

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SCHOOL BOARD OF HERNANDO
COUNTY, FLORIDA,

Petitioner,

Case No. 20-0612

vs.

DOUGLAS WISEMAN,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on June 30, 2020, in Brooksville, Florida, before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Gregory A. Hearing, Esquire
Matthew A. Bowles, Esquire
GrayRobinson, P.A.
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Tampa, Florida 33602

For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent (“Douglas Wiseman”) violated Petitioner, the School Board of Hernando County’s (“the Board”),¹ drug-free workplace policy; and, if so, whether his employment with the Board should be terminated.

PRELIMINARY STATEMENT

The Board’s Superintendent of Schools issued a letter dated December 9, 2019, notifying Mr. Wiseman that he intended to recommend that the Board terminate Mr. Wiseman’s employment because of the results from a random drug screening:

This letter is in reference to allegations of misconduct from the outcome or results of a random drug screen. You have violated [Board] Policies, including but not limited to, 4124, 4139.01 Group II (6), Group III (9, 12,) and Group IV (2), 4162, 4210 I. B and C, and II A.1, and Staff Handbook p. 6-8 or 6A-10.081 Principles of Professional Conduct for the Education Profession in Florida.

A predetermination meeting was held on December 6, 2019. There was a review of the allegations and you had an opportunity to share your side for the record. Please be advised that the process has concluded. As such, probable cause exists for disciplinary action. I will make a recommendation to [the Board] for termination of your employment. This recommendation for termination will be placed on the School Board agenda at its regularly scheduled meeting of January 14, 2020 . . .

Upon receipt of this letter you should leave the work site. You will be on administrative leave with pay until the date of the Board meeting. You must return all School Board property (badge, keys, etc.)

¹ The Board’s official name is “The School Board of Hernando County.” § 1001.40, Fla. Stat. (2019). The case style has been amended accordingly.

to Mr. Cox immediately. You are not permitted to access any school site(s).

Mr. Wiseman filed a timely appeal, and the Board referred this matter to DOAH on February 3, 2020.

After granting one continuance, the undersigned convened the final hearing on June 30, 2020. The Board presented the testimony of John L. Martin, Matthew Goldrick, and Lisa Becker. Mr. Wiseman did not call any witnesses and did not testify on his own behalf.

Joint Exhibits 1 through 22 were accepted into evidence.

The one-volume final hearing Transcript was filed on July 17, 2020. After the undersigned granted one extension of time, the parties filed timely Proposed Recommended Orders on August 3, 2020, and those Proposed Recommended Orders were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, the entire record in this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

1. Section 381.986, Florida Statutes (2019)², pertains to the medical use of marijuana and allows patients suffering from chronic, nonmalignant pain to receive marijuana if they have been added to the medical marijuana use registry by a qualified physician. However, section 381.986(15)(a), provides that “[t]his section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy.” Also,

² All statutory references shall be to the 2019 version of the Florida Statutes.

section 381.986(15)(b), states that “[t]his section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana.”

2. The Board operates 24 schools, employs over 3,000 people, and has approximately 24,000 students.

3. The Board maintains a drug-free workplace. On August 27, 2019, the Board revised its drug-free workplace policy in order to explicitly prohibit medical marijuana. The revised policy states, in pertinent part, that:

[m]arijuana is considered a controlled substance under the Federal Controlled Substance Act. The Board does not distinguish between marijuana and medical marijuana for its policies. Use of marijuana in any form is prohibited. If a drug test result is positive for marijuana, the employee will be subject to disciplinary action per Board Policy 4139.01.

4. The Board adopted the above-quoted revision in order to resolve any ambiguity regarding its position on medical marijuana following the passage of section 381.986.

5. The Board’s revised policy mandates that employees who perform “safety-sensitive functions with Board-owned and/or operated . . . vehicles must be mentally and physically alert at all times while on duty.” Accordingly, the Board requires “the Superintendent to establish a drug and alcohol testing program whereby each regular and substitute bus driver, and any other staff member who holds a CDL license, *as well as any staff member performing safety-sensitive functions*, is tested for the presence of” alcohol, marijuana, cocaine, opioids, amphetamines, and PCP. (emphasis added). The revised policy further provides that drug tests can be conducted prior to employment, for reasonable cause, upon return to duty after drug or alcohol rehabilitation, after an accident, on a random basis, and on a follow-up basis.

6. The revised policy states that “[t]he term safety-sensitive functions includes all tasks associated with the operation and maintenance of Board-

owned vehicles.” The revised policy is silent as to whether maintenance employees or those operating power tools perform safety-sensitive functions.

7. The Board also revised its disciplinary policy on August 27, 2019, to classify a positive drug test as a “Group IV” offense punishable by termination. However, that same policy also provides that

[t]he Superintendent and the School Board retain the right to treat each incident of employee misconduct or performance deficiency on an individual basis without creating a precedent for other similar incident cases which may arise and to determine the appropriate disciplinary [measure] on a case-by-case-basis.

8. The Board has a department responsible for maintaining its buildings and its fleet of approximately 50 vehicles.

9. Mr. Wiseman has been employed with the Board for nearly 14 years as a Carpenter III. Mr. Wiseman is the Board’s head roofer and thus used ladders up to 36 feet in height on an almost daily basis. In addition, he performed carpentry work such as putting up drywall, installing ceiling tiles, and repairing doors and shelves. In the course of his duties, Mr. Wiseman regularly used power tools such as electric drills, circular saws, and nail guns that have the potential to cause injury if not properly handled.

10. The Board assigned one of its fleet vehicles to Mr. Wiseman, and it was stocked with equipment and tools. He drove that vehicle every workday.

11. While Mr. Wiseman had no responsibilities relating directly to students, the Board considered him to be in a safety-sensitive position due to the nature of his duties and because he drove a Board vehicle.

12. Mr. Wiseman injured his back approximately two years ago, and the incident resulted in a workers’ compensation claim.

13. Mr. Wiseman initially used muscle relaxers and pain medication to deal with the pain associated with his injury, but he could not tolerate the side effects. As a result, he became certified to receive medical marijuana in

2018. Mr. Wiseman has benefited greatly from this treatment and plans to continue using medical marijuana until he can live without pain.

14. Mr. Wiseman only uses medical marijuana to treat his pain and did not use it during school/work hours.

15. The Board convened a meeting of the maintenance staff on the morning of September 19, 2019, in order to discuss the revisions to the Board's drug-free workplace policy. Because the Board considers maintenance to be a safety-sensitive function, the maintenance staff was put on notice that they would be subject to random drug testing and that random testing would start in 60 to 70 days.

16. The Board did not impose immediate random testing because it wanted to give employees taking medical marijuana an opportunity to confer with their physicians and make arrangements to bring themselves into compliance with the revised policy.

17. Mr. Wiseman attended the September 19, 2019, meeting, and he was required to give a urine sample on November 20, 2019. The Board received the positive test result on December 2, 2019, and immediately prohibited Mr. Wiseman from working on roofs and driving the Board-owned vehicle that had been assigned to him.

18. The Board leveled several allegations against Mr. Wiseman and proved by a preponderance of the evidence that he violated the following policies: (a) Policy 4124 which prohibits the use of any controlled substance by any staff member at any time while on Board property or while engaged in Board-related activities; (b) Policy 4139.01 Group II (6) which prohibits violations of known safety rules or practices; (c) Policy 4139.01 Group IV (2) which subjects a Board employee to termination for a positive drug or alcohol test; and (d) Policy 4162 which prohibits any Board employee with a positive drug test from driving any school vehicle or using Board-owned equipment." The Board failed to prove the remaining allegations by a preponderance of the evidence.

19. The greater weight of the evidence demonstrates that Mr. Wiseman worked for the Board in a safety-sensitive position.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter and parties in this case, pursuant to sections 1012.33(6), 120.569, and 120.57(1), Florida Statutes.

21. The Board is a duly constituted school board charged with the duty to operate, control, and supervise all free public schools within the school district of Hernando County, Florida, under section 1012.22.

22. The Board seeks to terminate Mr. Wiseman's employment and has the burden of proving the allegations set forth in its December 9, 2019, letter by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence applicable to the loss of a license or certification. *Cropsey v. Sch. Bd. of Manatee Cty.*, 19 So. 3d 351 (Fla. 2d DCA 2009), *rev. denied*, 29 So. 3d 1118 (Fla. 2010); *Cisneros v. Sch. Bd. of Miami-Dade Cty.*, 990 So. 2d 1179 (Fla. 3d DCA 2008).

23. 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).

24. The Board alleges that Mr. Wiseman violated the following Board policies: (a) Policy 4124 which prohibits the use of any controlled substance by any staff member at any time while on Board property or while engaged in Board-related activities; (b) Policy 4139.01 Group II (6) which prohibits violations of known safety rules or practices; (c) Policy 4139.01 Group III (9) which prohibits conduct that adversely affects the employee's ability to perform his or her duties; (d) Policy 4139.01 Group III (12) which prohibits any fraudulent, criminal, or dishonest acts; (e) Policy 4139.01 Group IV (2) which subjects a Board employee to termination for a positive drug or alcohol

test; (f) Policy 4162 which prohibits any Board employee with a positive drug test from driving any school vehicle or using Board-owned equipment; (g) Policy 4210 I. B. which requires Board employees to exercise the best professional judgment and integrity; (h) Policy 4210 I. C. which requires Board employees to sustain the highest degree of ethical conduct; (i) Policy 4210 II. A. 1. which requires Board employees to make reasonable efforts to protect students from harmful conditions; and (j) Florida Administrative Code Rule 6A-10.081 which sets forth the “Principles of Professional Conduct for the Education Profession in Florida.”

25. As noted above, the Board proved that Mr. Wiseman violated Policy 4124, Policy 4139.01 Group II (6), Policy 4139.01 Group IV (2), and Policy 4162. The Board’s remaining allegations were not proven by a preponderance of the evidence.

26. Rather than disputing the aforementioned allegations, Mr. Wiseman argues that the Board violated his rights under the Fourth Amendment of the United States Constitution by conducting an unreasonable search and seizure.

27. “The Fourth Amendment protects ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and applies to the states through the Due Process Clause of the Fourteenth Amendment.” *AFSCME v. Scott*, 717 F.3d 851, 866 (11th Cir. 2013). “Testing a urine sample, which can reveal a host of private medical facts about an employee, and which entails a process that itself implicates privacy interests, is a search.” *Id.* In determining whether a random drug test violated the Fourth Amendment, the first question to answer is whether the government employee subjected to random drug testing holds a “safety-sensitive” position. *Shepherd v. City of East Peoria*, 2015 WL 2455084, at *5 (C.D. Ill. 2015). Employees may be tested randomly and without suspicion consistent with the Constitution if they are employees in “safety-sensitive” positions. *Crager v. Bd. of Educ. of Knott Cty, Ky*, 313 F.Supp.2d 690, 702

(E.D. Ky. 2004). An employee holds a safety-sensitive position if “the employee’s duties were fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences.” *Shepherd*, at *5.

28. Mr. Wiseman argues that he does not hold a safety-sensitive position. Therefore, the Board had no lawful basis to subject him to a random drug test and terminate his employment. For instance, Mr. Wiseman argues in his Proposed Recommended Order that driving a Board-owned vehicle is not a safety-sensitive function:

A requirement for all employees holding a commercial driver’s license to transport students to be drug tested is obviously reasonable. However, no such obvious rationale exists for maintenance employees who drive Board-owned vehicles. The evidence established that Mr. Wiseman does not transport students, and has no meaningful interaction with students.

The tasks Mr. Wiseman performs driving a Board-owned vehicle [are] indistinguishable from those performed by any driver on the road. Mr. Wiseman has no special license to drive the vehicle. There is no distinction between Mr. Wiseman’s driving the vehicle, and [other Board employees] driving their vehicles to school sites, other than the ownership and title of the vehicle. The titling of a vehicle is not a sufficient basis to deprive an individual of his constitutionally protected rights against unreasonable search and seizure.

29. Mr. Wiseman drove a fleet vehicle stocked with equipment and tools every workday, and other jurisdictions have held that driving an employer-owned vehicle can be classified as a safety-sensitive function. *See Burka v. New York City Transit Auth.*, 739 F.Supp. 814, 822 (S.D. N.Y. 1990)(holding that “[t]he cleaners are in safety-sensitive positions because they perform the duties of a clerk during the clerk’s break, and because they must drive the

mobile wash unit trucks. Like a gun, a motor vehicle on a public motorway can instantly become a deadly instrument if misused.”); *Watson v. Sexton*, 755 F.Supp. 583, 589 (S.D. N.Y 1991)(suggesting the establishment of a “rule of thumb” that “[w]hen the employee’s duties require driving, such as the duties of one who patrols or makes pick-ups, that employee’s position is safety sensitive. When driving is only incidental to other duties that engage no safety concern, the employee’s position is not safety sensitive.”).³

30. Mr. Wiseman also argues that his duties as a Carpenter III are not safety-sensitive in nature:

The facts in the instant case establish that Mr. Wiseman had little, if any, contact with students. He had no supervisory responsibility for students. The performance of his job duties presented no risk of injury to himself or others beyond that risk inherent in doing any skilled labor job. The School Board presented no persuasive evidence [that] being a carpenter created a safety and security risk sufficient to extinguish Mr. Wiseman’s constitutionally protected right against an unreasonable search.

31. The Fifth Circuit Court of Appeals addressed in *Aubrey v. School Board of Lafayette Parish, et al.*, 148 F.3d 559 (5th Cir 1998) whether a custodian employed by the Lafayette Parish School Board held a safety-sensitive position. The Fifth Circuit described the appellant’s duties as follows:

As a custodian at the Prairie Elementary School, Aubrey’s duties included cleaning the fourth and fifth grade bathrooms each day, using various

³ While there was no testimony from Board witnesses regarding potential liability, it is reasonable to infer that the Board would be facing substantial liability if a Board employee caused a traffic accident while driving a fleet vehicle under the influence. See *Heifetz v. Dep’t of Bus & Prof’l Reg.*, 475, So. 2d 1277, 1281 (Fla. 1st DCA 1985)(stating that “[i]t is the hearing officer’s function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.”).

chemicals. He mowed the grounds immediately adjacent to the building and was responsible for securing the premises at the end of the day, making minor repairs to buildings, furniture and equipment, lighting pilot lights, maintaining HVAC equipment, cleaning and replacing light fixtures, and trimming trees. He constantly was in the presence of the young students.

Aubrey, 148 F.3d at 561. The Fifth Circuit ultimately held that the appellant's Fourth Amendment protections were not violated. *Id.* at 565 (holding that "the Board's need to conduct the suspicionless searches pursuant to the drug testing policy outweighs the privacy interests of the employees in an elementary school who interact regularly with students, use hazardous substances, operate potentially dangerous equipment, or otherwise pose any threat or danger to the students.").

32. While there was no testimony indicating that Mr. Wiseman spent any significant time in the presence of students, his duties, like those of the custodian in *Aubrey*, put him in positions where he could be a danger to himself or others if he were in an impaired state. As discussed above in the Findings of Fact, Mr. Wiseman was the Board's head roofer and used ladders up to 36 feet in height on an almost daily basis. He regularly used power tools such as electric drills, circular saws, and nail guns that have the potential to cause injury if not properly handled. Moreover, if Mr. Wiseman were impaired and did a poor job of putting up drywall, installing ceiling tiles, or repairing doors, it is certainly conceivable that students could be injured.

33. The greater weight of the evidence and the current state of the law compel the undersigned to conclude that Mr. Wiseman held a safety-sensitive position and that the Board did not violate his rights under the Fourth Amendment by subjecting him to a suspicionless drug test.

34. As for the recommended penalty, the Board's revised disciplinary policy classifies a positive drug test as a "Group IV" offense punishable by termination. However, that same policy states the offense groupings merely

“guide the resulting disciplinary action.” The Superintendent and the Board retain the right to treat each incident on a case-by-case basis.

35. There are compelling reasons in the instant case for the Board to utilize a disciplinary measure other than termination. For example, Mr. Wiseman’s use of medical marijuana was legally authorized under section 381.986. Also, Mr. Wiseman uses medical marijuana to ameliorate pain resulting from a workers’ compensation injury suffered while he was fulfilling his duties as a Carpenter III. In addition, Mr. Wiseman has been employed by the Board for nearly 14 years, and there is no evidence of previous disciplinary action by the Board.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Hernando County issue a written reprimand to Respondent.

DONE AND ENTERED this 2nd day of September, 2020, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
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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.