

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-6002

JOSE R. BUSTOS,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference between Tallahassee and Miami, Florida, on March 18, 2015, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Sara M. Marken, Esquire  
Miami-Dade County School Board  
1450 Northeast Second Avenue, Suite 430  
Miami, Florida 33132

For Respondent: Mark S. Herdman, Esquire  
Herdman and Sakellarides, P.A.  
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STATEMENT OF THE ISSUES

Whether Jose R. Bustos (Respondent) committed the acts alleged in the Revised Notice of Specific Charges filed by the

Miami-Dade County School Board (the School Board) on March 6, 2015, and whether the School Board has good cause to terminate Respondent's employment as a school security monitor.

PRELIMINARY STATEMENT

At the times relevant to this proceeding, Respondent was employed by the School Board as a school security monitor at G. Holmes Braddock Senior High School (Braddock High), a public school in Miami-Dade County.

At its regularly scheduled meeting on December 10, 2014, the School Board took action to suspend Respondent's employment without pay and institute proceedings to terminate his employment. Respondent timely challenged the School Board's action, the matter was referred to DOAH, and this proceeding followed.

The School Board filed its Revised Notice of Specific Charges on March 6, 2015, in which the School Board made factual allegations relating to Respondent's absenteeism. Based on those factual allegations, the School Board charged in three separate counts that Respondent was guilty of (1) misconduct in office, (2) incompetency due to inefficiency, and (3) gross insubordination.

At the final hearing, Petitioner presented the testimony of Carmen Gutierrez (district director of the Office of Professional Standards) and Manuel Garcia (principal of Braddock High). The

School Board offered pre-numbered Exhibits 1 through 8, 11 through 13, 17 through 18, 20 through 28, and 30 through 32, each of which was admitted into evidence. The School Board's remaining pre-numbered exhibits were not offered into evidence.

Respondent testified on his own behalf, but offered no other testimony. Respondent offered one Exhibit, which was admitted into evidence. Respondent's Exhibit was filed post-hearing.

A Transcript of the proceedings, consisting of one volume, was filed on April 20, 2015. On Respondent's unopposed motion, the deadline for the Respondent to file his proposed recommended order was extended to close of business on May 4, 2015. The parties timely filed proposed recommended orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2014), and all references to rules are to the version thereof in effect as of the entry of this Recommended Order.

#### FINDINGS OF FACT

1. At all times material hereto, the School Board has been the constitutional entity authorized to operate, control, and supervise the public schools in Miami-Dade County, Florida. Braddock High is a public school in Miami-Dade County, Florida.

2. The School Board hired Respondent on September 19, 2001,

as a school security monitor assigned to Braddock High, the position Respondent continuously held until the date of the disciplinary action at issue.

3. At all times material hereto, Respondent's employment was governed by the collective bargaining agreement between the School Board and the United Teachers of Dade, the rules and regulations of the School Board, and Florida law.

4. Braddock High is a large school in terms of student population and campus size. Braddock High employs 12 full-time security monitors. While it is common practice to hire a substitute for an absent teacher, Braddock High does not employ a substitute security monitor to replace an absent security monitor. If a security monitor is absent on any given day, the schedules of the other security monitors must be adjusted to avoid a breach in security.

5. Respondent has been documented for poor attendance since April 2006.

DECEMBER 4, 2009, MEMORANDUM

6. Manuel S. Garcia has been the principal of Braddock High for the last 13 years. On December 4, 2009, Mr. Garcia issued to Respondent a memorandum on the subject "Absence from Worksite Directive." From October 2009 to December 2009, Respondent accumulated 13.5 absences<sup>1/</sup> of which 7.5 were unauthorized. The 7.5 unauthorized absences were categorized as "Leave Without Pay

Unauthorized (LWOP-U)". The memorandum issued by Mr. Garcia as Respondent's supervisor, provided, in part, as follows:

Because your absence from duties adversely impacts the work environment, particularly in the effective operation of this worksite, you are apprised of the following procedures concerning your future absences:

Be in regular attendance and on time.

Intent to be absent must be communicated directly to a designated site supervisor, Mr. Manuel S. Garcia, principal or Dr. Edward G. Robinson, assistant principal.

Absences for illness must be documented by your treating physician and a written note presented to the designated site supervisor upon your return to the site.

Your future absences will be reported as LWOU [sic] (unauthorized) until you provide the required documentation to show that you qualify for Family Medical Leave Act (FMLA) or other leave of absence.

If it is determined that future absences are imminent, leave just [sic] be requested and procedures for Board approved leave implemented, and the FMLA or ADA requirements, if applicable, must be complied with.

These directives are in effect upon receipt of this notice and are necessary to prevent adverse impact to students and their academic progress and to ensure continuity of the educational program and to maintain effective worksite operations.

Please be assured that assistance will continue to be provided to facilitate your regular attendance. Non-compliance with the directives will be considered a violation of professional responsibilities.

APRIL 23, 2010, CONFERENCE FOR THE RECORD

7. On April 23, 2010, Respondent was required by Mr. Garcia to attend a Conference for the Record. The purposes of the conference were to address Respondent's non-compliance with School Board Rule 6Gx13-4A-1.21 (Responsibilities and Duties) and his insubordination to attendance directives.

8. Between January 19, 2010, and April 6, 2010, Respondent was absent 14.5 days without communicating his intent to be absent to the principal or the assistant principal. As part of the conference, Mr. Garcia reiterated in writing to Respondent the directives pertaining to attendance set forth in the December 4, 2009, memorandum. Mr. Garcia advised Respondent that "[a]ny non-compliance with these directives will compel [sic] gross insubordination and will compel further disciplinary measures." Mr. Garcia provided Respondent with a copy of School Board rules 6Gx13-4A.1.21 (Responsibilities and Duties) and 6Gx13-4E-1.01 (Absences and Leave).

9. Mr. Garcia issued Respondent a referral to the School Board's Employee Assistance Program (EAP). There was no evidence that Respondent used that referral.

10. For the 2009-2010 school year, Respondent was absent a total of 28.5 days of which 17.5 days were unauthorized.

DECEMBER 8, 2011, MEMORANDUM OF CONCERN

11. On December 8, 2011, Mr. Garcia issued to Respondent a Memorandum of Concern addressing his excessive absences. Within less than five months into the 2010-11 school year, Respondent had accumulated 15 absences of which 8 were unauthorized. Respondent was informed that he was in violation of School Board Policy 4430 - Leaves of Absence.<sup>2/</sup> Additionally, he was directed to report any future absence to Mr. Medina, the assistant principal.

DECEMBER 5, 2012, MEMORANDUM

12. On December 5, 2012, Mr. Garcia issued Respondent another memorandum addressing his absences. Mr. Garcia noted that Respondent had been absent a total of 11 days during the 2012-2013 school year. Respondent's absence on November 21, 2012, was unauthorized. Mr. Garcia reiterated the directives as to absenteeism he had given to Respondent on December 4, 2009, and April 23, 2010.

SEPTEMBER 10, 2013, MEMORANDUM

13. On September 10, 2013, Mr. Garcia issued Respondent another memorandum addressing his absences. Between September 27, 2012, and August 29, 2013, Respondent had 36.5 absences, 19.5 of which were unauthorized leave. Mr. Garcia reiterated the directives as to absenteeism he had given to

Respondent on December 4, 2009; April 23, 2010; and December 12, 2012.

14. Mr. Garcia stated to Respondent that he considered Respondent's actions of failing to abide by the attendance directives to be insubordination.

OCTOBER 16, 2013, CONFERENCE FOR THE RECORD

15. On October 16, 2013, Mr. Garcia conducted a Conference for the Record with Respondent to address Respondent's attendance, his failure to abide by the previously issued directives, and his future employment with the School Board. Between September 30 and October 4, 2013, Respondent was absent without authorization. For three of those four days, Respondent did not notify anyone at Braddock High that he would be absent. Mr. Garcia reiterated the directives he had given to Respondent on December 4, 2009; April 23, 2010; December 12, 2012; and September 10, 2013.

16. Mr. Garcia advised Respondent again that failure to comply with directives would be deemed gross insubordination. Mr. Garcia again provided Respondent with a copy of School Board Policy 4430 - Leaves of Absence.

17. Mr. Garcia provided to Respondent a second referral to the EAP. In addition, Mr. Garcia gave Respondent contact information for four School Board Departments (including the name and telephone number of each department's director). Those



departments were Civil Rights Compliance; Leave, Retirement, and Unemployment; Human Resources - Americans with Disabilities Act; and EAP.<sup>3/</sup>

18. On October 18, 2013, Mr. Garcia issued a written reprimand to Respondent based on his absenteeism and his repeated failure to notify administrators in advance of absences.

JANUARY 16, 2014, CONFERENCE FOR THE RECORD

19. On January 10, 2014, Mr. Garcia issued to Respondent a Notice of Abandonment based on Respondent's absence from work for the workweek beginning January 6, 2014, and his failure to communicate in advance with any school administrator about the absences.

20. On January 16, 2014, Mr. Garcia conducted a Conference for the Record to address Respondent's attendance. Respondent's unauthorized absence for an entire week and his failure to abide by the previously issued directives prompted the Conference for the Record. Mr. Garcia also discussed Respondent's future employment with the School Board.

21. Mr. Garcia advised Respondent that the directives that had been repeatedly reiterated to Respondent were still in full force and effect. Mr. Garcia advised Respondent that failure to adhere to those directives would be considered gross insubordination. Mr. Garcia gave Respondent copies of the applicable School Board policies, including a copy of School

Board Policy 4430-Leaves of Absence, and 4210-Standards of Ethical Conduct.

22. Mr. Garcia issued Respondent a letter of reprimand.

MARCH 12, 2014, CONFERENCE FOR THE RECORD

23. Following the written reprimand in January 2014, Respondent was absent without authorization on six consecutive school days in February 2014.

24. On March 12, 2014, Carmen Gutierrez, the district director of the Office of Professional Standards, conducted a Conference for the Record with Respondent because of Respondent's history of absenteeism and his unauthorized absences in 2014. Ms. Gutierrez issued to Respondent the same directives Mr. Garcia had repeatedly issued to Respondent.

25. Ms. Gutierrez informed Respondent that his failure to follow directives constituted gross insubordination.

26. The Summary of the Conference for the Record contains the following:

You were given the opportunity to respond to your excessive absenteeism. You stated that you had a family problem, a family member that was sick and you were helping them [sic] out. Ms. Hiralda Cruz-Ricot spoke on your behalf stating that you had been diagnosed with fibromyalgia and it impedes your ability to do things. She added that you were recently diagnosed and are not undergoing treatment. Ms. Cruz-Ricot said that you would be producing doctor's notes since Mr. Garcia remarked that he had only received

one doctor's note dated October 18, 2013 from Broward Psychological Services.

MAY 7, 2014, SUSPENSION

27. At the School Board meeting on May 7, 2014, the School Board took action to suspend Respondent without pay for fifteen (15) workdays for just cause, including, but not limited to: gross insubordination, excessive absenteeism, non-performance and deficient performance of job responsibilities, and violation of School Board Policies 4210-Standards of Ethical Conduct, 4210.01-Code of Ethics, 4230-Leaves of Absence. Respondent was notified of the Board's action via a letter dated September 4, 2014.

JUNE 3, 2014, NOTICE OF ABANDONMENT

28. Respondent was due back from his suspension on May 29, 2014. Respondent failed to show up for work on May 29th, May 30th, June 2nd, and June 3rd. Respondent was mailed another Notice of Abandonment. Respondent provided no explanation for his leave.

29. At the beginning of the following school year on August 19, 2014, Mr. Garcia reiterated the directives as to absenteeism that had been repeatedly given to Respondent by Ms. Gutierrez and by Mr. Garcia.

OCTOBER 28, 2014, CONFERENCE FOR THE RECORD

30. Respondent failed to report to work for four consecutive school days beginning September 29, 2014. As a result, on October 28, 2014, Ms. Gutierrez conducted a Conference for the Record with Respondent to address Respondent's absenteeism, gross insubordination, non-performance and deficient performance of job responsibilities and violation of School Board Policies 4210-Standards of Ethical Conduct, 4210.01-Code of Ethics, 4230-Leaves of Absence.

31. On December 9, 2014, Respondent received a letter informing him that the Superintendent of Schools would be recommending that the School Board suspend Respondent's employment without pay and initiate proceedings to terminate that employment.

32. At its regularly scheduled meeting on December 10, 2014, the School Board suspended Respondent's employment and instituted these proceedings to terminate his employment.

FAILURE TO COMMUNICATE

33. In addition to the excessive absenteeism set forth above, between October 2009 and December 2014, Respondent repeatedly failed to communicate in advance with any administrator that he would be absent on days he failed to appear for work.

DEPRESSION

34. Respondent's only exhibit was a letter from Dr. Maribel Agullera, a psychiatrist. This letter confirms that Respondent has been diagnosed with "Major Depressive Disorder, Recurrent, Moderate" and "Alcohol Dependence." The exhibit also confirms that Respondent is on medication.

35. Respondent testified, credibly, that he was diagnosed with depression before 2001, the year he first started working at Braddock High. Respondent testified he has suffered from depression for most of his adult life and that all of his absences were related to depression. There was no other evidence to support the contention that Respondent's repeated absences should be attributed to depression. In the absence of competent medical evidence to support Respondent's contention, the undersigned declines to find that Respondent's excessive absenteeism and his failure to appropriately communicate with school administrators over a five-year period was attributable to depression.<sup>4/</sup>

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the subject matter of and the parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

37. Respondent is an "educational support employee" within the meaning of section 1012.40.

Section 1012.40(2)(c) pertains to educational support employees and provides as follows:

(c) In the event a district school superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event there is no collective bargaining agreement.

38. Because the School Board seeks to terminate Respondent's employment, which does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in its Notice of Specific Charges by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

39. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American

Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

40. This is a de novo proceeding designed to formulate final agency action. See Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't. Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991), and section 120.57(1)(k), Fla. Stat.

#### THE ALLEGED VIOLATIONS

41. Article XXI(3)(D) of the collective bargaining agreement between the School Board and the teacher's union provides that just cause for the termination of educational support personnel includes "misconduct in office," "incompetency," and "gross insubordination." Those terms are defined by Florida Administrative Code Rule 6B-4.009.

42. The Revised Notice of Specific Charges alleged that Respondent was guilty of the following: (Count 1) misconduct in office, (Count 2) incompetency due to inefficiency, and (Count 3) gross insubordination.

#### COUNT 1: MISCONDUCT IN OFFICE

43. Florida Administrative Code Rule 6A-5.056(2) defines the term "Misconduct in Office," in relevant part, as follows:

(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 6A-10.080];

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in [rule 6A-10.081];

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

44. Rule 6A-10.080 sets forth the following as the Code of Ethics of the Education Profession in Florida:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

45. Rule 6A-10.081 sets forth the "Principles of Professional Conduct for the Education Profession in Florida," and provides, in relevant part, as follows:

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to



learning and/or to the student's mental and/or physical health and/or safety.

46. School Board Policy 4210, Standards of Ethical Conduct, provides, in relevant part as follows:

A support staff member with direct access to students shall:

A. Make a reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

47. The School Board proved that Respondent was guilty of misconduct in office by proving that Respondent was guilty of excessive absenteeism and by proving that Respondent's excessive absenteeism adversely impacted the security of Braddock High.

COUNT 2: INCOMPETENCY DUE TO INEFFICIENCY

48. Rule 6A-5.056(3) defines the terms "incompetency" and "inefficiency" as follows:

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;

\* \* \*

3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;

\* \* \*

5. Excessive absences or tardiness.

49. The School Board proved that Respondent was guilty of incompetency due to inefficiency as alleged in Count 2 by proving that Respondent failed to communicate appropriately with administrators and by proving that Respondent was guilty of excessive absenteeism.

COUNT 3: GROSS INSUBORDINATION

50. Rule 6B-4.009(4) defines "gross insubordination" to mean "a consistent or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority."

51. The School Board proved that Respondent was guilty of gross insubordination by repeatedly failing to follow applicable policies pertaining to absences from school after being specifically instructed to adhere to those policies by Mr. Garcia and Ms. Gutierrez.

52. In making the penalty recommendation that follows, the undersigned considered Respondent's request that he be given one last opportunity to keep his job. The undersigned has also considered Respondent's testimony that he has long suffered from depression, to which Respondent attributed his absenteeism. Except for a note from his doctor stating that Respondent suffers

from depression and alcohol dependence, Respondent's testimony is uncorroborated. The undersigned is constrained to recommend that the School Board terminate Respondent's employment due to his excessive absenteeism and his repeated failure to follow very straightforward directives from Mr. Garcia and Ms. Gutierrez.

RECOMMENDATION

The following recommendations are based on the foregoing Findings of Fact and Conclusions of Law:

It is RECOMMENDED that the Miami-Dade County School Board enter a final order adopting the Findings of Fact and Conclusions of Law set forth in this Recommended Order. It is further RECOMMENDED that the final order terminate the employment of Jose R. Bustos.

DONE AND ENTERED this 11th day of May, 2015, in Tallahassee, Leon County, Florida.



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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of May, 2015.

ENDNOTES

1/ For ease of reference any day or part thereof that Respondent was absent from work will be referred to as an absence.

2/ This policy replaced School Board rule 6Gx13-4E-1.01 on July 7, 2011.

3/ There was no evidence that Respondent sought help from any of those departments.

4/ In his Proposed Recommended Order, Respondent makes the following statement: "Clearly, just cause exists to discipline Respondent. He does not expect back pay if he is reinstated to his position. What Respondent seeks is [a] final opportunity to [do] his job on a timely [and] consistent basis. There is no indication there is any problem with his job performance aside from his attendance. If Respondent can fix his attendance, he can do his job. He has taken steps to improve his outlook, and thus, his attendance. He asks for one last opportunity."

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.