

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,            )  
  )  
          Petitioner,                            )  
  )  
vs.    )    Case No. 10-1570  
  )  
JEROME HEAVEN,                             )  
  )  
          Respondent.                         )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 27 and 28, 2010, in Bradenton, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Martin, Esquire  
Manatee County School Board  
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For Respondent: Carl R. Hayes, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether there is just cause to terminate Respondent's employment as a school bus driver.

PRELIMINARY STATEMENT

On March 1, 2010, Petitioner, Manatee County School Board (School Board), issued an Administrative Complaint against Respondent, Jerome Heaven (Mr. Heaven), alleging that Mr. Heaven violated Subsection 1012.67, Florida Statutes (2009)<sup>1</sup>; Florida Administrative Code Rules 6B-4.009(1)(b), 6B-4.009(3), 6B-4.009(4), and 6B-1.006(3)(e); and School Board of Manatee County Policy 6.2(2)(b). Mr. Heaven requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the final hearing.

At the final hearing, the School Board called the following witnesses: Debra Horne, Barry Murray, Teri Davis, Chuck Banks, Franklin Farmer, Barbara Pelletier, and Terry Palmer. Petitioner's Exhibits 1 through 6, 8, 10, 12A through 12F, 13, and 14 were admitted in evidence. Mr. Heaven testified in his own behalf and offered no exhibits for admission in evidence.

The three-volume Transcript was filed on June 7, 2010. Petitioner filed its Proposed Recommended Order on June 17, 2010. As of the date of this Recommended Order, Mr. Heaven has filed no post-hearing submittals.

FINDINGS OF FACT

1. Mr. Heaven is employed by the School Board as a school bus operator for the Manatee County School District (School District).

2. Mr. Heaven's direct supervisor is Teri Davis, the area coordinator, and, Ms. Davis' immediate supervisor is Terry Palmer, the director of transportation.

3. In the 2009-2010 school year, Mr. Heaven was assigned a bus route, which included the transportation of disabled students. Barry Murray was assigned to Mr. Heaven's bus as an attendant to assist in maintaining conduct on the bus and in getting the disabled students on and off the bus.

4. While assigned to Mr. Heaven's bus, Mr. Murray observed Mr. Heaven looking at the female students in a manner which Mr. Murray perceived to be inappropriate. Mr. Murray felt that Mr. Heaven was adjusting his rear view mirror so that he could look at the female students. On two different occasions, he observed Mr. Heaven stop the bus at a red light, get up out of his seat, walk to the back of the bus, go back to his seat, and continue driving. He heard Mr. Heaven ask female students their names, and Mr. Murray thought that this was inappropriate because the student's names were already written down on a passenger list, which Mr. Heaven had. Mr. Murray heard Mr. Heaven ask one female student when her father would be home.

5. Mr. Murray cautioned Mr. Heaven about his behavior. Mr. Murray felt that Mr. Heaven was still behaving inappropriately after he was cautioned by Mr. Murray. Mr. Murray contacted Ms. Davis about his concerns. Ms. Davis was scheduled to do a routine evaluation of Mr. Heaven on January 7, 2010, by riding with him on his route and observing. She decided to see for herself if there was any inappropriate behavior while she was doing her routine evaluation.

6. On January 7, 2010, Ms. Davis rode in Mr. Heaven's bus for Mr. Heaven's routes that day. While Mr. Heaven was parked at school waiting for his students, Ms. Davis saw him watch an attractive female student walk in front of the bus. She observed him watching female students as they entered and exited the bus. She observed Mr. Heaven looking at a female student in the rearview mirror of the bus. Ms. Davis felt that the looks that Mr. Heaven gave the female students were inappropriate.

7. During her evaluation trip on January 7, 2010, Ms. Davis watched as Mr. Heaven got out of the bus at a bus stop where a female passenger was exiting. When Ms. Davis questioned Mr. Heaven about his leaving the bus, he did not give a cogent explanation.

8. Both Mr. Murray and Ms. Davis observed female students put books in front of their faces and slip down into their seats, when Mr. Murray and Ms. Davis thought that Mr. Heaven was

looking at the students. While Ms. Davis was on the evaluation ride, one student asked to come and sit next to Ms. Davis.

Ms. Davis felt that the student was changing her seat to avoid Mr. Heaven's gaze.

9. No students testified at the final hearing concerning Mr. Heaven's behavior on the bus. There was no direct testimony that the students felt that Mr. Heaven was looking at them inappropriately.

10. Mr. Heaven had a plausible explanation for the actions that Ms. Davis and Mr. Murray observed. Mr. Heaven would get up at red lights sometimes in order to stretch his legs. His bus route was five hours long, and he had sustained an injury to his back and knee and needed to stretch his legs and back. He got off at the bus stop where a female student exited because he noticed an unfamiliar truck parked at the bus stop, and the female was headed for the truck. When he got out, he recognized the passenger in the truck. Mr. Heaven would adjust his rear view mirror at times when the mirror would move from its normal setting because of a bump in the road. Mr. Heaven watched the students enter and leave the bus because he felt that he needed to know who got on and who got off the bus. Mr. Heaven asked a female student when her father was going to be home because there was an antique car sitting in the student's front yard,

and he wanted to ask her father about the car. Mr. Heaven's testimony is credited.

11. On January 14, 2010, Ms. Davis contacted Mr. Palmer and told him what she had observed. Mr. Palmer told Ms. Davis to contact the Office of Professional Standards (OPS), which she did. Ms. Davis was instructed to send Mr. Heaven home. Ms. Davis called Mr. Heaven and told him that there was an investigation being initiated and that she would contact him later in the day and tell him what to do next.

12. It is customary in the School District to assign employees who are under investigation a temporary alternative placement pending the investigation. In the case of bus drivers, the temporary alternative placement is washing substitute buses at the maintenance department. It should be noted, however, that the School Board contracted the washing of the regular buses to an independent contractor so that washing buses was not a routine part of the duties of a bus driver.

13. Ms. Davis called Mr. Heaven on January 14, 2010, to let him know that he would be assigned to washing buses. Their recorded conversation is as follows:

Heaven: Hello.

Davis: Hey, Jerome, this is Terri Davis. I just got with Mr.--spoke with Mr. Palmer. And he said to tell you tomorrow morning you're to report to, no earlier than 7:30, at 7:30 go over and report into at the guys

at maintenance. Okay. And you're to work your--

Heaven: For what?

Davis: To wash buses or do whatever they ask you to do.

Heaven: No, ma'am, I was not hired to do that.

Davis: Then you need to call Mr. Palmer and talk with him, because that is what he said.

Heaven: Mr. Palmer can call me.

Davis: Well, you're being assigned tomorrow to--you're supposed to be here at 7:30 to be at maintenance to wash buses. And--

Heaven: I was hired to drive buses. Thank you.

Davis: You need to be there. Jerome?  
Hello.

14. Ms. Davis informed Mr. Palmer that Mr. Heaven had refused to wash buses. On January 14, 2010, Mr. Palmer called Mr. Heaven and told him that his refusal to Ms. Davis to wash buses was unacceptable and was considered insubordination. Mr. Palmer told Mr. Heaven to report to Mr. Palmer's office the next morning at 7:30 a.m. to see how they would proceed. Mr. Heaven wanted to know why he was being investigated, and Mr. Palmer said until the investigation was over that there was nothing that he could tell Mr. Heaven. Mr. Heaven then said, "Hello. Hello. Hello," and the telephone went dead.

15. On January 15, 2010, Mr. Heaven went to the human resources office of the School District. He did not have an appointment, but spoke with C.V. Banks, Jr., who is the assistant director of human resources. Mr. Heaven told Mr. Banks that he was a bus driver and had been directed to wash buses. Mr. Heaven said that he had told staff at transportation that he was not hired to wash buses. Mr. Heaven did not tell Mr. Banks that he had a physical condition that would be aggravated by washing buses. Mr. Banks advised Mr. Heaven to contact Mr. Heaven's supervisor.

16. Mr. Heaven had sustained an injury to his leg, back, and arm during a fall from his bus in early December 2009. From December 7, 2009, to December 17, 2009, Mr. Heaven had been placed on restrictions and was not allowed to drive his bus. After he was released to return to work on December 17, 2009, he continued to see his doctor and to get physical rehabilitation therapy. After each doctor visit, Mr. Heaven would give the School District's risk management department a copy of the doctor's report.

17. Mr. Heaven had a regularly scheduled appointment to see his doctor on January 15, 2010, for his injuries. After the visit on January 15, 2010, the doctor again placed Mr. Heaven on restrictions so that he could not drive his bus. The restrictions were a result of some pain medication that the



doctor had prescribed and the need for Mr. Heaven to wear a knee brace. The doctor also referred Mr. Heaven to an orthopedic specialist. Mr. Heaven took the doctor's report to the risk management department. As a result of the doctor's report, Mr. Heaven was placed on approved leave for January 15, 2010.

18. On January 15, 2010, Mr. Heaven called OPS and spoke to Debra Horne, an investigator for OPS. Ms. Horne told Mr. Heaven that he was to report to the maintenance department on Tuesday, January 19, 2010, to wash buses.<sup>2</sup>

19. At 7:00 a.m. on January 19, 2010, Mr. Heaven reported to Frank Farmer, a mechanic at the maintenance department. Mr. Farmer told Mr. Heaven that he was assigned to wash buses. Mr. Heaven said that he was not washing buses in his condition. Mr. Farmer told Mr. Heaven to go and see Mr. Palmer.

20. After speaking with Mr. Farmer, Mr. Heaven went to see Mr. Palmer. When he got to the transportation department, Mr. Heaven spoke with Barbara Pelletier, a dispatcher. He told Ms. Pelletier that he was not going to wash buses in his condition.

21. After speaking with Ms. Pelletier, Mr. Heaven went to Mr. Palmer's office. Mr. Heaven wanted to know if Mr. Palmer was going to make him wash buses in the condition that he was in. Mr. Palmer told Mr. Heaven that the staff at risk management had concluded that Mr. Heaven's condition would not

preclude him from washing buses, and Mr. Palmer directed Mr. Heaven to wash buses while the investigation was pending. Mr. Heaven stated that he was not going to "further [his] injuries by washing buses." Mr. Heaven left Mr. Palmer's office and did not return to work that day.

22. During their conversation on January 19, 2010, Mr. Heaven alleges that Mr. Palmer tried to push him out of the office. Mr. Palmer denies the allegation and states that he was trying to shake Mr. Heaven's hand.

23. Mr. Heaven called OPS on January 19, 2010, and left a message for the OPS investigator to call him. On January 20, 2010, Mr. Heaven did not report to work or call to report his absence, but instead, went to OPS and left a message for the OPS investigator to call him. The OPS investigator called Mr. Heaven on January 20, 2010. Mr. Heaven told the investigator that Mr. Palmer had pushed him and that he wanted OPS to call law enforcement. The investigator declined to call law enforcement, but told Mr. Heaven that he would need to notify the police, if he wanted to press charges against Mr. Palmer.

24. On January 21, 2010, Mr. Heaven did not come to work and did not call in to report his absence. He did go to see his doctor for a regularly scheduled appointment. The doctor restricted Mr. Heaven from using his right knee, which precludes

him from driving a school bus. Mr. Heaven was sent home for the remainder of the day and was credited with four hours of approved leave. No evidence was presented as to the amount of time that this restriction was in place.

25. January 22, 2010, was a Record Day, and none of the bus drivers worked that day.

26. On Monday, January 25, 2010, Mr. Heaven went to the transportation office, where he was directed to take a random drug test. After returning from taking the drug test, Mr. Heaven was told to report to risk management for light duty. The light duty consisted of shredding papers and making up folders.

27. School Board of Manatee County Policy 6.11(12)(c) provides:

(c) Involuntary Termination:

Any employee of the School Board may be terminated from employment, for just cause, including, but not limited to, immorality, misconduct in office, incompetence, gross insubordination, willful neglect of duty, drunkenness, or conviction of any crime involving moral turpitude, violation of the Policies and Procedures manual of the School District of Manatee County, violation of any applicable Florida statutes, violation of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida.

28. School Board of Manatee County Policy 6.2(2)(b) provides:

(b) Disciplinary Action

Unauthorized leave shall constitutes willful neglect of duty and misconduct and therefore, may result in the initiation of dismissal procedures, loss of salary or such disciplinary action as may be deemed appropriate. Employees will not receive pay for unauthorized leave.

1. Any employee who is willfully absent from duty without leave shall forfeit compensation for the period of absence and his/her contract shall be subject to termination by the school board. Any willful absence from work without notice may be considered grounds for termination.

2. Any absence from work without leave or excessive absence with notice may be considered grounds for termination.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

30. Petitioner has the burden to establish the allegations in the Administrative Complaint by a preponderance of the evidence. McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2nd DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990). A preponderance of the evidence is the greater weight of the evidence or evidence that more likely than not tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

31. The School Board has alleged that Mr. Heaven is guilty of misconduct in office, taking unauthorized leave, absence without leave, a violation of Florida Administrative Code Rule 6B-1.006(3)(e), gross insubordination, and incompetence. Subsection 1012.40(2)(a), Florida Statutes, provides that educational support employees, such as bus drivers, may be terminated for reasons set forth in the collective bargaining agreement<sup>3</sup> or by school district rule if no collective bargaining agreement exists. School Board of Manatee County Policy 6.11(12)(c) provides that a School Board employee may be terminated for misconduct in office, incompetence, gross insubordination, a violation of the School Board policies, a violation of Florida Statutes, and a violation of the Code of Ethics.

32. Section 1012.67, Florida Statutes, provides:

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

33. School Board of Manatee County Policy 6.2(2)(b) provides that an employee may be disciplined for taking unauthorized leave. Such discipline may include termination, loss of salary, or other such disciplinary action as may be deemed appropriate.

34. Florida Administrative Code Rule 6B-4.009 provides criteria for suspension and dismissal actions against instructional personnel and is helpful in defining grounds for dismissal of educational support employees. One of the bases for dismissal is gross insubordination. The definition of gross insubordination set forth in Florida Administrative Code Rule 6B-4.009(4) provides that "[g]ross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority."

35. Misconduct in office is defined in Florida Administrative Code Rule 6B-4.009(3) as "a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system." Florida Administrative Code Rule 6B-1.006(3)(e) provides that an individual "[s]hall not intentionally expose a student to unnecessary embarrassment or disparagement."

36. Florida Administrative Code Rule 6B-4.009(1) defines incompetency as "inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity." The

rule further defines incapacity to include "lack of adequate physical ability."

37. The School Board claims that Mr. Heaven was insubordinate because he refused to wash school buses while being investigated by OPS. When Mr. Heaven told Ms. Davis and Mr. Palmer that he was not going to wash the school buses on January 14, 2010, he did not tell them that he had a physical condition that would be aggravated by washing the buses. On January 15, 2010, Mr. Heaven visited the department of human resources and advised the assistant director that he was not hired to wash buses. However, he did visit his physician on January 15, 2010, and was placed on the restriction of not driving a school bus because of the medication that he was taking and the knee brace he was wearing. Because of the doctor's report, Mr. Heaven was granted leave for January 15, 2010.

38. When Mr. Heaven reported to work on January 19, 2010, he informed Mr. Farmer, Mr. Palmer, and Ms. Pelletier that he thought that washing buses would aggravate his condition and would be harmful to him. Thus, at this time, Mr. Heaven did put School Board personnel on notice that he had a physical condition that may preclude him from washing buses. The issue becomes at this junction whether it was reasonable for the School Board to order Mr. Heaven to wash buses. Based on the

totality of the circumstances, it was not reasonable for the School Board to order Mr. Heaven to wash school buses given his medical history.

39. A little over a month before the order to wash buses occurred, Mr. Heaven had sustained a work-related injury to his back, knee, and arm. He was out of work for ten days. He continued to see his physician and therapist for his injuries. He went to see his physician on January 15, 2010, for an appointment which had been scheduled well in advance of the initiation of the investigation of Mr. Heaven. The doctor placed Mr. Heaven on restrictions because of the knee brace and pain medication. The School Board argues that the doctor did not restrict Mr. Heaven from washing buses, but there is no evidence whether the doctor knew that washing buses would be considered a part of Mr. Heaven's duties. In fact, the evidence that the School Board hired a contractor to wash the regular buses supports the contention that washing school buses was not a routine duty of a bus driver. Additionally, when Mr. Heaven returned to his physician on January 21, 2010, the doctor made it clear that Mr. Heaven was not to use his knee.

40. The School Board has failed to demonstrate by a preponderance of the evidence that Mr. Heaven is guilty of gross insubordination.



41. The School Board has alleged that Mr. Heaven is guilty of misconduct and a violation of Florida Administrative Code Rule 6B-1.006(3)(e) for his inappropriate conduct toward female students. Ms. Davis and Mr. Murray felt that Mr. Heaven was looking at various body parts of the female students in an inappropriate manner and that he was stopping the school bus to look at the female students. Mr. Heaven's explanation of his conduct presents innocent and plausible rationales for his actions. No students were called to testify that they felt uncomfortable by Mr. Heaven's actions. No complaints were made by students concerning Mr. Heaven's conduct. The School Board has failed to establish that Mr. Heaven is guilty of misconduct or a violation of Florida Administrative Code Rule 6B-1.006(3)(e).

42. The School Board has failed to demonstrate that Mr. Heaven should be terminated for incompetency. The evidence established that for an unspecified number of days that Mr. Heaven could not drive a bus because of the results of a workers' compensation injury. No evidence was produced to show that Mr. Heaven's injuries were permanent or temporary. It is doubtful that the School Board terminates every employee who suffers an injury.

43. The School Board has established by a preponderance of the evidence that Mr. Heaven was absent without leave on

January 19 and 20, 2010. He left work without permission on January 19, 2010, and did not come to work on January 20, 2010, or provide notice to the appropriate personnel at the School District that he was not coming to work. Thus, the School Board has established that Mr. Heaven has violated Section 1012.67, Florida Statutes, and is subject to discipline pursuant to School Board of Manatee County Policy 6.2(2)(b). Termination of employment is not the only discipline which may be warranted for being absent without leave. Given the circumstances of this case, termination is not warranted. However, some discipline is warranted. Such discipline should be a suspension without pay for the time which Mr. Heaven has been suspended as of the date of this Recommended Order and a forfeiture of any payment for the days he was absent without authorized leave.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Mr. Heaven is not guilty of misconduct, gross insubordination, and incompetency; finding that he is guilty of being absent without leave; suspending him without pay for the time that he has been suspended as of the date of this Recommended Order; and requiring forfeiture of any payments to Mr. Heaven for the days he was absent without authorized leave.

DONE AND ENTERED this 21st day of July, 2010, in  
Tallahassee, Leon County, Florida.

*Susan B. Harrell*

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Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of July, 2010.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

<sup>2/</sup> Monday, January 18, 2010, was a school holiday; therefore, Mr. Heaven was not required to work.

<sup>3/</sup> No evidence was presented as to the existence of a collective bargaining agreement.

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.