

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

POLK COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 19-4255TTS

HECTOR MARRERO,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division), heard this case by video teleconference at locations in Tallahassee and Lakeland, Florida on November 14, 2019.

APPEARANCES

For Petitioner: Donald H. Wilson, Jr., Esquire
Boswell & Dunlap, LLP
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Bartow, Florida 33830-4620

For Respondent: Branden M. Vicari, Esquire
Herdman & Sakellarides, P.A.
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STATEMENT OF THE ISSUE

Did the absenteeism of Respondent, Hector Marrero, amount to just cause to terminate his employment as a teacher with Petitioner, Polk County School Board (Board), under Article 4.4

of the County's Teacher Collective Bargaining Agreement
(Agreement)?

PRELIMINARY STATEMENT

By a letter that Mr. Marrero received on May 29, 2019, Teddra J. Porteous, J.D., Associate Superintendent for Human Resource Services for the Board, advised Mr. Marrero that the Superintendent had determined there was just cause to terminate his employment and that she would recommend termination to the Board. Mr. Marrero requested a hearing to contest his proposed termination. On August 12, 2019, the Board referred the matter to the Division to conduct the hearing as provided in the contract between the Division and the Board.

The undersigned scheduled the matter for hearing to be held September 24, 2019. Later the undersigned granted Mr. Marrero's unopposed motion to continue and rescheduled the hearing for November 14, 2019. The hearing was held as scheduled.

The Board presented testimony from Tony Kirk and Edgar Santiago. Board Exhibits 1 through 12 were admitted into evidence. Mr. Marrero testified on his own behalf. Mr. Marrero's Exhibits 1 through 8 were admitted into evidence.

The Transcript was filed on December 2, 2019. After obtaining an extension of time for filing, the parties timely filed Proposed Recommended Orders. The undersigned has considered them in preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Marrero worked 20 some years in Polk County schools as an art teacher. Most recently, he taught art to the students of Palmetto Elementary School for eight years. The Board employed him pursuant to a professional services contract.

2. Mr. Marrero's home life was difficult for him and his children. This was due to his wife's substance abuse, her domestic violence toward Mr. Marrero, and her mistreatment of their children. In 2016, these problems reached a crescendo.

3. Authorities filed criminal child abuse and domestic violence charges against Mr. Marrero's wife. In October 2016, the criminal charges were resolved by judgment that included a prohibition against the wife possessing weapons, a prohibition against the wife contacting Mr. Marrero, 12 months' probation, and random drug tests of the wife.

4. The Department of Children and Families (DCF) intervened to help protect Mr. Marrero's minor children. This resulted in requirements for counseling, which Mr. Marrero fulfilled.

5. In August 2016, Mr. Marrero began a dissolution of marriage proceeding. It was contentious and abusive with numerous issues related to the problems identified above. The issues included critical child custody disputes. The disputes were resolved with Mr. Marrero being given full-time custody with the children and their mother permitted only supervised visits.

6. Throughout this period, courts issued several restraining orders against the mother. Mr. Marrero, as the sole responsible parent, cared for his daughters, ensuring their continued participation in events at their separate schools.

7. These demands and disruptions caused the absences resulting in his proposed termination. The absences described below were to attend various court hearings, attend litigation related conferences, attend required counseling sessions, transport his daughters to events, attend their events, and other obligations arising from the legal and DCF issues created by the behavior of Mr. Marrero's wife.

8. The Polk County school system suffers from a significant absenteeism problem. The Board employs over 13,000 people. Approximately 9,000 of them are teachers or other instructional staff. During the 2018-2019 school year, the system imposed attendance related discipline 302 times.

9. The Polk County school system has taken several actions to improve attendance. The actions include providing training and guidance to school principals and other administrative employees to help them assist employees to manage available leave time. The actions also include promulgating guidelines for principals and supervisory personnel to address absenteeism as a disciplinary issue.

10. A teacher's presence in the classroom is a critical part of the job. The interruption of continuity of instruction that excessive absenteeism causes compromises student learning. It also injures co-workers asked to cover the absent teacher's duties. The entire school suffers as a result.

11. The Agreement governs the availability of paid leave for Polk County teachers. Section 20.1 of the Agreement grants four days of sick leave as of a teacher's first day of employment. After the first day, teachers earn one additional day of sick leave for each month of employment. The system credits the day to the employee at the end of each month. The maximum number of sick leave days an employee may earn during any given school year is twelve. Unused sick leave accrues from year-to-year. The Agreement does not limit the number of days that teachers may accrue.

12. Section 20.2 of the Agreement grants teachers six personal leave days during the school year. They are drawn from the pool of total available sick days. The distinction between personal days and sick leave days is that sick leave is intended to be taken because of an employee's or employee's family's illness or other health problem. Personal days may be taken for any reason. Personal leave days are a subset of sick leave days. A teacher may take personal leave days only if sick leave days are available to the employee. If an employee is absent and has

no available sick leave time, then the employee is absent without authorization.

13. Article XXI of the Agreement governs unpaid leave. It includes a variety of categories including medical leave, educational leave, and parental leave. There is no indication that Mr. Marrero inquired about unpaid leave or that the school administration suggested that he consider it.

14. Mr. Marrero's struggles with attendance reach back to 2016. By letter dated February 12, 2016, his Principal, Edgar Santiago, documented a verbal warning for excessive absenteeism. The Principal noted that he held a conference with Mr. Marrero on the 12th and had discussed the fact that attendance records showed Mr. Marrero had missed 18 days of work during the school year. Eight days were unpaid because he had exhausted his available leave time. The letter cautioned that it was the first step of the Progressive Discipline process set forth in Section 4.4-1 of the Agreement. The letter concluded, "It is important to note that further disciplinary action, up to and including termination, will follow if unacceptable behaviors continue."

15. On March 15, 2016, Principal Santiago delivered another letter to Mr. Marrero. The letter was a written reprimand under Step 2 of the Progressive Discipline process. The letter noted that by then Mr. Marrero had missed 23 days of work that school

year, 13 of which exceeded his available leave time. The letter referenced the Agreement's Progressive Discipline section and noted that further disciplinary action could result in termination of Mr. Marrero's employment.

16. On March 29, 2017, Principal Santiago wrote the Superintendent of the Polk County schools and advised her that Mr. Marrero continued to miss work after depleting his available sick and personal leave days. Principal Santiago noted that Mr. Marrero knowingly missed work without available sick or personal leave. His letter stated, "I am of the opinion that Mr. Marrero's recent absences without pay is [sic] a continuing trend and just cause for further disciplinary action." Principal Santiago recommended imposition of Step 3 of the progressive discipline process, suspension for up to five days without pay. He provided Mr. Marrero a copy of the letter.

17. On April 19, 2017, the school administration provided Mr. Marrero a letter from Associate Superintendent Teddra Porteous notifying him that he was suspended without pay for three days for his absenteeism. The letter stated specifically that the suspension constituted Step 3 of progressive discipline under the Agreement. The letter also stated that further disciplinary action could result in termination.

18. Because of Mr. Marrero's absenteeism, Principal Santiago placed him on a Professional Development Plan, which included goals and strategies for improving his attendance. After the suspension and imposition of the Professional Development Plan, Mr. Marrero completed the 2017-2018 school year without absences exceeding his accrued leave time.^{1/}

19. Mr. Marrero's attendance problems returned in the 2018-2019 school year. Beginning in August of 2018, Mr. Marrero missed work for one-half or more days on 23 different dates. These dates do not include his absences on May 30 and 31, 2019, which were the result of his suspension after the Superintendent recommended termination of his employment. As of January 24, 2019, Mr. Marrero had exhausted his available sick leave and personal time for one-half day or more on ten different workdays. Yet he was absent five days in April.

20. Principal Santiago wrote the Superintendent on April 30, 2019, recommending termination of Mr. Marrero. This was Step 4 of the progressive discipline process. The Superintendent accepted the recommendation.

21. On May 29, 2019, Principal Santiago delivered a May 23, 2019, letter from Associate Superintendent Porteous to Mr. Marrero. The letter stated, "Based on these facts [absences history], and in accordance with Step IV of Progressive Discipline in Article 4.4-1-Progressive Discipline of the Teacher

Collective Bargaining Agreement, the Superintendent has determined that 'just cause' exists to recommend termination of your employment to the School Board of Polk County." The letter advised Mr. Marrero of his right to request a hearing. He exercised that right.

22. During the 2016-2018 period, Mr. Marrero had advised Principal Santiago of the serious personal problems causing his repeated absences. Principal Santiago authorized Mr. Marrero to occasionally arrive late for work or leave early. He did not authorize Mr. Marrero to take full days or half-days off without charging them to available leave. Nor did Principal Santiago have authority to do that.

CONCLUSIONS OF LAW

23. The Division has jurisdiction over the parties and subject matter of this proceeding pursuant to the contract between the Board and the Division and sections 1012.33, 120.569, and 120.57, Florida Statutes (2019).^{2/}

24. The Board must prove its charges by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; McNeill v. Pinellas Cty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990). Preponderance of evidence means evidence showing as a whole that the fact sought to be proved is more probable than not. Dufour v. State, 69 So. 3d 235, 252 (Fla. 2011).

25. Sections 1001.42(5) and 1012.22(1)(f), Florida Statutes, grant the Board the authority to impose discipline up to termination on Mr. Marrero. Section 1012.33(1)(a) provides that school district instructional personnel may be dismissed at any time during the school year for "just cause." Section 4.4 of the Agreement also permits termination for "just cause."

26. The statute defines "just cause" as follows:

Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

27. Florida Administrative Code Rule 6A-5.056, of the State Board of Education defines "just cause" as the basis for dismissal actions against instructional personnel. The rule defines incompetency as the failure or inability to discharge required duties because of inefficiency. Fla. Admin. Code R. 6A-5.056(3). It defines inefficiency as, among other things, "Excessive absences or tardiness." Fla. Admin. Code R. 6A-5.056(3)(a)5.

28. The paid leave provisions of the Agreement plainly state what absences are permitted. The linked corollary is that absences exceeding those permitted are excessive.

29. The preponderance of the evidence proved the excessive absences of Mr. Marrero, as set out in the Findings of Fact.

30. The preponderance of the evidence also proved the Board complied with the progressive discipline requirements of the Agreement. The progressive discipline provided Mr. Marrero clear and repeated notice of his offenses and the consequences that would follow if they continued.


31. Mr. Marrero's absences stem from his attending to grave problems at home affecting his children. They present sympathetic circumstances. However, they do not change the fact that Mr. Marrero was repeatedly absent more days than the Agreement permitted or the importance of a teacher's presence in the classroom.

32. The Board proved "just cause" for Mr. Marrero's discharge.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Polk County School Board, enter a final order finding just cause to terminate the employment of Respondent, Hector Marrero, and dismissing him from his position with the Polk County School Board.

DONE AND ENTERED this 22nd day of January, 2020, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of January, 2020.

ENDNOTE

^{1/} The April 30, 2019, letter recommending Mr. Marrero's suspension refers to an April 1, 2018, absence. (P. Ex. 4) The date is a typographical error.

^{2/} All statutory citations are to the 2019 codification of the Florida Statutes.

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.