

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-2579TTS
)
CHARLES STAUB,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 25, 2012, in Fort Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire
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For Respondent: Richard M. Ricciardi, Jr., Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists to terminate Respondent, Charles Staub's (Staub) employment with Petitioner, Lee County School Board (the "Board"), based on

violations of Florida Administrative Code Rule 6B-4.009 (3) and (4), for failing to perform duties appropriately, repeated failures to obey direct orders, or misconduct in office.

PRELIMINARY STATEMENT

On May 31, 2012, the Board issued a Petition for Termination of Employment alleging just cause for the termination of Respondent's employment. Staub timely filed a request for a formal administrative hearing before the Division of Administrative Hearings (DOAH).

At the final hearing, the Board called the following witnesses: Ranice Monroe, director of Professional Standards and Equity for the Board; Fred Purvis (Purvis), plumbing supervisor; James Cash (Cash), assistant plumbing supervisor; Victoria Ramina, coordinator for maintenance; and Reginald Snell, director of construction and maintenance services. The Board's Exhibits 1 through 15 were accepted into evidence. Staub testified on his own behalf and offered Exhibits 1 through 5 into evidence, each of which was accepted. (All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent, such hearsay was not corroborated or was not used to supplement competent evidence, it will not be independently used as a basis for any finding herein.)

The parties advised the undersigned that a transcript of the final hearing would be ordered. They were given ten days from the date the transcript was filed at DOAH to submit proposed recommended orders. The Transcript was filed at DOAH on November 16, 2012. Each party timely submitted a proposed recommended order and both parties' submissions were given due consideration in the preparation of this Recommended Order.^{1/}

FINDINGS OF FACT

1. The Board is duly constituted to operate, control, and supervise all free public schools within the school district of Lee County, Florida, pursuant to Article IX, section 4(b) of the Florida Constitution and section 1012.23, Florida Statutes.^{2/}

2. At all times pertinent hereto, Staub was an employee in the school district. The school district has a collective bargaining agreement (the "Agreement"), but Staub is not a paying member of the union covered by the Agreement. Rather, Staub is the member of a professional union having no involvement with the Board. Staub is, however, an "employee" within the collective bargaining unit covered by the Agreement.

3. Staub has been a plumber for over 20 years, receiving his journeyman status around 1980. He worked as a plumber for many years before taking a job with the City of Cape Coral in the wastewater treatment department. He left that position when hired by the Board as a plumber for the school district in 2003.

4. During his employment with the Board, Staub was one of several plumbers in the maintenance department. At the time of the issues relevant to this case, there were six or seven other plumbers in the department. They were supervised by Purvis, who was in turn supervised by Snell. When Purvis was absent, his duties were handled by Cash. It was the duty of the supervisors to give the plumbers job assignments each day. The supervisors were also responsible for prioritizing the job assignments so that the most important assignments were completed first.

5. Each day, the plumbers would gather at the district office for the purpose of receiving their assignments, transferring any needed tools into a district vehicle, and going from school to school to complete their assigned tasks. For most of his career with the Board, Staub exhibited good work habits and did well. That began to change in recent years. Beginning in 2010, Staub began to receive warnings and reprimands concerning his work and his interaction with other employees. Those shortcomings form the basis for the Board's decision to seek termination of Staub's employment.

6. The Board has alleged three areas of concern which it feels identify Staub's shortcomings and failures as an employee of the school district. Facts addressing each of those areas of concern are set forth below.

Failure to perform duties as expected

7. On March 22, 2010, Staub replaced a leaking hot water heater at Lehigh High School ("Lehigh"). The existing hot water heater had been on a shelf attached to the wall with brackets. Staub replaced the hot water heater with a new, five gallon heater. However, upon removing the old heater Staub noticed that the shelf brackets were of an inferior quality and were not sufficient to hold the new heater safely on the shelf. Upon completing the installation of the new heater, Staub placed the heater on concrete blocks on the floor rather than placing it on the wall shelf with the inferior brackets.

8. Staub then contacted the Board's welders to order new brackets which would be "up to code" and would more properly hold the shelf in place. While the brackets were on order, Staub believed the heater could sit on the concrete blocks safely. He did fail, however, to properly install a drain pan for the new heater. He also did not have the pressure relief line properly affixed so as to prevent possible damage if the new heater should leak. Staub also admits to failing to remove a rubber glove he had placed over the smoke detector while he was working on the heater.

9. The building manager at Lehigh complained to Purvis about the work Staub had done on the new heater. Purvis looked at the situation and gave Staub a verbal warning about the

quality of his work on the hot water heater. The warning was then reduced to writing, including directions for Staub to return to Lehigh and correct his work. Staub complied with the written directive, correcting all of his work on the job within a couple of weeks.

10. Staub maintains that his work was completely satisfactory. The testimony of Purvis was more persuasive concerning this incident.

Insubordination by failing to follow orders of superiors

11. On or about March 28, 2012, Staub and Cash were working on a job at Cypress High School ("Cypress"). A bathroom had flooded and a substantial amount of plumbing work was required to correct the situation. Staub and Cash capped off the water coming into the bathroom in order to prevent further flooding. Then they began the process of making necessary repairs to the walls and floor, including filling holes with concrete. They then began installing new fixtures to replace the ones that had been leaking.

12. At some point during the day, Staub left Cypress to go to a local Home Depot store to buy some supplies needed for the job. While he was gone, Cash -- who was acting as supervisor that day due to the absence of Purvis -- received a call from the building manager at Orangewood Elementary School ("Orangewood") about a leaking toilet in a special education

classroom. The toilet needed to be repaired as soon as possible. Cash called Staub at 11:45 a.m. and told him to go by Orangewood to make the repair before the end of the work day (3:30 p.m.). Staub replied that he would take care of the toilet as directed.

13. When Staub finished purchasing the supplies he needed at Home Depot, he went directly back to Cypress rather than go to Orangewood. Cash had already left Cypress by that time. It was Staub's intention to "tend" some concrete which was drying in order to continue work on the repairs and the fixture installation. Staub unilaterally decided that the work at Cypress had a higher priority than repairing the toilet at Orangewood. He worked at Cypress until the end of his work day, then returned to the office for end-of-day debriefings. When Staub told Cash he had not gone to Orangewood, Cash was "not happy" with Staub. Cash took the Orangewood work order form, wrote "#1 3/29/12" on it, and gave it back to Staub. The #1 was an indication that the work was to be Staub's first priority the next day. Staub did as he was instructed, completing the toilet repair on the morning of the 29th.

14. On or about December 6, 2011, at the beginning of the work day, Purvis called the plumbers together for a meeting. After handing out assignments for the day, Purvis told the employees to meet behind the office to help unload materials

from a van. He instructed the men not to go to their cars to get tools and equipment prior to unloading the van. All of the plumbers except Staub went immediately to the van to unload it as directed.

15. Staub, however, first went to his car to get his tools for the work day. When Staub didn't show up at the van with the others, Purvis called Staub on his work cell phone. After three to five calls, Staub finally answered. Purvis asked Staub where he was and Staub said he was at his van. In response, Purvis simply shrugged his shoulders in disgust because he had become tired of Staub's behavior. When Staub came back to the office area, Purvis called him aside and told him to get on with his work assignments, rather than helping to unload the van. Staub does not remember hearing Purvis say to go to the van prior to getting tools from their cars, but all the other plumbers apparently did. Staub's testimony in that regard is not credible.

Failing to dedicate himself to high ethical standards

16. On or about February 2, 2011, Staub went to Gateway Elementary School for an assigned project. While there, Staub discussed the use of iodine with some of the kitchen staff, pointing out the existence of acids in the iodine. Based upon whatever Staub told the kitchen staff, a complaint was made about Staub to his supervisors. The complaint included

allegations that Staub had a poor attitude, provided poor customer service, and did not respond timely. However, there is no credible, non-hearsay evidence in the record to substantiate those allegations.

17. Staub said the kitchen staff specifically asked him about the iodine, and he simply pointed them to the ingredients on the bottle. That explanation lacks credibility in light of the complaints made by staff. However, there is not sufficient evidence in the record to establish what actually occurred.

18. At around the same time, Staub went to Sunshine Elementary to complete an assigned job. While there, he spoke with the kitchen manager concerning a disagreement about a prior work order. The kitchen manager made a complaint to Staub's supervisors, claiming that Staub treated her rudely. Staub was given a written warning, based on the allegations made by the kitchen manager. Staub said that there was no argument between he and the kitchen manager; they simply discussed a prior work order. There was no testimony from the kitchen worker, so it is impossible to verify what occurred. Again, the absence of direct, non-hearsay testimony precludes a finding that Staub acted in the fashion alleged by the Board. However, in light of the fact that a complaint was filed by the kitchen manager, it is more likely than not that there was some disagreement between her and Staub.

19. On July 19, 2011, at the end of the work day, Staub was sitting in the conference room at the maintenance office along with other maintenance workers. Staub and an employee named Christiansen, a carpenter, began arguing about something. Christiansen was upset with Staub and said something to him about the matter. The men argued briefly and Christiansen began to walk away. As he did, Staub called Christiansen a vulgar name. Christiansen then left the office, followed by all the other employees -- including Staub -- as they went to their private cars to go home.

20. When Christiansen left the parking lot in his car, Staub was close behind him. Christiansen and Staub were both traveling in the same direction, Christiansen, as he headed home; and Staub, as he ostensibly went to a meeting at Shadow Pines Air Park (Shadow Pines). It is alleged that Christiansen was frightened and felt he was being harassed by Staub, but Christiansen did not testify, and there was no non-hearsay evidence presented to verify that allegation. Staub's written statement made in close temporal proximity to the events mentions the meeting at Shadow Pines, thus giving some credibility to his testimony. Two unsworn, written statements by witnesses -- though insufficient evidence by themselves on which to base a finding of fact -- support Staub's contention that he remained fairly calm during the argument, up to the

point where he called Christiansen a name. An eyewitness to the event, Purvis, remembers Staub yelling the vulgar name at Christiansen. Two employees apparently talked with Christiansen on his cell phone while Staub was tailgating him, but no competent, non-hearsay evidence was offered to prove that fact.

21. There is competent evidence that Staub and Christiansen argued and that Staub drove behind Christiansen as they left work on that day. Further, it is clear Staub called Christiansen a vulgar name. The remainder of the incident was not sufficiently proven by admissible evidence.

22. On September 23, 2011, Staub went to Gulf Middle School ("Gulf Middle"). His daily labor sheet does not include Gulf Middle as a place he worked that day. However, he did go to the high school ("Gulf High School") which is adjacent to Gulf Middle. Staub walked over to Gulf Middle for the purpose of getting a work ticket signed from a previous day's job. While at the school, he decided to eat lunch at the school cafeteria. It is a common practice among maintenance workers to eat at the cafeteria of schools where they are working.

23. The building superintendent's office was in the cafeteria area. The superintendent was not at his office when Staub arrived, so Staub waited on the stage area of the cafeteria for his return. There was a photographer setting up on the stage preparing to take pictures of students and staff.

While Staub was there, no one was getting their picture taken. Staub was asked by the teacher supervising the photographer if he would want to pay ten dollars to get his picture made as part of a school fundraiser. Staub at first declined, but then agreed to help the school out by having his picture taken.

24. Later, when the pictures were returned to the school by the photographer, Staub's picture was included. Because he was an adult, his picture had been placed on an identification badge rather than returning simply as a photograph. The identification badge indicated that Staub was "Faculty" at Gulf Middle. At the time his picture had been taken, Staub was wearing his work uniform which clearly identified him as a Lee County School District employee. He was also wearing his employee badge.

25. Upon receipt of the picture, Purvis turned it over to his supervisor, Snell, because he believed it was inappropriate for Staub to have a Gulf Middle identification card. Snell and Purvis were concerned that something inappropriate was going on vis-à-vis the identification card. Despite their concern, it appears the issue of the picture qua faculty badge was completely innocent.

26. Another allegation against Staub by his supervisors was that Staub frequently failed to sign in when he visited schools to perform his work tasks. When signing in, Staub would

sign as "C. Plumber" rather than by his real name. No competent evidence, i.e., school sign-in sheets, was offered into evidence to support the allegation, however. Staub denies the allegation.

Staub's Employment History

27. In 2004 and 2005, Staub's annual performance evaluations showed him to be "Effective" in all categories of performance. His supervisor wrote "Good man" at the end of those two evaluations.

28. From 2007 until 2009, Staub began to receive less satisfactory evaluations, with many areas of performance marked as "Inconsistently practiced." In the area of "interpersonal skills" on the evaluation form, Staub received several less than satisfactory scores. Then, in 2010, the evaluation indicated that all areas were again in the Effective category.

29. The 2011 evaluation, however, was a different story. Staub received "Unacceptable level of performance" scores on two benchmarks in the interpersonal skills area. Three of the skills in that portion of the evaluation form were marked as "inconsistently practiced." The evaluation form contained an addendum outlining three written sanctions that had been issued to Staub: 1) A formal verbal warning for unsatisfactory work; 2) A written warning related to the customer complaint at Sunshine; and 3) A written warning regarding the incident at

Gateway. The supervisor said that, "While [Staub] meets the standard for the skills required to be a plumber, he is below standard regarding customer service."

30. Staub received a verbal warning (April 13, 2010), and four written warnings (two on February 14, one each on October 26, and December 6, 2011). His personnel file also contains several reports of improper work, unacceptable behavior, and conflicts with other employees. The Board properly followed its protocol for progressive discipline concerning the actions it took against Staub.

31. Other than the formal incidents set forth above, there is an underlying tone of coolness between Staub and the witnesses who testified. It does not appear that Staub gets along well with his fellow employees.

CONCLUSIONS OF LAW

32. DOAH has jurisdiction over the parties to and the subject matter of this proceeding, pursuant to a contract with the Board. The proceedings are governed by sections 120.57 and 120.569, Florida Statutes. The Superintendent of Schools for Lee County, Florida, has the authority to recommend to the Board that an employee be suspended or dismissed from employment. § 1012.27, Fla. Stat.

33. The Board has the authority to terminate the employment of or to suspend non-instructional personnel without

pay and benefits. See §§ 1012.22(1)(f) and 1012.40(2)(c), Fla. Stat.

34. The burden of proof in this proceeding is on the Board to prove, by a preponderance of the evidence, just cause exists to suspend or terminate Staub's employment. McNeil v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996). See also 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"). This burden is contrary to other penal cases in which actions must be proven by clear and convincing evidence (see e.g., Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987)), but is the accepted standard of proof because no license or certification is at issue in this proceeding. Nonetheless, as this is a disciplinary proceeding in which the Board seeks to terminate Staub's employment, the statutes, rules and policies relied upon by the Board must be strictly construed, with ambiguities resolved in favor of Staub. See Lester v. Dep't of Prof'l & Occ. Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

35. "Just cause" is the standard of discipline applied to actions against support personnel. See Support Personnel Association of Lee County (SPALC) Agreement (the "Agreement"), Provision 7.10. However, just cause is not defined in the

Agreement. Staub is governed by the Agreement despite not being a paying member of the union. That is because, as an employee within the collective bargaining unit, Staub's individual interests are subordinate to the interests of all employees within the unit. See NLRB v. Jaggars-Chiles-Stovall, Inc., 639 F.2d 1344, 1347 (5th Cir. 1981); Bouchard Transp. Co., Inc. v. Connors, 811 So. 2d 787 (Fla. 4th DCA 2002).

36. In the absence of a rule or written policy defining just cause, school boards have historically had discretion to set standards which subject an employee to discipline. See Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217 (Fla. 2nd DCA 1994). Nonetheless, just cause for discipline must rationally and logically relate to an employee's conduct in the performance of the employee's job duties and which is concerned with inefficiency, delinquency, poor leadership, lack of role modeling, or misconduct. State ex rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948).

37. The 1999 Florida Legislature amended section 231.36(1)(a), Florida Statutes (the former statute governing public education in Florida) five years after the Dietz case was entered. The amendment removed school boards' "absolute discretion" to define just cause for purposes of dismissing staff members. Instead, the State Board of Education was given the authority to define just cause by rule. After the creation

of the Florida K-20 Education Code (the "Code") in 2002, the provisions of former section 231.36(1)(a), Florida Statutes, were transferred to the Code, and are now found in section 1012.33(1)(a) and (4)(c).

38. The rule created by the State Board of Education is now codified as Florida Administrative Code Rule 6A-5.056. The rule reads in pertinent part as follows:

6A-5.056 Criteria for Suspension and Dismissal.

"Just cause" means cause that is legally sufficient. Each of the charges upon which just cause for a dismissal action against specified school personnel may be pursued are [sic] set forth in sections 1012.33 and 1012.335, F.S. In fulfillment of these laws, the basis for each such charge is hereby defined:

* * *

(2) "Misconduct in Office" means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

* * *

(4) "Gross insubordination" means the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties.

(5) "Willful neglect of duty" means intentional or reckless failure to carry out required duties.

* * *

39. The evidence in this case supports the Board's contention that Staub is not an agreeable and likable employee. It appears he has some difficulty interacting appropriately with his peers and superiors.

40. However, there is not a preponderance of evidence supporting the allegations that Staub failed to perform his duties, was insubordinate, or failed to dedicate himself to high ethical standards. While there is some evidence to generally acknowledge the bases of the claims, there is not a preponderance of evidence, as presented by the Board, to substantiate just cause for termination of Staub's employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by

Petitioner, Lee County School Board, reversing its decision to terminate the employment of Respondent, Charles Staub for the reasons set forth above.

DONE AND ENTERED this 11th day of December, 2012, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of December, 2012.

ENDNOTES

^{1/} Respondent filed a "Final Judgment" with a cover letter identifying it as a proposed final judgment. The document was accepted as Respondent's proposed recommended order, although it did not reference the exhibits or cite to the transcript.

^{2/} Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2012 version.

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.