

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 05-0950
)
 TANWEER I. MALIK,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on June 9, 2005, at Miami, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Denise Wallace, Esquire
Miami-Dade County Public Schools
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Madelin Gonzalez, Qualified Representative
AFSCME Council 79
99 Northwest 183 Street, Suite 224
Miami, Florida 33169

Steven H. Malone, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the offenses alleged in the Notice of Specific Charges (NSC) filed by Petitioner and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

At all times relevant to this proceeding, Respondent has been employed by Petitioner as a school bus driver. At its regularly scheduled meeting of February 16, 2005, Petitioner voted to suspend Respondent's employment without pay for a period of 30 days. Respondent timely challenged Petitioner's proposed action, the matter was referred to DOAH, and this proceeding followed.

On April 7, 2005, Petitioner filed its NSC, which constitutes the charging document in this proceeding. The NSC alleged certain facts pertaining to an accident Respondent had on August 20, 2004, while driving a school bus (the bus). Based on those facts, Petitioner charged Respondent with three offenses. Count I alleged that Respondent failed to bring credit upon himself and the School Board in violation of School Board Rule 6Gx13-4A-1.21, which is captioned "Responsibilities and Duties of Employees." Count II alleged that Respondent violated School Board Rule 6Gx13-3E-1.10, which is captioned "Transportation - Specific Procedures," by failing to follow required pre-trip inspection procedures, failing to make a

required inspection following an accident, and failing to immediately report an accident. Count III alleged that Respondent failed to perform his job responsibilities, which subjects him to discipline pursuant to the provisions of Article XI, Section 4C of the applicable collective bargaining agreement between the American Federation of State, County, and Municipal Employees (AFSCME), Local 1184 and Petitioner (the AFSCME contract).

At the final hearing, Petitioner presented the testimony of Mary Carter (school bus attendant), Gwendolyn Cone (Field Operations Specialist for Petitioner's Transportation Department), Mary Sweeting (an Area Director for Petitioner's Transportation Department), Barbara Moss (a District Director for Petitioner's Office of Professional Standards), and Respondent. Petitioner presented seven sequentially-numbered exhibits, each of which was admitted into evidence. Respondent presented the testimony of Greg Allen (a school bus driver and union officer). Respondent had two exhibits marked for identification purposes, but neither exhibit was admitted into evidence.

A Transcript of the proceedings was filed on August 8, 2005. Each party filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times, Petitioner has been a duly constituted School Board pursuant to Article IX, Florida Constitution, and Section 1001.32, Florida Statutes (2005).¹

2. At all times relevant to this proceeding, Respondent has been a member of AFSCME and, as such, has been entitled to the benefits of the AFSCME Contract.

3. Since November 15, 2002, Respondent has been employed by Petitioner as a school bus driver and assigned to the North Regional Transportation Center (NRTC). Until this incident, Respondent had not been disciplined by Petitioner.

4. At all times relevant to this proceeding, Ms. Carter was a school bus attendant assigned to the NRTC.

5. At all times relevant to this proceeding, Ms. Cone was a Field Operations Specialist assigned to the NRTC and had supervisory authority over Ms. Carter and Respondent.

6. At all times relevant to this proceeding, Ms. Sweeting was the Director of Petitioner's NRTC and had supervisory authority over Ms. Cone.

7. At all times relevant to this proceeding, Ms. Moss was a District Director in the Office of Professional Standards and assisted with performance and discipline of employees. She ensured that Petitioner complied with applicable due process requirements during a disciplinary proceeding.

8. School Board Rule 6Gx13-4A-1.21 states in pertinent part that:

All persons employed by The School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

9. School Board Rule 6Gx13-E-1.10 incorporates by reference Petitioner's Handbook for School Bus Drivers, Aides, and Operations Staff (Handbook).

10. Section 3 of the Handbook is captioned "School Bus Driver Guidelines and Procedures." Section 3.4 of the Handbook, captioned "Duties," imposes the following duties on a school bus driver:

. . . Drivers must report defective equipment to their Dispatch Office in writing on the "Driver's Request for Repair (DRR)" form. The report must be made as soon as possible after the problem is detected. . . . If the driver encounters a problem while operating the vehicle, the Dispatch Office must be notified immediately and the driver must wait for instructions from the garage.

11. Section 3.3 of the Handbook, captioned "Regulations," imposes the following responsibilities on a school bus driver:

". . . Prepare immediately an accident report after every accident involving the bus or bus passenger. This report must be completed with the driver's supervisor.

12. Section 10 of the Handbook is captioned "Operating Procedures and Safe Driving Principles." Section 10.1 of the Handbook, captioned "School Bus Operation," provides as follows:

Drivers must perform a complete pre-trip inspection of their assigned buses at least twice daily. The pre-trip inspection must be accomplished before the driver departs the compound with the bus. Pre-trip inspection results must be documented on the form provided for this purpose. . . .

13. On August 20, 2004, Respondent was assigned to drive the bus along school bus Route 22.

14. There is a bridge on Northwest 42nd Avenue between Northwest 179 and 183 Streets (the 42nd Avenue Bridge). On August 20, 2004, the 42nd Avenue Bridge was undergoing construction work. There were barricades, construction cones, and other warning devices that were visible to approaching drivers. Because of the construction, the NRTC had informed school bus drivers not to cross the 42nd Avenue Bridge. Respondent testified that he did not hear that warning, but that he knew the bridge was undergoing construction work.

15. On the morning of August 20, 2004, Ms. Carter was the bus attendant on the bus driven by Respondent. At the time of the accident described below, there were four students on the bus.

16. On the morning of August 20, 2004, Respondent drove the bus across the 42nd Avenue Bridge.

17. There was a dispute between the parties as to what, if anything, occurred while Respondent was driving the bus across the 42nd Avenue Bridge. The greater weight of the competent evidence established that the bus collided with an object on the 42nd Avenue Bridge or with the 42nd Avenue Bridge itself. This accident caused minor damage to the bus.²

18. Respondent did not immediately stop to inspect the bus. After Respondent crossed the 42nd Avenue, he continued on his route, picked up students, and stopped at North Dade Middle School (NDMS) to drop off students. While stopped at NDMS, Respondent inspected the bus and noticed that the outer tire on the right rear of the bus was flat. Respondent testified that the inner tire on the right rear of the bus did not appear to be damaged. Respondent did not contact or make any report to the transportation dispatch office at that time. Respondent drove the bus with the damaged tire to the NRTC bus parking area. Respondent made the determination that it was safe to drive the bus with the damaged tire without consulting anyone.³

19. After Respondent returned to the NRTC bus compound, he completed a Driver's Request for Repair (DRR) form, which indicated that the right rear outer tire needed repair.

20. Because of Respondent's DRR, the bus was taken from the bus parking area to the garage.

21. After Ms. Carter returned to the bus compound with Respondent, she reported to Ms. Cone that the bus had had an accident as it crossed the 42nd Avenue Bridge. The report was in the form of a message left for Ms. Cone on her voicemail.

22. Ms. Cone received Ms. Carter's message on August 20, 2004, and promptly went to the parking area and then to the garage. She inspected the bus at the garage. Ms. Cone, who has had extensive experience and training in accident investigation, observed that bus' right rear tire rim was bent and disfigured and that the bus' door was damaged.

23. After inspecting the bus, Ms. Cone informed Ms. Sweeting of Ms. Carter's report and of her own observations. Ms. Sweeting and Ms. Cone immediately thereafter went to the 42nd Avenue Bridge, where they observed markings on the bridge that were consistent with a vehicle coming in contact with the bridge. The white stony color of the damaged area of the bridge was consistent with the white stony color Ms. Cone had observed on the damaged tire rim. Although the markings on the bus and on the bridge were consistent with one another, there was no conclusive proof that the markings observed on the bridge were caused by the bus.

24. Ms. Cone took photographs of the bus and the bridge on August 20, 2004. Ms. Cone subsequently delivered the photographs and a report of the accident to Ms. Sweeting. Prior

to the final hearing in this matter, Ms. Sweeting was reassigned to the East Regional Transportation Center. When she left the NRTC, Ms. Sweeting left the photographs in a file on her desk. The photographs were subsequently lost or misplaced. Respondent's qualified representative made a public record's request for the photographs and was informed that they had been lost.⁴

25. A Conference for the Record (CFR) was conducted on August 23, 2004, with Ms. Sweeting presiding. Also present were Respondent and an AFSCME representative. Ms. Sweeting recommended further disciplinary action.

26. A second CFR was conducted October 29, 2004, with Ms. Moss presiding. Also present were Jerry Klein (Petitioner's Director of Transportation), Ms. Sweeting, two AFSCME representatives, and Respondent. Following the second CFR, Respondent was required to submit to a fitness-for-duty evaluation. Thereafter, Petitioner's staff made the disciplinary recommendation that was subsequently adopted by Petitioner.

27. The photographs taken by Ms. Cone were available for review at both CFRs.

28. The Handbook does not define the term "accident." School bus drivers employed by Petitioner are required to undergo training when they are first hired. During training, a

driver is taught to immediately report to the transportation dispatcher if his or her bus hits an object and damage to the bus results. A driver is taught that such an incident is an accident. Despite that training, Respondent denied that there had been an accident and explained that he defined an accident as being when someone gets hurt on the bus, when he hits or kills someone, or when he damages the property of another. He would not acknowledge that an accident also includes damaging the bus by hitting a bridge or an object on a bridge.

29. It is undisputed that Respondent failed to document pre-trip inspections on August 18, 19 and 20, 2004. Respondent testified that he actually performed the pre-trip inspections, but that he did no documentation because he could not find the pencil he usually kept on the bus after he returned from sick leave. Respondent's testimony that he completed the pre-trip inspection but failed to complete the required paperwork, although self-serving, was not refuted. Consequently, it is found that Petitioner failed to prove that Respondent did not conduct a pre-trip inspection, but it did prove that Respondent failed to complete the pre-trip inspection report.⁵

30. The parties agree that Petitioner has the authority to discipline Respondent for just cause consistent with the principles of progressive discipline. Article XI, Section 1A of

the AFSCME Contract provides, under the caption "Due Process", in relevant part, as follows:

. . . Progressive discipline steps should be followed, however in administering discipline, the degree of discipline shall be reasonably related to the seriousness of the offense and the employees [sic] record. Therefore, disciplinary steps may include:

1. verbal warning;
2. written warning (acknowledged);
3. letter of reprimand;
4. suspension/demotion;
5. dismissal.

31. Article XI, Section 1B of the AFSCME Contract provides, in part, as follows:

. . . [I]t is agreed that disciplinary action(s) taken against AFSCME . . . members shall be consistent with the concept and practice of progressive or corrective discipline and that in all instances the degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record.

32. Article XI, Section 4C of the AFSCME Contract provides that termination of employment may occur if a member is guilty of non-performance of job responsibilities. Article XI, Section 3 of the AFSCME Contract provides as follows:

If those cases where any employee has not complied with Board Policies and/or department regulations, but the infraction is not deemed serious enough to recommend dismissal, the department head may recommend suspension up to 30 calendar days without pay. All suspensions must be approved by the Superintendent.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

34. Pursuant to Section 1012.40(2)(b), Florida Statutes, and the AFSCME Contract, Petitioner has the authority to discipline Respondent's employment for "just cause." The School Board has the burden of proving the allegations in the NSC by a preponderance of the evidence. Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990). The AFSCME Contract does not impose a more stringent burden of proof on the School Board.

35. This is a de novo proceeding, not an appeal of a decision by Petitioner or its staff. See § 120.57(1)(k), Fla. Stat. Consequently, the fact that the missing photographs were considered at the CFRs but were not available at the final hearing does not dictate a finding of not guilty on all charges as argued by Respondent. Whether Respondent is guilty or not guilty of the charges must be determined based solely on the preponderance of the competent evidence presented at the final hearing. See § 120.57(1)(j), Fla. Stat.

36. Petitioner proved by the requisite evidentiary standard that Respondent failed to immediately report the accident on the 42nd Avenue Bridge, that he failed to immediately inspect the bus following the accident, and that he failed to follow the pre-trip inspection procedures by documenting the inspection. These acts are in violation of the Handbook as alleged in Count II of the NSC.

37. The foregoing acts also constitute non-performance of job duties within the meaning of Article XI, Section 4C of the AFSCME Contract as alleged in Count III of the NSC.

38. The foregoing acts further constitute a violation of School Board Rule 6Gx13-4A-1.21, as alleged in Count I of the NSC.

39. Other than the provision for progressive discipline, there are no disciplinary guidelines applicable to this proceeding. Consideration should be given to the fact that Respondent has no previous discipline against his employment with Petitioner. Consideration should also be given to the fact that his employment could be terminated for the offenses established by Petitioner in this proceeding. The testimony presented by Petitioner established that the penalty of suspension for 30 calendar days without pay is reasonable under the circumstances.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that. Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order that adopts the Findings of Fact and Conclusions of Law set forth in this Recommended Order and sustains the suspension of Respondent's employment for 30 calendar days without pay.

DONE AND ENTERED this 13th day of September, 2005, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of September, 2005.

ENDNOTES

^{1/} Unless otherwise indicated, statutory references are to Florida Statutes (2005). Rule references are to the version of the rule admitted into evidence as an exhibit.

^{2/} In reaching these findings, the undersigned has considered Respondent's testimony that he did not have an accident on August 20, 2004. The undersigned has further considered Respondent's argument based on the theory of spoliation of evidence, as discussed below. That argument pertains to photographs that were taken on the date of the incident but had been lost or misplaced. The undersigned has also considered the testimony of the witnesses who inspected the subject bus after Respondent completed his route. Petitioner's witnesses are found to be more credible than Respondent's denial that no accident had occurred. The Respondent's definition of the term "accident," which is discussed in a subsequent paragraph of this Recommended Order, is one reason that his denial is given little credibility.

^{3/} In its NSC, Petitioner cites the following excerpt from Section 10.1 of the Handbook:

Drivers must at all times, operate their buses in a safe, prudent, lawful, and courteous manner. Drivers must, at all times, observe the principles of defensive driving. Drivers must always remember that the main goal of our transportation system is a safe ride for the students.

In its Proposed Recommended Order, Petitioner argues that Respondent violated the cited provision by driving the bus with a damaged tire. Because the NSC does not contain that factual allegation, no consideration has been given that argument in recommending the penalty that follows.

^{4/} The public records request was made by Ms. Gonzalez while this matter was pending before DOAH before Mr. Malone entered his appearance, but while Petitioner was being represented by Ms. Wallace. No formal discovery request was made by Respondent for the photographs and neither Respondent's qualified representative or his counsel asked Ms. Wallace for the photographs prior to the hearing. The undersigned denied Respondent's motion to treat the unavailability of the photographs as a discovery violation based on the argument that the absence of the photographs constituted the spoliation of evidence. Respondent's motion to infer that there was no damage to the bus based on the unavailability of the photographs was also denied. Respondent was granted a continuing objection to the testimony from Ms. Cone and Ms. Sweeting as to the damages they had observed to the bus and/or the 42nd Avenue Bridge.

^{5/} The failure to complete the pre-trip inspection report established that Respondent did not comply with the pre-trip inspection procedures as alleged in Paragraph 9 of the NSC.

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.