

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VOLUSIA COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 10-4490
)
TAMIKA WHITAKER,)
)
 Respondent.)

)

RECOMMENDED ORDER

A final hearing was conducted in this case via video teleconferencing on September 20, 2010, with sites in Daytona Beach and Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Erin G. Jackson, Esquire
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& Hearing, P.A.
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For Respondent: Marc Aaron Sugerman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent's employment should be terminated by Petitioner.

PRELIMINARY STATEMENT

In a letter dated June 17, 2010, Greg Akin, Director of Student Transportation Services of Volusia County School District (the "District") advised Respondent, Tamika Whitaker (Respondent), that she would be terminated effective the date of the letter. The letter referenced a Statement of Charges signed by Margaret A. Smith, D.Ed., Superintendent of Schools, which charged Respondent with failure to maintain a safe atmosphere for students by using a cell phone to create and send text messages while operating a school bus transporting students; talking on a cell phone while operating a school bus; engaging in activity which caused her view of the road to be obscured while operating a school bus with students on board; and parking a school bus at an unauthorized location, while on duty and in paid status, for an extended period of time while talking on a cell phone. The Statement of Charges alleges that these acts constitute a violation of School Board Policy 418, and Student Transportation Services Responsibility Procedures Nos. 2.6 and 3.24. Superintendent Smith also informed Respondent in the Statement of Charges that she intended to recommend the termination of Respondent's employment to the Petitioner Volusia County School Board (School Board).

Mr. Akin's letter informed Respondent of her right to contest the termination through using the grievance procedure or by requesting a hearing. In a letter dated June 20, 2010, Respondent requested an administrative hearing. On or about July 1, 2010, the School Board referred the case to the Division of Administrative Hearings.

A Notice of Hearing on was issued on July 16, 2010, scheduling the hearing for September 20, 2010. The case was transferred to the undersigned and an Amended Notice of Hearing was issued on September 17, 2010, notifying the parties that the hearing would be held by video teleconference. The case was heard as scheduled.

At hearing, Petitioner presented the testimony of Patricia Rush, Greg Akin, and Tamika Whitaker. Petitioner offered Exhibits 1, 2, 4-10, 12, 19, 20, 24, and 27, which were admitted into evidence.

Respondent testified on her own behalf and presented the testimony of Regina Hayes and Joseph Zaffuto. Respondent offered Exhibits 1 through 6, which were admitted into evidence.

A one-volume Transcript was filed on October 15, 2010. The parties filed a Joint Motion for Extension of Time for Filing Proposed Recommended Orders, which was granted.

The parties timely filed Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this proceeding, the School Board was the constitutional entity authorized to operate, control, and supervise the public schools in Volusia County, Florida.

2. Respondent, Tamika Whitaker, began working as a bus driver for the School Board in 2002. At all times relevant to the allegations in the Superintendent's Statement of Charges, Respondent was assigned to the bus route of Riverview Learning Center.

3. In order to be employed as a school bus operator, Respondent had to undergo sixty hours of initial training, consisting of thirty-two hours of classroom training reviewing rules, policies, and procedures, and twenty-eight hours of training on the school bus.

4. Respondent was also required to obtain a Class B commercial driver's license (CDL) with a passenger endorsement. This allows the bus operator to drive a bus that is approximately 40 feet long and 10 feet wide, weighs 24,000 to 26,000 pounds unloaded, and can carry approximately 77 passengers.

5. School bus operators are required to know and abide by all federal and state laws, rules, and regulations pertaining to operating school buses, as well as all policies, practices, and procedures of the School Board. During her initial training, Respondent was provided a copy of the School Board's Student Transportation Services Procedural Manual and was trained regarding the procedures therein. Each time a change is made to the Manual, bus drivers are provided copies of the changes.

6. In addition to her initial training, pursuant to Florida Department of Education rules, Respondent was required to complete eight hours of recertification training every year. The recertification training is designed to educate transportation staff on any new laws, rules, and regulations, and on policies, practices, and procedures of the School Board.

7. At the March 2010 recertification training, changes to U.S. Department of Transportation's interpretation of federal regulations were discussed. Under the revised interpretation, texting while driving would be prohibited.^{1/}

8. On May 4, 2010, Respondent's afternoon bus route was completed approximately 40 minutes later than usual. Because such a delay is unusual, the School Board investigated the delay pursuant to standard practices. This included review of the GPS report for the bus Respondent was driving, review of the video

for the bus, and inquiry to the Student Transportation Services dispatch office.

9. Greg Akin is the Director of Student Transportation Services for the School Board. He asked Patricia Rush, lead driver at the New Smyrna terminal, to review bus video of Respondent from her May 4, 2010, route to determine the cause for Respondent's delay.

10. By accident, Ms. Rush watched a video from a different day, and saw actions of Respondent which Ms. Rush determined to be unsafe. Specifically, Ms. Rush described what she saw, "driving with no hands . . . driving with her elbows . . . using the cellular telephone . . . drinking out of a mug. There were students on board. I was just kind of shocked that she was doing that."

11. Ms. Rush's concern regarding the use of the mug was that it was a large mug and appeared to Ms. Rush to block Respondent's face when she raised it to drink out of it while driving.

12. Ms. Rush reported what she saw on the video to William Ralys, an area manager, who asked her to continue to review bus videos of Respondent and to archive what she saw.

13. Ms. Rush reviewed the bus video of Respondent's routes on May 4, 2010, and observed Respondent pull over for a long period of time and use her cellular telephone. She also viewed

the bus video of Respondent's routes on May 6, 2010, and observed Respondent using her cellular telephone while operating the bus with students on board.

14. An internal investigation was conducted during which bus videos of several days of Respondent's routes were viewed by Mr. Akin, Assistant Director of Student Transportation Services Chip Kent, and by Mr. Ralys. Mr. Akin wrote a detailed chronology of what he observed Respondent doing while operating the school bus on April 30, 2010; May 3, 2010; and May 4, 2010.

15. Bus video of Respondent's routes shows Respondent placing a call and talking on her cellular telephone while operating a school bus at approximately 4:00 p.m. on May 3, 2010. Respondent's cellular telephone records show she sent and received numerous text messages during her routes on that date.^{2/}

16. Bus video of May 4, 2010 shows Respondent checking her cellular telephone, placing a call, and talking on the phone while operating the school bus. At approximately 3:32 p.m., the video shows Respondent talking on the phone regarding a personal matter. She told the person to whom she was speaking to "hold on, let me turn, hold on." Respondent then lowered her cellular telephone to her lap and waved out the window. Respondent then resumed her telephone conversation after turning.

17. Also on May 4, 2010, the bus video of Respondent shows, and Respondent acknowledged, that she spent approximately 42 minutes stopped at a location, the library, which is not part of her route assignment. During this time, she again used her cell phone for talking and messaging for personal reasons. Students were not on the bus at this time, but Respondent was still "on the clock."

18. Respondent's cellular telephone records for May 4, 2010, show that she sent and received numerous text messages while on her routes. Bus video for May 6, 2010, and her cellular telephone records, show Respondent using her cellular telephone to read and type text messages while operating the school bus with students on board, as well as to make phone calls.

19. Bus video shows Respondent drinking from a large pink mug or container on multiple days while operating the school bus. Respondent has used this large mug for seven years and had not previously been disciplined for using it, nor had anyone told her to stop using it while driving her routes.

20. Students on Respondent's bus were aware of her text messaging and complained to her about it. The bus video of May 6, 2010, shows Respondent holding her cellular phone in one hand while driving students. She appears to be reading incoming texts and texting while driving. She then pulls over to text

message, at which time the students complain. One student said "We gotta pull over so you can text." He also said, "Oh, this is great, and "Drop me off . . . I can walk faster." Another student said to Respondent, "You can text and drive at the same time, I don't mind." The first student then offered to text message for Respondent, but she retorted, "You can't spell."

21. Respondent presented evidence of another School Board employee, Sandra McDavid, a bus attendant, who was disciplined for not properly securing seat belts to wheel chair students and for talking on a cellular phone while operating the wheel chair lift while loading a wheel chair student. Ms. McDavid was suspended without pay for 20 days. Respondent argues that Ms. McDavid's case is similar to Respondent's, yet Respondent is receiving much harsher disciplinary action.^{3/}

22. In a letter dated May 7, 2010, the Assistant Director of Student Transportation Services notified Respondent that her driving duties were temporarily suspended pending the outcome of an investigation.

23. On June 17, 2010, Mr. Akin sent a letter to Respondent notifying her that she would be recommended for termination from employment. The letter was accompanied with the Statement of Charges signed by Superintendent Smith.

24. At hearing, Mr. Akin noted that Respondent's case "is the first time [he] ever [saw] a case that involves this many issues on repeated days."

25. On June 20, 2010, Respondent requested a hearing on her termination which gave rise to this proceeding.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Sections 120.569, 120.57(1), 120.65(7) Florida Statutes (2010).

27. The superintendent of each School District has the authority to make recommendations for dismissal regarding school employees pursuant to Subsection 1012.27(5), Florida Statutes (2010).

28. The School Board has the authority to dismiss school board employees pursuant to Subsections 1001.42(5) and 1012.22(1)(f), Florida Statutes (2010).

29. The School Board has the burden of proving that it has just cause to discipline Respondent and that Respondent's employment should be terminated. The standard of proof is a preponderance of the evidence. See, e.g., McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2nd DCA 1996); Sublett v. Sumter County School Board, 644 So. 2d 1178, 1179

(Fla. 5th DCA 1995); Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

30. Article 6 of the collective bargaining agreement between the School Board and the employee's union is entitled "Discipline and Discharge" and provides that an employee may be disciplined only for just cause. It further provides that under normal circumstances, the School Board will follow the tenets of progressive discipline in the administration of its disciplinary standards.

31. Section 1020.23(1), Florida Statutes, is entitled "School District Personnel Policies," and authorizes district school boards to adopt rules governing personnel matters. Florida Administrative Code Rule 6A-3.0171 requires school districts to adopt a school board policy prohibiting the use of a cellular telephone by any school bus operator while actively driving the bus.

32. In the Statement of Charges, Superintendent Smith charges Respondent with the following:

A. The Respondent has failed to maintain a safe atmosphere for students by:

1. Using a cell phone to create and send text messages while operating a school bus transporting students,
2. Talking on a cell phone while operating a school bus,

3. Engaging in activity which caused her view of the road to be obscured while operating a school bus with students on board,

4. Parking school bus at an unauthorized location, while on duty and in paid status, for an extended period of time while talking on a cell phone.

These acts violated School Board Policy 418, Standards of Conduct, and Student Transportation Services Responsibility Procedure No. 2.6, Cellular Telephone/Instant Messaging/PTT (Push-To-Talk) Direct Connect Devices and Student Transportation Services Operations Procedure No. 3.24, Conformance to Route Schedules.

33. Student Transportation Services Responsibility

Procedure No. 2.6 reads in pertinent part as follows:

CELLULAR/MOBILE COMMUNICATION PROCEDURES:

1. Bus operators and bus attendants are not permitted to use cellular telephones, including hands-free devices, "Bluetooth" enabled headsets, instant messaging, PTT Direct Connect mobile communication devices, headphones, tape recorders, and/or other devices while on duty on a Volusia County school bus.

34. The preponderance of the evidence establishes that Respondent violated Student Transportation Services Responsibility Procedure No. 2.6 in that she repeatedly used a cellular device on the school bus she was operating when students were present and while driving when students were not present. Thus, Petitioner has proven that Respondent failed to maintain a safe atmosphere for students by using a cell phone to

create and send text messages while operating a school bus while transporting students as charged.

35. Student Transportation Services Operations Procedure No. 3.24, is entitled "Conformance to Route Schedules" and requires school bus drivers to "drive the routes as printed on the official schedule."

36. The preponderance of the evidence establishes that Respondent made a lengthy stop at a location which was not part of her route and while on duty. Thus, Petitioner has proven the charge that Respondent parked a school bus at an unauthorized location while on duty and in full paid status, for an extended period of time while talking on a cell phone, in violation of Procedure No. 3.24.

37. The Statement of Charges alleges that Respondent engaged in activity which caused her view of the road to be obscured while operating a school bus with students on board. This charge references Respondent's frequent use of a large pink mug while driving which, when lifted to drink, appears to obstruct her view. At hearing, Petitioner's witnesses referenced Student Transportation Services Operations Procedure No. 3.22(7) concerning the prohibition of eating or drinking on the school bus.

38. Respondent has engaged in this behavior for seven years, with no admonitions from her supervisors. Moreover, this Procedure number was not specifically referenced in the Statement of Charges. It is concluded that Petitioner did not establish by a preponderance of the evidence that Respondent engaged in activity which caused her view to be obscured while operating a school bus with students on board.

39. The Statement of Charges alleges that Respondent violated School Board Policy 418, Standards of Conduct. However, while the Procedure Manual for School Bus Operators and Bus Attendants is in evidence, School Board Policy 418 is not in evidence. Thus, it cannot be concluded that Respondent violated this standard of conduct.

40. The only remaining issue is the severity of the discipline. Progressive discipline was not used in this case. Student Transportation Services Orientation Procedure No. 1.5 sets forth three "levels" of disciplinary cases. Level three is the most severe and is defined as "cases of alleged misconduct wherein major violations of law . . . School Board Policy/ Procedure are alleged to have occurred, and if substantiated, the level of discipline would rise to the level of unpaid suspension or termination of the employee." Examples include committing fraud or stealing School Board property (such as claiming time worked for time spent at an unauthorized location

while using a cellular telephone for personal reasons), and major violations of School Board Policy or Procedures.

41. Respondent's conduct constitutes a major violation of School Board Policy in that it endangered students on the bus and people in other vehicles on the road.

RECOMMENDATION

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

RECOMMENDED:

That the Volusia County School Board enter a final order terminating Respondent's employment.

DONE AND ENTERED this 3rd day of December, 2010, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of December, 2010.

ENDNOTES

1/ Petitioner's witnesses described this as a change in federal law. However, Petitioner's Exhibit 27 is a communication from the U.S. Department of Transportation regarding the interpretation of Federal Regulation 49 C.F.R. 390.17. This regulatory interpretation answers the question, "Do the Federal Motor Carrier Safety Regulations prohibit "texting" while driving a commercial motor vehicle in interstate commerce?" The regulatory guidance letter answers this question as follows:

Yes. Although the current safety regulations do not include an explicit prohibition against texting while driving by truck and bus drivers, the general restriction against the use of additional equipment and accessories that decrease the safety of operation of commercial motor vehicles applies to the use of electronic devices for texting.

2/ The complete cellular telephone records are not in evidence. Notably, there are references to pages of calls from the cellular telephone records in Petitioner's Proposed Recommended Order, which are not in evidence.

3/ Respondent presented evidence regarding other employees who, she argues, committed similar violations but who received less harsh discipline. However, the evidence regarding these other employees was not competent evidence and, further, is not sufficient in and of itself to support findings of fact concerning these other employees. See § 120.57(1)(c), Fla. Stat.

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.