STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-2456
	)	
WADE RAGLAND,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Fred L. Buckine, held a formal hearing in the above-styled cause on September 19, 2001, in Largo, Florida.

APPEARANCES

For Petitioner: Jacqueline M. Spoto, Esquire
School Board of Pinellas County
301 Fourth Street, Southwest
Post Office Box 2942
Largo, Florida 33779-2942

For Respondent: Andrew J. Salzman, Esquire
Zimmet, Unice, Salzman
& Feldman, P.A.
Two Prestige Place
2650 McCormick Drive, Suite 100
Clearwater, Florida 33759

STATEMENT OF THE ISSUE

Whether Respondent, Wade Ragland, when notified by his transportation dispatcher that he had been selected for a random

drug substance test, did not immediately report for testing because he had scheduled a prior maintenance appointment at his home, constitutes a refusal to be tested in violation of School Board Policy, state law, or contractual agreement. If so, was his failure to report immediately for random drug testing just cause for termination.

PRELIMINARY STATEMENT

On April 24, 2001, Respondent (Wade Ragland, bus driver) was suspended with pay. Thereafter, the Superintendent of Public Schools for Pinellas County, Florida, submitted a recommendation to the Pinellas County School Board (the Board) that Wade Ragland be terminated because of his alleged refusal to submit to a random drug test and that his actions were in violation of School Board Policy 8.23 and 8.25(1)(u) and (x). Ragland, upon receipt of the recommendation of termination notice, requested a hearing pursuant to Chapter 120, Florida Statutes. On June 21, 2001, the matter was referred to the Division of Administrative Hearings.

The final hearing was held at the Pinellas County School Board, Largo, Florida, on September 19, 2001. The Board presented testimony from seven witnesses: Gene M. Bessette, Administrator, Office of Personnel Standards; Susan Detmold-Collins, Assistant Director, Transportation Department; Theresa Hooker, Personnel Office Technician; Joyce Hefty, Clerk

Specialist II, Transportation Department; Steven A. Masone, Dispatcher; Walter Pownall, Service Center; and Dennis J. Bennett, Chief Operating Officer, FirstLab (third party administrator of drug/alcohol testing programs). The Board offered twenty-eight exhibits (P-1-28) in evidence, which were accepted without objection.

Ragland presented the testimony of his son, Shane Ragland, and Craig Schultheis, Sentricon Technician, Swat Exterminating. Respondent, Wade Ragland, did not testify. Ragland offered in evidence without objection the depositions of Wade Ragland, John R. Degen, Board's Field Operations Coordinator, Steve Masone, Susan Detmold-Collins, Joyce Hefty, and Gene Bessette.

On September 28, 2001, the two-volume Transcript of the hearing was filed. On October 30 and 31, 2001, respectively, the Board's and Ragland's Proposed Recommended Orders were filed and have been given consideration.

FINDINGS OF FACT

1. Petitioner, Pinellas County School Board, is a political subdivision and an administrative agency of the State of Florida charged with the duty to operate, control, and supervise all public schools and personnel in the Pinellas County School District. Dr. J. Howard Hinesley is the Superintendent of Public Schools for Pinellas County, Florida.

2. Respondent, Wade Ragland, at all relevant times, was an employee of the Pinellas County School Board in its Transportation Department. Ragland was employed as a substitute school bus driver on July 20, 1998, and became a regular bus driver on August 17, 1998. On April 24, 2001, Ragland was acting as a school bus driver for the Board. He was tested for drugs in January 2001, and the test was performed after his first run, which was the Board's policy and standard procedure. Ragland's drug test result was negative.

3. Pursuant to the Board's Policy 8.23 and Title 49 of the Code of Federal Regulations (CFR) as of January 1, 1995, all employees who are required to hold a Commercial Drivers License (CDL) as a condition of employment and who perform safety-sensitive functions, which include operating a vehicle designed to transport more than 15 persons, shall be subject to drug urinalysis testing and/or breath alcohol testing via sample collection, through random testing.

4. The Federal Omnibus Transportation Act (The Federal Act) was at all times relevant, including April 24, 2001. Four times a year, once every three months, and on or before the 15th day of the month preceding the beginning of the quarter, a random list of drivers will be requested by a contract testing facility. The Federal Act does not require termination of a CDL employee who either fails or refuses to take a random drug test.

5. The School Board Policy 8.23 is incorporated as Article 32 of the Agreement between the Pinellas County School Board and the School Employees Union, the exclusive collective bargaining representative for bus drivers. Under Section 8.23(3)(a) 3 of the Board's policy, random drug testing must be unannounced and shall be conducted during the selected driver's on-duty time.

6. The Board's internal normal operating procedures for the selection of drivers to be tested in each quarter is accomplished in the following manner. Theresa Hooker, Personnel Technician and Drug Testing Program Manager since July 2, 2000, is responsible for drug testing of all personnel and maintenance of their confidential drug test records. FirstLab, the contract testing facility, is responsible for the selection of employees who will be tested during a given quarter from the list of names provided by the Board. Ms. Hooker is solely responsible for the determination of the date each of the selected employee will be tested.

7. Upon receiving the quarterly list from FirstLab, Ms. Hooker sends the names of 20-25 selected bus drivers to Joyce Hefty, personnel technician in the Transportation Department. It is Ms. Hefty's responsibility to notify each driver, directly or through one of three dispatchers, of the selection for drug testing during a driver's first or second morning bus run. Once the selected driver reports to her

office, she checks the driver's identification, provides the driver with the necessary testing paperwork and gives the location of a Board-approved testing facility.

8. All dispatchers and bus drivers know that drivers who have been notified by dispatcher(s) that their names came up for testing are to report immediately, after completion of their first or second morning run, to Ms Hefty's office for identification check, completion of paper work, and instructions to report to a Board-approved test site for testing during their on-duty time for which they are paid.

9. Equally known by dispatchers and drivers, is the meaning of on-duty time under School Board's Policy 8.23. On-duty time is the time required for a driver to complete his last morning run. Included is the time required for each driver to return to his/her assigned transportation compound. In those instances where a driver has permission to take the bus home, on-duty time is computed from check-out time of the first run to the time it would take a driver to return from the first or second morning run to the assigned compound. Each compound dispatcher maintains records and time sheets of assigned drivers.

10. Should a driver selected for random drug testing not be tested, refuse to be tested, or experience the inability to provide a specimen and therefore has to wait hours to complete

testing, Ms. Hefty is notified. She in turn notifies Ms. Hooker. Ms. Hooker notifies Mr. Gene Bessette, Administrator, Office of Personnel Standards. Mr. Bessette has discretionary decisional authority touching upon every facet of a particular situation. He is informed of each situation and determines whether an individual situation requires further action and, if so, what action should be taken. He determines the appropriate discipline based upon the totality of circumstances, disciplinary guidelines, and aggravating and mitigating factors, if any, and submits his final recommendations to the Superintendent of Pinellas Public Schools, Dr. Hinesley. Dr. Hinesley has authority to accept, reject or modify Mr. Bessette's recommendations. Dr. Hinesley's decision is presented to the Pinellas County School Board for final modification or approval.

11. The chain of command would be for Ms. Hooker, upon receipt of information from Ms. Hefty, to contact Mr. Bessette. On April 24, 2001, at 9:34 a.m., Ms. Hooker received an e-mail from Ms. Hefty regarding Respondent, Wade Ragland. Ms. Hooker, however, was not in her office and did not speak with Ms. Hefty or Mr. Bessette on that day.

12. On April 24, 2001, Ragland was acting as a school bus driver for the Board. The agreement between the Board and School Employees Union Local 1221, Firemen and Oilers, an

affiliation of Service Employees International Union, which governs Ragland, provides, as does Board's Policy 8.23, that random drug testing "shall be during on-duty time."

13. The Board's "normal random testing procedure," in effect since 1998, was to notify drivers during their first run in the morning that they are going to be sent for a random test after the completion of the first morning run. Dispatch would send a relief driver and bus to cover the second and third runs of the selected driver's route.

14. Under the Board's normal procedure, notification to drivers would occur during a driver's first morning run. A driver's drug test, conducted at an approved testing site, would occur during the time the driver would normally be driving a second and third morning run. Under this procedure, selected drivers would not receive additional pay. Should, however, the actual drug test extend beyond a driver's normal scheduled time for morning runs, including compound check-in time, additional time would be added when computing the driver's total hours for that week.

15. Under the operative terms of the Board's procedure, bus drivers are on non-paying "down-time" after completion of the final morning run. Down-time would continue until a driver began their evening run usually about 1:00 p.m. or later, depending on their selected bus route.

16. "Down-time" is equal to "off-duty" time for which drivers receive no pay. The Board, at all times, was fully aware that drivers held other jobs during their down-time, a few cared for their elderly relatives, some, as did Ragland, scheduled personal appointments with service providers and others engaged in various other activities.

17. Under the Board's procedure, "over-time," for over-time pay purposes, is the time drivers work beyond and over a predetermined time for each route. Drivers, at the beginning of each year, bid for a specific bus route. Each bus route has its own, per-week pay schedule based upon the number of morning/evening runs, the combined distance of the runs, plus any required over-time work in excess of their route time.

18. The School Employees Union Agreement and the Board's policy mandate that drivers could be required to work over-time, when and if, the driver was requested by a dispatcher or supervisor to work over-time while the driver was on duty. For special trips, weekends, nights, etc., dispatchers or supervisors would first seek a volunteer driver. If no volunteer is found, a dispatcher would select a driver to work over-time who would receive over-time pay for the over-time work.

19. Faced with a shortage of regular bus drivers for 2000-2001 school year, the Board changed its herein above "normal

random drug testing procedures" as described above. The intent of the Board was to comply with its Federal drug-testing requirements and to minimize expenditure of over-time pay for bus drivers.

20. Accordingly, on August 31, 2000, Susan Detmold-Collins, Assistant Director, Transportation Department, issued a memo to "All School Bus Drivers" outlining a "Temporary Change To Random Drug/Alcohol Testing Procedure." In pertinent part the memo stated:

> To: ALL SCHOOL BUS DRIVERS
>
> Every year, at this time, we run into a bit of a problem with meeting our quotas for random drug/alcohol testing. As many of you know, we are required, by Federal Law, to randomly test 25 percent of our drivers each quarter. The current quarter started in July and will end in September. We always start out the school year somewhat behind in meeting our testing quotas, because many of our drivers do not work for summer school, and therefore can not be sent for testing during July and August.
>
> This year, because of our shortage of drivers, and the number of drivers we are required to send for testing, we decided to enact a <u>temporary</u> change to our usual procedures . . .
>
> First, I wanted to make sure all drivers were made aware of this temporary change we are making to our normal procedure and the reasons for it.
>
> Second, I wanted to reassure all drivers that we will pay them for any extra time they may end up working as a result of this

> change in procedure. (Since random drug/alcohol testing is usually conducted during a period of time when drivers would normally be doing their second and third runs, drivers do not usually receive any additional pay.)
>
> Third, I wanted to let drivers know we fully recognize that many of them have scheduled appointments and other things which they count on being able to do during the middle of the day, on what would normally be their "their down-time." If drivers let us know about these things, in advance, we will take steps to make sure they are not called to drug test when doing so would cause a scheduling conflict for the driver. Since a refusal to take a drug/alcohol test can have very severe consequences under Federal Law and School Board Policy, I wanted to reassure all drivers that we will work cooperatively with them and make every effort not to pull them for testing if they have made us aware that they have a doctor's appointment or other appointment or activity scheduled during their "down-time" on a particular day.
>
> Mr. Fleming and I greatly appreciate your cooperation and support during this period. . . . We are working hard with Supporting Services Personnel to recruit and train additional drivers as quickly as possible. We hope we'll have things back to "normal" by October at the latest, if not sooner. [emphasis added]

21. By March 2001, the Transportation Department had hired sufficient bus drivers to cover the above-cited need. It is unclear, however, whether the Transportation Department made the administrative staff, dispatchers and bus drivers aware of the fact that a sufficient number of bus drivers had been hired.

It is equally unclear, from the collective testimony of the Board's employees, whether the temporary change in the drug-testing procedure herein above outlined had been retracted, and if so, on what date. It is clear that as of April 24, 2001, the Transportation Department had not issued a written retraction of its August 31, 2000, temporary procedural change memoranda.

22. From the testimony of a dispatcher, Masone, and the comments of a bus driver, Ragland, it is clear that neither Masone, nor Ragland, knew whether the normal drug-testing procedure or the temporary drug-testing procedure was in effect on April 24, 2001. It is therefore, a reasonable conclusion that some dispatchers, Masone for instance, assumed the temporary drug testing procedure was in effect wherein drivers would be required to undergo random drug-testing on down-time. Others, however, drivers like Ragland, assumed the normal drug-testing procedure was in effect and drivers could only be required to undergo random drug testing during on-duty time. This conflicting and confusing situation resulted in a misunderstanding of what was required of the drivers by dispatchers and what was required of dispatchers by drivers as it related to random drug testing procedures on April 24, 2001.

23. It is certain, that bus drivers, dispatchers, the transportation personnel technician, the drug-testing program manager, and the professional standards office were not informed

that the Board's temporary drug testing policy procedure was in effect on April 24, 2001, some six months past October 2000.

24. On April 24, 2001, Ragland had driven to Palm Harbor University, then to Brooker Creek University and was driving to Safety Harbor Middle School, the third and last stop of his morning runs. Completion of the last morning run and the driving time required for Ragland to report back to the Tarpon Springs transportation compound checkpoint is considered on-the-clock time for pay purposes. The time of Ragland's arrival at the Tarpon Springs compound would begin his down-time. On that day, according to dispatcher Masone, Ragland's down-time began at 9:56 a.m. He would remain on down-time until his evening runs began at 1:00 p.m. later that same day.

25. At 9:18 a.m. on April 24, 2001, Masone notified Ragland that he had been randomly selected for drug testing that morning. Ragland informed Masone that he had a prearranged service appointment at his home with an exterminator at 10:00 a.m. and he would go for testing "as soon as my appointment is over with."

26. When asked by Masone why he did not tell his supervisor that morning when he checked in that he would not be available during his down-time, Ragland's reply was "I did not know I had to report" planned down-time activities. On this point Ragland is right. According to Gene Bessette, before the

August 30, 2000, temporary change memo, there was never a written policy that required drivers to notify dispatchers or anyone else if they had a prearranged appointment during their down-time.

27. Masone, not sure whether the temporary procedure or the normal procedure was in effect, informed Ragland that he "could" lose his job if he did not go for drug testing. Ragland replied he would go for testing after his appointment was finished, probably within the next one-half hour or approximately 10:30 a.m.

28. At approximately 9:25-9:30 a.m. and after his conversation with Ragland, Masone called Joyce Hefty and informed her of his conversation with Ragland. Ms. Hefty asked Masone to call Ragland and have him call her. When Ragland arrived home, he called Ms. Hefty.

29. At approximately 9:31 a.m. and after her conversation with Masone, Ms. Hefty e-mailed Susan Collins regarding Ragland's selection for random drug test at 9:18 a.m. and relayed the information as she received it from Masone regarding Ragland's position of his down-time status. Ms. Hefty does not recall if Masone told her Ragland said he would come for testing after his appointment was finished. Unable to reach Ms. Collins by telephone, Ms. Hefty called Mike Bessette regarding Ragland's situation. Bessette concluded the conversation by instructing

Ms. Hefty to give Ragland another 40 minutes to cool off and see if he showed up at her office.

30. As Masone had requested, Ragland called Ms. Hefty from his home between 9:32 a.m. and 9:44 a.m. Ms. Hefty asked if he was going for his drug test, Ragland replied that he could not come to her office at that time, but he would come as soon as his exterminator finished his work. The exterminator, Craig Schultheis, was in the house at the time of this telephone conversation and overheard Ragland's comments. Ragland's offer to Ms. Hefty to speak with his exterminator for verification was refused.

31. Mr. Schultheis, the exterminator, arrived at Ragland's home approximately 9:40 a.m. completed his task and departed at approximately 10:05 a.m. While there, he overheard the telephone conversation and Ragland say, "When I'm done I can come in." He did not know at that time that Ragland was talking to Ms. Hefty.

32. During the above telephone conversation, Ms. Hefty failed to inform Ragland that Mr. Bessette had given him an additional 40 minutes to report to her office. Had Ms. Hefty obeyed Mr. Bessette's instruction, Ragland would have had the option of immediately driving from his home to her office, should he chose to do so. Instead, at 9:44 a.m. Ms. Hefty, without further consultation with Mr. Bessette, her superior,

concluded her conversation with Ragland by informing him that he was terminated. A few minutes later, she called the North County Dispatcher and requested that they send two drivers to pick up Ragland's bus and return it to the motor pool.

33. Because Ragland drove from Safety Harbor Middle School directly to his home rather than driving directly to her office, Ms. Hefty testified it was too late for him to take the drug test. To her, his conduct constituted in part his refusal. This was Ms. Hefty's first occasion to encounter the situation where a driver who has been notified by a dispatcher of selection for random drug testing responded with, "No I can't; I have an (prearranged) appointment and will go when its finished."

34. Ms. Hefty did not know whether Ragland was on "down-time" or "on-the-clock" status when he called her from his home. At the time she determined that Ragland's responses, "will go when my appointment is finished" or "not on my own time," coupled with his failure to immediately report to her office, was a refusal under her understanding of the rules. She did not know nor could she articulate the procedure or rule she relied on in reaching her conclusion. She testified she was merely doing what Polly Frush, who had the job before, had taught her.

35. Ragland took a drug test at 1:00 p.m., on April 24, 2001, at Atlantis Clinic with a negative result. This drug test

was not accepted by the Board as a substitute drug test. Under its policy, the Board accepts drug test results from only its approved and designated drug-testing facilities. Atlantis is not an approved facility.

36. No Board employee, with whom Mr. Bessette spoke on April 24, 2001, informed him of Ragland's statement that he would be willing to go immediately to take the drug test after his appointment was concluded. If he had been made aware of Ragland's statement, he testified he would have taken that into consideration when determining whether or not Ragland's action was a refusal to take the random drug test. Assuming that Board staff had provided him with all the facts, and following the no exceptions policy (refusal equals automatic termination), Mr. Bessette made his recommendation of Ragland's termination to Dr. J. Hinesley, Superintendent of Public Schools, Pinellas County.

37. This is a case of first impression for the Board's staff, wherein the Board issued two procedures for random drug testing, Policy 28.3 and the August 30, 2001, Memo to Bus Drivers; first impression where Board staff members and employees were not certain which one of the two procedures was in effect on April 24, 2001; and first impression where the conduct of the Board's administrative staff and the conduct of a

bus driver employed the Board was reasonable given the circumstances on April 24, 2001.

38. Petitioner's evidence in this case does not demonstrate insubordination by Ragland. The evidence does not prove that Ragland engaged in flaunting the Board's authority, repeatedly failed to heed the Board's instructions to take a drug test, openly refused to take the drug test, or failed to follow the Board's recently changed random drug testing procedure. Just the opposite is evident. On April 24, 2001, at approximately 1:00 p.m., during his normal on-duty time, Ragland took a drug test with a negative result.

39. The facts here demonstrate, at most, Ragland's exercise of poor judgment based on the confusion created by a lack of clear directions from the Board. The confusion resulted from the Board's temporary random drug-testing procedure termination date and its normal random drug-testing procedure resumption date. Petitioner failed to produce evidence in any form to establish with reasonable certainty, which one of its two procedures was in effect on April 24, 2001. I find that on April 24, 2001, the Board's staff, at the very least, did not have a working knowledge of the applicable random drug testing procedure.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

41. Section 231.3605(2)(b) requires that Petitioner conform to the provisions of the collective bargaining agreement and Petitioner's rules in terminating most non-instructional employees, including an employee assigned to the transportation department. As noted above, the collective bargaining agreement provides for termination for the refusal to submit to a random drug test.

42. Petitioner has the burden of proof in this non-instructional employee dismissal hearing. The standard of proof in this proceeding is by a preponderance of the evidence. McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 1996); Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3rd DCA 1990).

43. Accordingly, Petitioner has failed to prove by a preponderance of the evidence the charge of insubordination against Respondent, Wade Ragland.

44. The Rules and Regulations governing the administration of drug testing of individuals who drive commercial vehicles are set forth in 49 Code of Federal Regulations, Part 40, Subparts A

and B. The Federal Regulations provide mandatory procedures governing the drug testing of bus drivers and employers, including this School Board. Petitioner was responsible to see that regulations are enforced and testing is done in compliance with those regulations. See 49 C.F.R. Section 40.1.

45. The Superintendent of the Pinellas County School Board has the authority to suspend and recommend dismissal of School Board employees, Section 230.33(7)(e), Florida Statutes.

46. The School Board of Pinellas County has the authority to suspend and/or dismiss School Board employees, Section 230.23(5)(f), Florida Statutes.

47. Under Section 230.22, Florida Statutes, the School Board has authority to adopt rules and regulations that contribute to efficient operations of the school system.

48. Alcohol and drug testing of school bus drivers is regulated under Federal Law, 49 C.F.R. Part 40 and 49 C.F.R. Section 382.109. Consistent with the Drug-Free Workplace Act of 1998, 49 C.F.R. Part 40, and 40 C.F.R. Part 382, the School Board adopted Policy 8.23. The Board's policy requires that as of January 1, 1995, all School Board employees who hold a commercial driver's license as a condition of employment and who perform safety sensitive functions, that includes operating a vehicle designed to carry more than 15 persons, shall be subject to drug urinalysis and/or breath alcohol testing.

49. C.F.R. Section 382.211 states that:

> No driver shall refuse to submit to . . . a random alcohol or controlled substance test. . . . No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

50. Section 382.211 does not require dismissal in cases of refusals, only discontinuation of "safety-sensitive functions."

51. School Board Policy 8.32 is incorporated as Article 32 of the Agreement between the Pinellas County School Board and the School Employees Union, the exclusive collective bargaining representative for bus drivers and applicable to Respondent.

52. The determinative issue in this case turns on School Board Policy 8.23(3)(e)2(3), which defines refusal to submit to a test to include "the driver engaging in conduct that clearly obstructs the testing process." The plain meaning of "obstruct" is to "block" "interfere with, impede, or retard."

53. 49 C.F.R. Section 382.305(1), places a time requirement on an employee notified to take a drug test. It requires that "each driver who is notified of selection for random alcohol and/or controlled substances testing proceed to the test site immediately." The only exception to this requirement is to allow the driver to complete the current safety-sensitive function, i.e., to drop off students in the school bus at the school.

54. Immediately, in fact, is determined by the circumstances and length of time required for the notified driver to depart the location where the notification was received (school drop-off site), with consideration for traffic delays, to reach Ms. Hefty's office at the school board building. This period can range from 30 minutes to one and one-half hours depending upon traffic conditions at the time.

55. The August 30, 2000, memorandum of temporary change in procedure created confusion among all the parties involved. It is unclear whether that memorandum was in effect on April 24, 2001. Dispatcher Masone was under the impression that the August 30, 2000, memorandum procedure was in effect on April 24, 2001. Respondent, Ragland, was under the impression that the August 30, 2000, memorandum was not in effect on April 24. 2001. Ms. Hefty admitted she was unsure. Mr. Bessette acknowledged that the memorandum caused confusion. The Board failed to make clear to its administrative staff, dispatchers, union representatives and bus drivers whether the August 30, 2000, memorandum was in effect on April 24, 2001, or terminated in October 2000.

56. School Board policy 8.25(1)(x), entitled "Disciplinary Guidelines for Employees," defines failure to comply with School Board Policy, state law, or appropriate contractual agreement as an offense with a penalty range from caution to dismissal.

57. The agreement with the School Employees Union permits the School Board to set work schedules and work hours for bus drivers and to require over-time work for drivers. When a driver is notified during a regularly scheduled bus run that he/she has been selected for a random drug test, the School Board has the authority to require the bus driver to go for drug testing even when the test would require the driver to work beyond his/her regularly scheduled work hours.

58. The Atlantis Clinic is not an approved by the Board for testing its bus drivers. The Atlantis Clinic testing procedures do not meet federal requirements. First, the testing is not by appropriate laboratory methods. Second, the person collecting the samples is not an approved collector. Third, the test results are not on a form approved by the Federal Department of Transportation. Fourth, the test results are not reviewed by a Medical Review Officer.

59. Ragland is charged, in the Board's May 3, 2001, suspension letter, with violation of School Board Policy 8.25(1)(u) and (x) which in pertinent part states:

> (1) The school district generally follows a system of progressive discipline in dealing with deficiencies in employee work performance or conduct. Progressive discipline may include, but is not limited to, verbal or written counseling or caution, written reprimand, suspension without pay and dismissal. The severity of the problem or employee conduct will determine whether

> all steps will be followed or a recommendation will be made for suspension without pay or dismissal. When there is a range of penalties, aggravating or mitigating circumstances will be considered. Support Services probationary employees sign an "At Will" statement that says: During the probationary period the employee will not be eligible for certain benefits as defined by the applicable collective bargaining agreement and may be terminated at the will and discretion of the Pinellas County School Board without advance notice or a right to a hearing. The following offenses, when constituting grounds for discipline under Section 231.36, Florida Statutes, shall have the following penalties:
>
> (u) Insubordination, Which is Defined as a Continuing or Intentional Failure to Obey a Direct Order, Reasonable in Nature, and Given By and With Proper Authority.
>
> (x) Failure to Comply With School Board Policy, State Law, or Appropriate Contractual Agreement.

60. Subsection (3) defines aggravating and mitigating factors or circumstances that will be considered when determining the appropriate penalty within a penalty range. Pertinent parts of this subsection are:

* * *

> (k) The actual knowledge of the employee pertaining to the misconduct.

* * *

> (l) Attempts by the employee to correct or stop the misconduct.

* * *

(q) Length of employment.

* * *

(s) Any relevant mitigating or aggravating factors under consideration.

* * *

61. Petitioner, Pinellas County School Board has proven by a preponderance of evidence that Respondent, Wade Ragland, did, on April 24, 2001, refuse to immediately report for a random drug test after notification by proper authority, Ms. Hefty. However, Ms. Hefty's "are you going to report" notice to Ragland was incomplete. She did not tell Ragland that Mr. Bessette, her superior, had given him an additional 40 minutes to report to her office. Neither did she have proper authority, approval, or permission, to terminate Ragland, at the time she informed him he was terminated. Therefore, even through Ragland refused to report, his refusal was not "insubordinate," as the term is defined by the Board.

62. Respondent's refusal to report for the random drug test after proper notice constitutes a failure to comply with School Board policy. The uncertainly is "which" School Board policy was in effect on April 24, 2001.

63. Petitioner, Pinellas County School Board did not prove by a preponderance of evidence that Respondent, Wade Ragland, was insubordinate by his failure to report immediately for a

random drug test after notice on April 24, 2001. Respondent's response to the random drug test notice from Petitioner complied with "a" procedure established by the Board.

64. Petitioner's memoranda to all bus drivers, regarding its temporary procedural change in random drug-testing procedures coupled with no notice to affected employees whether its temporary policy continued past October 2000, mitigates imposition of policy guideline discipline that every random drug test refusal equals automatic termination.

RECOMMENDATION

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

RECOMMENDED that Pinellas County School Board enter a final order finding Respondent, Wade Ragland, was not insubordinate and did not violate Board Policy 8.25(1)(u).

Further finding that Respondent, Wade Ragland, did not violate School Board Policy 8.25(1)(x) by failing to comply with an existing School Board Policy.

Further Recommended that Respondent, Wade Ragland be reinstated to his former position as a bus driver.

DONE AND ENTERED this 4th day of December, 2001, in Tallahassee, Leon County, Florida.

FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of December, 2001.

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Tallahassee, Florida 32399-0400

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 must be filed with the agency that will issue the Final Order in this case.