

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GRANT L. LESTER, a/k/a)	
G. L. LESTER,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 94-4074
)	
DUVAL COUNTY SCHOOL BOARD,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

A hearing was held in this case in Jacksonville, Duval County, Florida on March 15, 1995, before Suzanne F. Hood, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael Mullin, Esquire
26 South 5th Street
Fernandina Beach, Florida 32034

For Respondent: Clay Meux, Esquire
Vicki Reynolds, Esquire
600 City Hall
220 East Bay Street
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

The issues are whether Respondent properly suspended Petitioner's Contract for Transportation of School Children and revoked his license to drive a school bus.

PRELIMINARY STATEMENT

By letter dated February 19, 1993, Respondent Duval County School Board (Respondent) notified Petitioner Grant L. Lester (Petitioner) that his contract to transport Duval County school children was suspended and his Florida Department of Education driver's license was revoked. Petitioner subsequently filed a Petition for Writ of Mandamus in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida. Said Petition, dated January 31, 1994, sought an order requiring Respondent to provide Respondent with certain information and an opportunity for a hearing. Petitioner dismissed his Petition for Writ of Mandamus after the parties agreed to submit this matter to the Division of Administrative Hearings for resolution pursuant to Section 120.57(1), Florida Statutes.

On July 20, 1994, Respondent referred this case to the Division of Administrative Hearings for the assignment of a Hearing Officer. A Notice of Hearing dated August 17, 1994, set the case for hearing on March 14, 1995 through March 17, 1995. On February 21, 1995, the undersigned issued an Order denying Respondent's motions to dismiss for failure to state grounds upon which relief could be granted and for failure to join Petitioner's wife as an indispensable party.

When the hearing commenced on March 15, 1995, the undersigned granted Respondent's motion to dismiss the Duval County School Superintendent (Superintendent) as a party to the proceeding. Petitioner testified on his own behalf and presented the testimony of nine (9) witness. Petitioner offered six (6) exhibits into evidence. Respondent presented the testimony of five (5) witnesses and offered six (6) exhibits into evidence.

The transcript of the proceedings was filed on April 10, 1995. Proposed findings of fact and conclusions of law were filed by Petitioner and Respondent on April 20, 1995. Rulings on the parties' proposed findings of fact are contained in the appendix to this Recommended Order.

FINDINGS OF FACT

1. Respondent's method of providing transportation for its students is unique in the state of Florida because it contracts annually with independent contractors for each bus route. Pursuant to the contract, independent contractors furnish a bus or busses and are responsible for employing qualified drivers. In order to be qualified, drivers must hold a license issued by Respondent pursuant to Rule 6A-3.0141, Florida Administrative Code.

2. Respondent and Petitioner entered into an annual contract for Petitioner to transport school children in Bus #657 for the 1991-1992 school year. At all times material hereto, the parties continued to perform under the terms of the 1991-1992 contract because Respondent was still negotiating the bus contracts for the 1992-1993 school year. Petitioner had been an independent bus contractor for approximately nineteen (19) years. The contract provided no guarantee that Respondent would renew its contract with Petitioner from year to year.

3. At all times material hereto, Petitioner's wife, Eloise J. Lester, was the independent bus contractor for Bus #28.

4. At all times material hereto, Petitioner held a Florida Department of Education school bus license issued by Respondent to operate a school bus. He had been licensed to drive a school bus for Respondent for nineteen (19) years. During that time, he had driven a bus on the Plummer Road route approximately 1,800 times with no reported mishaps. His prior record as a bus driver and bus contractor was unblemished.

5. Respondent uses the Florida School Bus Drivers Handbook, published by the Florida Department of Education, as the curriculum to initially train drivers and for annual in-service training. Respondent gives a copy of this handbook to every driver.

6. On the morning of February 8, 1993, Petitioner was driving his wife's bus #28 with students on board. He approached the railroad crossing at 9520 Plummer Road, stopped, and opened the door. Petitioner saw the Norfolk Southern Railroad train #229 a "good ways" down the track. The railroad crossing

signals, flashing lights and bells, were activated indicating that the train was approaching the crossing. The engineer blew the train's whistle. Despite these warnings, Petitioner drove the bus across the tracks in front of the approaching train. The bus cleared the tracks just seconds before the train entered the crossing.

7. The engineer, Jimmy W. Carter, and the conductor, Everett Maine, witnessed the incident and immediately reported the "near miss" to the railroad yard by radio. Later they prepared written incident reports. Norfolk Southern Railroad reported the incident to Respondent.

8. Mr. Carter has been a train engineer for twenty-five (25) years. Mr. Maine has been a train conductor for forty-three (43) years. They were not under the influence of drugs or alcohol at the time of the incident. They were not involved in any conspiracy to harm Petitioner.

9. Ms. Ruby C. Mardis lives near the crossing. She was waiting for the bus in her driveway with her grandchildren on the morning of February 8, 1993. She testified that she did not know where the train was when the bus crossed the tracks. She did not remember hearing any bells or whistles.

10. Petitioner testified that he could see the light of the approaching train before he entered the crossing. He denied that the crossing lights were flashing or that the alarm bells were ringing at that time. However, Petitioner stated that under certain circumstances, even if the crossing signals were activated, he had discretion to cross the tracks, i.e. when there is no train in sight or a train is stopped on the track.

11. The eyewitness testimony of the engineer and the conductor relative to the activated signals and the distance of the train from the crossing at the time Petitioner drove across the tracks is more persuasive than any testimony to the contrary.

12. After completing an investigation, the Director of Transportation, as the designee of the Superintendent made a determination in writing to suspend Petitioner's bus contract and revoke his school bus driver's license effective February 19, 1993. The initial suspension of the contract and revocation of the license was not permanent because both actions were subject to review by Respondent. The Respondent has discretion to enter into a new bus contract with Petitioner and to reinstate Petitioner's school bus license provided he meets the requirements of Rule 6A-3.0141, Florida Administrative Code.

13. In March of 1993, Respondent assigned the contract for Route #657 (School Bus #657) to Petitioner's wife at her request.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

15. Paragraphs B(7) and B(8) of the bus contract state as follows:

(7) The Contractor and his/her drivers shall comply with all applicable terms and provisions of Chapter 234, Florida Statutes, in addition to all applicable federal, state and local laws,

rules and regulations, including without limitation all rules and regulations promulgated by the State Board of Education and the Board [Respondent] and requirements of the Superintendent of Schools. The Contractor shall be solely responsible for the actions and conduct of his/her employees as the same pertain to fulfilling the covenants, agreement and provisions of this Contract.

(8) If the Contractor fails to comply with any of the covenants, agreements and provisions hereof, this contract may be suspended, in writing, by the Superintendent of Schools, or his designee, within ten (10) days of the time that the violation becomes known to the Superintendent of Schools, or his designee. (NOTE: If the contractor is charged in any court of law with any felony, or with any misdemeanor of such a nature that, in the sole judgment of the Superintendent of Schools, it seriously affects the best interest of the Board, the contract may be suspended until a final resolution of the criminal charge(s). No suspension shall take place until the facts surrounding the criminal charge(s) have been reviewed by the Superintendent of Schools, or his designee in his absence, to determine if suspension is warranted. If the Superintendent of Schools does deem suspension to be warranted, the contractor may appeal the suspension to the Board.)

16. Paragraph C(2) of the bus contract provides as follows:

Any Florida Department of Education school bus driver license issued by the Superintendent of Schools may be suspended or revoked by the Superintendent of Schools, or his designee, in any case where a driver is deemed to be in violation or non-compliance with any provisions of this contract, and all federal, state and local laws, rules, and regulations relative to transportation of students on a school bus. Thereafter, any driver whose license has been suspended shall be prohibited from driving any school bus on official Board business, unless the license has subsequently reinstated by the Superintendent of Schools, or his designee.

17. Respondent's primary consideration must be the safety and protection of health of its students when appointing drivers and operating buses in accordance with all applicable law. Section 234.02, Florida Statutes.

18. Section 234.111, Florida Statutes, provides as follows:

Each school bus shall be brought to a full stop before crossing any railroad track and before entering or crossing any arterial highway or

dangerous thoroughfare, and the bus shall not proceed until the driver has clearly observed that it is safe to proceed.

19. Section 316.1575, Florida Statutes, provides in pertinent part as follows:

(1) Any person walking or driving a vehicle and approaching a railroad-highway grade crossing under any of the circumstances stated in this section shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad and shall not proceed until he can do so safely. The foregoing requirements apply when:

(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;

* * *

(c) An approaching train emits an audible signal or the railroad train, by reason of its speed or nearness to the crossing, is an immediate hazard; or

(d) An approaching railroad train is plainly visible and is in hazardous proximity to the railroad-highway grade crossing, regardless of the type of traffic control devices installed at the crossing.

20. Section 316.159, Florida Statutes, specifically requires a school bus driver to stop within the required number of feet, to listen and look in both directions for approaching trains or activated warning signals, and to proceed only after determining that it is safe to do so.

21. Federal Motor Carrier Safety Regulations, United States Department of Transportation, Federal Highway Administration, Subpart B, section 392.10, mirrors Florida law for any bus transporting passengers but further requires the driver to "ascertain that no train is approaching."

22. The Florida School Bus Drivers Handbook (Handbook), revised 1990, was prepared by FAPT Training Committee in cooperation with the Florida Department of Education. Respondent uses the Handbook in training its drivers. The Handbook provides procedures for school bus drivers at railroad crossings. Generally, the driver must stop within the statutorily required distance from the nearest rail, shift into neutral, open the door and driver's window, and listen and look in both directions for approaching trains. Handbook, p. 16. If lights are flashing at the crossing, the driver must not cross the tracks unless directed to do so by a law enforcement officer. Handbook, p. 16.

23. In this case, Petitioner has not met his burden of proving that Respondent improperly suspended his contract and revoked his license. In fact, Respondent presented clear and convincing evidence that Petitioner violated the contract and state and federal law when he drove the bus through the railroad crossing with the train in close proximity, train whistle blowing, signal lights flashing, and warning bells ringing.

24. The Superintendent's designee properly suspended the contract and revoked the license in writing after completing an internal investigation. Pursuant to the parties' agreement, Respondent afforded Petitioner review of the

adverse decisions by referring this matter to the Division of Administrative Hearings for resolution pursuant to Section 120.57(1), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that Respondent enter a Final Order affirming the suspension of Petitioner's bus contract and revoking his school bus license.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 17th day of May, 1995.

SUZANNE F. HOOD, Hearing Officer
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 1995.

APPENDIX

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties to this case.

Petitioner's Proposed Findings of Fact

1. Accepted in paragraph 6 of this Recommended Order.
2. Accepted in paragraphs 2-4 of this Recommended Order.
3. Accept that the testimony of the witnesses is in conflict. However, the testimony of the engineer and conductor is more persuasive than the testimony of the neighbor, the Petitioner, or any other witness.
4. Rejected. The suspension and revocation was subject to review by Respondent and will not become final until the Respondent issues a Final Order in this proceeding. Respondent has discretion to enter into a new contract with Petitioner and to reissue a school bus license.
5. Rejected. Ms. Mardis did not see the bus as it crossed the tracks. The testimony of the engineer and the conductor is more persuasive.
6. Rejected. The testimony of the engineer and the conductor is more persuasive.
7. Rejected. The contract was suspended and the license revoked subject to review by Respondent. Even though the contract does not expressly provide for an appeal to Respondent under the facts and circumstances of this case, the right to review is implicit in the contract.
8. Rejected. Regardless of what was said at staff meetings or in conference with Petitioner, the contract was not suspended and the license not revoked until Petitioner was notified in writing. Even then the adverse decisions were reviewable by Respondent.

9. The contract does not specifically provide Petitioner an opportunity to explain why his contract should not be suspended and his license revoked at the time of the staff conference. The suspension and revocation was subject to review before the Respondent. Moreover, Respondent has provided Petitioner with a due process hearing by referring this matter to the Division of Administrative Hearings.

10. Rejected. Ms. Lester was paid for transporting students in Bus 657 for the balance of the 1992-1993 school year beginning March of 1993. Since that time, Ms. Lester has been paid for transporting children in Bus 657.

Respondent's Proposed Findings of Fact

- 1.--15. Accepted in paragraphs 1-12 of this Recommended Order.
- 16.--17. Accepted in paragraphs 1-2 of this Recommended Order.
- 18.--19. Accepted in paragraph in paragraph 11 of this Recommended Order.
- 20. Accepted but unnecessary to resolution of case.
- 21. Accepted but not at issue in this case.
- 22.--23. Accepted in paragraph 3.
- 24.--25. Accepted in paragraph 12 of this Recommended Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.