December, 2012.

ENDNOTES

^{1/} Ms. Robertson explained that T.L. was friends with her older son, and that T.L. had helped her with different custodian tasks. As a result, T.L. spent a lot of time with Ms. Robertson. Sometime in 2010 or 2011, Ms. Robertson's husband left the marital home, and in May 2011, T.L. moved into the home. T.L. graduated from LaBelle High School in June 2011. Although T.L. moved into Ms. Robertson's home in May 2011, Ms. Robertson testified that she and T.L. did not develop an intimate relationship until May 2012. At the time of the hearing, Ms. Robertson and T.L. continue to cohabit.

^{2/} References to Florida Statutes shall be the 2012 version unless otherwise indicated.

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 should be filed with the agency that will issue the Final Order in this case.