STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2990
	)	
FREDERICK ELLIS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on December 14, 2004, in West Palm Beach, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jean Marie Nelson, Esquire
School District of Palm Beach County
Office of the Chief Counsel
Post Office Box 19239
West Palm Beach, Florida 33416-9239

For Respondent: Frederick Ellis, pro se
160 Elysium Drive
Royal Palm Beach, Florida 33411

STATEMENT OF THE ISSUE

Whether Respondent's employment should be terminated "for being absent without approved leave," as recommended in the

Superintendent of Schools of the School District of Palm Beach County's Petition for Involuntary Resignation.

PRELIMINARY STATEMENT

On or about August 13, 2004, the Superintendent of Schools of the School District of Palm Beach County (Superintendent) filed a Petition for Involuntary Resignation recommending that the Palm Beach County School Board (School Board) take action to terminate Respondent from his position as a materials handling technician with the School District of Palm Beach County (School District) "for being absent without approved leave." Pursuant to Respondent's request, the matter was referred to DOAH for the assignment of an Administrative Law Judge to conduct an evidentiary hearing on the Superintendent's recommendation.

The hearing was originally scheduled for October 29, 2004, but was continued (at the School District's request) and rescheduled for, and, as noted above, ultimately held on, December 14, 2004. A total of seven witnesses testified at the hearing. Testifying for the School District were Cherie Boone, Sherry Kleinman, and Ernie Camerino. Testifying for Respondent were Carolyn Killings, Mary Washington, Maria Lo Verso, and Ken Morris.[1] In addition to the testimony of these seven witnesses, a total of 13 exhibits were offered and received into evidence (Petitioner's Exhibits 1 through 6, and Respondent's Exhibits 2, 4, 8, 12, 12a, 19, and 22).

At the close of the taking of evidence, the undersigned, on the record, established February 8, 2005, as the deadline for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on January 14, 2005.

On February 3, 2005, the School District filed its Proposed Recommended Order. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing, and the record as a whole, the following findings of fact are made:

1. The School Board is responsible for the operation, control and supervision of all public schools (grades K through 12) and support facilities within the jurisdictional boundaries of the School District.

2. Systemwide testing programs in the School District are coordinated by the School District's Department of Research, Evaluation, and Accountability (DREA).

3. At all times material to the instant case, Marc Baron headed DREA.

4. DREA operates a test distribution center.

5. Cherie Boone is now, and was at all times material to the instant case, in charge of the DREA test distribution center.

6. Ms. Boone supervises four employees. As their supervisor, she is "responsible for [among other things, their] time and attendance."

7. Respondent is employed as a materials handling technician with the School District.

8. At all times material to the instant case, he was assigned to work in the DREA test distribution center under the direct supervision of Ms. Boone.

9. As a materials handling technician employed by the School District, Respondent is a member of a collective bargaining unit represented by the National Conference of Firemen & Oilers, Local 1227 (NCF&O) and, at all times material to the instant case, has been covered by a collective bargaining agreement between the School District and NCF&O (NCF&O Contract).

10. Article 7 of the NCF&O Contract discusses "employees[']contractual rights." It provides as follows:

> SECTION 1. Probationary Employees
>
> 1. All newly hired or rehired employees may be subject to a probationary period of ninety (90) workdays.
>
> 2. Employees who have not completed such period of employment may be discharged without recourse.
>
> 3. Probationary employees shall not be eligible for any type of leave except accrued sick leave, annual leave, or short

term unpaid leave (due to illness) not to exceed five (5) days.

SECTION 2. Permanent Employees

1. Upon successful completion of the probationary period by the employee, the employee status shall be continuous unless the Superintendent terminates the employee for reasons stated in Article 17 - Discipline of Employees (Progressive Discipline).

2. In the event the Superintendent seeks termination of a continuous employee, the 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 in accordance with Article 17 - Discipline of Employees (Progressive Discipline).

11. Article 8 of the NFC&O Contract addresses the subject of "[m]anagement [r]ights." It provides as follows:

NCF&O and its members recognize the responsibility of the District to operate and manage its affairs in all respects in accordance with its responsibilities as established by law and as delegated by the State Board of Education; and the powers of authority which the District has not officially agreed to share by this agreement, are retained by the District. It is the right of the District to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the District to manage and direct its employees, establish reasonable rules and procedures, take disciplinary action for proper cause, and relieve its employees from

> duty because of lack of work or for other legitimate reasons, provided, however, that the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequences of violating the terms and conditions of this agreement in force.
>
> The District has the sole authority to determine the purpose and mission and the amount of the budget to be adopted by the School Board. The District and NCF&O agree that the District has and retains unaltered, its legal right to select, assign, reassign, or relocate any of its employees, and to carry out its mission under the law and State Board of Education Regulations, unless otherwise specifically enumerated herein.
>
> Except to the extent it has been done prior to May 26, 1998, no bargaining unit work which would result in the loss of jobs by members of the bargaining unit, shall be contracted out without prior consultation with the Union.
>
> It is understood that changes under this Article may not be arbitrary and capricious, and it is agreed that the District has those rights which are enumerated within Florida Statute 447; however, nothing herein shall relieve the parties of their ability to request impact bargaining.

Among the "rules and procedures" that the School District, through the School Board, has established in exercising its "[m]anagement [r]ights" are School Board Directive 3.27 and School Board Policy 6Gx50-3.80, which provide, in pertinent part, as follows:

School Board Directive 3.27

* * *

Resignations.

2. If employees desire to be released from their employment contract the following procedures are to be followed:

* * *

c. When employees do not report for duty for three (3) consecutive days without notifying their supervisor, the principal/department head will initiate a certified letter to the employee stating that their resignations will be recommended to the School Board at its next regularly scheduled meeting.

* * *

Suspension/Termination.

3. The Principal/Department Head may recommend to the Assistant Superintendent for Personnel Relations disciplinary action against an employee if the employee commits one or more of the following offenses, including but not limited to:

* * *

b. Willful absence from duty without leave in violation of Section 231.44, Florida Statutes. [2]

* * *

4. Employees included in a bargaining unit are subject to suspension/dismissal provisions of the collective bargaining agreement.

* * *

6. When a recommendation for suspension and termination is made, the procedures listed in School Board Policy 3.27 shall be followed.

* * *

School Board Policy 6Gx50-3.80

A leave of absence is permission granted by the Board, or allowed under its adopted policies, for an employee to be absent from duty for specified periods of time with the right of returning to employment on the expiration of the leave. All absences of School Board employees from duty shall be covered by leave duly authorized and granted. Leave shall be officially granted in advance by the School Board 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. No leave except military leave shall be granted for a period greater than one (1) year. A new leave application may be filed and granted at the expiration of leave, but automatic renewals of leave shall not be allowed. Leave may be with or without pay and provided by law, rules of the State Board of Education, School Board policy, and negotiated contracts. If the terms of the collective bargaining agreement differ from this Policy, the language of the employee's agreement will take precedence. The following types of leave are available for School District employees:

a. Leave for personal reasons
b. Annual leave for 12-month personnel
c. Sick leave
d. Catastrophic leave
e. Injury or illness in-line-of-duty leave
f. Sabbatical leave
g. Temporary military leave
h. Regular military service leave

i. Professional leave and extended professional leave
j. Charter school leave
k. Voluntary/extended military leave
l. Leave of absence for the purpose of campaigning for political office
m. Personal leave including maternity/ recovery and child care

Paid Leaves

* * *

c. Sick Leave

* * *

iv. An employee requiring more than thirty (30) working days of paid leave for recovery may be required to submit medical evidence at reasonable intervals supporting the need for additional leave.

* * *

vi. Sick leave claims shall be honored as submitted by the employee for personal illness, as well as illness or death of father, mother, brother, sister, husband, wife, child or other close relative or member of the employee's own household.

vii. Sick leave without pay may be granted for employees who have used all accumulated sick leave, but who would otherwise qualify for sick leave.

viii. The Superintendent may require a doctor's statement of verification of illness. A request to the Superintendent for a verification of claim may be initiated by the principal or supervisor.

* * *

Unpaid Leaves

* * *

e. Personal Leave -- An employee requesting short-term or long-term personal leave shall make written application to the supervisor, stating reasons for such leave. The Board shall satisfy itself in terms of the need of the requested leave.

i. Personal leave may be used to extend a leave of absence due to sickness when that sickness has extended beyond all compensable leave for the duration of up to one (1) calendar year when supported by doctor's statements verifying the necessity of the extended leave.

ii. An employee requesting return to duty who has served efficiently and exhibited those qualities called for in the position held prior to such leave will be given every consideration for reemployment provided the conditions of employment have been met and the request is supported by a doctor's statement certifying that his physical condition is satisfactory to return to normal duties.

* * *

12. Article 17 of the NCF&O Contract, as noted in Article 7 of the contract, deals with the "[d]iscipline of [e]mployees." It provides as follows:

1. Without the consent of the employee and the Union, disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action.

2. All disciplinary action shall be governed by applicable statutes and

provisions of the Agreement. Further, an employee shall be provided with a written charge of wrongdoing, setting forth the specific charges against that employee as soon as possible after the investigation has begun.

3. Any information which may be relied upon to take action against an employee will be shared promptly with said employee and his/her Union representative as soon as possible. Copies of any written information/correspondence that is related to the action of the employee or the investigating administrator(s) will be provided promptly to the employee and his/her Union representative.

4. An employee against whom action is to be taken under this Article and his/her Union representative shall have the right to review and refute any and all of the information relied upon to support any proposed disciplinary action prior to taking such action. To this end, the employee and the Union representative shall be afforded a reasonable amount of time to prepare and present responses/refutations concerning the pending disciplinary action and concerning the appropriateness of the proposed disciplinary action. This amount of time is to be mutually agreed upon by the parties.

5. Only previous disciplinary actions which are a part of the employee's personnel file or which are a matter of record as provided in paragraph #7 below may be cited if these previous actions are reasonably related to the existing charge.

6. Where just cause warrants such disciplinary action(s) and in keeping with provisions of this Article, an employee may be reprimanded verbally, reprimanded in writing, suspended without pay, or dismissed upon the recommendation of the immediate supervisor to the Superintendent and final

action taken by the District. Other disciplinary action(s) may be taken with the mutual agreement of the parties.

7. Except in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable School Board rules and regulations, progressive discipline shall be administered as follows:

(A) Verbal Reprimand With A Written Notation. Such written notation shall be placed in the employee's personnel file and shall not be used to the further detriment of the employee, unless there is another reasonably related act by that same employee within a twenty-four (24) month period.

(B) Written Reprimand. A written reprimand may be issued to an employee when appropriate in keeping with provisions of this Article. Such written reprimand shall be dated and signed by the giver of the reprimand and shall be filed in the affected employee's personnel file upon a receipt of a copy to the employee by certified mail.

(C) Suspension Without Pay. A suspension without pay by the School Board may be issued to an employee, when appropriate, in keeping with provisions of this Article, including just cause and applicable laws. The length of the suspension also shall be determined by just cause as set forth in this Article. The notice and specifics of the suspension without pay shall be placed in writing, dated, and signed by the giver of the suspension and a copy provided to the employee by certified mail. The specific days of suspension will be clearly set forth in the written suspension notice which shall be filed in the affected employee's personnel file in keeping with provisions of Chapter 119 and 231.291 of the Florida Statutes.

(D) An employee may be dismissed when appropriate in keeping with provisions of this Article, including just cause and applicable laws.

8. An employee against whom disciplinary action(s) has/have been taken may appeal through the grievance procedure. However, if the disciplinary action(s) is/are to be taken by the District, then the employee shall have a choice of appeal between either the Department [sic] of Administrative Hearings in accordance with Florida Statutes or the grievance procedure outlined in the collective bargaining agreement. Such choice must be exercised within fifteen (15) days of receipt of written notification of disciplinary action being taken, and the District notified accordingly. If the grievance procedure is selected, the grievance shall be initiated at Step Three.

13. Article 18 of the NCF&O Contract describes the grievance procedure available to bargaining unit members who allege a "misapplication or misinterpretation of the agreement." The described procedure consists of an "informal level" and four formal "levels," the final one being "arbitration before an impartial arbitrator, using the Federal Mediation and Conciliation Services." Pursuant to Section 4B. of Article 18, "if NCF&O decides to withdraw its support of an alleged grievance, the individual may continue to process the claim on his/her own, so long as all costs are borne by that individual"; however, according to Section 4E. of Article 18, "[a]grievance, once [actually] withdrawn, may not be reopened without the

mutual written agreement between the [School District] and [the] NCF&O."

14. "[L]eave [w]ithout [p]ay" is the subject of Article 25 of the NCF&O Contract, which provides as follows:

> SECTION 1. Personal Leave of Absence
>
> Personal leave of absence as described herein is leave without pay and may be requested by a member of the bargaining unit for purely personal reasons. A member of the bargaining unit may request short-term personal leave of absence within the school or department to which the employee is assigned. Personal leave as described herein shall be requested through the principal or department head for his/her approval and subsequently approved by the Superintendent.
>
> An employee granted an unpaid leave of absence shall be returned to his/her former classification if the leave is less than ninety (90) days, notwithstanding the layoff provisions contained in this agreement. An employee granted a leave of absence and who wishes to return before the leave period has expired, may submit a request to return to the principal/department head. An employee granted a leave of absence in excess of ninety (90) days will be permitted to return to work provided there is an opening in the same job classification in the work unit. If the former position is not available, the employee, upon written request, shall be listed as an eligible applicant for a period of six (6) months.
>
> Group Life and Hospitalization Insurance coverage may be continued for a period equal to the authorized leave of absence, provided full premium payments, including the Board's payment, are kept current by the employee.

SECTION 2. Return from Leave

> Failure to return to work at the expiration of approved leave shall be considered as absence without leave and grounds for dismissal.[3] This section should be subject to extenuating circumstances preventing timely return, as determined by the Superintendent.[4]

15. Section 2 of Article 35 of NCF&O Contract protects employees from "[h]arassment." It provides as follows:

> No employee shall be subjected to or be part of:
>
> A. Unwelcome sexual advances, requests for sexual favors, offensive, lewd or suggestive comments. Also includes the creation of a hostile, intimidating, or offensive work environment. Verbal or physical abuse is submitted to by an employee. An adverse decision is made against an employee after such abuse is rejected. Racial/ethnic slurs, jokes, or other inappropriate conduct.
>
> B. Verbal or physical abuse. An adverse decision shall not be made against an employee after such abuse is rejected.
>
> C. Racial/ethnic slurs, jokes, or other inappropriate conduct.

16. There came a time when Respondent claimed, in a Level One grievance filed under the NCF&O Contract, that he was a victim, at the hands of Ms. Boone, of the "[h]arassment" proscribed by Section 2 of Article 35 of the contract.

17. The grievance was filed (with the support of NCF&O) on or about April 8, 2004, several weeks following an incident in

which Ms. Boone "yell[ed]" at Respondent for returning "a little bit late[]" from a delivery run.

18. It contained the following "[g]rievance [s]tatement" and description of the "[r]elief [s]ought":

> Grievance Statement: (Include Date of Occurrence) Mr. Ellis fe[e]ls that he is working in a hostile work environment. He had meeting with the Dept. Head to express his feelings. On March 31, the employee was issued a written reprimand when there has never been any discipline for the employee.
>
> Relief Sought: The reprimand is withdrawn from all personnel files. All intimidation of the employee to cease immediately.

19. Ms. Boone, on behalf of the School District, responded to the grievance by providing Respondent with the following written "disposition":

> After careful consideration of all available information, it has been determined that there has not been a violation, misapplication, or misinterpretation of the collective bargaining procedures.

20. The grievance was not pursued beyond Level One.

21. Since March 16, 2004, Respondent had not been reporting to work, notwithstanding that he had not received authorization to be absent.

22. On or about April 5, 2004, Respondent submitted a request for leave of absence without pay for the period from April 5, 2004, to July 5, 2004. The type of leave without pay he requested was personal leave.

23. By letter dated April 8, 2004, Mr. Baron advised Respondent that Respondent's request was being denied. In his letter, Mr. Baron wrote:

> You were absent without approved leave on April 5, 2004, April 6, 2004, and April 8, 2004. On Monday, April 5, 2004, you reported your intended absences and requested personal leave of absence starting April 5, 2004 through July 5, 2004.
>
> Pursuant to Article 25, Section 1, of the Agreement between The School District of Palm Beach County and National Conference of Firem[e]n & Oilers, "*Personal leave of absence as described herein is leave without pay and may be requested by a member of the bargaining unit for purely personal reasons. A member of the bargaining unit may request short-term personal leave of absence within the school or department to which the employee is assigned. Personal leave as described herein shall be requested through the principal or department head for his/her approval and subsequently approved by the Superintendent.*"
>
> Your request for personal unpaid leave is denied. You are directed to return to work on Monday, April 12, 2004. Continued unapproved absences will result in further disciplinary action up to and including termination.

24. Respondent did not return to work on April 12, 2004, as directed.

25. The matter of Respondent's unauthorized absences was then "turn[ed] . . . over to [the School District's] personnel [office]" to "deal with."

26. The personnel office decided to ask the School Board to terminate Respondent's employment for his having been absent without authorization.

27. Before the School Board took any action, Respondent submitted another request for leave of absence without pay. The type of leave without pay he requested this time was sick leave. On the request form, Respondent indicated that he wanted the leave period to begin on April 16, 2004, "but there was no end date" written in anywhere on the form. Without an "end date," the form could not be processed.

28. Sherry Kleinman, a School District analyst assigned to the personnel office (whose job duties include processing "all the leaves of absence for School [District] employees"), telephoned Respondent and "asked him what end date he wanted" her to place on the form for him.

29. During their telephone conversation, Ms. Kleinman and Respondent "agreed upon" a May 17, 2004, "end date."

30. Ms. Kleinman inserted this "end date" in the appropriate space on the form and then completed processing Respondent's leave request.

31. Respondent was granted leave without pay for the period starting April 16, 2004, and ending May 17, 2004. Moreover, the personnel office "pulled" its recommendation that

the School Board terminate Respondent for his having been absent without authorization.

32. Respondent did not report to work at any time following the expiration of his authorized leave on May 17, 2004, nor did he seek an extension of this leave.

33. There has been no showing made that there were extenuating circumstances present preventing Respondent's timely return to work; nor has it been shown that the issue of whether such extenuating circumstances existed has ever been presented to the Superintendent for determination.

34. Personnel office staff attempted to reach Respondent by telephone to encourage him to seek an extension of the authorized leave that had expired. These efforts were unsuccessful. Upon being advised of the situation by Ms. Kleinman, NCF&O business agent Carolyn Killings, who had helped Respondent in filing his "[h]arassment" grievance, offered to try to contact Respondent, but she too was unable to "reach him."

35. By letter dated June 14, 2004, Ernie Camerino, the assistant director of the personnel office, advised Respondent of the following:

> You were recently notified by your supervisor of your failure to return to work. As a result of such action, Personnel is currently processing your involuntary

resignation from employment with the School District.

Please be advised that I will recommend at the July 21, 2004 meeting of the School Board of Palm Beach County, Florida, your involuntary resignation. Subsequent to the July 21, 2004 Board meeting you will have fifteen (15) days to file an appeal under Section 120.[6]8, Florida Statutes. Unless a timely request for an administrative hearing (DOAH) is made within fifteen (15) days stated herein pursuant to Section 120.569 and 120.57, Florida Statutes the District will consider this matter closed. This action is taken in accordance with Section 1001.42 and 1001.51, Florida Statutes. Failure to timely request an administrative hearing shall waive all rights to request a DOAH hearing on such matters and shall be subject only to appeal rights under Section 120.[6]8, Florida Statutes. You have a choice of filing a grievance or requesting a hearing before the Division of Administrative Hearings (DOAH). Questions regarding the appeals process should be referred to the District's Legal Department.

If you find this letter inconsistent with the action taken above, you may contact Mr. Camerino immediately at . . . to resolve this matter prior to School Board Action.

36. By letter dated July 8, 2004, Respondent informed the School District's legal department that he was "requesting an appeal" of Mr. Camerino's "involuntary resignation" recommendation.

37. On August 23, 2004, the same day the Superintendent filed his Petition for Involuntary Resignation recommending that

the School Board terminate Respondent's employment, the School District referred Respondent's appeal to DOAH.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto.

39. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat. (formerly § 230.03(2), Fla. Stat.)

40. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See § 1001.42(5), Fla. Stat. (formerly § 230.23(5)(f), Fla. Stat.)("The district school board, acting as a board, shall exercise all powers and perform all duties listed below: PERSONNEL.--. . . provide for the . . . suspension, and dismissal of employees subject to the requirements of chapter 1012."); § 1012.22(1)(f), Fla. Stat. ("The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees."); and § 1012.23(1), Fla. Stat. (formerly § 231.001, Fla. Stat.)("Except as otherwise provided by law or the State

Constitution, district school boards may adopt rules governing personnel matters,[5] including the assignment of duties and responsibilities for all district employees.").

41. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat.

42. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons." § 447.209, Fla. Stat.

43. It, however, must exercise these powers in a manner that is consistent with the requirements of law and the provisions of any collective bargaining agreements into which it has entered with the bargaining unit representatives of its employees. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); and Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a

ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment . . . .").

44. "Under Florida law, a [district] school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."[6] Sublett v. District School Board of Sumter County, 617 So. 2d at 377.

45. The employee must be given written notice of the specific charges prior to the "formal hearing." Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [district school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring).

46. Any adverse action taken against the employee may be based only upon the conduct specifically alleged in the written notice of specific charges. See Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

47. At the "formal hearing," the burden is on the district school board to prove the allegations contained in the notice.

48. Ordinarily, the district school board's proof need only meet the preponderance of the evidence standard. See McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal."); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We agree with the hearing officer that for the School Board to demonstrate just cause for termination, it must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true . . . ."); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not involve the loss of a license and, therefore, Allen's losses are adequately protected by the preponderance of the evidence standard."); Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence

to support both charges by a preponderance of the evidence standard."); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, ..."). Where, however, the district school board, through the collective bargaining process, has agreed to bear a more demanding standard,[7] as the School Board has done in the instant case, it must honor, and act in accordance with, its agreement. See Palm Beach County School Board v. Auerbach, Case No. 96-3683, 1997 WL 1052595 *5 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . . However, in this case, the district must comply with the terms of the collective bargaining agreement, which, as found in paragraph 27, above, requires the more stringent standard of proof: clear and convincing evidence.").

49. Where the employee is an "educational support employee" who has successfully completed his or her probationary period and the adverse action sought to be taken against the employee is termination, the district school board must act in accordance with the provisions of Section 1012.40, Florida

Statutes (formerly Section 231.3605, Florida Statutes), which provides as follows:

> (1) As used in this section:
>
> (a) "Educational support employee" means any person employed by a district school system who is employed as a teacher assistant, an education paraprofessional, a member of the transportation department, a member of the operations department, a member of the maintenance department, a member of food service, a secretary, or a clerical employee, or any other person who by virtue of his or her position of employment is not required to be certified by the Department of Education or district school board pursuant to s. 1012.39. This section does not apply to persons employed in confidential or management positions. This section applies to all employees who are not temporary or casual and whose duties require 20 or more hours in each normal working week.
>
> (b) "Employee" means any person employed as an educational support employee.
>
> (2)(a) Each educational support employee shall be employed on probationary status for a period to be determined through the appropriate collective bargaining agreement or by district school board rule in cases where a collective bargaining agreement does not exist.
>
> (b) Upon successful completion of the probationary period by the employee, the employee's status shall continue from year to year unless the district school superintendent terminates the employee for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist, or reduces the

> number of employees on a districtwide basis for financial reasons.
>
> (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.

50. Respondent is an "educational support employee," within the meaning of Section 1012.40, Florida Statutes, who is covered by a collective bargaining agreement (the NCF&O Contract).

51. Pursuant to Section 1012.40, Florida Statutes, Respondent's employment may be terminated only "for reasons stated in th[is] collective bargaining agreement."

52. An examination of the NCF&O Contract reveals that it states (in Article 25, Section 2) that a bargaining unit member's "[f]ailure to return to work at the expiration of approved leave shall be considered as absence without leave and grounds for dismissal." It further provides that "[t]his section should be subject to extenuating circumstances preventing timely return, as determined by the Superintendent [of Schools]."

53. The Petition for Involuntary Resignation served on Respondent in the instant case alleges that Respondent's termination is warranted because of his failure to return to work following the expiration of his approved leave in May 2004.

54. The record evidence clearly and convincingly establishes that, as charged, Respondent did not report to work after his leave without pay expired on May 17, 2004. Furthermore, no showing has been made that there were extenuating circumstances preventing Respondent's timely return to work, as determined by the Superintendent.

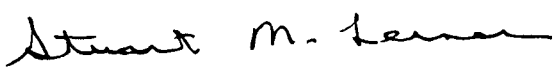
55. Such being the case, the School Board has grounds, under Section 2 of Article 25 of NCF&O Contract, to terminate Respondent's employment, and it therefore is authorized to take such action pursuant to Section 1012.40, Florida Statutes.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the School Board issue a final order terminating Respondent's employment based on his failure to return to work following the expiration of his leave without pay on May 17, 2004.

DONE AND ENTERED this 14th day of February, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of February, 2005.

ENDNOTES

[1] Respondent did not testify at the hearing.

[2] Section 231.44, Florida Statutes, was repealed effective January 7, 2003. Its successor is Section 1012.67, Florida Statutes, which provides as follows:

> Any district school board employee who is willfully absent from duty without leave shall forfeit compensation for the time of such absence, and his or her employment shall be subject to termination by the district school board.

[3] This language makes clear that the "[f]ailure to return to work at the expiration of approved leave" is considered to be so deleterious to the operations of the School District that it "shall be considered . . . grounds for dismissal," regardless of the employee's prior disciplinary record.

[4] Under this provision, it is for the Superintendent, and the Superintendent alone, to determine, in his discretion, whether there were "extenuating circumstances preventing [the bargaining

unit member's] timely return," and, even if the bargaining unit member is able to show that such "extenuating circumstances" did exist, there is no requirement that the bargaining unit member be spared dismissal based upon these "extenuating circumstances." See State v. Thomas, 528 So. 2d 1274, 1275 (Fla. 3d DCA 1988)("As we perceive it, the State's argument is that 'should' is the equivalent of 'shall' and that 'shall' is mandatory. While we acknowledge that 'should' retains its arcane, schoolmarm meaning as a past tense of 'shall,' its modern usage is as the weaker companion to the obligatory 'ought.' Thus, it is said that '[o]ught should be reserved for expressions of necessity, duty, or obligation; should, the weaker word, expresses mere appropriateness, suitability or fittingness.'"); Massey Builders Supply Corp. v. Colgan, 553 S.E. 2d 146, 150 (Va. App. 2001)("The word 'shall' is primarily mandatory, whereas the word 'should' ordinarily implies no more than expediency and is directory only."); and Magnuson v. Grand Forks County, 97 N.W.2d 622, 624 (N.D. 1959)("It does not seem that the word 'should' was used inadvertently. Other instructions on the back of the order contain the more compulsive word 'must,' as for example 'the original of this order must be signed by the recipient or person acting in his behalf and by the vendor.' We construe the word 'should' as used here to be persuasive rather than mandatory.").

[5] The "rules governing personnel matters" that have been adopted by the School Board include School Board Rule 6Gx50-3.80 (dealing with "[l]eave of [a]bsence").

[6] "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

[7] There is no statutory impediment to a district school board entering into such an agreement with the collective bargaining representative of its noninstructional employees.

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.