

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OKEECHOBEE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 20-2889

JACQUELINE SKINNER,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was heard by Robert L. Kilbride, the assigned Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on September 1, 2020, in Tallahassee, Florida, via Zoom conference.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Petitioner has sufficient just cause to terminate Respondent, Jacqueline Skinner ("Skinner"), for multiple unapproved absences from work.

PRELIMINARY STATEMENT

On May 18, 2020, Superintendent Ken Kenworthy notified Skinner in writing that she was being suspended without pay pending his recommendation to the Okeechobee County School Board (the "Board") of Skinner's termination from employment.

The letter outlined that he would be recommending termination to the Board due to her failure "to follow established guidelines concerning arrangement for leave in advance or notifying your immediate supervisor."¹

On June 17, 2020, Skinner notified the Board in writing that she was requesting an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes.

An administrative hearing was conducted by the undersigned on September 1, 2020, via Zoom conference.

Petitioner presented testimony from Ken Kenworthy, Dr. Joseph Stanley, Cynthia Kubit, Christina Norman, and Jacqueline Skinner. Petitioner's Exhibits 1 through 13, 18, and 19 were admitted into evidence.

¹ The limited issue in this case was framed by Superintendent Kenworthy's letter--essentially, did Skinner's repeated absences from work constitute just cause to terminate her. Moreover, in this proceeding, Petitioner is limited to the allegations raised in the termination letter. While the evidence revealed other work related problems and evidence of problems with alcohol, these issues were not raised in the notification letter, and cannot be relied upon as the basis for termination. *See generally, Cottrill v. Dep't of Ins.* 685 So. 2d 1371(Fla. 1st DCA 1996); *Christian v. Dep't of Health, Bd. of Chiropractic Med.*, 161 So. 3d 416 (Fla. 2d DCA 2014).

Respondent presented testimony from Jacqueline Skinner and Gary Simmons. Respondent's Exhibit 2 was admitted into evidence.

The Transcript of the Final Hearing was filed with DOAH on September 10, 2020. After a brief extension of time was granted, proposed recommended orders were timely submitted by the parties.

Any references to statutes, rules, or policies herein include the versions in effect at the time the related action, omission, or conduct occurred.

FINDINGS OF FACT

Based on the evidence presented and the record as a whole, the undersigned makes the following Findings of Fact:

Parties' Stipulated Facts

1. At all times pertinent, Respondent was employed by Petitioner as a bookkeeper at Central Elementary School.
2. Respondent's supervisor during the 2016-17, 2017-18, and 2018-19 school years was Joseph G. Stanley, principal of Central Elementary School.
3. Respondent's supervisor during the 2019-20 school year was Cynthia Kubit, principal of Central Elementary School.
4. At all times pertinent, Christina Norman was an assistant principal at Central Elementary School.
5. At all times pertinent, Ken Kenworthy was superintendent of Okeechobee County Schools.
6. The annual noninstructional employee evaluations of Respondent from the 2017-18, 2018-19, and 2019-20 school years showed that Respondent needed improvement in attendance. Pet. Ex. 1.
7. Respondent failed to report for work on June 7, 2019, without arranging for leave in advance and without notifying her immediate supervisor.

8. Principal Joseph G. Stanley issued a letter to Respondent dated June 14, 2019, confirming a verbal reprimand; Respondent acknowledged receipt of said letter. Pet. Ex. 2.

9. Respondent failed to report for work on October 29, 2019, without arranging for leave in advance and without notifying her immediate supervisor.

10. Principal Cynthia Kubit issued a letter of reprimand to Respondent dated October 30, 2019; Respondent acknowledged receipt of said letter. Pet. Ex. 3.

11. During February 2020, Respondent continued to have incidents regarding leave and, by letter dated February 20, 2020, Principal Cynthia Kubit recommended disciplinary action against Respondent; Respondent acknowledged receipt of said letter. Pet. Ex. 4.

12. On May 15, 2020, Respondent failed to report to work without arranging for leave in advance and without notifying her immediate supervisor.

13. Principal Cynthia Kubit, in the presence of Assistant Principal Christina Norman, called Respondent several times and issued a memorandum of the telephone conversations. Pet. Ex. 6.

14. Principal Cynthia Kubit issued a letter to Superintendent Ken Kenworthy dated May 18, 2020, recommending that Respondent be terminated; Respondent acknowledged receipt of a copy of said letter. Pet. Ex. 7.

15. By letter dated May 18, 2020, to Respondent, Superintendent Ken Kenworthy informed Respondent that he was recommending to the Board that Respondent's employment be terminated. The letter was hand delivered to Respondent by Assistant Principal Dylan Tedders and Respondent acknowledged receipt of a copy of said letter. Pet. Ex. 8.

16. At all times pertinent, School Board Policy 6.213--Notification of Absence--was in effect. Pet. Ex. 9.

17. At all times pertinent, School Board Policy 6.20--Leave of Absence--was in full force and effect. Pet. Ex. 10.

18. At all times pertinent, School Board Policy 6.52--Suspension and Dismissal--was in full force and effect. Pet. Ex. 11.

19. At all times pertinent, School Board Policy 6.45--Alcohol and Drug Free Workplace--was in full force and effect.

Other Facts Established by the Evidence

20. Skinner was employed pursuant to the Okeechobee County School Board Classified Personnel Contract for the 2019-20 School Year on a continuing basis. Pet. Ex. 18.

21. An employee who has completed the probationary period may be dismissed under the Classified Personnel Contract for just cause. Pet. Ex. 18, p. 15.

22. Pursuant to the Classified Personnel Contract, under Public Employer Rights, "[i]t is the right of the Board to direct its employees, to take disciplinary action for proper cause, and relieve its employees from duty because of lack of work and other legitimate reasons...." Pet. Ex. 18, p. 5.

23. Pursuant to the Classified Personnel Contract, the Board is required to follow progressive discipline, the progression of which is as follows: "documented verbal warning; written reprimand following a meeting; suspension; termination." Pet. Ex. 18, p. 13.

24. It was largely undisputed, as acknowledged in the Joint Pre-hearing Statement-Amended, filed September 1, 2020, that Skinner had attendance problems the past several years of her employment, which escalated in the last year of her employment.

25. According to her supervisor, Kubit, Skinner's attendance problems started immediately when Kubit became principal in July 2019 and continued throughout the last year of Skinner's employment.

26. During her last year of employment, from the time period July 1, 2019, through May 14, 2020, Skinner accumulated numerous absences from work.

27. During her last year of employment, Skinner used more leave than she had allocated. This put her leave bank in the negative. Pet. Ex. 19.

28. This was not the first time Skinner used more leave than she had accrued. Her prior supervisor, Dr. Stanley, testified that Skinner would run out of available sick days and then would have to take unpaid leave.

29. During her last year of employment, Skinner failed to attend work approximately ten days and failed to arrange for advance leave with her supervisor. Pet. Ex. 12.

30. Providing advance notice of an absence could have been accomplished by Skinner by calling, texting, or e-mailing her supervisor any time prior to the start of the work day, even a few minutes before.

31. On some of the days when Skinner failed to attend work, arrange for leave, or notify her supervisor, her supervisor, Kubit, nonetheless tried to assist Skinner by not disciplining her for failure to attend work without notice.

32. For instance, Kubit sometimes allowed Skinner to use vacation days when she ran out of sick days even though employees are normally required to arrange for vacation leave days in advance. Kubit did so because she wanted Skinner to come back and work more regularly. Kubit thought it would help Skinner to do so.

33. According to Kubit, Skinner did not provide legitimate excuses for her unauthorized absences. Instead, she just repeatedly apologized and promised to improve her attendance in the future.

34. Skinner candidly acknowledged during her testimony that she had attendance problems and that she had received multiple disciplinary letters for her problems with attendance.

Annual Performance Evaluations

35. As part of her employment, Skinner received annual employee evaluations. Pet. Ex. 1.

36. Her attendance problems over time were documented and verified in her annual employee evaluations. Pet. Ex. 1.

37. More specifically, Skinner's last four annual employee evaluations evaluated her on six main categories of performance, one of which was Attendance. This category evaluated the following performance attribute: "Complies with policies and procedures regarding usage of time and leave; [m]aintains scheduled work and break times; [r]eports absences for emergencies and illnesses, and requests leave, in a timely manner." Pet. Ex. 1, pp. 1-4.

38. In each of her last three annual employee evaluations, Skinner was rated as "Needs Improvement" for Attendance. Pet. Ex. 1, pp. 2-4.

39. On each of the last four annual employee evaluations, Skinner also received written comments from her supervisor about her attendance. These comments were consistent and pointed out that Skinner needed to improve attendance and work to comply with attendance policies. Pet. Ex. 1, pp. 1-4.

40. Each annual performance evaluation was discussed with Skinner and she signed each. Pet. Ex. 1, pp. 1-4.

School Board Attendance Policies and Requirements

41. The Board's policies established and outlined general guidelines and expectations for work attendance. Employees were generally expected to attend work as scheduled unless they had arranged for advance leave. *See generally*, Pet. Ex. 10. Employees who were absent from duty for any reason were required to notify their supervisor as early as possible.

42. Notification of an absence had to be given in advance unless conditions beyond the control of the employee made advance notice impossible. Pet. Ex. 9.

43. The Classified Personnel Contract governing Skinner and other employees similarly provided that employees were required to arrange for advance leave for vacation and to notify their supervisor prior to the start of the work day if they were taking sick leave. Pet. Ex. 18, pp. 33 and 34.

44. The School Bookkeeper Job Description, which applied to Skinner, required her to follow attendance, punctuality, and other qualities of an appropriate work ethic. Pet. Ex. 13, line 11.

45. Skinner's significant and frequent attendance problems caused her to fall short of these policy, contract, and job description requirements.

History of Attendance Problems

46. The witnesses confirmed that Skinner violated the attendance policies on a frequent basis for several years. Regrettably, her attendance problems became most acute in her last year. This eventually led to a recommendation for her termination in her last year of employment.

47. The parties acknowledged in their Joint Pre-hearing Statement-Amended, that Skinner received all required stages of progressive discipline for her attendance problems. This included a verbal warning, a written reprimand, and a suspension, finally resulting in a recommendation by the Superintendent that her employment be terminated.

48. Skinner's supervisors also discussed and counseled her on her attendance problems several times throughout the years, both informally and formally.

49. In the disciplinary letters, Skinner was informed that, in the event of recurrence, she would be subjected to further discipline including a recommendation for termination. Pet. Exs. 2-3.

50. More specifically, in the disciplinary letter from the Superintendent dated March 3, 2020, Skinner was informed that: "It is expected that there be no further occurrence of such behavior. If it continues, your position with the Okeechobee County School Board will be terminated." Pet. Ex. 5, p. 1.

51. In this disciplinary letter, Skinner received numerous attachments including copies of the Board Policy 6.213, entitled "Notification of Absence and the Employee Assistance Plan."

52. Skinner signed and acknowledged receiving the disciplinary letters for her attendance problems, and agreed that they put her on notice that her attendance shortcomings were a problem.

53. Skinner also received negative employee evaluations on her attendance for the past three years, which were discussed and signed by her. Pet. Ex. 1, pp. 2-4.

54. It was clear to the undersigned that Skinner received full, fair, and adequate notice of her attendance problem for several years. Unfortunately, she was unable to correct it after multiple warnings, corrective action, and progressive discipline.

Termination Authority

55. Superintendent Ken Kenworthy is responsible for determining and recommending whether an employee should be terminated for violation of Board policies or rules. Pet. Ex. 11.

56. The Superintendent is only entitled to discipline and terminate the employment of an administrative employee on a continuing contract for "just cause." Pet. Ex. 18, p. 15.

57. The Superintendent testified that he takes many factors into consideration when determining whether just cause exists for termination. He looks at the reasonableness of the Board's rules, whether the employee was informed of the rules, and whether the disciplinary action taken is proportionate to the infraction.

58. The undersigned finds that this process is fair, and provides adequate due process to affected employees of the District.

59. The Superintendent ensures that progressive discipline has been followed when taking an action against an employee's employment. *See generally*, Pet. Ex. 8.

60. In this case, all the stages of progressive discipline from informal conversations and memoranda of conference through the formal disciplinary

stages of verbal reprimand, written reprimand, suspension, and recommendation for termination were followed.

61. The Board's rules on employee attendance are reasonable and necessary to ensure the proper functioning and operation of the school district.

62. Several witnesses and the Superintendent testified that proper and regular attendance was a "critical" and "essential function" of an employee's job performance.

63. Skinner's supervisors, Kubit and Dr. Stanley, both testified that notification of absences when an employee cannot attend work is "critical." Several Board witnesses provided testimony showing the hardship that Skinner's absences created for Central Elementary School.

64. For instance, Dr. Stanley expressed his view that it was a hardship for Central Elementary School when Skinner was absent, especially at the last minute, because others had to cover her job. This left the school short staffed in other areas.

65. Likewise, according to Kubit, it was especially difficult when Skinner was absent because other people had to perform her duties, but according to rules and regulations most people were not authorized to handle money.

66. According to Assistant Principal Norman, when Skinner was absent from work, money would have to be kept at the school even though it is supposed to be promptly deposited. This was true because only Skinner could verify the money for a deposit. This violated bookkeeping rules about depositing money, and was unsafe when large sums of money were left undeposited at a school.

67. Skinner was advised on numerous occasions and by different people that her repeated and unauthorized absences without notification were creating difficulty for the functioning of Central Elementary School.

68. Not only did Skinner leave the school short staffed, but she had a tendency to do so when her presence was most needed. The witnesses concurred that Skinner's repeated absences tended to follow a pattern.

69. For example, if Central Elementary School was at a busy time of year or an event occurred that required additional bookkeeping, like a fundraising event, Skinner often would not come to work and did not arrange for leave or call in. This left the school in a difficult predicament.

70. Aside from her leaving the school short staffed, Skinner's work absences also had a negative effect on her job performance.

71. Several Board witnesses testified, for example, that Skinner's work performance started to decline. This was caused by Skinner's work getting backed up and not completed on time because of her absences.

72. This became particularly evident after her suspension when other employees came in to review her unfinished work and sort out the bookkeeping at Central Elementary School. During this review, several problems were noticed.

73. Skinner acknowledged knowing that her problem with unauthorized absences was having a negative effect on Central Elementary School.

74. During the hearing, Skinner admitted that her struggle with alcohol misuse caused or contributed to her attendance problems.

75. According to her supervisor, Dr. Stanley, Skinner never provided alcoholism as an excuse for her absences. Instead, Skinner would make the excuse that she slept in or just did not get up to come to work.

76. According to her supervisor, Kubit, Skinner did not offer or mention problems with alcohol as an excuse for her unauthorized absences. Instead, she regularly apologized and promised to improve her attendance in the future.

77. Not only did Skinner not reveal to her supervisors that alcoholism was a reason for her absence problem, Skinner never sought assistance or

accommodation for her struggle with alcohol prior to the Superintendent's recommendation for termination.

78. The Board provides employees struggling with medical or other problems assistance through its Employee Assistance Program. It also provides leave for medical problems through the Family Medical Leave Act ("FMLA"). Pet. Ex. 18, p. 32.

79. Skinner was provided a copy of the Employee Assistance Plan when she was suspended for three days in March 2020, prior to the Superintendent's recommendation for termination of her employment two months later. Pet. Ex. 5, p. 2.

80. However, despite her awareness of the assistance offered in March 2020, Skinner never used the Employee Assistance Plan or FMLA leave to try and save her job or correct her underlying problem prior to being terminated.

81. While the evidence revealed that an employee suffering from an alcohol problem had an opportunity to seek treatment while still employed, this treatment was permitted when their employment was active and in good stead--not *after* the employee was suspended and dismissal of employment was in progress.

82. Further, Skinner testified that she had been an alcoholic her "whole life" and it had progressively gotten worse in the last four years. Regrettably, there was no medical documentation or other evidence provided in advance for the Board to verify her problem with alcohol.

83. But, at the end of the day, and to be clear, this was Skinner's illness and it was her responsibility to seek help and take advantage of programs the Board offered.²

² The undersigned reasonably infers from the evidence and record that Skinner knew or should have known about the Employee Assistance Plan many months, if not years, before her termination. Sadly, however, she did not take advantage of the program.

84. Turning directly to the matter at hand, the allegations of the Superintendent's termination letter were limited to her attendance problems.

85. While problems with alcohol may have existed or accounted for her absences, the crux of this case concerns Skinner's attendance problem. Other violations or performance deficiencies related to Skinner's problems with alcohol or related performance issues were not alleged as a basis to terminate her.

86. Those related problems provide some background and context to the attendance issue at hand, but they are not being considered by the undersigned as directly affecting the outcome of this case.

87. Added to that, despite later discovering Skinner's problems with alcohol and how this affected her attendance, the Superintendent did not amend his recommendation for termination of employment to include abuse of alcohol or other related work performance issues.

88. Superintendent Kenworthy felt that Skinner's chronic and disruptive workplace absences alone merited termination of employment. In his view, no other violations needed to be cited since Skinner was not meeting his attendance expectations.

89. Based on the greater weight of the evidence, the undersigned finds that the Board had sufficient just cause to terminate Skinner for repeated and chronic attendance problems.

CONCLUSIONS OF LAW

90. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 1012.33(6)(a)2., Florida Statutes.

91. Petitioner seeks to terminate Respondent's employment. Since this case does not involve the loss of a teaching license or certification, Petitioner has the burden of proving its allegations by a preponderance of the evidence, as opposed to the higher standard of clear and convincing evidence. *See McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476 (Fla. 2d DCA 1996); *Allen v.*

Sch. Bd. of Dade Cty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); and *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990).

92. On a related note, the Superintendent issued a termination letter on May 18, 2020. The Board is, therefore, limited to seeking discipline only for that violation. Discipline for any other conduct or infractions would not be authorized. *Christian v. Dep't of Health, Bd. of Chiropractic Med.*, 161 So. 3d 416 (Fla. 2d DCA 2014), and cases cited therein.

93. 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, 281 n.1 (Fla. 2000)(relying on *American Tobacco Co. v. State*, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997)(quoting *Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987)).

94. In proceedings at DOAH, the matter is considered de novo by the Administrative Law Judge ("ALJ"). This means that the ALJ considers the evidence again, and there is no presumption of correctness that attaches to the decision of the Board. *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *Boca Raton Artificial Kidney Ctr., Inc. v. Fla. Dep't of HRS*, 475 So. 2d 260 (Fla. 1st DCA 1985).

95. Factual findings in a recommended order are based on the discretion afforded to an independent ALJ. *Goin v. Comm'n on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995).

96. The law requires the ALJ to consider all the evidence presented. The ALJ is authorized to resolve conflicts, determine the credibility of witnesses, draw permissible and reasonable inferences from the evidence, and reach ultimate findings of fact based on the competent and substantial evidence presented. *Id.*

97. Whether Skinner committed the charged offense(s) is a question of ultimate fact to be decided by the trier-of-fact in the context of each alleged

violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

98. Section 1001.41(2), Florida Statutes, grants the Board the authority to adopt rules pursuant to sections 120.536(1) and 120.54 to implement its statutory duties and to supplement rules prescribed by the State Board of Education.

99. The Board has adopted the School Board of Okeechobee County Policies Manual. Board Policy 6.213, Notification of Absence, provides, in pertinent part, as follows:

An employee who is absent from duty for any reason shall notify the principal or his/her immediate supervisor as early as possible. Such notification shall be given in advance unless condition beyond the control of the employee makes such advance notification impossible. (emphasis added).

Pet. Ex. 9.

100. Board Policy 6.20--Leave of Absence--provides, in pertinent part, as follows:

A leave of absence is permission granted by the School Board or allowed under its adopted policies for an employee to be absent from duty for a specified period of time. *Any absence of an employee from duty shall be covered by leave duly authorized and granted.* Leave shall be officially granted in advance and shall be used for the purposes set forth in the leave application. Leave for sickness or other emergencies may be deemed to be granted in advance if prompt report is made to the proper authority. (emphasis added).

Pet. Ex. 10.

101. The School Bookkeeper Job Description is adopted by the Board and sets forth the essential duties of the position. The School Bookkeeper Job Description provides, in pertinent part, as follows:

PERFORMANCE RESPONSIBILITIES:

(11) ***Follow attendance, punctuality and other qualities of an appropriate work ethic[.]***

(25) ***Follow*** federal and state laws as well as ***School Board polices,*** rules and regulations[.] (emphasis added).

Pet. Ex. 13.

102. Petitioner proved by a preponderance of the evidence that Respondent violated Board Policy 6.213--Notification of Absence--and Board Policy 6.20--Leave of Absence--by failing to notify her supervisor on several occasions when she was absent from duty or to arrange for leave in advance. Pet. Exs. 9 and 10.

103. Skinner was informed on many occasions that she needed to notify her supervisor in advance of the work day if she was going to be absent from work or arrange for leave in advance, but continually failed to do so despite such repeated warnings. Pet. Exs. 2-5, 7, and 8.

104. Further, Skinner was required as a part of her job responsibilities to know and follow Board Policies. Pet. Ex. 13.

105. Skinner's termination was based on her repeatedly failing to attend work as scheduled or arranging for advance leave or notifying her supervisor of her absences, which occurred on multiple days in 2019 and 2020.

106. Prior to termination, Skinner was properly afforded all steps of progressive discipline.

107. Skinner's repeated and unauthorized absences from work after failing to heed multiple warnings constitute just cause for termination of her employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Okeechobee County School Board enter a Final Order terminating Jacqueline Skinner's employment.

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



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of October, 2020.

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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.