

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SCHOOL BOARD,     )  
  )  
      Petitioner,                        )  
  )  
vs.                                        )     Case No. 11-5436TTS  
  )  
ERIC F. THOMAS, JR.,                 )  
  )  
      Respondent.                       )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held on January 19 and April 3, 2012, in Largo, Florida, Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: Laurie A. Dart, Esquire  
Pinellas County Schools  
301 4th Street, Southwest  
Post Office Box 2942  
Largo, Florida 33779-2942

For Respondent: Eric F. Thomas, Jr., pro se  
14099 Belcher Road South, Lot 1001  
Largo, Florida 33771

STATEMENT OF THE ISSUE

Whether just cause exists to terminate Respondent from his employment with the Pinellas County School Board.

PRELIMINARY STATEMENT

By correspondence dated April 5, 2011, Respondent, Eric F. Thomas, Jr. (Respondent), was informed by Julie M. Janssen, superintendent of Pinellas County Schools (Superintendent), that a recommendation seeking the termination of Respondent's employment would be submitted to Petitioner, Pinellas County School Board (Petitioner/School Board), for appropriate action. In response to the correspondence of April 5, 2011, Respondent, on April 26, 2011, timely filed a Request for Administrative Hearing. By correspondence dated October 19, 2011, the matter was forwarded to the Division of Administrative Hearings for a disputed fact hearing.

This final hearing in this matter was scheduled to commence on January 10, 2012. Petitioner moved for a continuance, and the final hearing was re-scheduled for January 19, 2012. During the final hearing on January 19, 2012, it was determined that a second day would be needed for the presentation of evidence. By agreement of the parties, April 3, 2012, was designated as the day for submitting additional evidence.

Petitioner called Respondent to testify during its case-in-chief. Petitioner also offered the testimony of Amy Danson, A.M. (student witness), Rosa Gibbs, Michael Griffiths, William Moan, Jr., T. Mark Hagewood, and Valencia Walker. Respondent testified on his own behalf and offered the testimony of Rose

Irizarry, Felicia Salters, Sonya Roundtree, and James Lott. Petitioner's Exhibits 1, 2A through 2G, 3 through 8, and 9A were admitted into evidence. Respondent's Exhibits 1 through 3, 5 through 10, and 13 through 20 were admitted into evidence. Respondent's Exhibits 11 and 12 were officially recognized.

A three-volume Transcript of the proceeding was filed with the Division of Administrative Hearings on April 16, 2012. The parties timely filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. On January 23, 2006, Respondent was hired by Petitioner to work as a school bus driver. The position of bus driver is covered by the 2008-2011 Collective Bargaining Agreement between The School Board of Pinellas County, Florida, and SEIU/Florida Public Services Union, CTW-CLC (Collective Bargaining Agreement).

2. Respondent's employment disciplinary history with Petitioner is as follows:

- 12/07/06 Respondent received a "Conference Summary" for uncorrected job deficiencies and for making inappropriate remarks to students;
- 05/06/08 Respondent received a "Caution" for making inappropriate remarks to students;
- 05/22/08 Respondent received a "Reprimand" for failing to comply with board policy, State law, or the appropriate contractual agreement;
- 01/25/10 Respondent received a "Caution" for excessive absenteeism;

- 03/26/10 Respondent received a "Caution" associated with an accident/crash that he had while operating his assigned school bus;
- 10/04/10 Respondent received a "Conference Summary" for insubordination;
- 12/02/10 Respondent received a "Caution" for making inappropriate and disparaging remarks to a student; and
- 12/14/10 Respondent received a "Caution" associated with an accident/crash that he had while operating his assigned school bus.

3. During Respondent's term of employment with Petitioner, his performance appraisals have been satisfactory with the exception that on January 20, 2009, Respondent was advised that he needed to improve his punctuality; and on January 25, 2010, he was told that his work attendance was unsatisfactory.

4. The passenger compartment of the school bus operated by Respondent during all times relevant hereto is typical of most school buses. There are two columns of seats separated by an aisle for ingress and egress that runs the length of the bus. Each column of seats is composed of approximately nine bench seats.

5. The bus operated by Respondent was equipped with an operable audio/video camera. The audio/video camera was mounted at the front of the bus' passenger compartment and was positioned such that it simultaneously recorded audio and images of the passengers and of Respondent while he operated the bus.

6. The bus also has a mirror mounted forward of the driver and above his head. When viewed from the seat of the driver of the bus, the overhead mirror allows the driver to monitor some of the activities of the passengers.

7. During all times relevant hereto, Respondent was operating his assigned bus on the roads of Pinellas County, Florida.

8. On February 8, 2011, student A.D. was a passenger on the bus operated by Respondent. School had been released for the day, and Respondent was transporting the students to their appointed stops. A.D. was enrolled as a middle school student and the other 30 or so students that were on the bus on February 8 and 9, 2011, appear from the audio/video recording to be of an age similar to that of A.D.

9. On February 8, 2011, A.D. was seated in the third row nearest Respondent and was, for the most part, positioned such that his upper torso was angled towards the rear of the bus. At approximately 4:22 p.m., A.D. is seen on the video making a throwing motion with his right arm.

10. Within a second of A.D. completing the throwing motion, Respondent removed the sunglasses from his face and in an agitated voice said, "(student's name) what did I say?" Simultaneous to making the statement, Respondent also spread his arms as an added gesture of frustration. Respondent's facial

expression further reflected his feelings of frustration and exasperation.

11. Approximately 14 seconds after calling out to A.D., Respondent picked up the microphone to the bus' public address system and announced the following:

Respondent: Hey! (1 second pause)

Respondent: If anybody sees (A.D.) throwing paper, you have my permission to knock him out!

12. According to Mr. Thomas Hagewood, who works for Petitioner as manager of the transportation department, a student's assigned school determines appropriate disciplinary action when a student commits an infraction while riding on a bus operated by Petitioner. Employees, like Respondent, that are assigned to Petitioner's transportation department are not responsible for disciplining students.

13. Respondent testified as follows regarding his rationale for authorizing the students on the bus to strike A.D.:

Respondent: Well, I felt like I had to just bring A.D. down a peg because, like I said before, in the beginning of the year--this has been an ongoing problem. I've written him up, I've gone to the school, you know, I've gone to my FOS (Field Operations Supervisor) and I couldn't get anybody to help me get this child under control. It came to a point where we had a sixth grader bullying 50 kids on the bus by throwing pencils, crayons, paper, you name it, snot rags.

It was just that particular day where even after I told him before the bus pulled out of the bus circle--I asked him not to throw anything, you know, and he did not listen to me. He got on the bus. He continued to throw stuff. I could hear the girls in the back asking A.D. to stop, you know.

I just thought that if I embarrassed him a little bit that it would work, you know, that he would just stop for that moment, you know, just to leave everybody alone.

Counsel: So you intended to embarrass him?

Respondent: I intended to get his attention.

Counsel: Okay. You just said "I thought if I embarrassed him."

Respondent: Well, okay. Yeah. I just thought if I brought the attention on him that, you know, he would stop doing what he was doing.

Although Respondent testified that he had previously "written A.D. up" for misconduct and complained repeatedly to school officials about A.D.'s behavior, Respondent did not produce any evidence to corroborate this testimony. Additionally, Petitioner reviewed its files and did not locate any documentation to substantiate Respondent's claim that he complained about A.D.'s behavior prior to February 8, 2011. Respondent's testimony regarding his complaints about A.D. is not credible.

14. Immediately after Respondent finished announcing to the students that it was permissible to "knock out" A.D., several girls can be heard screaming in response to Respondent's

statement, and a male student in a grey jacket is seen rising from his seat and moving towards A.D. in a provocative manner while stating something to A.D. that is inaudible. The student in the grey jacket returned to his seat without incident.

15. A few moments later, a male student in a white hat, who was initially positioned a few seats behind A.D., is seen on the video making his way towards A.D. The student in the white hat eventually positions himself in the seat diagonal from A.D. At approximately 4:24 p.m., the student in the white hat is seen on the video standing over A.D. and throwing a punch at A.D. that appears not to have been intended to strike A.D. After throwing the counterfeit punch, the student in the white hat returned to his seat and pointed his right index finger at A.D. It is not decipherable from the audio what, if anything, the student in the white hat said to A.D. while gesturing with his finger.

16. Over the next 30 seconds or so, the student in the white hat is seen on the video poking A.D. Both students are seated while this is occurring. At approximately 4:25 p.m., the student in the white hat rises from his seat, positions himself in a fighting stance while standing over A.D., and throws a right hand punch that strikes A.D.'s head. Immediately after being punched, A.D. sinks into his seat and disappears from the view of the camera.



17. Approximately 15 seconds after A.D. was punched, a female student in a grey jacket makes her way from the back of the bus and leans over A.D. After leaning over A.D. for approximately three seconds, the female student walks back to her seat. It is not known what, if anything, the female student said to A.D.

18. Approximately ten seconds later, a female student in a cream-colored jacket rises from her seat near the rear of the bus, walks down the aisle, and positions herself in the seat across from A.D. The student leans over A.D. and can be seen patting A.D. in such a way as to suggest that she was providing A.D. with comfort and support. After several seconds, the female student in the cream-colored jacket rises and returns to her seat at the back of the bus.

19. Throughout the remaining portion of the video from February 8, 2011, A.D. remains crouched down in his seat and hidden from the video, except for a momentary instance when he rises from his seat and throws a punch at the student seated behind him. Respondent did not react to A.D. having thrown a punch at another student because Respondent, at the time the punch was thrown, was driving the bus while using his cell phone. Additionally, at other times on February 8, 2011, students on the bus were leaving their seats, walking up and down the aisle, and throwing objects about the bus. These activities went unnoticed

by Respondent because he was distracted by talking on his cellular phone while operating the bus.

20. The following morning, Respondent, while transporting the students to school, made the following announcement over the public announcement system:

Respondent: Hey, real quick. Who would ya'll say the main person is that is always throwing stuff on this bus?

Students: (Students yell out A.D.'s name)

Respondent: Okay. They are probably going to question ya'll since he isn't on the bus. He probably told his parents about something trying to get me fired or something, you know whatever.

Student: We got your back Mr. Thomas!

Respondent: Alright.

21. A.D. sustained physical injuries and sought medical treatment as a consequence of receiving the punch to his head. A.D. reported the incident to his mom who was extremely upset by the fact that Respondent, as a school board employee, would encourage students to engage in acts of violence. At 5:05 p.m., on February 8, 2011, A.D.'s mom called Respondent to report the incident. After the incident of February 8, 2011, A.D. was afraid to ride the bus operated by Respondent. A.D.'s mother moved her place of residency and transferred A.D. to another school because she wanted to "get away from that area" where she and A.D. lived at the time.

22. The student that struck A.D. was arrested and charged with battery. The offending student successfully completed the juvenile diversion program. The mother of the student that struck A.D. was also outraged by Respondent's conduct of encouraging students on the bus to engage in acts of violence.

23. Around February 8, 2011, Respondent was going through a stressful domestic situation related to him gaining custody of his son. As a consequence of his domestic instability, Respondent was experiencing a great deal of subjective emotional distress to the extent that he felt like a "bottle about to pop."

24. As previously noted, Respondent, on December 2, 2010, was issued a letter of caution for using inappropriate language while on the bus with middle school students. As a part of the process for addressing the incident of December 2, 2010, Respondent agreed to voluntarily attend a student management class that is tailored towards bus drivers. A confluence of factors contributed to Respondent not taking the student management class. First, Respondent missed work for a period of time due to a workers' compensation injury. Second, the school district was closed several weeks for winter break. Third, due to a rotation of managerial personnel by Petitioner, the individuals that were aware of Respondent's request to take the student management class were given new assignments such that they no longer supervised Respondent. Finally, and most

importantly, Respondent showed no initiative upon his return to work in taking the steps necessary to inform his new superiors about his desire to enroll in the student management training course.

#### CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2011).<sup>1/</sup>

26. Petitioner seeks to terminate Respondent's employment. Petitioner bears the burden of proving by a preponderance of the evidence that just cause exists for Respondent's termination. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

27. As a member of the transportation department of the School Board, Respondent is considered an educational support employee. §§ 1012.01(6) and 1012.40(1)(a).

28. Section 1012.40(2)(b) provides in part that "[u]pon successful completion of the probationary period by the [educational support] employee, the employee's status shall continue from year to year unless the district school superintendent terminates the employee for reasons stated in the collective bargaining agreement. . . ." At the time of the

events that provide the basis for the instant action, Respondent had successfully completed his term of probationary employment.

29. Article 24, section 1, of the Collective Bargaining Agreement provides, in part, that "[t]he provisions of Board Policy 8.25 shall define just cause [and] [s]hould the superintendent seek termination of an employee, the exclusive forum of appeal shall be through the Administrative Procedures Act (Chapter 120, Florida Statutes)." Board Policy 8.25 has been re-designated as School Board of Pinellas County Policy 4140 (Board Policy 4140). Board Policy 4140 applies to Respondent.

30. Board Policy 4140 authorizes the superintendent to recommend to the School Board that disciplinary action, including termination, be taken against covered personnel that violate the policy.

31. Board Policy 4140 provides, in part, as follows:

Support staff may be dismissed for cause.

\* \* \*

The Superintendent retains the right and the responsibility to manage the work force. The School District generally follows a system of progressive discipline in dealing with deficiencies in employee work performance or conduct. Progressive discipline may include, but is not limited to, written counseling/conference summary, caution, reprimand, suspension without pay, and dismissal defined as follows:

A. Written Counseling/Conference Summary--  
This is a written memorandum or letter

memorializing an area of concern involving the performance or conduct of the employee. It is the first step in progressive discipline and is intended to counsel and advise the employee of best practices.

- B. Letter of Caution--A letter of caution is given to an employee who has demonstrated problematic behavior or performance. It is the second step in progressive discipline and is intended to alert the employee that a problem has been identified and needs to be corrected.
- C. Reprimand--A written reprimand is more serious than a caution. It is a formal censure or admonition given to an employee who has engaged in unacceptable behavior or demonstrated unacceptable performance.
- D. Suspension Without Pay--A suspension without pay is the temporary release from duty of an employee for a stated number of calendar days without pay and applies when a violation or repetition of violations of policies, contractual provisions, laws, or District expectations are serious enough to warrant suspension.
- E. Dismissal--This is the final step in progressive discipline and applies in cases where the employee misconduct is severe or in cases where the misconduct or unacceptable behavior or performance is repetitive and the progressive discipline procedures have not corrected the problems.

The severity of the problem or employee conduct will determine whether all steps will be followed or a recommendation will be made for suspension without pay or dismissal. When there is a range of penalties, aggravating or mitigating circumstances will be considered. The following offenses are subject to the penalties described below:

VIOLATIONS	OFFENSE	PENALTY RANGE
A.7.	Use of corporal punishment, excessive force or inappropriate method of discipline	Conference Summary-- Dismissal
A.9a.	Failure to perform the duties of the position	Caution-- Dismissal
A.13.	Inappropriate or disparaging remarks to or about students or exposing a student to unnecessary embarrassment of disparagement	Conference Summary-- Dismissal
A.19	Failure to correct performance	Conference Summary-- Dismissal
A.21	Conduct unbecoming a Board employee that brings the District into disrepute or that disrupts the orderly processes of the District	Caution-- Dismissal
A.24	Failure to comply with Board policy, State law, or appropriate contractual agreement	Caution-- Dismissal

\* \* \*

C. The following aggravating and mitigating factors or circumstances will be considered when determining the appropriate penalty within a penalty range:

1. the threat posed to the health, safety or welfare of students, co-workers, or members of the public;
2. the severity of the offense;

3. degree of student involvement;
4. the disciplinary history of the employee, including the number of offenses, the length of time between offenses as well as the similarity of offenses;
5. the actual damage, physical or otherwise, caused by the misconduct;
6. any effort of rehabilitation by the employee;
7. attempts by the employee to correct or stop the misconduct;
8. pecuniary benefit or self-gain to the employee realized by the misconduct;
9. impact of offense on students, co-workers, or members of the public;
10. length of employment;
11. whether the misconduct was motivated by unlawful discrimination;
12. employee's evaluations; [and]
13. any other relevant mitigating or aggravating factors[.]

A. Inappropriate Method of Discipline

32. Respondent was charged with violating Board Policy 4140 A.7. This section of the policy prohibits support staff, like Respondent, from using corporal punishment, excessive force or inappropriate methods of discipline on a student. According to Petitioner, Respondent was charged with this violation because he "did not use an appropriate method of discipline as a bus driver on the school bus."



33. As to this charge, two critical events occurred on the school bus. First, Respondent observed A.D. making a gesture that appeared to be consistent with a throwing motion. In response to this gesture, Respondent stated over the bus' public address system the following: "[A.D.] what did I say?" Second, Respondent, in anticipation of future misconduct by A.D. announced "[i]f anybody sees (A.D.) throwing paper, you have my permission to knock him out!"

34. Respondent's accusatory question to A.D., to wit: "what did I say," is not "discipline" within the context of School Board Policy 4140 A.7. Respondent's accusatory question to A.D. was nothing more than an attempt by Respondent to alert A.D. to the fact that he was being observed by Respondent and that A.D. should comport his behavior so as not to deviate from the rules of the bus.

35. Respondent's statement "[i]f anybody sees (A.D.) throwing paper, you have my permission to knock him out!" was clearly a solicitation to other students wherein Respondent was seeking help with controlling A.D. Similarly, this statement was also a clarion call to A.D. to modify his behavior.

36. As a predicate to the charge of using an inappropriate method of discipline, an individual must first have authority to impose discipline on a student. As stated by the transportation department manager, Mr. Hagewood, "transportation does not decide

the discipline of a student." Therefore, Respondent, as a part of the transportation department, does not have the authority to discipline students. Since Respondent does not have the authority to discipline, it is not appropriate to cite him for violating Board Policy 4140 A.7. and, accordingly, no violation of the same occurred.

B. Failure to Perform Duties

37. Respondent was charged with violating Board Policy 4140 A.9a. This section of the policy prohibits support staff from failing to perform the duties of their position. The School Bus Driver Handbook (Handbook) enumerates, among other things, the duties of a school bus driver.

38. Section 2.02 of the Handbook provides, in part, as follows:

A. Drivers will, at all times, operate their buses in accordance with the requirements of the Florida Traffic Laws, the requirements of the State Board of Education, and the procedures detailed in this Handbook. Drivers shall not leave the bus while students are on board.

\* \* \*

P. Drivers are required by Florida Statute and Rules of the State Board of Education to maintain order and good behavior by students on their buses. Rules for student conduct on school buses are set forth in the Pinellas County School Board's Student Code of Conduct. Drivers will make every reasonable effort to deal with infractions of the rules of student conduct and will, to

the best of their ability, maintain order and good behavior by students on their buses.

39. On February 8, 2011, Respondent failed to maintain order and good behavior by the students riding on his assigned bus. Respondent's statement "[i]f anybody sees (A.D.) throwing paper, you have my permission to knock him out!" was the cause of the breach of order and good behavior by the students on the bus. Immediately after Respondent advised the students that it was permissible to knock A.D. out, several students screamed on the bus in response to Respondent's statement. Subsequent to Respondent's making the statement, other students got out of their seats and walked the aisle for the sole purpose of interacting with A.D. The culminating event occurred, of course, when a student punched A.D. after he was given free rein to do so by Respondent. Each of these events occurred while Respondent was actively engaged in the process of driving the bus and transporting students to their respective destinations. Petitioner satisfied its burden and has proved by a preponderance of the evidence that Respondent's conduct violated Board Policy 4140 A.9a.

C. Inappropriate Remarks and Exposing a Student to Embarrassment, etc.

40. Respondent was charged with violating Board Policy 4140 A.13. This section of the policy prohibits support

staff from making inappropriate or disparaging remarks to or about students or exposing a student to unnecessary embarrassment or disparagement. Respondent's statement "[i]f anybody sees (A.D.) throwing paper, you have my permission to knock him out!" was inappropriate and designed to unnecessarily embarrass A.D. Equally inappropriate were Respondent's statements of February 9, 2011, about A.D. Petitioner satisfied its burden and has proved by a preponderance of the evidence that Respondent's conduct violated Board Policy 4140 A.13.

D. Failure to Correct Performance

41. Respondent was charged with violating Board Policy 4140 A.19. This section of the policy provides that a staff member can be disciplined for his/her failure to correct certain performance deficiencies. On three occasions prior to the events that provide the basis for the instant termination action, Respondent was disciplined for violating Board Policy 4140, because he made inappropriate remarks to students. As noted previously, Respondent, on February 8 and 9, 2011, again made inappropriate remarks to students. Petitioner satisfied its burden and has proved by a preponderance of the evidence that Respondent's conduct violated Board Policy 4140 A.19.

E. Conduct Unbecoming a Board Employee

42. Respondent was charged with violating Board Policy 4140 A.21. This section of the policy provides that a staff

member can be disciplined for "[c]onduct unbecoming a Board employee that brings the District into disrepute or that disrupts the orderly processes of the District." Respondent's conduct on February 8, 2011, of soliciting students to exact violence against A.D. and on February 9, 2011, of manipulating students in an attempt to have them support and otherwise validate his behavior, are certainly acts that are unbecoming of a school board employee. Respondent has failed, however, to prove that Respondent's conduct either "brought the District into disrepute" or that his conduct disrupted "the orderly processes of the District."

43. After the respective incidents, A.D.'s mother transferred him to another school. The parent's decision to transfer A.D. to another school was not motivated by a desire to avoid Respondent, but was instead motivated by the mother's desire to "get away from that area" where they were living. The parent of A.D. and the parent of the student that punched A.D. were both understandably upset by Respondent's conduct. However, there was no evidence offered that either parent, or members of the general public, projected their feelings in such a way as to hold the District in disrepute because of Respondent's conduct.

44. Petitioner argues that Respondent's conduct disrupted the orderly processes of the school district in several ways. First, Petitioner points to the fact that the administrative

hearing conducted herein is evidence of the disruption resulting from Respondent's conduct. The "conduct" that necessitated the need to have a chapter 120 hearing was Respondent's "conduct" of exercising his right to challenge Petitioner's proposed termination of his employment. Petitioner, as required by section 1012.40(2)(b), and further as reflective in the Collective Bargaining Agreement, acknowledges that employees, such as Respondent, are entitled to challenge employment termination decisions before a neutral tribunal. Petitioner's suggestion that the orderly processes of the school district have been disrupted by Respondent's act of exercising his right to challenge the allegations leveled against him, and the resulting inconvenience to Petitioner of having to produce witnesses to testify at the disputed fact hearing, is rejected.

Respondent's act of exercising his right to challenge Petitioner's allegations is not, as a matter of law, evidence of disruption as contemplated by Board Policy 4140 A.21.

45. Second, Petitioner cites as evidence of disruption the fact that A.D.'s parent withdrew him from school "because a bus driver encouraged her child to get punched." Petitioner's assertion notwithstanding, A.D.'s mother transferred him to another school because she wanted to move to a different area. The evidence does not establish a causal connection between Respondent's conduct and A.D. transferring to another school.

Even if such a causal connection were established, this would certainly be evidence of how A.D.'s life was disrupted, but would not necessarily be evidence of how the orderly processes of the school district were disrupted. Similarly, the fact that the student that punched A.D. faced criminal charges is not, in this case, probative of how Respondent's conduct disrupted the orderly processes of the school district.

F. Cellular Phone Use

46. Article 33 of the Collective Bargaining Agreement provides, in part, as follows:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining.

The parties affirm that after the exercise of that right and opportunity, this Agreement represents the complete and final understanding and agreement on all bargainable issues. Further, the parties agree that during the term of this Agreement, each voluntarily and unqualifiedly waives the right and agrees that the other shall not be obligated to bargain collectively with respect to any matter or subject not referred to or covered in this Agreement.

47. Article 29, section 25, of the Collective Bargaining Agreement provides, in part, as follows:

Use of Cell Phones/Pagers: Employees may be in possession of a personal cell phone/pager. However, they must be in an inactive or

monitoring status and may not be used for personal reasons during working hours except as provided herein. Personal cell phones may only be used during the employee's lunch time while on duty. In an emergency situation, an employee may be permitted to use his/her personal cell phone. (Emphasis added).

48. Section 7.09 of the Handbook provides that "[t]he use of cellular telephones while driving a Pinellas County school bus is STRICTLY PROHIBITED [and] [c]ellular telephones may be used on a school bus only when the bus is parked."

49. Article 29, section 25, of the Collective Bargaining Agreement generally allows employees covered by the agreement to use their personal cell phones during working hours only in emergency situations. Section 7.09 of Handbook compliments the Collective Bargaining Agreement by allowing bus drivers to use cell phones on a school bus, but only when the bus is not being driven.

50. Respondent does not dispute that on February 8, 2011, he used his cellular phone while driving his assigned school bus. Respondent's defense as to this charge is based upon his anecdotal observations that he has witnessed other drivers operating school buses while talking on their cellular phones with no resulting disciplinary action. Without more, such anecdotal evidence is insufficient to rebut Petitioner's evidence that clearly shows that Respondent operated his assigned school bus while using his cellular phone.



G. Failure to Comply With Policy, Law or Agreement

51. Respondent was charged with violating Board Policy 4140 A.24. This section of the policy provides that a staff member can be disciplined for a "[f]ailure to comply with Board policy, State law, or appropriate contractual agreement." As noted herein, Petitioner has proved by a preponderance of the evidence that Respondent's conduct violated Board Policy 4140 and Articles 24 and 29 of the Collective Bargaining Agreement.

H. Mitigation and Aggravation

52. When determining the appropriate disciplinary sanction to impose against a staff member, Board Policy 4140 C. directs consideration of certain aggravating and mitigating factors.

Aggravation

53. As a result of Respondent's conduct, there was a substantial threat posed to the health, safety, and welfare of A.D.

54. Respondent's behavior of authorizing students to use physical force against another student and manipulating students in an attempt to have them to support and otherwise validate his behavior, is a significant violation of Board Policy 4140.

55. Fortunately, the physical damage caused to A.D. by the punch to his head was very limited in duration. It is unclear however, if A.D. will suffer from long-term emotional damage as a result of Respondent's behavior. Nevertheless, the evidence

presented during the disputed fact hearing clearly established that Respondent's conduct caused A.D. to fear riding the bus operated by Respondent.

56. Respondent seems to be an intelligent individual who suffers from an inability to self-regulate the verbalization of his thoughts. On three occasions prior to February 8, 2011, Respondent was disciplined by Petitioner for making inappropriate comments. Respondent's recent verbal transgressions are so severe that they off-set any favorable consideration that should be afforded Respondent for the time that has elapsed between offenses or the longevity of his tenure as a School Board employee.

#### Mitigation

57. While it is undisputed that Respondent drove his assigned bus while talking on his cellular phone, the events leading to A.D. being punched by another student did not occur while Respondent was using his cellular phone. Furthermore, there is no evidence that Respondent, prior to February 8, 2011, was disciplined for operating his assigned bus while talking on his cellular phone.

58. Having considered all of the factors set forth in Board Policy 4140, the undersigned concludes that there are no mitigating factors that weigh in favor of action other than termination of employment.

RECOMMENDATION

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

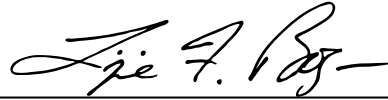
RECOMMENDED that:

1. Petitioner, Pinellas County School Board, dismiss the charge against Respondent, Eric F. Thomas, Jr., which alleges that Respondent violated Board Policy 4140 A.7.

2. Petitioner terminate Respondent's employment as a school bus driver as a consequence of Respondent's violation of Board Policy 4140 A.9a., A.13., A.19., and A.24. The violation of any one of these subsections, standing alone, is sufficiently severe so as to warrant Respondent's termination from employment as a school bus driver.

3. Petitioner dismiss the charge against Respondent which alleges that Respondent violated Board Policy 4140 A.21. (If Petitioner disagrees with the recommendation that Respondent should be terminated, then it is RECOMMENDED that Respondent, consistent with Petitioner's system of progressive discipline, be issued a letter of caution for operating his bus while using his cellular phone.)

DONE AND ENTERED this 4th day of May, 2012, in Tallahassee,  
Leon County, Florida.



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LINZIE F. BOGAN  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of May, 2012.

ENDNOTE

<sup>1/</sup> All subsequent references to Florida Statutes will be to 2011,  
unless otherwise indicated.

COPIES FURNISHED:

Gerard Robinson, Commissioner  
Department of Education  
Turlington Building, Suite 1514  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Charles M. Deal, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Dr. John A. Stewart  
Interim Superintendent  
Pinellas County School Board  
301 4th Street Southwest  
Largo, Florida 33770-2942

Laurie A. Dart, Esquire  
Pinellas County Schools  
301 4th Street, Southwest  
Post Office Box 2942  
Largo, Florida 33779-2942

Eric F. Thomas, Jr.  
14099 Belcher Road South, Lot 1001  
Largo, Florida 33771

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.