

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 07-5130
)
JULIUS BALOGH,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, this case was heard before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on January 17, 2008, in Fort Myers, Florida.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire
School District of Lee County
2055 Central Avenue
Fort Myers, Florida 33901

For Respondent: Robert J. Coleman, Esquire
Coleman & Coleman
Post Office Box 2089
Fort Myers, Florida 33902-2089

STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate Respondent's employment as an educational support employee based on the incident that occurred on May 16, 2007.

PRELIMINARY STATEMENT

On November 6, 2007, Petitioner suspended Respondent without pay and notified Respondent that Petitioner intended to seek termination of Respondent's employment. Respondent timely requested an administrative hearing. Petitioner referred the matter to the Division of Administrative Hearings (DOAH) to conduct the administrative hearing and discovery followed. A Joint Pre-hearing Stipulation was filed on January 10, 2008.

At the hearing, Petitioner did not present the testimony of witnesses, relying instead on the admitted facts contained in the Joint Pre-hearing Stipulation. Petitioner offered one exhibit, containing tabs one through seven, which were admitted into evidence. Respondent presented the testimony of three witnesses: Craig Baker, Petitioner's investigator; Joe B. Howard, Petitioner's supervisor of transportation east; Edith Balogh, Respondent's wife; and Respondent testified in his own behalf. Respondent offered 18 exhibits, which were admitted into evidence.

The Transcript was filed on February 6, 2008. Respondent filed a motion for extension of time to file proposed recommended orders. The motion was granted, and each party timely filed their respective Proposed Recommended Orders on February 28, 2008. Each proposal has been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Julius Balogh, has been employed with Petitioner, Lee County School Board ("the District"), since October 17, 2002. He is currently assigned as a Bus Operator in the Transportation Department. Respondent's annual contract with Petitioner was renewed for each of the school years: 2003-2004, 2004-2005, 2005-2006, 2006-2007, and 2007-2008.

2. Since Respondent commenced working for Petitioner in October 2002, he has received five annual performance assessments. With the exception of Respondent's first year when he received three scores of "inconsistently practiced" out of 32 areas targeted for assessment, Respondent always scores at an "effective level of performance" in all areas targeted for assessment. The "comment" section for Petitioner's 06/07 performance assessment stated he was "a good worker, helpful, dependable and a joy to work with." On his 05/06 assessment, the assessor wrote in the "comments" section "Great job. Julius takes personal satisfaction in job and cares about his students. Continues to grow."

3. During the five years Respondent has been employed with Petitioner, he has had a perfect attendance record. Aside from the present charges, he has never before been the subject of any disciplinary action.

4. Respondent is an "educational support employee," as defined by Subsection 1012.40(1)(a), Florida Statutes (2007), and is governed by the Collective Bargaining Agreement between the School Board and the Support Personnel Association of Lee County ("SPALC"). The standard for the discipline of support personnel is "just cause," pursuant to Article 7 of the SPALC Agreement.

5. On May 16, 2007, Respondent reported for duty at 4:49 a.m. He completed his morning shift at 10:07 a.m. He was then required to submit to a random drug and alcohol screening, which he passed.

6. After dropping-off all students at their bus stops, Respondent was returning to the bus compound while following his regularly-scheduled route. While on duty and in uniform, Respondent parked his bus in front and entered the San Carlos Package Store. Respondent's stated reason for entering the store was for the intended purpose of purchasing an herbal extract product called St. Hubertus for his wife.

7. St. Hubertus is an herbal product that Respondent's wife administers to herself daily, in her evening cup of tea, to alleviate digestive problems and stomach pain resulting from various medications she is prescribed. St. Hubertus is 35 percent alcohol by volume. Respondent and his wife regularly purchase St. Hubertus while visiting their country of origin, Hungary. Edith Balogh returns there annually for medical

treatment. Edith Balogh's Hungarian physician first recommended St. Hubertus for her some 10 to 15 years ago to relieve her stomach pain.

8. Edith Balogh had exhausted her annual supply of St. Hubertus sometime prior to May 2007. Although she and Respondent were scheduled to fly to Hungary on May 21, 2007, she was experiencing severe stomach pain and related symptoms. She, therefore, had asked her husband to attempt to procure the product locally.

9. Respondent unsuccessfully sought to obtain the product at several stores prior to May 16, 2007. Ultimately, Respondent was told by a pharmacist that he might be able to find the product at the San Carlos Package Store. Since the San Carlos Package Store was located on Respondent's direct route to the bus compound, and because the weather was intemperate, Respondent did not want to backtrack after concluding his shift. Respondent decided to stop at the San Carlos Package Store for the purpose of purchasing the St. Hubertus product.

10. Before stopping at the package store that day, Respondent had not used either of his two 15 minute breaks. He stopped at the store at approximately 6:45 p.m., clocked out of work at 7:17 p.m., and drove the approximately four miles from the store to the compound before clocking out. Respondent thus

did not exceed the personal time Petitioner otherwise allowed its employees for their daily breaks.

11. When Respondent inquired about the availability of St. Hubertus, the sales clerk advised him that he would have to order it and it would take three to six weeks to receive it. Respondent explained the urgency of obtaining the product, and the clerk recommended a similar product called "Jagermeister." Respondent purchased two 50 ml bottles of Jagermeister.

12. The label on the bottles of Jagermeister were in German and English. Respondent speaks German. The label described the product in German as "noble herb tea extract." The label also stated, in English, that the product contained 35 percent alcohol by volume (70 Proof).

13. Respondent purchased the two bottles of Jagermeister, placed them in a ziplock bag, secured them in his briefcase, and returned to his bus. Respondent then drove directly to the bus compound.

14. As Respondent was pulling into the compound he received a cell phone call from the afternoon supervisor, Robert Schwartz, advising him that he was observed purchasing liquor and that he was suspended from operating the bus. Respondent clocked out and went home. Joe Howard, another supervisor, checked Respondent's bus for open alcohol containers the following day and found no such evidence. As had previously

been approved, Respondent did not return to work prior to his departure for Europe.

15. Respondent took the Jagermeister product home with him on May 16, 2007, and presented it to his wife. Edith Balogh used the Jagermeister as a substitute for St. Hubertus, and while it was not as effective as St. Hubertus, the Jagermeister product did help to alleviate her stomach pain.

16. Respondent testified that he believed he was purchasing a medicinal product, not an alcoholic beverage, when he bought the two small bottles of Jagermeister. Respondent credibly explained that the reason he purchased the product was not for personal consumption, but for his wife's medicinal use.

17. Respondent testified that he no longer consumes alcohol. Edith Balogh, Respondent's wife of 54 years, confirmed that Respondent does not drink alcohol and has not consumed any for approximately 45 years.

18. Joe Howard's (Howard) testimony relating to Respondent's alleged admission that he would often purchase a "medicinal" product for his and his wife's consumption is not reliable. He did not make notes of the conversation, which occurred some eight months before the hearing. He offered conflicting testimony about who was present when the conversation occurred and was imprecise about whether Respondent admitted to regularly consuming Jagermeister or whether he

merely was admitting to intending to consume one of the bottles of the product purchased on May 16, 2007. Howard also failed to mention the alleged admission in the course of Petitioner's investigation.

19. The greater weight of the evidence supports the testimony of Respondent and his wife that Respondent does not consume alcohol. Therefore, there is insufficient evidence to believe that Respondent intended to consume any of the Jagermeister himself.

20. Although Respondent's motive for purchasing the Jagermeister product was for a medicinal purpose to alleviate his wife's chronic stomach pain, the product was not sold in a drug store as an over-the-counter medicinal product. The product was marketed and sold as an "alcoholic beverage" in a package store. The words on the label, "noble herb tea extract," were only written in German.

21. Respondent parked the school bus in front of the package store, entered the package store while in uniform, purchased an alcoholic beverage, took it back to his bus, and returned to the bus compound, all while on duty. Respondent's stated reason that he did not first return the bus, clock out, and then return to the package store in his own vehicle was because it was raining and he was in a hurry to get the product home to his wife, is unsatisfactory.

22. Respondent's effectiveness in the school system was impaired by purchasing the product while on duty and in uniform and returning with it on the bus to the compound. Respondent was in possession of alcohol under circumstances that would affect the efficient operation of the District's business or the safety of its employees and students or the public.

23. Petitioner has adopted disciplinary guidelines for transportation employees. Under the facts of this case, the proper penalty for Respondent's misconduct in this case is disciplinary action up to and including termination.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of these proceedings, pursuant to Section 120.569 and Subsections 120.57(1) and 1012.33(6)(a), Florida Statutes (2007),¹ and School Board Policy 1.80(6)(c).

25. As bus operator, Respondent is an "educational support employee," as defined by Subsection 1012.40(1)(a), Florida Statutes.

26. The superintendent of the District has the authority to recommend to the School Board that educational support employees be suspended and/or dismissed from employment. § 1012.27, Fla. Stat.

27. The School Board has the authority to terminate and/or

suspend without pay educational support employees.

§§ 1012.22(1)(f) and 1012.40(2)(c), Fla. Stat.

28. An educational support employee can only be terminated for the reasons set forth in the Collective Bargaining Agreement (SPALC), which governs these employees. § 1012.40(2)(b), Fla. Stat. According to the applicable Collective Bargaining Agreement, support employees can only be terminated for "just cause." SPALC at 7.09.

29. "Just cause" is not defined in the SPALC agreement nor does it provide for a progressive discipline plan. In the absence of some rule defining just cause, Petitioner has discretion (subject to challenge via a hearing) in setting standards which subject an employee to discipline. See Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2d DCA 1994).

30. In the case of support personnel, "just cause" may include, but is not limited to, misconduct in office, incompetence, gross insubordination, willful neglect of duty, or an act involving moral turpitude as such are defined by the State Board of Education rules. Lee County School Board v. Kehn, 2005 WL 428965 (Fla. Div. Admin. Hrgs.), citing Lee County School Board v. Simmons, 2003 WL 21673031 (Fla. Div. Admin. Hrgs.).

31. Prior cases before DOAH involving the Petitioner and support personnel have held that the Petitioner can construe "just cause" in the same manner as it is used in Section 1012.33, Florida Statutes (2006), for instructional staff. Most

recently in Lee County School Board v. Denson, Case No. 06-4995 (DOAH April 18, 2007) (Support employee recommended for termination for striking lawn maintenance worker), this tribunal held that misconduct, as defined by State Board of Education in Florida Administrative Code Rule 6B-4.009, applies to support personnel.

32. Florida Administrative Code Rule 6B-4.009 refers to Rule 6B-1.001 and Rule 6B-1.006 in defining misconduct. Florida Administrative Code Rule 6B-1.001 states that employees should be held to the highest degree of ethical conduct. Respondent's conduct violated Florida Administrative Code Rule 6B-1.001.

33. School Board Policy 5.37, Alcohol, Drug and Tobacco-Free Workplace, was promulgated pursuant to Section 440.102, Florida Statutes. The policy states, in pertinent part: "Employees are prohibited from using or possessing alcohol while in or on District property . . ." -- Policy 5.37 (2)(b). The policy further states, "Employees who violate paragraphs 2(a) and/or 2(b) shall be subject to disciplinary action up to and including termination." -- Policy 5.37(8).

34. Article 16 of the SPALC Agreement is entitled, "Alcohol and Drug Free Workplace." Section 16.01 provides:

No employee shall possess, consume or sell alcoholic beverages or . . . possess or use, on the job or in the workplace, any narcotic, drug, amphetamine, barbiturate, marijuana or any other controlled substance, as defined in the Controlled Substances Act (21 U.S.C.

812), and as further defined by regulations at 21 CFR 13001.11 through 1300.15, or by Florida Statutes, Chapter 893.

35. School Board Policy 5.33, Personal Business on School Time, states, "no employee may conduct personal business on school time except for emergencies approved by the principal or Superintendent." Policy 5.33(1).

36. Respondent admits that he brought an alcoholic beverage onto the school bus and placed it in his briefcase on the bus in violation of the above policy.

37. Respondent admits that he stopped at the San Carlos Lounge while on duty as a bus operator and purchased two bottles of Jagermeister. Respondent failed to advise the appropriate District personnel that he had conducted personal business on District time. Respondent was paid for his time while conducting personal business.

38. Petitioner has the burden of establishing just cause by a preponderance of the evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996).

39. Petitioner has established by a preponderance of the evidence that Respondent committed a serious violation of School Board Policies 5.37 and 5.33, and Section 16.01 of the SPALC Agreement. These violations constitute just cause for termination.

40. Respondent attempted to mitigate his conduct by testifying that he purchased the Jagermeister for his ill spouse, who desperately needed the product to settle her stomach

prior to their departure for Europe. Respondent also testified, on cross-examination, that he had previously attempted to purchase the preferred product, St. Hubertus, on weekends or after hours at various stores throughout Lee County.

41. Respondent wife, Edith Balogh, testified that she has been taking St. Hubertus for ten to 15 years and stated that she purchased the product in Hungary and that she was aware that it had alcohol in it. She testified that she possibly ran out in February, March or April and that Respondent had been attempting to purchase the product since that time. In addition, Mrs. Balogh admitted that she had consumed Jagermeister prior to May 2007 and that she was aware that it was purchased at a liquor store and not a pharmacy.

42. Respondent testified proudly regarding the length of his marriage and the fact that all he was concerned about was his wife's health. Respondent attempted to describe his wife's situation as dire and that it was absolutely necessary for him to purchase the Jagermeister on the date and time in question, even though his wife had been without St. Hubertus for as long as three months prior to the incident in question. Respondent's testimony regarding his wife's condition and his mitigation regarding the purpose for purchasing the Jagermeister is credible, but not exculpatory.

43. Respondent violated School Board Policy 7.04--Driving

and Replacing District Vehicles. Policy 7.04(3) states,

"Employees who drive District-owned, leased, or rented vehicles shall:

(a) Use the vehicle strictly for approved District business.

(b) Operate the vehicle in accordance with all applicable laws.

* * *

(f) Prohibit anyone from driving a District vehicle while impaired (under the influence of alcohol, drugs, prescribed medication, etc.) or in violation of the Florida traffic laws."

44. Respondent's explanation of his conduct, even though credible, only explains why he may have chosen to purchase alcohol while on District time and bring it on a District school bus. It does not excuse his behavior, nor provide a basis to recommend to Petitioner that the District must continue to employ Respondent.

RECOMMENDATION

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

Recommended that Petitioner, Lee County School Board enter a final order dismissing/terminating Respondent, Julius Balogh, from his position as an employee with the Lee County School District.

DONE AND ENTERED this 18th day of March, 2008, in
Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
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this 18th day of March, 2008.

ENDNOTE

1/ All references to Florida Statutes are to Florida Statutes
(2007), unless otherwise indicated.

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.