

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDO COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-1686

KIMBERLY ROSARIO,

Respondent.

_____ /

RECOMMENDED ORDER

An administrative hearing was conducted in this case on June 9, 2015, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Thomas M. Gonzalez, Esquire
Nathan Paulich, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
Suite 1600
201 North Franklin Street
Tampa, Florida 33602

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether there is just cause to terminate the employment of Respondent, Kimberly Rosario (Respondent), as an employee with the Hernando County School Board (Petitioner or School Board).

PRELIMINARY STATEMENT

By letter dated February 19, 2015, the Superintendent of Hernando County School District notified Respondent that she would recommend to the School Board that Respondent be terminated from her employment with the School Board, and that the recommendation would be placed on the School Board's agenda for March 17, 2015. The letter further advised Respondent that the recommendation was based upon Respondent's excessive absence and absence without authority. The letter also informed Respondent of her right to appeal the recommendation of termination within 15 days from receipt of the letter.

Following her receipt of the Superintendent's letter, Respondent timely filed a request for a hearing contesting the recommendation. On March 2, 2015, Hernando County School District administrator Heather Martin wrote to Respondent and advised that, because Respondent filed a letter contesting the recommended termination, "[t]he Superintendent's recommendation for termination will be revised to a recommendation for suspension without pay effective March 18, 2015[,] " to be presented to the School Board at their regular meeting scheduled for March 17, 2015. The March 2, 2015, letter further informed Respondent that the matter would be referred to the Division of Administrative Hearings (DOAH) for a hearing and that "[t]he suspension without pay will continue until the conclusion of the

DOAH process and final employment action is taken by the School Board.”

On April 23, 2010, counsel for the School Board forwarded Respondent’s request for a hearing to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing.

At the administrative hearing held June 10, 2015, the School Board acknowledged that it had the burden in this case to show, by a preponderance of the evidence, just cause to justify the termination of Respondent’s employment. The School Board presented the testimony of J.D. Floyd K-8’s school principal, Rick Markford; School District administrator, Heather Martin; and School District Risk and Benefits Specialist, Awilda Rodriguez-Fonte. The School Board introduced 26 exhibits received into evidence as Exhibit’s P-1 through P-26. Respondent did not show up to the final hearing, and therefore, did not participate.

The proceedings were recorded and a transcript was ordered. The parties were given 10 days from the filing of the transcript within which to submit their proposed recommended orders. The one-volume Transcript was filed on July 6, 2015, and the School Board timely filed its Proposed Recommended Order which was considered in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. The School Board is the duly authorized entity responsible for the operation, control, and supervision of all public schools, grades K through 12, in Hernando County, Florida, and for otherwise providing public education to school-aged children in the county. Art. IX, § 4(b), Fla. Const.; § 1001.32, Fla. Stat.^{1/}

2. Rick Markford is the principal at J.D. Floyd K-8 (J.D. Floyd), a school in the Petitioner's school district. As principal, he has ultimate supervisory authority over all staff members at the school, including custodians.

3. In December 2013, Mr. Markford hired Respondent to serve as a Custodian 1 to work the night shift at J.D. Floyd.

4. Shortly after starting her employment, Respondent's excessive absenteeism rose to a level where she was taking impermissible leave without pay. As a result, Mr. Markford contacted the School Board's human resources department for guidance on how to proceed.

5. The School Board has enacted Policy 6.37 to provide the grounds for termination for all educational support and non-certified instructional personnel in its school district. Under Policy 6.37, Group III offenses warrant termination for a first-time violation. Respondent was specifically charged with violating Policy 6.37 Group III offenses "(5) Excessive

absenteeism or excessive tardiness" and "(8) Absence from duty without authority, including refusal to report to duty at any time as directed."

6. Although the Petitioner can proceed directly to termination for a first-time Group III offense, it utilizes a five-step progressive discipline process for excessive absenteeism and absence from duty without authority. The first step is a coaching session with the employee. If the issue continues, the second step is a corrective action plan. The third step is a formal conference with an employee conference report placed in the employee's file. Step four is a letter of reprimand. And the fifth step is a referral to Human Resources for further action, up to and including termination.

7. In accordance with School Board policy, because of Respondent's excessive absences, Mr. Markford initiated the five-step process described above.

8. Step 1 occurred on March 7, 2014, when Mr. Markford held a coaching session with Respondent to discuss her absences without pay. She was specifically warned that any further unpaid absences would result in a second meeting and a corrective action plan.

9. On April 17, 2014, Mr. Markford met with Respondent to address her excessive absenteeism and issue a corrective action plan in accordance with Step 2. As part of the corrective

action plan, Respondent was informed that all future absences for the 2013-14 school year would require a doctor's note and she would need to directly contact Mr. Markford.

10. Despite the coaching, Respondent's absences without pay continued, requiring Mr. Markford to initiate Step 3 in a June 23, 2014, meeting with Respondent. The employee conference report reflects that Respondent was absent without pay from May 29, 2014, through June 16, 2014.

11. Petitioner's fiscal year runs from July 1 to June 30, each year. Although Respondent had no entitlement to continued employment beyond June 30, 2014, Mr. Markford decided to reappoint her for the 2014-15 school year to give her a second chance. Because it was a new school year, any further issues with absenteeism would start at Step 1 of the five-step process rather than continuing directly to Step 4.

12. On July 14, 2014, shortly after the start of the new school year, Mr. Markford had to meet with Respondent to initiate Step 1 in the process due to her taking leave without pay on July 2, 3, and 9, 2014. In the corresponding coaching-session note, Respondent was issued a corrective action plan. Respondent's impermissible absences continued.

13. On July 23, 2014, Mr. Markford met with Respondent to discuss a corrective action plan related to her continued excessive absenteeism, including her absence on July 16, 2014.

That same day, Mr. Markford met with Respondent for an Employee Conference Report due to her continued absences without pay, including her absence on July 17, 2014. As reflected in the Employee Conference Report, Respondent was again informed that being in attendance every day was important. Respondent was directed to contact Mr. Markford directly to notify him of any future absences and that she must provide a doctor's note for such absences.

14. Despite the coaching, Respondent continued to be absent without pay and failed to comply with the corrective action plan. As a result, Mr. Markford issued her a Letter of Reprimand on September 14, 2014. Mr. Markford again explained to Respondent that "[p]unctual and regular attendance is an essential function of [her] job." In the Letter of Reprimand, which Respondent signed, Respondent was specifically informed that "any further incidents of absenteeism will be considered willful absenteeism and [that Mr. Markford] will recommend that [her] employment with the [School Board] be terminated."

15. Following the reprimand, Mr. Markford informed the School Board's human resources office of the issues with Respondent's excessive absences and identified the disciplinary procedures he had followed.

16. It was only after Respondent had exhibited a clear pattern of absenteeism and had been specifically warned that her

continued actions would lead to a recommendation for termination that she filed a complaint against a co-worker alleging harassment. Specifically, on September 26, 2014, Respondent alleged that Christopher Griesbeck, night Custodian 1 at J.D. Floyd, said her "days are numbered here and laughed." The complaint also referenced an April 2014 incident where Mr. Griesbeck, who was allegedly upset that Respondent was appointed to a day shift instead of him, took her to classrooms she was responsible for and pointed out deficiencies. There was no allegation that the alleged harassment was sexual in nature.

17. Mr. Markford conducted an investigation into the harassment allegations by interviewing Respondent; Vincent Juliano, a Custodian 2 at J.D. Floyd; Mr. Griesbeck; and several Custodian 1s at J.D. Floyd. After completing the investigation, Mr. Markford determined that Respondent's "complaint of working in a hostile environment is unfounded." The investigation revealed that, as a result of Respondent's high absenteeism, there was a degree of resentment and frustration among some of the custodial staff. Mr. Markford took steps to address the issue and developed a plan to limit the interaction between Respondent and Mr. Griesbeck going forward. Mr. Markford met with Respondent to inform her of his findings.

18. On October 17, 2014, Respondent suffered an injury at work when she mis-stepped and twisted her knee, aggravating a

pre-existing injury. A workers' compensation injury report was completed on October 20, 2014, at Mr. Markford's insistence and Respondent thereafter received treatment. The next day, October 21, 2014, Respondent was cleared to return to work with restrictions for her left knee. Consistent with the restrictions, as well as the restrictions she had over the next couple of months, J.D. Floyd provided her with light-duty work.

19. On December 15, 2014, Respondent's treating physician cleared her to return to work from her workers' compensation injury with no restrictions. But Respondent was absent without authority on December 15, 17, 18, 19, 22, and 23, 2014. The Petitioner's school district had a vacation break from December 24, 2014, through January 4, 2015. After returning from the break, Respondent's unauthorized absenteeism continued.

20. On January 6, 2015, Respondent's treating physician cleared her to return to work on January 12, 2015, again with no restrictions. Despite this, Respondent's high absenteeism and failure to follow the corrective action plan continued. On January 28, 2015, Mr. Markford held a meeting with Respondent because she was absent on January 12, 13, 14, 16, 20, 21, 26, and 27, 2015, without providing a doctor's note. Mr. Markford explained that he considered Respondent's actions to be insubordination and the matter would be referred to Human Resources.

21. Respondent's absences continued. At the time of those continued absences, Respondent would send text messages to Mr. Markford explaining she was not coming to work, and Mr. Markford would respond by informing her that she did not have any leave time and she was required to come to work. She did not comply with the directions.

22. On February 2, 2015, Petitioner's Director of Human Resources, Dr. Sarah Meaker, wrote a memorandum to the Petitioner's Equity, Policy, Insurance and Compliance Administrator, Heather Martin, recommending that disciplinary action be imposed against Respondent based on Respondent's continual absence from work without a doctor's note.

23. On February 12, 2015, Mr. Markford met with Respondent regarding her continued failure to come to work and non-compliance with the corrective action plan. This was the first workday in February that Respondent showed up to work. Respondent refused to sign any documentation and left work early without authority.

24. On February 13, 2015, Ms. Martin informed Respondent that a pre-determination meeting would be scheduled regarding Respondent's excessive absenteeism and absenteeism without leave in violation of School Board Policy 6.37 Group III (5) and (8). Petitioner had difficulty trying to contact Respondent in an effort to move forward with the disciplinary process. In reply

to a text message from Mr. Markford informing her to contact Ms. Martin, Respondent responded: "They have my number they can use it."

25. In preparation for the predetermination meeting, Ms. Martin had a calendar created for the 2014-15 school year which showed the number of days and partial days that Respondent was absent. Specifically, for July 2014, Respondent missed five full days and one partial day; for August 2014, she missed four full days and three partial days; for September 2014, she missed seven full days and one partial day; for October 2014, she missed four full days and three partial days; for November 2014, she missed six full days and three partial days; for December 2014, she missed nine full days; for January 2015, she missed 12 full days and five partial days; and for February 2015, through the 18th of that month, she missed 11 full days and one partial day out of the 12 possible work days.

26. The predetermination meeting was held on February 18, 2015. Minutes were kept for the meeting and thereafter transcribed. At the predetermination hearing, Respondent admitted that she was no longer on workers' compensation because the doctor cleared her as maximum medical improvement (MMI). Respondent offered no valid justification for her excessive absenteeism and absenteeism without authority. Following the meeting, Ms. Martin recommended to the Superintendent that

Respondent be terminated due to her excessive absenteeism and absence without authority.

27. On February 19, 2015, Petitioner's Superintendent of schools, Dr. Lori Romano, charged Respondent with violating School Board Policy 6.37 Group III (5) and (8) based on Respondent "being excessively absent and absent without authority." Dr. Romano explained there was probable cause for discipline and that she would recommend Respondent's termination.

28. After Respondent indicated she wished to appeal the recommendation, the matter was transferred to DOAH and an administrative hearing was scheduled. Respondent did not attend the hearing. Respondent did not give advance notice that she would not attend the hearing and she did not explain or provide a reason for her absence.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the parties and subject matter over the petition. §§ 120.569 & 120.57, Fla. Stat. (2015).

30. Petitioner bears the burden of proof to show by a preponderance of the evidence that Respondent committed the charged grounds for discipline and that cause exists to terminate her employment. See McNeil v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd.

of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990). An educational support employee can be terminated for "reasons stated in the collective bargaining agreement, or in district school board rule." § 1012.40(2)(b), Fla. Stat. The Petitioner has met its burden to show Respondent violated School Board Policy 6.37 Group III offenses (5) (excessive absenteeism or excessive tardiness) and (8) (absence from duty without authority, including refusal to report to duty at any time as directed). A first offense for a Group III violation is punishable "[u]p to discharge."

31. The School Board proved, by a preponderance of the evidence, that Respondent exhibited a clear pattern of habitual absenteeism and absences without authority. Based on Respondent's excessive absenteeism and absences without authority, it is concluded that there is just cause to terminate Respondent's employment. See, e.g., Seminole Cnty. Sch. Bd. v. Williams, DOAH Case No. 11-1736 July 28, 2011, ¶ 21 (Recommended Order finding just cause exists to terminate custodian who was absent without leave); Seminole Cnty. Sch. Bd. Final Order Sept. 13, 2011 (adopting Recommended Order).

32. In its Proposed Recommended Order, Petitioner suggests that an award for Petitioner's costs and attorney's fees associated with this proceeding would be appropriate on the ground that Respondent's failure to show up for the hearing

demonstrated that she participated in the proceeding for an improper purpose. See § 120.595(1)(d), Fla. Stat. While Respondent's failure to attend the final hearing or file a proposed recommended order certainly waived her right to defend against the allegations supporting her termination, her failure to participate, under the facts and circumstances of this case, is insufficient to show that Respondent's primary intent was "to harass, to cause unnecessary delay, for any frivolous purpose, or to needlessly increase the prevailing party's costs" in this proceeding. See Burke v. Harbor Estates Assocs., Inc., 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991) (explaining grounds for finding that a party participated in a DOAH hearing for an improper purpose). Therefore, although the School Board proved grounds supporting Respondent's termination, an award for Petitioner's costs and attorney fees is not recommended.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered terminating Respondent's employment with the School Board.

DONE AND ENTERED this 17th day of July, 2015, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of July, 2015.

ENDNOTE

^{1/} All references to the Florida Constitution, Florida Statutes,
and School Board Policies are to the 2014 versions 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.