BEFORE THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

ST. LUCIE COUNTY SCHOOL BOARD,
Petitioner,

v. DOAH Case No. 10-10698TTS

PATRICIA DAVIS,
Respondent.

FINAL ORDER

THIS CAUSE came before The School Board of St. Lucie County, Florida ("School Board"), as governing body of the School District of St. Lucie County, Florida ("District"), for final agency action in accordance with Section 120.57(1)(k) and (1), Florida Statutes.

Appearances

For Petitioner: Elizabeth Coke, Esquire
Leslie Jennings Beuttell, Esquire
Richeson & Coke, P.A.
317 South Second Street
Post Office Box 4048
Fort Pierce, Florida 34948-4048

For Respondent: Mark Wilensky, Esquire
Dubiner & Wilensky, L.L.C.
Northbridge Centre, Suite 325
515 North Flagler Drive
West Palm Beach, Florida 33401

Introduction

The Respondent Patricia Davis is a paraprofessional bus aide employed by the Petitioner St. Lucie County School Board. The Petitioner, by and through the Superintendent of Schools, sought to discipline the Respondent for just cause in accordance with Section 1012.40(2), Fla. Stat., and School Board Policy 6.301 for conduct on a bus that resulted in injury to a student, identified as "C.P." in this proceeding to protect the student's privacy.

The Respondent requested a formal administrative hearing and one was held on August 16 and 17, 2011, before an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings of the Florida Department of Administration. The hearing was conducted by videoconference with the ALJ in Tallahassee while the parties and witnesses were in St. Lucie County. On November 1, 2011, the ALJ entered a Recommended Order finding that (a) the Respondent neglected her duties, violated School Board rules, and failed to exercise her best professional judgment, (b) the Respondent's failures to perform her job duties do not amount to just cause for termination, and (c) those failures do amount to just cause for a one-year suspension. Recommended Order at pp.18-19 and 20, ¶¶ 68 and 73. He recommended that the School Board enter a Final Order suspending the Respondent for a period of one year starting November 9, 2010. Recommended Order at p. 20. The Recommended Order has been forwarded to the School Board in accordance with Section 120.57(1), Florida Statutes, and is attached to and made a part of this Final Order.

The Superintendent as Petitioner filed written exceptions to the Recommended Order, with an incorporated memorandum of law in support ("Petitioner's Exceptions"), on November 16, 2011. *See* Section 120.57(1)(k), Fla. Stat.; Fla. Admin. Code Rule 28-106.217(1). The Respondent filed a reply to the exceptions ("Respondent's Reply") on November 28, 2011. *See* Fla. Admin. Code Rule 28-106.217(3).

The Respondent also filed written amended exceptions to the Recommended Order ("Respondent's Exceptions") on November 16, 2011. The Superintendent filed a response to the Respondent's Exceptions ("Petitioner's Response") on November 28, 2011. Both parties have also submitted proposed forms of final order.

On February 21, 2012, less than one hour before the School Board hearing scheduled to consider final agency action in this proceeding, counsel to the Respondent filed a motion to disqualify

counsel to the Petitioner. The putative basis for the motion is that this Board sits "as finder of fact and decision maker on matters presented to it by lawyers with whom it has a confidential and fiduciary relationship." Motion at p. 1, ¶ 2. In response, the Petitioner's counsel noted that the motion was both untimely and unsupported by authority.

The School Board has two roles in certain employee disciplinary proceedings. Firstly, as public employer, acting through the Superintendent as its chief executive officer, the Board may propose disciplinary action subject to the employee's rights of review. Secondly, when, as here, the employee exercises rights of review through referral to an ALJ for hearing and rendition of a Recommended Order, the Board acts in a quasi-judicial capacity in ruling upon the Recommended Order. *See* Collective Bargaining Agreement (Petitioner's Exhibit 73) at p. 26, Article XIV, § F.6.d; Section 120.57(1)(l), Fla. Stat. Counsel to the Petitioner has represented the School Board solely in the agency's capacity as public employer, while the Board's (general) counsel has represented the agency in its quasi-judicial capacity under Section 120.57(1), Fla. Stat. During these proceedings, the School Board has scrupulously observed the prohibitions against *ex parte* communications with the parties or their counsel, including counsel to the Petitioner, as required by Section 120.66, Fla. Stat. The motion to disqualify is denied.

Being unavailable for the hearing on February 21, 2012, Board Member Troy A. Ingersoll took no part in the consideration of this proceeding or the decision set forth below.

The School Board met on February 21 and March 13, 2012, in Fort Pierce, St. Lucie County, Florida, to take final agency action. At the hearing on February 21, 2012, argument was presented by counsel for each of the parties. Upon consideration of the Recommended Order, the Petitioner's Exceptions, the Respondent's Exceptions, the Petitioner's Response, the Respondent's Reply, the pro-

posed forms of final order, and argument of counsel to the parties, and upon a review of the complete record in this proceeding, the School Board finds and determines as follows:

Rulings on Exceptions

An agency may reject or modify an ALJ's finding of fact only if the finding is not supported by competent, substantial evidence, or the proceedings on which the finding was based did not comply with essential requirements of law. *See* Section 120.57(1)(1), Fla. Stat.; *Schrimsher v. School Board of Palm Beach County*, 694 So. 2d 856, 860 (Fla. 4th D.C.A. 1997). The agency has no authority to reweigh conflicting evidence. *See, e.g. Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). The agency may adopt the ALJ's findings of fact and conclusions of law in a recommended order, or the agency may reject or modify the conclusions of law over which it has substantive jurisdiction. *See* Section 120.57(1)(1), Fla. Stat. *See also State Contracting and Engineering Corporation v. Department of Transportation*, 709 So. 2d 607 (Fla. 1st D.C.A. 1998) (an agency is not required to defer to the ALJ on issues of law). The agency may accept the recommended penalty in a recommended order, but may not reduce or increase the penalty without review of the complete record and without stating with particularity its reasons in the final order, by citing to the record in justifying its action. *See* Section 120.57(1)(1), Fla. Stat.

The Petitioner's and Respondent's Exceptions will be addressed in the order of the challenged paragraphs from the Recommended Order.

Paragraph 9 (Petitioner's Exception No. 12). The Petitioner excepts to the ALJ's finding of fact in Paragraph 9 of the Recommended Order that the Respondent recognized that the student C.P. was autistic. Recommended Order at p. 6. See Petitioner's Exceptions at pp. 15-16. The Petitioner notes that when the Respondent was asked if she knew that the student was autistic, she answered

"no," citing Tr. Vol. IV, p. 288, lines 5-6. The Respondent acknowledges in her reply that she "did not understand . . . that [C.P.'s] condition was called 'autism'. . ." Respondent's Reply at p. 16.

The Petitioner's Exception No. 12 is accepted and the findings of fact in Paragraph No. 9 are revised to reflect that the Respondent did not recognize that C.P. was autistic.

Paragraph 12 (Petitioner's Exception No. 8). The Petitioner excepts to the findings in Paragraph 12 of the Recommended Order that: "School officials knew that within the past two years C.P.'s behavior included vigorous head banging. They also knew that within the past two years C.P. had worn a protective helmet. C.P.'s educational plans included techniques developed to manage head banging and other self injurious behavior." Recommended Order at pp. 6-7. See Petitioner's Exceptions at pp. 11-12.

The Petitioner points out that the District's Assistant Superintendent for Exceptional Student Education testified that when the incident occurred, C.P. had been attending Palm Pointe Educational Research School for 1½ to 2 years, during which time the student did not exhibit head banging behavior, citing Tr. Vol. IV, p. 405, lines 1-17; p. 406, lines 8-22. The Petitioner also contends that, because educational plans must be created yearly, the student's educational plan at the time of the incident would not include responses to head banging behavior that was no longer occurring. In reply, the Respondent notes that the Assistant Superintendent also stated that consultants continued to work on a program for C.P., even at the student's new school, to address the student's head-banging as well as other issues. Respondent's Reply at p. 13, citing Tr. Vol. IV, p. 421.

To the extent that Paragraph 12 of the Recommended Order included a finding that school officials knew C.P. had exhibited head-banging behavior and worn a protective helmet *up to the date of the incident*, the record lacks competent, substantial evidence for such a determination. The Petitioner's Exception No. 8 is accepted in part and the findings of fact in Paragraph No. 12 are revised

to reflect that school officials knew that C.P. had exhibited head banging behavior and worn a protective helmet approximately 1½ to 2 years prior to the incident.

Paragraph 19 (Petitioner's Exception No. 14). The Petitioner's Exception No. 14 is rejected as the finding in Paragraph 19 of the Recommended Order is supported by competent substantial evidence.

Paragraph 22 (Petitioner's Exception No. 10). The Petitioner excepts to the finding in Paragraph 22 of the Recommended Order that the bus driver properly placed the student in his E-Z vest and secured him by his harness. Petitioner's Exceptions at pp. 13-14. The Petitioner points out that it was the Respondent's duty to place the student in the E-Z vest, citing Tr. Vol. IV, p. 458, lines 12-17; p. 493, line 25; and p. 494, lines 1-8. (The Petitioner also cites to Tr. Vol. IV, p. 497, lines 16-21, but the latter referenced testimony addresses the Respondent's training as opposed to her assigned duties.) The Petitioner then notes that Respondent's supervisor testified that the harness could not have been properly secured because if it had been the student would not have been able to stand up, citing Tr. Vol. II, p. 200, lines 6-13. The Petitioner also notes that an expert for the Respondent testified that the harness was not sufficiently secure, and that the harness not being sufficiently secure could have contributed to the student being able to strike the window with his head, citing Tr. Vol. III, p. 336, lines 4-25; and p. 337, lines 1-6.

The Respondent replies that the District's Director of Transportation testified that the nature of the E-Z vest harness allowed for play in the harness. Respondent's Reply at p. 15, citing Tr. Vol. II, p. 165. The question answered affirmatively by the Director of Transportation, however, was whether the harness allows for "*some* play," Tr. Vol. II, p. 165, lines 20-21 (emphasis supplied). The Respondent also argues that there was no testimony that the vest was not properly fastened. Respondent's Reply at p. 15.

The Petitioner's Exception No. 14 is accepted in part and the findings of fact in Paragraph No. 22 are revised to reflect that it was the Respondent's duty to place C.P. in the E-Z vest, but that the bus driver actually did so, and that although the bus driver secured the student by his harness in the middle of the bus seat and not beside the window, the harness was not sufficiently secured so as to prevent the student from striking the window.

Paragraph 29 (Petitioner's Exception Nos. 11 and 13). In his Exception No. 11, the Petitioner excepts to the finding in Paragraph 29 of the Recommended Order that the bus driver and the Respondent "were hesitant to physically approach C.P. because they remembered being told in training that physical efforts to control a child with autism would likely cause them to become more violent." Petitioner's Exceptions at p. 15. The Petitioner points out that the record is devoid of any testimony that would support this finding of fact. In reply, the Respondent maintains that the training materials entered into evidence provided information about the perils of approaching a child with autism. Respondent's Reply at p. 15. Although the record clearly indicates that the bus driver and the Respondent were reluctant to approach the student, there was no testimony that such reluctance arose from any remembrance of training.

In Exception No. 13, the Petitioner also excepts to the finding in Paragraph 29 that the bus driver was "panicked" during the incident. Petitioner's Exceptions at p. 16. The Respondent, in turn, asserts that the bus surveillance video reflects a "panicked" demeanor on the part of the bus driver. Respondent's Reply at pp. 16-17.

The Petitioner's Exception No. 11 is accepted in part, Petitioner's Exception No. 13 is rejected, and the findings of fact in Paragraph No. 29 are revised to reflect that the Respondent and the bus driver were panicked and frightened, that they discussed what steps they could take, and that they were hesitant to approach the student physically.

Paragraph 44 (Petitioner's Exception No. 2). The Petitioner excepts to the finding in Paragraph 44 of the Recommended Order that the Crisis Prevention Intervention ("CPI") training "did not provide information about how to address head banging or suggest techniques such as cushioning the blows' impact when a person is banging his head against a hard object." Petitioner's Exceptions at pp. 6-7. The Petitioner notes that one of the District's CPI trainers testified that during the CPI course participants are taught two techniques or principles when a student is striking or coming into contact with an object: move the object or block the student from hitting the object, citing Tr. Vol. III at p. 372, lines 15-25, and p. 373, lines 7-11. The Petitioner also points out that the District's other CPI trainer testified that if a student acts out physically so as to be a danger to self or others, course participants are taught to intervene physically, citing Tr. Vol. III at p. 353, lines 11-15, p. 362, lines 13-15, and p. 363, lines 2-4. The Respondent replies that her expert did not see anything specific in the training materials that would have prepared her to handle a child banging his head on a bus window (citing to Tr. Vol. III at p.298, line 8), and that the student's school behavior program could have been shared with transport (citing Tr. Vol. III at p. 301). Respondent's Reply at pp. 8-9.

The Petitioner's Exception No. 2 is accepted in part and the findings of fact in the second sentence of Paragraph No. 44 are revised to reflect that the CPI training did provide general information about blocking and physical intervention as techniques to prevent or cushion the blows when a student is banging his head against a hard object.

Paragraph 45 (Petitioner's Exception No. 3). The Petitioner excepts to the finding in Paragraph 45 of the Recommended Order that "[t]he training in aggregate provided . . . nothing useful about ways to manage behavior such as that exhibited by C.P. on February 8, 2010." Petitioner's Exceptions at pp. 7-8. The Petitioner cites to various statements by the Respondent's expert indicating that her training included principles or techniques that are applicable in this case. See Tr. Vol.

III, p. 285, lines 15-25. In reply, the Respondent notes that her expert also stated that general suggestions for intervention with autistic children may not be sufficient. Respondent's Reply at pp. 9-10, citing Tr. Vol. III at p. 289.

As discussed above concerning Paragraph 44 of the Recommended Order, the District's CPI training provided to the Respondent included information on blocking and physical intervention. The Petitioner's Exception No. 2 is accepted in part and the findings of fact in the second sentence of Paragraph 45 are revised to reflect that although the training in aggregate provided little specific information about students with autism, it did include general information on blocking and physical intervention as ways to manage behavior such as that exhibited by C.P. on February 8, 2010.

Paragraph 47 (Petitioner's Exception No. 4). The Petitioner's Exception No. 4 is rejected as the finding of fact in Paragraph 47 of the Recommended Order is supported by competent substantial evidence.

Paragraph 60 (Respondent's Exception No. 1). The Respondent excepts to the conclusion of law in Paragraph 60 of the Recommended Order that "[a] preponderance of the evidence established that on February 8, 2010, [the Respondent] did not perform the duty of getting off the bus to greet students and escorting them to their seats." (Although the Respondent's reference in her Exception No. 1 is to Paragraph 50, she clearly intended to challenge the conclusions of law in Paragraph No. 60.) Respondent's Exceptions at p. 1. The Respondent's Exception No. 1 is rejected as the conclusions of law in Paragraph 60 are supported by competent legal authority.

Paragraph 62 (Respondent's Exception No. 2). The Respondent excepts to the conclusion of law in Paragraph 62 of the Recommended Order that "a preponderance of the evidence proved that [the Respondent] did not maintain the constant supervision of the students as required by her job." (Although the Respondent's reference in her Exception No. 2 is to Paragraph 52, she clearly intended

to challenge the conclusions of law in Paragraph No. 62.) Respondent's Exceptions at pp. 1-2. The Respondent's Exception No. 2 is rejected as the conclusions of law in Paragraph 62 are supported by competent legal authority.

Paragraph 65 (Petitioner's Exception No. 9). The Petitioner excepts to the findings of fact recited in Paragraph 65 of the Recommended Order, noting that the student had not exhibited head banging behavior during the last 1½ to 2 years and had never exhibited such behavior on the bus, and that the student's current educational plan no longer addressed head banging, citing Tr. Vol. IV at p. 404, lines 9-25, and p. 405, lines 1-17. Petitioner's Exceptions at pp. 12-13. The Respondent replies that the District had developed an extensive behavior plan to address head banging behavior at the student's prior school, that District staff acknowledged it would have been helpful if Transportation had known of the head banging history, and that the District did not plan for nor otherwise warn the Respondent of the potential for such behavior. Respondent's Reply at pp. 13-15.

The Petitioner's Exception No. 9 is accepted in part and the findings of fact recited in Paragraph 65 are revised to reflect that the District was aware that the student had previously engaged in head banging behavior at school 1½ to 2 years prior to the incident, the Student had never previously engaged in head banging behavior on the bus, the District had addressed the previous in-school behavior in the student's educational plan for a prior year, the District did not have a plan to address head banging on the bus, and the District did not specifically warn the Respondent or the bus driver of the possibility of such behavior.

Paragraph 66 (Petitioner's Exception No. 7). The Petitioner's Exception No. 7 is rejected as the findings of fact recited in the conclusion of law set forth in Paragraph 66 of the Recommended Order are supported by competent substantial evidence.

Paragraph 67 (Respondent's Exception No. 3). The Respondent's Exception No. 3 is rejected as the findings of fact recited in the conclusion of law set forth in Paragraph 67 of the Recommended Order are supported by competent substantial evidence.

Paragraph 68 (Respondent's Exception No. 4). The Respondent's Exception No. 4 is rejected as the conclusions of law in Paragraph 68 of the Recommended Order are supported by competent legal authority.

Paragraph 70 (Petitioner's Exception No. 5). The Petitioner excepts to the determination in Paragraph 70 of the Recommended Order that "the School Board did not provide specific training for handling self-injurious behavior by students with autism and did not provide [the Respondent] with information it had about C.P. that would have helped her prepare for the events of February 8, 2010." Petitioner's Exceptions at pp. 9-10. The Petitioner notes that the record includes testimony regarding the Respondent's training in general techniques for blocking or physical intervention, citing Tr. Vol. III, p. 372, lines 15-25, and p. 373, lines 7-11. The Respondent replies that the challenged conclusion of law could only be rejected if this Board were to re-weigh the evidence, substitute its own judgment for the credibility of witnesses, or interpret the evidence to reach a desired conclusion. Respondent's Reply at pp. 10-11.

The challenged determination includes recited findings of fact together with a conclusion of law. The Petitioner's Exception No. 5 is accepted in part and the challenged determination is revised to reflect that although the School Board did not provide specific training for handling self-injurious behavior by students with autism and did not provide the Respondent with information it had about C.P. that would have helped her prepare for the events of February 8, 2010, it did provide the Respondent with general training on blocking and physical intervention as ways to manage behavior

such as that exhibited by C.P. on February 8, 2010. See also the discussion above concerning Recommended Order Paragraphs 44 and 45.

Paragraph 72 (Petitioner's Exception No. 6). The Petitioner excepts to the conclusion of law in Paragraph 72 of the Recommended Order that the Respondent "faced an emergency for which she had not been well trained." Petitioner's Exceptions at p. 10. In reply, the Respondent contends that record contains ample evidence that she was not well trained for the particular emergency that arose. Respondent's Reply at p. 11.

The Petitioner's Exception No. 6 is accepted in part and the challenged conclusion of law is revised to reflect that the Respondent faced an emergency for which she had not received specific training, but she had received general training on blocking and physical intervention when a student is striking an object, and she had received training on calling for assistance in an emergency.

Paragraph 73 (Petitioner's Exception No. 1; Respondent's Exception No. 5). The Petitioner excepts to the conclusion of law set forth in Paragraph 73 of the Recommended Order that the Respondent's failures to perform her job duties do not amount to just cause for termination. Petitioner's Exceptions at pp. 5-6. The Petitioner reasons that because the Respondent was found to have failed to perform her assigned duties, neglected her duties in violation of School Board rules, violated established procedure, and failed to exercise her best professional judgment (see Recommended Order at pp. 18-19, ¶ 68), all acts constituting just cause for discipline, the School Board has the authority and discretion to determine the appropriate level of disciplinary action to be taken, including termination. In reply, the Respondent contends that not every disciplinary decision is infused with policy considerations, and implies that only by ignoring findings of fact supported by the record can the Board conclude that termination is appropriate. Respondent's Reply at pp. 7-8.

The Respondent excepts to the conclusion of law set forth in Paragraph 73 that there is just cause for a one year suspension. Respondent's Exceptions at p. 3. Stating that no other District employee was subjected to a one year suspension as a result of the event, the Respondent maintains that "[t]he recommended discipline is disproportionate to [her] responsibilities and actions and should not be upheld." Respondent's Exceptions at p. 3. In response, the Petitioner notes that the bus driver was subjected to appropriate disciplinary action for her part in the incident, and that there is no record support for disciplinary action against any of the other employees named by the Respondent. Petitioner's Response at pp. 6-9. The findings that the Respondent neglected her duties, violated School Board rules, and failed to exercise her best professional judgment, and that those violations constitute just cause for discipline, the Petitioner asserts, warrant the penalty of termination. Petitioner's Response at p. 10.

Considering the ALJ's determinations that the Respondent failed to perform her assigned duties, neglected her duties in violation of School Board rules, violated established procedure, and failed to exercise her best professional judgment, and his finding that those violations constitute just cause for discipline, and infusing policy in the application of the School Board's disciplinary rules, the Petitioner's Exception No. 1 is accepted, the Respondent's Exception No. 5 is rejected, and the Recommended Penalty is modified as set forth below.

Findings of Fact

The School Board adopts the findings of fact set forth in paragraph Nos. 1 through 54 of the Recommended Order, subject to the revision of Paragraphs 9, 12, 22, 29, 44 and 45 as set forth above.

Conclusions of Law

The School Board adopts the conclusions of law set forth in paragraphs 55 through 73 of the Amended Recommended Order, subject to the revision of Paragraphs 65, 70, 72, and 73 as set forth above.

Penalty

In this proceeding, an infusion of policy is required to determine the appropriate level of discipline warranted by the Respondent's failure to perform her assigned duties, neglect of duty, violation of established procedure, and failure to exercise professional judgment. *See Winters v. Florida Board of Regents*, 834 So. 2d 243, 250-251 (Fla. 2d D.C.A. 2003); *Goss v. District School Board of St. Johns County*, 601 So. 2d 1232, 1235 (Fla. 5th DCA 1992); *Johnson v. School Board of Dade County*, 578 So. 2d 387 (Fla. 3rd DCA 1991). *Compare Purvis v. Marion County School Board*, 766 So. 2d 492 (Fla. 5th D.C.A. 2000). The School Board may reduce or increase the penalty set forth in the Recommended Order provided that it reviews the complete record and states with particularity its reasons for reducing or increasing the penalty, citing to the record in justifying its action. *See* Section 120.57(1)(1), Fla. Stat.; *Allen v. School Board of Dade County*, 571 So. 2d 568, 569 (Fla. 3d D.C.A. 1990).

The collective bargaining agreement that governs the Respondent's position as a bus aide provides that "just cause" for a recommendation of dismissal includes neglect of duty, unsatisfactory work performance, and violation of School Board policy. See Petitioner's Exhibit 73 at p. 26, Article XIV, § F.6.a. The ALJ concluded that the Respondent neglected her duties in violation of School Board Rule 6.301(3)(b)xii, violated School Board Rule 6.301(3)(b)xii by violating established procedures, and failed to exercise her best professional judgment in violation of rule 6B-1.001(2). Rec-

ommended Order at p. 19, ¶ 68. The ALJ also concluded that the Respondent's misconduct constitutes "just cause" for disciplinary action. Recommended Order at p. 20, ¶ 73.

The Respondent's misconduct was very serious, and because of her misconduct a student with a disability was placed in danger. See Recommended Order at pp. 7-10, ¶¶ 17, 20, 25, 30, 31, and 33. The School Board therefore rejects the ALJ's conclusion that the Respondent's violations do not warrant termination, and finds on the factual record presented, and after an infusion of policy considerations in applying the Board's own rules, that the Respondent's conduct constitutes just cause for termination. Moreover, the School Board rejects the penalty recommended by the ALJ, finds that termination of the Respondent's employment is the correct and appropriate penalty based upon the record in this proceeding and the Board's application of policy considerations, and increases the penalty to termination of employment.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Respondent Patricia Davis be, and she is hereby, terminated from her employment with The School Board of St. Lucie County, Florida, as of the effective date of this Final Order. This Final Order shall take effect upon filing with the Superintendent of Schools as Secretary of THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA.

A copy of this Final Order shall be provided to the Division of Administrative Hearings within 15 days of filing, as set forth in Section 120.57(1)(m), Fla. Stat.

* * *

DONE AND ORDERED this 13th day of March, 2012.

THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

By: Carol A. Hilson
CAROL A. HILSON, Chair

Attest:
MICHAEL J. LANNON, Superintendent and Ex-Officio
Secretary to The School Board of St. Lucie County, Florida

* * *

NOTICE OF RIGHT TO APPEAL

Any party adversely affected by this Final Order may seek judicial review pursuant to Section 120.68, Fla. Stat., and Fla. R. App. P. 9.030(b)(1)(C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Fla. R. App. P. 9.110, with the Superintendent as Ex-Officio Secretary of The School Board of St. Lucie County, Florida, 4204 Okeechobee Road, Fort Pierce, Florida 34947. A second copy of the Notice of Appeal, together with the applicable filing fee, must be filed with the appropriate District Court of Appeal.

Attachment: Recommended Order

Copies furnished to:

Elizabeth Coke, Esquire
Mark Wilensky, Esquire
Daniel B. Harrell, Esquire
Clerk, Division of Administrative Hearings

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-10698TTS
	)	
PATRICIA DAVIS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 16 and 17, 2011, by video teleconference at sites in Tallahassee and St. Lucie, Florida, before John D. C. Newton, II, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elizabeth Coke, Esquire
Leslie Jennings Beutell, Esquire
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317 South Second Street
Fort Pierce, Florida 34948

For Respondent: Mark Wilensky, Esquire Dubiner & Wilensky, LLC
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West Palm Beach, Florida 33401-4349

STATEMENT OF THE ISSUE

As stipulated by the parties, the issue in this case is whether there is "just cause" to terminate the employment of Patricia Davis.

PRELIMINARY STATEMENT

Petitioner, St. Lucie County School Board (School Board), employed Respondent, Patricia Davis (Ms. Davis), as a bus aide. As a result of an incident on February 8, 2010, it determined to terminate her employment.

On October 21, 2010, the School Board issued a letter that recommended termination of Respondent as a paraprofessional bus aide due to allegations of "just cause", pursuant to section 1012.40(2), Florida Statutes (2010),[1/] and the applicable Collective Bargaining Agreement.

The School Board maintains that Ms. Davis violated:

1. School Board rule 6.301(3)(b)xii., by neglect of duty;

2. School Board rule 6.301(3)(b)xix. by violating any rule, policy, regulation, or established procedure;

3. School Board rule 6.301(3)(b)xxv., by sleeping during working hours;

4. School Board rule 6.301(3)(b)xxvi., by violating safety rules;

5. School Board rule 6.301(3)(b)xxix., by violating the Code of Ethics of the Education Profession, the Principles of Professional Conduct for the Education

Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees.

6. The Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6B-1.001(2), by failing to exercise the best professional judgment and integrity.

7. The Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6B-1.001(2), by failing to always have the concern for students as her primary professional concern.

8. The Code of Ethics of the Education Profession in Florida, Florida Administrative Code Rule 6B-1.006(3)(a), by failing to make a reasonable effort to protect a student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

On November 8, 2010, School Superintendent Michael Lannon (Mr. Lannon) advised Ms. Davis in writing of his intent to recommend termination of her employment to the School Board. Mr. Lannon suspended Ms. Davis without pay effective November 9, 2010. The School Board accepted the recommendation.

On December 1, 2010, Ms. Davis petitioned for an administrative hearing to contest her termination. She seeks reinstatement, back pay, and a clear performance record as her remedy.

On December 16, 2010, the School Board referred the petition to the Division of Administrative Hearings to conduct a

hearing. The School Board also issued and filed a Statement of Charges and Petition for Termination on December 16, 2010.

The hearing was scheduled for March 17, 2011. During the course of this proceeding, the parties filed a total of 21 motions and other documents addressed to discovery issues, which were ruled upon. On February 23, 2011, the undersigned granted Ms. Davis' Motion for Continuance based upon medical emergencies in counsel's immediate family. The hearing was re-scheduled to May 24, 2011. On April 27, 2011, Ms. Davis filed a combined Motion to Compel, for Sanctions, and for Continuance. The School Board opposed it. Ms. Davis' request for a continuance was based upon delays due to the continuing discovery disputes. The continuance was denied. On May 12, 2011, Ms. Davis filed a renewed Motion for Continuance, again based on the long-running discovery disputes. An Order of May 13, 2011, granted the motion. The case was re-scheduled to August 16, 2011. On June 10, 2011, the School Board moved to continue the hearing. The motion was denied. The hearing convened August 16, 2011, as scheduled.

The School Board presented the testimony of Maurice G. Bonner, Dr. Robert John Brugnoli, Donald R. Carter, Paul Gavoni, Frank Krukauskas, Michael J. Lannon, John David Morris, Kathleen Noble, Susan Ranew, and Bill Tomlinson. School Board Exhibits 1, 5, 7, 8, 11 through 22, 24, 25, 27 through 29, 31 through 35,

38, 41, 42, 44, 53, 55, 56, 73, and 77 through 81, were received into evidence.

Ms. Davis presented the testimony of Dr. Stephen Alexander and Marvel Ann Figueroa. Ms. Davis also testified. Ms. Davis did not offer any exhibits into evidence.

The Transcript was filed September 16, 2011. Both parties timely filed proposed recommended orders. They have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board employs Ms. Davis as a bus paraprofessional. Ms. Davis has satisfactorily served the School Board as a bus paraprofessional for approximately ten years, without any significant discipline.

2. Ms. Davis is a continuing status employee.

3. Ms. Davis is covered by the CTA-CU bargaining unit Collective Bargaining Agreement (CBA).

4. During the 2009-2010 school year, until February 8, 2010, Ms. Davis was assigned to regularly work on bus number 2407. Ms. Marvel Ann Figueroa was the driver regularly assigned to bus number 2407.

5. During the 2009-2010 school year, Ms. Davis was assigned to supervise Exceptional Student Education (ESE) students during transport to and from school on bus number 2407.

6. During the 2009-2010 school year, until February 8, 2010, C.P.[2/] was regularly transported on bus number 2407, to and from Palm Pointe Educational Research School (Palm Pointe). C.P. is a student with autism.

7. During the 2009-2010 school year, until February 8, 2010, C.P. was under Ms. Davis' supervision during transport on bus number 2407.

8. Ms. Davis was aware that C.P. was non-verbal.

9. Ms. Davis recognized that student C.P. was an ESE student with autism.

10. Ms. Davis knew that C.P. was required to use a safety harness/E-Z vest during transport.

11. As required by School Board rules, C.P.'s Emergency Information ESE Bus Form was provided to the staff on bus number 2407, and located on the bus on February 8, 2010. The form provided minimal information. It provided family information and contact numbers. A block labeled "Non-verbal" is checked. In a space labeled "Special instructions for Dealing with Student," one word appears: "Autism." In the "Special Bus Equipment" section, "E-Z on Vest" is checked.

12. School officials knew that within the past two years C.P.'s behavior included vigorous head banging. They also knew that within the past two years C.P. had worn a protective

helmet. C.P.'s educational plans included techniques developed to manage head banging and other self-injurious behavior.

13. The school did not inform Ms. Davis of the history of head banging or of the risk of the behavior. This information did not appear on the ESE form.

14. The School Board did not provide the bus with a helmet or other protective or cushioning gear.

15. On February 8, 2010, Ms. Davis was working on bus number 2407.

16. On the morning of February 8, 2010, before boarding students, Ms. Davis performed the pre-trip inspection required by her job duties. It included verifying that the seat belts were securely attached to the seats and that all seat belts were in working condition.

17. Ms. Davis was not feeling well that morning. But she chose to work rather than call in sick. This was poor judgment that contributed to the events of the morning.

18. Ms. Davis and the driver, Ms. Figueroa, discussed Ms. Davis' illness. They agreed that Ms. Figueroa would get off the bus to escort the children to their seats. This service was a responsibility of Ms. Davis, the bus paraprofessional.

19. On the morning of February 8, 2010, Ms. Davis sat at the front of the bus. Her training and instructions said that the aide was to sit at the back of the bus. But the

Transportation Director had repeatedly approved seating charts for the bus that showed Ms. Davis sitting at the front. Consequently, the School Board had authorized Ms. Davis to sit in the front.

20. Ms. Davis' job duties also required her to constantly monitor the students. Although Ms. Davis periodically looked around to check on the students, she did not maintain a constant view of them. Due to her illness, Ms. Davis struggled to stay awake. Her head nodded and her eyes periodically closed momentarily. Ms. Davis was fighting sleep. She never fell completely asleep. But she did not maintain constant observation of the students.

21. C.P. and three other students were riding bus number 2407 on the route to Palm Pointe the morning of February 8, 2010.

22. Ms. Figueroa properly placed C.P. in his E-Z vest and secured him by his harness in the middle seat of his bus seat row. He was not seated beside the window.

23. During the ride to Palm Pointe, C.P. became upset. He began engaging in self-stimulatory behavior, looking out the window, shaking his hands, and rocking back and forward in his seat. The self-stimulatory behavior was intermittent.

24. This behavior, while often and typically exhibited by autistic children, was more vigorous behavior than C.P. had previously exhibited while riding the bus.

25. As the drive to Palm Pointe continued, C.P. began to hit his hands and then his head against the side of the bus and the bus window. He rocked back and forward in his seat. He leaned and rocked from side to side as he banged his head on the bus window. This behavior continued for about eight minutes.

26. Before that day, C.P. had never exhibited those behaviors while riding the bus. On February 8, 2010, C.P. had been riding bus number 2407, since the beginning of the school year, about six months earlier.

27. Ms. Davis and the bus driver noticed the behavior quickly. They were very concerned about C.P.'s behavior and safety, as well as the safety of the other children on the bus. The bus driver could not pull over, because of the traffic conditions and restrictions resulting from the roads on which she was driving.

28. Ms. Davis did not move C.P. farther away from the window. Unfastening C.P. from his harness and attempting to move him would have been dangerous for him and for the others on the bus.

29. Ms. Davis and Ms. Figueroa were panicked and frightened. They discussed what steps they could take. They

were hesitant to physically approach C.P. because they remembered being told in training that physical efforts to control a child with autism would likely cause them to become more violent.

30. Ms. Davis' training required her to seek help from a manager if she did not know how to handle a situation. Throughout the bus ride on February 8, 2010, as the situation worsened, Ms. Davis never used the available cell phone to seek assistance from a manager.

31. Near the end of the ride, C.P.'s head banging broke the window and cut C.P. He began bleeding, but not profusely.

32. Ms. Davis got the phone number of C.P.'s mother from the ESE form and called her. C.P.'s mother asked them to continue to the school and said she would meet them there.

33. Ms. Davis' call for assistance came too late. Her failure to promptly seek assistance was a neglect of her duties and a failure to exercise sound professional judgment.

34. As the bus pulled in and stopped at the school, C.P. calmed. Ms. Davis approached him and comforted him verbally and physically. Other school employees boarded the bus and escorted C.P. off where his mother met him.

35. The emergency intervention duties of a bus paraprofessional, like Ms. Davis, include providing ESE students physical assistance, if needed, during an emergency.

36. Ms. Davis had seen C.P. mildly agitated before February 8, 2010. But there is no persuasive evidence that his actions included banging his head against the window or anything else, or that he had previously engaged in any self-injurious activities in Ms. Davis' presence.

37. C.P.'s activities when agitated had included rocking, jerking, rubbing his fingers together, and humming. These are all typical self-calming behaviors shown by individuals with autism. They were not unusual for a student with C.P.'s disability. The behaviors were to be expected and would not have triggered concerns sufficient to report the behavior.

38. In the past when C.P. became agitated, Ms. Davis had calmed him by offering cookies and speaking quietly to him.

39. On February 8, 2010, these techniques worked briefly. C.P. paused his head banging, but then resumed.

40. During Ms. Davis' ten years of employment, the School Board provided her 92 hours of job-related training, an average of 9.2 hours per year. Of that, 20 hours were her initial training. Ms. Davis attended the classes and successfully completed them. The instruction covered a wide range of topics including equipment, procedures for emergencies, such as traffic accidents, school board policies, and employee relations.

41. The training provided by the School Board included initial and refresher training in Crisis Prevention Intervention

(CPI). Ms. Davis' most recent CPI training was August, 2007. She successfully completed it. The CPI training is general and addressed a range of situations. It includes training in verbal and non-verbal techniques. The techniques range from soothing and calming to physical restraint.

42. There is no persuasive evidence that any of the CPI or other training specifically addressed the unique problems and dangers presented by a student in need of physical restraint in a moving vehicle.

43. The testimony of School Board witnesses who reviewed the video tape of the incident and the reports highlighted the difficulty of the situation. The School Board witnesses believed that C.P. was sitting in a window seat and said Ms. Davis should have relocated him. Other School Board witnesses, and common sense, more reasonably maintained that trying to relocate a physically agitated student in a moving bus would endanger him and the other passengers.

44. The CPI training did not include techniques specific to the unique issues presented by students with autism. It did not provide information about how to address head banging or suggest techniques such as cushioning the blows' impact when a person is banging his head against a hard object.

45. Typically, the school's training involved two days of in-service presentations about general issues, transportation,

student and personnel issues, including School Board policy, equipment, safety, and duties of bus drivers and aides. The training in aggregate provided little specific information about students with autism and nothing useful about ways to manage behavior such as that exhibited by C.P. on February 8, 2010.

46. The School Board provided Ms. Davis training in non-violent crisis intervention. It involved techniques for dealing with children who are acting out in an aggressive or violent manner. The training did not emphasize or focus on issues involving behavior of students with autism. It presented techniques as equally applicable and effective for all student populations, including ESE students with autism. The training, however, provided that employees should call their manager for assistance when faced with a problem they cannot handle.

47. Autism presents widely varied types of behavior. The crisis intervention techniques suggest engaging students in conversation and establishing a relationship with them through verbal interaction. This is not particularly useful or instructive in dealing with situations concerning non-verbal children.

48. One of the district's training documents is titled "How well do you KNOW YOUR EQUIPMENT ?????."

49. This training document is a representative sample of the training material that the district relies upon as having

prepared Ms. Davis for the student's head banging. The information it provided did not.

50. This is all the document had to say about possible behaviors of children with autism and how to react to them.

> Child may not be able to voice his/her discomfort, this may be apparent by different types of behavior:
>
> Rocking
> Banging with head or hands
> Biting
> Yelling, etc.
>
> In retrospect things could be fine, and child may exhibit inappropriate language and behavior. Modification training may be required to minimize their actions and reactions, to a more acceptable behavior.
>
> DON'T TAKE IT PERSONALLY

51. The information in other training materials is similarly non-specific and not helpful in the emergency Ms. Davis faced.

52. The CBA states: "[a]ny member of the Classified Unit may be dismissed by the School Board during his/her term of appointment, when a recommendation for dismissal is made by the Superintendent, for "just cause." The CBA defines "just cause" to include "insubordination; neglect of duty; unsatisfactory work performance; and violation of School Board Policy and/or Rules . . .".

53. School Board Rule 6.301(3)(b), provides a non-inclusive list of infractions that support disciplinary action. They include: neglect of duty; violation of any rule, policy, or regulation; sleeping during working hours; violation of safety rules; violation of the Code of Ethics of the Education

Profession; violation of the Principles of Professional Conduct for the Education Profession; violation of the Standards of Competent and Professional Performance; and violation of the Code of Ethics for Public Officers and employees.

54. The Code of Ethics of the Education Profession in Florida (Florida Administrative Code Rule 6B-1.001), and the Principles of Professional Conduct for the Education Profession in Florida (Florida Administrative Code Rule 6B-1.006) require Ms. Davis to have concern for the students as her primary professional concern; to seek to exercise the best professional judgment and integrity; and to make reasonable efforts to protect students from harmful conditions.

CONCLUSIONS OF LAW

55. 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. (2011).

56. The School Board advances four factual bases for termination, all occurring on February 8, 2010. They are: Ms. Davis' handling of C.P.'s head banging; sitting in the front of the bus; not getting off the bus to greet each student and escorting the students to their seats; and sleeping on duty. The School Board maintains that violation of any one or more of the applicable School Board Rules or sections of the Code of Ethics, are good cause to terminate Ms. Davis. The clear focus

of the School Board's termination decision, however, is the handling of C.P.'s head banging.

57. The School Board bears the burden of proving the allegations of its petition for termination of employment by a preponderance of the evidence. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

58. Ms. Davis is an "educational support employee" as defined by section 1012.40(1)(a), Florida Statutes. She may be terminated for "just cause" as defined in the CBA. §1012.40(2)(c), Fla. Stat.

59. "Just cause" for discipline is a reason which is rationally and logically related to an employee's conduct in the performance of the employee's job duties and "imputes removal or termination for misconduct, some violation of the law, or derelict of duty on the part of the officer or employee affected." State ex rel. Hathaway v. Smith, 35 So. 2d 650, 651 (Fla. 1948).

60. A preponderance of the evidence established that on February 8, 2010, Ms. Davis did not perform the duty of getting off the bus to greet students and escorting them to their seats.

61. The School Board did not prove that by sitting at the front of the bus, Ms. Davis violated a governing rule or policy. The persuasive evidence proved that although the School Board had a rule requiring the paraprofessional to sit in the back of

the bus, the Transportation Director had approved a seating chart that plainly showed Ms. Davis sitting at the front of the bus. Therefore Ms. Davis' presence at the front of the bus was approved by the School Board.

62. The School Board did not establish that Ms. Davis was sleeping on the job. But, a preponderance of the evidence proved that Ms. Davis did not maintain the constant supervision of the students as required by her job.

63. Ms. Davis' handling of C.P. is the focus of the School Board's decision to terminate. One solution advocated by several School Board witnesses with the benefit of hindsight, time, and not being subject to the urgency of the moment, was moving C.P. That solution illustrates how difficult the situation was. The solution is also problematic. It would likely have endangered C.P. further, as well as the other bus passengers. It was also uninformed, since the witnesses thought that C.P. was sitting beside the window.

64. Another solution School Board witnesses propose, again with the benefit of hindsight, time, and no pressure, was that Ms. Davis should have removed her sweatshirt and used it as a cushion between C.P.'s head and the window. The sweatshirt would have provided minimal cushioning, and that sort of action was not covered in the training provided.

65. Notably the school was aware of the risk of head banging with C.P. and had planned for it in his educational plan. It did not have a plan for dealing with head banging on the bus and did not warn Ms. Davis or the driver of the possibility. A plan could have included providing a meaningful cushion to use if C.P. started head banging and advance preparation for such an incident.

66. The third solution advocated by the School Board witnesses was physical and verbal soothing. Ms. Davis initially tried to sooth C.P., giving him cookies and speaking to him. It ceased working. She was then faced with a choice between approaching him and possibly triggering more violent and self-destructive behavior or doing nothing, which permitted the head banging to continue and perhaps wind down, as it did. The persuasive evidence does not establish that one choice would have been better than the other.

67. But Ms. Davis ignored one choice, one that she was taught about in her training--call for assistance.

68. The facts of this case leave the question for resolution in this proceeding to be this: Does Ms. Davis' failure to perform her duty to greet and escort the children, failure to constantly monitor the students, and failure to call for assistance, in light of her satisfactory ten-year history of employment constitute "just cause" for terminating her?

Ms. Davis failed to perform her assigned duties. On February 8, 2010, Ms. Davis neglected her duties in violation of School Board Rule 6.301(3)(b)xii., she violated School Board Rule 6.301(3)(b)xii., by violating established procedures, and she failed to exercise her best professional judgment in violation of rule 6B-1.001(2).

69. The School Board relies heavily upon Lee County School Board v. Hall, Case No. 08-5409 (Fla. DOAH June 29, 2009), adopted by Final Order, School Board of Lee County Case No. 09-0005 (Lee C'nty Schl. Bd. Sept. 22, 2009). The facts of that case differ greatly from the facts here. Lee County School Board v. Hall, involved a bus driver who did not follow the School Board's specific written protocol for handling fights on the school bus. In that case, the School Board had provided specific training for handling fights. The School Board had also informed the driver of the student's history of fighting. Also, the bus driver in Lee County School Board v. Hall had a history of other disciplinary actions. Ms. Davis does not.

70. Lee County School Board v. Hall is instructive only in that it illustrates the significance of protocols and training for handling incidents. Here, the School Board did not provide specific training for handling self-injurious behavior by students with autism and did not provide Ms. Davis information

it had about C.P. that would have helped her prepare for the events of February 8, 2010.

71. The School Board also relies upon School Board of Sarasota County v. Shrader, Case No. 89-006946 (Fla. DOAH June 6, 1990; Fla. Sch. Bd. of Sarasota Sept. 23, 1990). Like Ms. Davis, Shrader was a bus aide on a bus transporting ESE students. There the similarity between the cases ends. Shrader yelled at a student and kicked at him. She was also yelling and screaming at the other children on the bus. Also when removing the child from the bus she held his elbow from behind, a technique that was not consistent with her training.

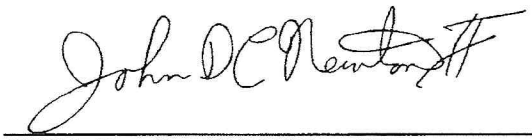
72. The facts here do not rise to the level of the facts in the preceding cases that supported termination. Ms. Davis faced an emergency for which she had not been well trained. The circumstances including the inability to stop the bus and the nature of autism created a situation with no clearly correct choices, except the choice to call for help.

73. Ms. Davis' failures to perform her job duties do not amount to "just cause" for termination. They do amount, however, to "just cause" for a one-year suspension.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered pursuant to section 435.06, suspending Respondent, Patricia Davis, from employment for a period of one year, starting November 9, 2010.

DONE AND ENTERED this 1st day of November, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2011.

ENDNOTES

[1]/ All citations to the Florida Statutes are to the 2010 edition unless otherwise noted.

[2]/ This Order refers to the student by initials to provide confidentiality.

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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.