

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ESCAMBIA COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-0592

TERRY GREEN,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge David M. Maloney presided at the final hearing in this case pursuant to a contract between the Escambia County School District ("School Board" or "ECSD") and the Division of Administrative Hearings ("DOAH"). The hearing was conducted on April 1, 2014, by video teleconference at sites located in Tallahassee and Pensacola, Florida.

APPEARANCES

For Petitioner: Joseph L. Hammons, Esquire  
The Hammons Law Firm, P.A.  
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Pensacola, Florida 32501-3125

For Respondent: Terry Green, pro se  
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STATEMENT OF THE ISSUE

Whether the School Board should permit Respondent to take sick leave for the period commencing December 18, 2013, through

the time it takes for evaluation by a Substance Abuse Professional and any necessary rehabilitation or until Respondent's sick leave is exhausted, whichever occurs first.

PRELIMINARY STATEMENT

On February 10, 2014, DOAH received a letter from Joseph L. Hammons, Esquire, announcing that he was "the attorney representing the Escambia County School Board with regard to a request for formal hearing." Enclosed with the letter were three documents. One of the three was described by Mr. Hammons' letter as "the Board's approval of . . . [a] recommendation for enrollment in a return-to-work program." The other two documents were the recommendation, itself, and a copy of a petition and request for hearing by Ms. Terry Green.

The petition, submitted by Ms. Green's attorney, stated that while employed by ECSD as a school bus driver, Ms. Green had been placed on leave with pay on December 5, 2013, pending a "reasonable suspicion drug test." It further alleged that following the receipt of the test results, ECSD and Ms. Green entered a Return to Work Agreement which provided that she would submit to evaluation by a Substance Abuse Professional (SAP) and any necessary rehabilitation.

The petition claimed that Ms. Green is entitled to use sick leave "while she is evaluated and receiving rehabilitation for substance abuse, which is a sickness." Petition for Hearing,

at 2 (emphasis supplied). In the "Relief" section of the petition, it requested that she be permitted "to take sick leave for the period December 18, 2013, until she has completed the evaluation and rehabilitation for substance abuse, or until that sick leave is exhausted, whichever occurs first." Id. at 3.<sup>1/</sup>

At the final hearing, the ECSD presented the testimony of two witnesses: Rob Doss, ECSD's Director of Transportation; and Kevin Windham, ECSD's Director of Risk Management. It offered into evidence five exhibits: Petitioner's Exhibit A, a Return to Work Agreement (First Time Positive Drug/Alcohol Screen) signed on December 6, 2013, by three parties: Ms. Green, an Administrator for the School Board and a Union/Legal Representative; Petitioner's Exhibit C, a nine-page composite exhibit, the first page of which is a letter dated December 5, 2013, on letterhead of The School District of Escambia County dated December 5, 2013, signed by Malcolm Thomas that places Ms. Green on "suspension with pay effective, Wednesday, December 4, 2013 pending further action . . ."; Petitioner's Exhibit D, a nine-page document entitled, "Master Contract between the School District of Escambia County, Florida and the Union of Escambia Education Staff Professionals, FEA, NEA, AFT," and that is primarily an excerpt from the contract - "Article IX, Employee Discipline"; Petitioner's Exhibit F, a report by a company named "FIRSTLAB" entitled "Result Report, Final

Verification, Positive, Opiates" dated December 4, 2013; and Petitioner's Exhibit H, a "Reasonable Suspicion Drug/Alcohol Testing Checklist for Supervisors" that is a two-page document.

Ms. Green offered the testimony of four witnesses: Danny Authement, her supervisor at work; Henrietta Moye, her mother; Angela Green, her daughter; and Ms. Green, presenting her own testimony in the form of a narrative. Ms. Green offered two exhibits. Both were deemed irrelevant to the issue of whether substance abuse is a sickness and whether Ms. Green is entitled to sick leave pending evaluation and rehabilitation for substance abuse. But the two exhibits were accepted into the record for purposes of background in light of the background information provided by the School Board in the presentation of its case-in-chief.

The one-volume Transcript of the final hearing was filed with DOAH on April 17, 2014. A Proposed Recommended Order was timely filed by ECSD on April 25, 2014. It has been reviewed and considered prior to the issuance of this Recommended Order. Ms. Green did not file a proposed recommended order.

#### FINDINGS OF FACT

##### A. Ms. Terry Green

1. Ms. Green has been employed by ECSD for at least five years. (See Hr'g Tr. 102, where the testimony indicates she was hired in 2008). At the time of the final hearing, Ms. Green was

on leave without pay from her position as a school bus driver, her employment status with ECSD since December 18, 2013.

2. As the driver of an ECSD school bus entrusted with the safety of the children she transports on school days, Ms. Green is required to meet certain criteria by the Department of Transportation. For example, she must have an annual medical examination. Ms. Green must also inform ECSD and the State of Florida of any pharmaceutical substances medically prescribed for her that she takes on a daily basis.

3. Among the pharmaceutical substances on a list in her patient profile with A&E Pharmacy in Pensacola is "Hydrocod/Apap Tab10-325MG." Ms. Green referred to the substance at hearing by its proprietary name: "Lortab." Ms. Green does not take Lortab on a daily basis. She listed it as one of the pharmaceutical substances that are prescribed for her when she was hired by ECSD because she takes Lortab occasionally.

B. Lortab

4. Lortab is the proprietary name for a tablet prescribed for pain management. Its active ingredients are "acetaminophen" (commonly known as Tylenol) and "hydrocodone."

5. Ms. Green offered an exhibit (Ex. R-2, attached to the Transcript of the final hearing), which shows relationships between hydrocodone and codeine and morphine. It cannot be determined on the state of this record whether Lortab metabolizes

in the human body into codeine and morphine, but the exhibit offered by Ms. Green raises that possibility.

C. Ms. Green's Illness

6. Ms. Green was ill for a period of about three weeks that commenced around November 18, 2013, and stretched into the early part of the week of December 9, 2013. Her recovery from the illness lasted until at least the end of January 2014. For much of the time after November 25, 2013, during her illness and recovery, Ms. Green was bed-ridden. The severity of her illness was unusual. As Angela Green, her daughter, testified, "my mom has never been like that." Hr'g Tr. 83.

7. Running a fever as high as 103 degrees, Ms. Green showed up for work and drove her school bus from Monday, November 18 through Friday, November 22, 2013. Her illness continued through the weekend of Saturday, November 23, 2013.

8. On Sunday, November 24, 2013, Ms. Green's mother tried to convince her to go to an emergency room ("ER"). She had seen Ms. Green in the morning and observed, "she was a pretty sick gal." Hr'g Tr. 75. The record is silent as to whether Ms. Green went to the ER, but it seems likely that she did not.

D. November 25, 2013

9. Sometime during the early morning hours of Monday, November 25, 2013, a school day, prior to reporting for work, Ms. Green took a Lortab.

10. Ms. Green went to work despite her illness and despite having taken the Lortab. Her determination to report to work and perform her duties is a characteristic ingrained in her from early childhood. As her mother testified, she required Ms. Green to attend school as a child unless she was "pretty much . . . on [her] death bed." See Hr'g Tr. 77.

11. While Ms. Green was driving the school bus that morning, a school bus assistant (another ECSD employee assigned to the bus) became concerned about Ms. Green's condition. The concern was reported to the ECSD's Office of the Director of Transportation. A replacement driver was sent to the bus, and Ms. Green returned to the office.

12. A form to be used to help determine reasonable suspicion for drug/alcohol testing, entitled "Reasonable Suspicion Drug/Alcohol Testing Checklist for Supervisors" was filled out by observers to determine whether Ms. Green should be subjected to drug or alcohol testing. See Pet'r's Ex. H.

13. The form shows Ms. Green was observed at 9:05 a.m. in the office. Her speech was slurred, and the checklist indicates that she was mumbling. She stumbled, appeared dazed, and had unkempt hair or clothing. Four boxes were checked on the form under the section called "Today's Job Performance": "Mistakes due to poor judgment," "Low productivity/Taking longer to complete tasks," "Complaints from others about

behavior/attitude/driving," and "Late to work." Under "Interpersonal Behavior," two boxes were checked: "Overly sensitive to real/imagined criticism," and "Major change in personality." Typed onto the form with regard to the source reporting any drug/alcohol use was: "Bus assistant reported initially then corroborated in the office with two route managers who see her frequently." The observations led to the conclusion, "The combination of factors indicates she is under the influence." The "Test Requested" section of the form had a box checked for "Drug and Alcohol." The form was signed by two observing supervisor/officials and dated November 25, 2013. The route managers, who observed Ms. Green, reported to the Director of Transportation that there was a reasonable suspicion that Ms. Green was under the influence of drugs or alcohol.<sup>2/</sup>

E. The Reasonable Suspicion Drug/Alcohol Test

14. Ms. Green submitted to the drug/alcohol test the same day. The test results are reported on a "Federal Drug Testing Custody and Control Form." See Pet'r's Ex. F, at 6. Dated November 25, 2013, it shows ECSD as the "employer," Dr. Natalie Hartenbaum of FirstLab as the medical review officer ("MRO"), and Ms. Green as the donor. Ms. Green signed a certification on the form that she submitted an unadulterated urine specimen to the laboratory's collector and that the information affixed on the specimen bottle was correct.



15. The report shows the specimen was verified as positive for two opiates: codeine and morphine.

F. The Timeline

16. The third page in Petitioner's Exhibit F is a "TIMELINE" under "DONOR NAME: TERRY GREEN" (the "Timeline"). Compiled by FirstLab with regard to the specimen Ms. Green submitted for analysis, the Timeline commences on November 25, 2013, and concludes with entries the following December 5, 2013.

17. The Timeline shows that the specimen collected on November 25, 2013, was received at the laboratory on November 26, 2013, for drug/alcohol analysis.

18. According to the Timeline, the laboratory transmitted the result to FirstLab on December 3, 2013: "MORE THEN [sic] ONE SUBSTANCE FOUND." Pet'r's Ex. F, at 6.

19. The Timeline shows involvement of the MRO, beginning on December 4, 2013. According to the Timeline, the MRO, after being sent the documents for review, called the Donor (Ms. Green). After an interview, the Timeline entry shows: "MRO GAVE DONOR 24 HOURS TO FAX RX." The entry for December 4, 2013, concludes: "MRO DETERMINATION MADE POSITIVE FOR CODEINE AND MORPHINE. ANOTHER SUBSTANCE PENDING." Pet'r's Ex. F, at 3, TIMELINE (emphasis supplied).

20. The Timeline shows two entries for December 5, 2013. The first December 5 entry states: "MRO ASSISTANT REPORTED TO

PATSY FLOWERS POSITIVE FOR CODEINE, MORPHINE AND PENDING FOR ANOTHER SUBSTANCE. MRO REC'D AND VERIFIED RX PROFILE FOR THE OTHER SUBSTANCE." Id. (emphasis supplied). The second December 5 entry and final Timeline entry states: "MRO ASSISTANT REPORTED TO PATSY FLOWERS VOICE MAIL, NO CHANGE IN RESULT. OTHER SUBSTANCE NEGATIVE." Id. (emphasis supplied).

21. It may be inferred from the timing of the report of the positive for codeine and morphine (prior to a determination on the "other substance"), the reference to the receipt and verification of the RX profile "for the other substance," and the conclusion in a separate entry that the "other substance" was negative, that the MRO examined the RX profile only for the other substance. It may also be inferred, therefore, that the MRO did not investigate whether the codeine and morphine positives in the specimen could have been due to the ingestion and metabolizing of Lortab or, as it is referred to on the RX profile, "HYDROCOD/APAP TAB." See Ex. R-1, attached to the Transcript of the final hearing.

G. The Return to Work Agreement

22. The next day, December 6, 2013, Ms. Green interrupted a stay at a hospital for the illness she had had since mid-November in order to meet outside the hospital with an ECSD Administrator and her Union Representative. The meeting led to the execution

of a Return to Work Agreement signed by Ms. Green, the ECSD Administrator, and Ms. Green's Union Representative.

23. The title of the agreement contains the following:  
"FIRST TIME POSITIVE DRUG/ALCOHOL SCREEN." See Pet'r's Ex. A.

The body of the agreement contains the following:

I, Terry Green, in exchange for my continued employment with the School District of Escambia County, Florida, and consistent with the provisions of Article XI.3 - Discipline Involving Drug or Alcohol Abuse or Dependency, Section B, hereby acknowledge that I have received a "First Time" positive drug/alcohol test result . . . . I am required to undergo a Substance Abuse Professional (SAP) evaluation and participate in the SAP recommended drug/alcohol abuse program at my expense with a goal of returning to full employment upon my successful completion of the prescribed rehabilitation regimen.

Id. It is apparent that prior to November 25, 2013, Ms. Green had not had a record of any drug or alcohol offenses while in the employ of ESCD.

24. The Return to Work Agreement acknowledges Ms. Green's understanding that she "had the benefit of competent legal counsel and/or Association representation [as shown by the signature on the agreement of a Union/Legal Representative] . . . ." Pet'r's Ex. A. It also acknowledges Ms. Green's entry into the agreement "voluntarily and without duress or coercion of any kind and with full understanding of [her] rights and any waiver thereof." Id. Nonetheless, at

hearing Ms. Green claimed that she signed the Return to Work Agreement in reliance on her Union Representative's advice without fully understanding the agreement's implications. It was not until she met with an attorney provided to her by the Union who told her that she "had signed away [her] rights," Hr'g Tr. 91, that she fully realized its significance. Signing it was an act she would not have committed, she asserted at hearing, even if it meant losing her job, had she thought it affected her right to challenge the positive drug/alcohol test.

#### H. ECSD Action

25. On December 5, 2013, ECSD notified Ms. Green that she had been placed on leave with pay.

26. Section IX.6(b) (6) of the Master Contract between the School District of Escambia County, Florida and the Union of Escambia Education Staff Professionals, FEA, NEA, AFT (the "Master Contract")<sup>3/</sup> states as follows:

Upon receipt of a positive test result in a first offense drug or alcohol screening, the employee may be administratively reassigned to her/his home pending appropriate due process procedures. The employee shall be recommended for suspension without pay until she/he completes a District and Union approved Substance Abuse Professional (SAP) evaluation and the drug/alcohol dependence or abuse rehabilitation program at the employees' expense as recommended by the SAP. (The employee may utilize the District Health Care Program to the extent specified for the rehabilitation program in the DHCP.)

Pet'r's Ex. D, at 8 (page 35 of the Master Contract).

27. Consistent with the section of the Master Contract quoted above, the superintendent of the ECSD recommended that Ms. Green be placed on suspension without pay until completion of an evaluation by the SAP and any rehabilitation program recommended by the SAP.

28. On December 17, 2013, the School Board approved the superintendent's recommendation, and Ms. Green was suspended without pay beginning December 18, 2013.

29. Ms. Green's subsequent request to use sick leave beginning December 18, 2013, was denied by ECSD.

I. Ms. Green's Petition

30. On January 14, 2014, Ms. Green, through counsel provided by the Union, submitted a Petition for Hearing to the ECSD. The petition requests that Ms. Green be allowed to use sick leave after December 18, 2013, the date the School Board placed her on leave without pay.

31. The Petition asserts that there are no disputed issues of material fact. Facts cited in the petition include Ms. Green's employment as a school bus driver with ECSD, her initial placement on leave with pay while a "reasonable suspicion" drug test was conducted, her entry into the Return to Work Agreement, and the School Board's subsequent placement of Ms. Green on leave without pay effective December 18, 2013.

32. The Petition does not definitively admit that Ms. Green is a substance abuser. Rather, it asserts that she "is unable to perform her duties as a bus driver while she is evaluated and receiving rehabilitation for substance abuse, which is a sickness." Petition for Hearing, at 2, ¶ 9. The Petition, therefore, depends on the evaluation of the SAP and a determination that Ms. Green is in need of rehabilitation for substance abuse. If Ms. Green were evaluated by the SAP and determined not to be in need of rehabilitation for substance abuse, there would be no basis for the petition or the relief it seeks.

J. Ms. Green's Need for Rehabilitation for Substance Abuse

33. At the hearing, Ms. Green's mother, Henrietta Moye, was asked the following question by Ms. Green: "Have you ever witnessed me being, in the last two years or almost two years being here, under the influence of any type of drug to impair or any type of alcoholic beverage to impair me?" Ms. Moye answered, "No." Hr'g Tr. 76.

34. Ms. Moye, moreover, is not aware of any time in her life that Ms. Green has abused any type of medication or consumed alcohol to the point of intoxication.

35. At the hearing, employees of ECSD did not contend that Ms. Green needs rehabilitation for substance abuse. Nor has ECSD expressed its position based on Ms. Green's relationship to

substance abuse. Rather, it bases its position solely on procedures dictated by a single, first-time, drug report positive for opiates and the Return to Work Agreement.

36. The record is silent as to the outcome of an evaluation by the SAP or whether such an evaluation has ever been conducted.

K. Sick Leave

37. Whether Ms. Green is in need of rehabilitation for substance abuse or is a person free of substance abuse, no evidence was produced at hearing that substance abuse is a sickness that would entitle her to sick leave.

38. Likewise, no statute, rule, regulation, or any applicable law was produced by Ms. Green that would entitle her to sick leave for substance abuse while she was placed on leave without pay pending an evaluation by the SAP.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has authority under its contract with ECSD to conduct this proceeding and issue a Recommended Order. See § 120.65(6), Fla. Stat.

40. Ms. Green has the burden of proving that she is entitled to sick leave after her suspension without pay by the School Board effective December 18, 2013.

41. The School Board followed the procedures prescribed by the Master Contract between ECSD and the Union of Escambia Education Staff Professionals.

42. Ms. Green did not present evidence that substance abuse in general or abuse of opiates, in particular, is a sickness.

43. Ms. Green did not cite to any law, rule, regulation, or provision in the Master Contract that would require ECSD to allow an employee to use sick leave for substance abuse after the employee entered a Return to Work Agreement and was suspended without pay for a first-time, positive, drug test.

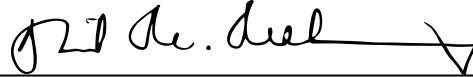
44. No conclusion is reached as to whether Ms. Green suffers from substance abuse.

#### RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Escambia County School Board continue to deny Ms. Green's request to use sick leave during her suspension without pay that the School Board imposed effective December 18, 2013, and enter a final order that denies the relief sought in Ms. Green's petition.



DONE AND ENTERED this 2nd day of May, 2014, in Tallahassee,  
Leon County, Florida.



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DAVID M. MALONEY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of May, 2014.

ENDNOTES

<sup>1/</sup> The petition also requested that her status as on "leave with pay" be re-instated for the period December 5 through 18, 2013, and that she be paid her salary for that period. At the hearing, the parties agreed that Ms. Green was paid her salary through December 18, 2013. Her employment status and back-pay prior to December 18, 2013, therefore, are not at issue.

<sup>2/</sup> While contesting that she had abused an illegal substance, Ms. Green, nonetheless admitted several times during the hearing that she was not fit to drive her school bus on November 25, 2013, and that the Director of Transportation acted appropriately in relieving her of her duties that morning. See Hr'g Tr. 13, 18, and 19.

<sup>3/</sup> The copy of the Master Contract admitted into evidence is dated July 1, 2009 to June 30, 2012. There was testimony, however, that the contract had been "extended or continued." See Hr'g Tr. 36.

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.