

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 10-8915
)
LUIS LOMONTE,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 1 and 2, 2010, in Fort Myers, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Dodig, Jr., Esquire
School District of Lee County
2855 Colonial Boulevard
Fort Myers, Florida 33966

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

STATEMENT OF THE ISSUE

Whether Petitioner has established just cause to terminate Respondent as an educational support employee.

PRELIMINARY STATEMENT

On August 3, 2010, James W. Browder, Ed.D., superintendent for the School District of Lee County (School District), issued a Petition for Termination (Petition) against Respondent, Luis Lomonte (Mr. Lomonte). The Petition recommended that Mr. Lomonte's employment as a bus driver be terminated for alleged violations of section 1012.33(1)(a), Florida Statutes (2009)^{1/}; Florida Administrative Code Rule 6B-4.009(3); and Lee County School Board Policies 5.02, 5.03, and 5.29.

On August 6, 2010, Mr. Lomonte requested an administrative hearing on the Petition pursuant to Article 7, Section 7.103 of the Collective Bargaining Agreement between the School District and the Support Personnel Association of Lee County (SPALC).

On August 31, 2010, Petitioner, Lee County School Board (School Board), voted to suspend Mr. Lomonte without pay pending the receipt of the Recommended Order from the Administrative Law Judge.

On September 7, 2010, Mr. Lomonte's request for a hearing was filed with the Division of Administrative Hearings, and an Initial Order was issued. The case was originally assigned to Administrative Law Judge Susan B. Harrell, and a final hearing was set for November 2 and 3, 2010. The School Board filed for a continuance of the hearing, and it was rescheduled for

December 1 and 2, 2010. The case was transferred to Administrative Law Thomas P. Crapps to conduct the final hearing.

The parties entered into a Joint Pre-hearing Stipulation, stipulating to certain facts contained in Section E of the Joint Pre-hearing Stipulation filed in this case. Those facts have been incorporated into this Recommended Order to the extent relevant.

At the final hearing, the School Board called Christine Christensen; D.T., a minor student; and Charles B. Dailey as its witnesses and presented the deposition testimony of H.J., J.S., A.S., D.P., and T.J.B.^{2/} Petitioner's Exhibits 1 through 4, 6 through 12, and 14 through 22 were admitted into evidence. Mr. Lomonte presented the testimony of himself, S.A., S.G.F., E.M.R., and A.F. Respondent's Exhibits 1 through 10 were admitted into evidence.

The two-volume Transcript was filed on December 27, 2010. At the final hearing, the parties requested that proposed recommended orders be filed with the Division of Administrative Hearings on January 14, 2011. The undersigned granted the parties' request for the January 14, 2011, filing date of the proposed recommended orders. On January 10, 2011, Mr. Lomonte filed an unopposed motion, seeking an extension of time to file his proposed recommended order. The undersigned granted the

motion and granted the parties until January 21, 2011, to file their proposed recommended orders. The parties timely filed their Proposed Recommended Orders, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence, the following facts were found:

1. The superintendent for the School District has the authority pursuant to section 1012.27 to recommend the termination of any School District employee to the School Board. Further, the School Board has the authority to terminate and/or suspend support personnel without pay and benefits pursuant to sections 1012.22(1)(f) and 1012.40(2)(c).

2. Mr. Lomonte has been employed with the School District since January 3, 2006, and was a bus driver for the School District's Transportation Department.

3. As a bus driver, Mr. Lomonte is an "educational support employee," as defined by section 1012.40(1)(a), and is governed by the Collective Bargaining Agreement (SPALC Contract) between the School District and SPALC. The SPALC Contract requires "just cause" for the discipline of support personnel. Art. 7.10, SPALC Contract.

4. On June 7, 2010, Charles Dailey (Mr. Dailey), the director of Transportation, West Zone of the School District, received a letter from a parent concerning Mr. Lomonte.^{3/} The

letter complained that the bus driver had engaged in inappropriate behaviors. Specifically, the parent complained that Mr. Lomonte was asking the middle school female student what she wore to bed, grabbing her book bag, and telling her that she was pretty.

5. The School District began an investigation into the complaint and took statements from some of the students who rode the bus driven by Mr. Lomonte. Based on its investigation, the School Board found just cause to terminate Mr. Lomonte's employment.

6. The School Board presented the testimony of D.T., a 14-year-old girl, who rode the bus driven by Mr. Lomonte for the time period of April 2010 until June 2010. D.T. credibly testified that:

(a) Mr. Lomonte, on two occasions, had kissed her hand on leaving the bus;

(b) Mr. Lomonte often called her "beautiful," "pretty," and "queen of the bus";

(c) Mr. Lomonte had invited her to his home, where he had a professional photography studio, to have her picture taken for Quincera, and told her that he had beautiful dresses that she could wear;^[4]

(d) Mr. Lomonte had placed his hand on her thigh once when she had been wearing Capri pants;

(e) Mr. Lomonte had commented on her clothing, and the fact that she wore long

pants, and asked her to turn-a-round so that he could see her;

(f) Mr. Lomonte would tell her that she "smelled really good"; and

(g) Mr. Lomonte would often stare at her.

7. D.T. credibly testified that Mr. Lomonte's actions and words made her feel "uncomfortable" and "weird."

8. The record shows the School District learned about D.T.'s allegations against Mr. Lomonte after he had been initially suspended as the bus driver. Mr. Lomonte's initial suspension occurred during its investigation based on the parent's June 7, 2010, complaint. The record shows that after Mr. Lomonte had been suspended off the bus in early June 2010, D.T. asked the substitute bus driver, Todd Thompson (Mr. Thompson), if he was going to be the new bus driver. D.T. explained to Mr. Thompson that Mr. Lomonte had made her feel uncomfortable based on his calling her "princess" and making suggestions that "she could come over to his house and he could take pictures of her."

9. Mr. Lomonte's testimony that D.T. exaggerated or was untruthful because he had disciplined her on the bus was not credible. Mr. Lomonte testified that he had given D.T. a referral for "horse play" with a younger student. Yet, there was no evidence of this referral at the time it occurred, or that D.T. had ever been sanctioned based on Mr. Lomonte's referral.

The only evidence that he had informed the School District that D.T. had been given a referral was before the School District's pre-determination hearing held on June 24, 2010.

10. The School Board also brought forward the deposition testimony of five student witnesses, H.J., J.S., A.S., D.P., and T.J.B. All of these students were middle school-aged girls that rode Mr. Lomonte's bus during the 2009-2010 school year.^{5/}

11. The testimony supports the allegation in the Petition that Mr. Lomonte asked H.J. and D.P. what they wore to bed. The record, however, is unclear and contradictory about the circumstances of the comments and when the comment or comments took place. Mr. Lomonte brought forward evidence showing that the middle school had a pajama day as part of its spirit week and that the comments may have occurred on pajama day. Similarly, some of the witnesses remembered Mr. Lomonte asking H.J. and D.P. together, others remembered him asking H.J. or D.P. on separate occasions. Although there was discrepancy in the circumstances, all of the witnesses remembered Mr. Lomonte asking H.J. and/or D.P. what they wore to bed. Even if Mr. Lomonte asked the question in the context of pajama day and in innocence, the question is inappropriate.

12. The deposition testimony also supported the factual allegation that Mr. Lomonte called female students on the bus "pretty" or "beautiful." This finding was also supported by one

of Mr. Lomonte's witnesses, E.F., that Mr. Lomonte would tell female students on the bus "you're pretty or you're beautiful."

13. The deposition testimony with regards to the allegation that Mr. Lomonte showed a student an inappropriate picture on his cell phone and sent a picture to the student on her cell phone was not supported. D.P. testified that Mr. Lomonte showed her a cartoon figure showing its middle finger. Mr. Lomonte denied that he showed her a picture on his cell phone. The record was inconclusive, and no other evidence was offered to support the allegation of Mr. Lomonte showing an inappropriate picture on his cell phone to D.P. No evidence was presented that Mr. Lomonte sent any picture to a student. Thus, these allegations were not proven.

14. The record did not support the factual allegation that Mr. Lomonte inappropriately touched the arms of the students who provided deposition testimony. The record did show that Mr. Lomonte pulled on H.J.'s sweat shirt to get her attention, but that he stopped once she asked him to.

15. Finally, the record was not clear that that Mr. Lomonte stared at the female students through the rearview mirror. Many of the female students testified that they felt that Mr. Lomonte stared at them through the rearview mirror. Mr. Lomonte testified that he did not stare at the students and that he often wore sunglasses because his eyes were sensitive to light.

Mr. Lomonte reasoned that because he wore dark sunglasses, the students could not testify that he was staring at them. The testimony from the students was that he sometimes wore sunglasses. Although the students "felt" he was staring at them, it is difficult to determine the witnesses' credibility from reading a deposition. One student, J.S., however, did offer unrebutted testimony that Mr. Lomonte had stared down her shirt on one occasion when she had worn a tank top. Notably, Mr. Lomonte, in his testimony, did not address the allegation by J.S. Based on Mr. Lomonte's conduct of calling young female students "beautiful or pretty" on the bus, it is understandable that the students would feel that he was staring at them. The allegation of staring at students, with the exception of staring down one student's shirt, is not established.

16. Mr. Dailey credibly testified that in 2008 he had given Mr. Lomonte a verbal warning about telling a female student that she was pretty and offering to take the student's picture. Mr. Dailey testified that he made it clear to Mr. Lomonte that those comments were totally inappropriate. Further, Mr. Dailey credibly testified that Mr. Lomonte understood the warning. At hearing, Mr. Lomonte admitted that he realized that he made a mistake about talking to D.T. about his photography business. Mr. Lomonte, however, attempted to explain that he understood that Mr. Dailey only prohibited him from talking about the

photography business, but did prohibit him from answering D.T.'s questions about Lomonte's photography business. Mr. Lomonte's attempt to parse his understanding about Mr. Dailey's warning is not credible.

17. Mr. Lomonte presented the testimony of S.A., S.G.F., E.M.F., and A.F. concerning the bus. The testimony showed generally that Mr. Lomonte dressed professionally. The students testified that they did not see Mr. Lomonte do anything improper. However, the facts showed that the students were often not in a position to hear whether or not Mr. Lomonte made inappropriate comments or see any inappropriate actions. For example, S.A. admitted that she was not on the bus all of the time that H.J., D.P., A.S., and J.S. were on the bus. Similarly, A.F. testified that she did not hear Mr. Lomonte call any student pretty or beautiful, but admitted that she could not hear what Mr. Lomonte was telling D.T. from her bus seat.

18. The record showed that despite his verbal warning in 2008, Mr. Lomonte received good evaluations as a bus driver and was effective in his job.

19. Mr. Lomonte testified under oath that he understood English and that he understood the proceedings against him and understood the testimony being offered.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has contractual jurisdiction over the parties and subject matter of the Petition pursuant to sections 120.65(7), 1012.40(2)(c), 120.569, and 120.57, Florida Statutes (2010), and pursuant to School Board Policy 1.16(6)(c).

21. The School Board has the burden of proving by a preponderance of the evidence the allegations underlying the proposed disciplinary action. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

22. As a bus operator, Mr. Lomonte is an "educational support employee," as defined by section 1012.40(1)(a). Mr. Lomonte's employment is governed by the SPALC Contract between the School District and the SPALC.

23. An "educational support employee," like Mr. Lomonte, can only be terminated for reasons set forth in the SPALC Contract. § 1012.40(2)(b), Fla. Stat. The SPLAC Contract provides that educational support employees can be terminated for "just cause." The term "just cause" is not defined in the SPALC Contract nor does the contract provide for a progressive discipline plan. The SPALC Contract provision 7.11 requires "that in all instances the degree of discipline shall be

reasonably related to the seriousness of the offense and the employee's record."

24. The School District has construed "just cause" for purposes of discipline pursuant to the SPALC Contract in the same manner as the term is used in section 1012.33, relating to instructional staff. See Lee Cnty. Sch. Bd. v. Simmons, Case No. 03-1498 (DOAH July 15, 2003) (adopted in toto by Final Order dated August 12, 2003). See also Lee Cnty. Sch. Bd. v. Kehn, Case No. 04-1912 (DOAH Feb. 12, 2005) (adopted in toto by Final Order dated March 10, 2005).

25. Section 1012.33(1)(a) provides in pertinent part:

Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross subordination. . . .

26. The School District charged Mr. Lomonte with misconduct in office. Rule 6B-4.009 provides as follows:

(3) Misconduct in office is defined 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 from Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

27. The School District also charged Mr. Lomonte with violating School Board Policies 5.02, 5.03, and 5.29. School Board Policies 5.02 and 5.03, Professional Standards, requires

School District employees to dedicate themselves to the highest ethical standards and to be of good moral character. School Board Policy 5.29 requires all employees to exemplify conduct that is lawful and professional.

28. Applying the law to the facts here, the School Board has proven by a preponderance of the evidence "just cause" for Mr. Lomonte's termination. Mr. Lomonte's conduct in kissing a female middle school student's hand, placing his hand on the student's thigh, having the female student turn around so that he can see what she was wearing, calling the young students "pretty" and "beautiful" on the bus, asking students what they wore to bed, staring down the shirt of a middle school-aged student, and soliciting to take photographs for his private business, after previously having been warned not to, is so serious as to impact his effectiveness as a bus driver and falls short of the high ethical standards set by the School District.

29. Although Mr. Lomonte has received positive job evaluations as a bus driver, one must consider his conduct here in light of his past discipline. Mr. Dailey credibly testified that Mr. Lomonte had been warned about telling young girls on the bus that they were "pretty" or "beautiful" and that he was not to solicit his photography business during school hours. The facts here show that Mr. Lomonte violated both of these prohibitions. The prior discipline and the inappropriate

touching weigh heavily against Mr. Lomonte's positive job evaluations. Even if one did not consider the past verbal discipline and considered that Mr. Lomonte was an effective bus driver, Mr. Lomonte's actions here concerning the young female students would still require termination. It would be difficult to see how he could be an effective employee when he is inappropriately touching and speaking to young female students.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order finding that just cause exists for termination of Mr. Lomonte's employment.

DONE AND ENTERED this 10th day of February, 2011, in Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of February, 2011.

ENDNOTES

- 1/ Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.
- 2/ The student's names are kept confidential, and any reference to a student providing testimony or a sworn statement will be by the student's initials.
- 3/ The letter referenced a complaint concerning the bus driver "Mr. Lewis." Mr. Lomonte's first name is "Luis." It is undisputed that the June 7, 2010, letter from the parent contained allegations against Mr. Lomonte and that the reference to "Mr. Lewis" applied to him.
- 4/ The evidence showed that "Quincera" is a coming of age party for 15-year-old Hispanic girls.
- 5/ Mr. Lomonte had two separate bus routes involving two separate schools. D.T. rode a bus route and attended Ft. Myers Academy of the Arts, and H.J., J.S., A.S., D.P., and T.J.B attended Caloosa Middle School.

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.