Division of Administrative Hearings
State of Florida

School Board of Monroe County, Florida, Petitioner
v.
Thomas Amador, Respondent

DOAH CASE NO. 12-0760TTS

November 12, 2013

Appearances
For Petitioner:
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FINAL ORDER

On February 6, 2013, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") submitted his Recommended Order on Remand ("RO") to the School Board of Monroe County, Florida ("SBMC") in the above captioned proceeding. A copy of the RO is attached hereto as **Exhibit "A."** The RO indicates that copies were sent to counsel for the Petitioner, SBMC, and counsel for the Respondent, Thomas Amador. SBMC filed its Exceptions on August 6, 2013. This matter is now before the SBMC for final agency action.

BACKGROUND

By hand-delivered letter dated January 19, 2012, the Monroe County School District Superintendent of Schools informed Respondent that he was going to recommend that the SBMC terminate Respondent's employment as an air-conditioning mechanic. On the same date, SBMC filed an Administrative Complaint against Respondent, wherein SBMC alleged Respondent was subject

to discipline because he: used institutional privileges for personal gain or advantage in violation of School Board Policy 4210(I); failed to maintain honesty in all dealings in violation of School Board Policy 4210(L); submitted fraudulent information on employment document as prohibited by School Board Policy 4210(Q); and was subject to dismissal for a willful violation of School Board Policies under Policy 4120.

Respondent timely requested a formal administrative hearing to contest SBMC's action, and on February 24, 2012, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings.

The final hearing was held on May 15, 2012, during which SBMC introduced 18 exhibits, numbered 1-18, and presented the testimony of Cheryl Allen and Jeff Barrow. Respondent testified on his own behalf and introduced 15 exhibits, numbered 1-15.

The final hearing transcript was filed on June 1, 2012, followed by the parties' timely submission of proposed recommended orders. A recommended Order was subsequently issued on June 21, 2012, wherein ALJ Bauer determined that the absence of record evidence concerning the terms of the collective bargaining agreement required the dismissal of the Complaint. ALJ Bauer further concluded, in the alternative, that dismissal of the Complaint was warranted in light of SBMC's perceived failure to demonstrate the applicability of School Board Policy 4210. Despite SBMC's allegation that Respondent was subject to dismissal via School Board Policy 4120, ALJ Bauer did not address the applicability of School Board Policy 4120 in his recommended Order.

ALJ Bauer also found it unnecessary to make specific findings concerning the underlying factual allegations.

On November 30, 2012, SBMC remanded this matter to DOAH with instructions to "reach the merits of the case." ALJ Bauer subsequently directed SBMC, in an order issued December 21, 2012, to transmit the final hearing transcript and exhibits to DOAH no later than January 18, 2013.

RECOMMENDED ORDER ON REMAND

In the February 6, 2013 RO on Remand, ALJ Bauer recommended that the SBMC dismiss the charges of the Administrative Complaint, and immediately reinstate Respondent's employment. (RO P 19). ALJ Bauer concluded that SBMC's failure to include the CBA in the record made it impossible to ascertain whether a violation of School Board Policy 4210 provided a valid basis upon which to terminate Respondent. (RO P 17). ALJ Bauer further concluded that the record is devoid of evidence indicating Respondent had direct access to students – rendering School Board Policy 4210 inapplicable. (RO P 18). Lastly, ALJ Bauer concluded that SBMC has not proven Respondent's acts were fraudulent, dishonest, or constituted a misuse of institutional privileges for personal gain or advantage. (RO P 19). Again, ALJ Bauer failed to address SBMC's allega-

tion that Respondent was subject to dismissal under School Board Policy 4120.

STANDARDS OF REVIEW

The following rulings on the Exceptions to the RO are made in light of the standards governing the administrative review of DOAH recommended orders by agencies having the authority and duty to enter final orders. Section 120.57(1)(l), Florida Statutes, provides that an agency final order "may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction." As required under Florida Statute 120.57(l), "[w]hen rejecting... such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting... such conclusion of law or administrative rule and must make a finding that its substituted conclusion of law or administrative rule is as or more reasonable than that which was rejected or modified." Section 120.57(1)(l) also prescribes that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(l), Fla. Stat. (2008); *Wills v. Florida Elections Commission*, 955 So.2d 61 (Fla. 1st DCA 2008); *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985) (holding that agency may not reject an ALJ's findings of fact, which are supported by competent, substantial evidence, nor is it authorized to reweigh the evidence, resolve conflicts in testimony, draw inferences, judge credibility of witnesses, or otherwise interpret the evidence). However, if a finding of fact in a recommended order is improperly labeled by an administrative law judge, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. *Battaglia Properties v. Fla. Land and Water Adjudicatory Commission*, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

A reviewing agency has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record in this case discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, this agency is bound by such finding in this Final Order. *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). In addition, a reviewing agency has no authority to make independent or supplemental findings of fact in construing the recommended order on review. *See*, e.g., *North Port, Fla. v. Con. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

RULINGS ON EXCEPTIONS

Preface

Under Florida law, parties to formal administrative proceedings must alert reviewing agencies to

any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See Couch v. Commission on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). The ALJ found that the Petitioner did not satisfy its burden of proof under Section 1112.34(3)(a), Florida Statutes. SBMC filed Exceptions to the RO, attached as **Exhibit "B."**

CONCLUSION

After reviewing the record, we find that each of SBMC's exceptions should be accepted and, in turn, are therefore incorporated into this Final Order. When using the definition of "student access" as defined under the Jessica Lunsford Act, SBMC finds that Respondent had access to students for purposes of School Board Policy 4210. Additionally, the ALJ failed to acknowledge that Respondent was subject to dismissal under School Board Policy 4120 – not just 4210. We also find that the theft of time by the Respondent is a violation of Florida Statute §1012.67, which provides in pertinent part that "[a]ny district school board employee who is willfully absent from a duty without leave . . . shall be subject to termination by the district school board." SBMC further finds that *Alvin* – which the ALJ bases much of his recommendation upon -- is distinguished by the facts of this case.

It is therefore ORDERED:

A. The Recommended Order on Remand (**Exhibit "A"**) is adopted as modified by the above, and incorporated by reference herein.

B. Petitioner School Board of Monroe County's exceptions (**Exhibit "B"**) are accepted.

C. Respondent is hereby terminated from employment with the School Board of Monroe County, Florida.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the School Board of Monroe County.

DONE AND ORDERED this 20th December day of ~~November~~, 2013, in Monroe County, Florida.

The School Board of Monroe County, Florida

Ron Martin
Chairman
241 Trumbo Road
Key West, Florida 33040

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DISTRICT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

DISTRICT CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MONROE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-0760TTS
	)	
THOMAS AMADOR,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER ON REMAND

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Key West, Florida, on May 15, 2012, before Administrative Law Judge Edward T. Bauer of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether there is just cause to terminate Respondent's employment with the Monroe County School Board.

PRELIMINARY STATEMENT

By correspondence dated January 19, 2012, the Monroe County School Board ("Petitioner" or "School Board") notified Respondent that it intended to terminate his employment as an air-conditioning mechanic. On the same date, Petitioner filed an Administrative Complaint ("Complaint") against Respondent, wherein it alleged that Respondent was subject to discipline because he: used institutional privileges for personal gain or advantage, contrary to School Board Policy 4210(I); failed to maintain honesty in all dealings, in violation of School Board Policy 4210(L); and submitted fraudulent information on employment documents, as prohibited by School Board Policy 4210(Q).

Respondent timely requested a formal administrative hearing to contest Petitioner's action, and, on February 24, 2012, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings.

As noted above, the final hearing was held on May 15, 2012, during which Petitioner introduced 18 exhibits,[1/] numbered 1-18, and presented the testimony of Cheryl Allen and Jeff Barrow. Respondent testified on his own behalf and introduced 15 exhibits, numbered 1-15.

The final hearing Transcript was filed on June 1, 2012, followed by the parties' timely submission of proposed

recommended orders. A Recommended Order was thereafter issued on June 21, 2012, wherein the undersigned determined that the absence of record evidence concerning the terms of the collective bargaining agreement required the dismissal of the Complaint. The undersigned further concluded, in the alternative, that dismissal of the Complaint was warranted in light of Petitioner's failure to demonstrate the applicability of School Board Policy 4210—a policy that, by its express terms, applies only to support staff members with direct access to students. (No evidence was adduced during the final hearing that would support a finding that Respondent had such direct access.) In light of these deficiencies, the undersigned found it unnecessary—and therefore declined—to make specific findings concerning the underlying factual allegations.

On November 30, 2012, Petitioner remanded this matter to DOAH with instructions to "reach the merits of the case." The undersigned subsequently directed Petitioner, in an order issued December 21, 2012, to transmit the final hearing transcript and exhibits to DOAH no later than January 18, 2013. The complete record, which Petitioner filed on January 18, 2013, as well as the parties' previously-filed proposed recommended orders have been reviewed and considered in the preparation of this Recommended Order.[2/]

FINDINGS OF FACT

A. The Parties / Background

1. Petitioner is the authorized entity charged with the responsibility to operate, control, and supervise the public schools within Monroe County, Florida.

2. At all times material to this proceeding, Petitioner employed Respondent as a non-probationary air-conditioning mechanic in the Upper Keys.

3. Respondent's professional duties include the maintenance and repair of air conditioning units at three schools—Plantation Key School, Coral Shores School, and Key Largo School—in the "Upper Keys" region of Monroe County. The record is devoid of evidence that Respondent's position affords him "direct access" to students, as that phrase is used in the School Board's policies.

4. On a typical workday, Respondent is expected to report by 7:00 a.m. to the school district's maintenance office (where Respondent's superintendent, Jeff Barrow, is located) in Tavernier, Florida. Generally speaking, the first 20 to 30 minutes of Respondent's day are spent at a computer terminal, where he monitors the temperatures in his assigned schools. Next, Respondent dedicates approximately 20 minutes to the completion of paperwork associated with repair tasks from the previous day. Respondent then begins work on various repair

assignments, all of which are described in written work orders. During the course of the day, Respondent is entitled to a one-hour lunch, as well as two 15-minute breaks, which are taken at approximately 9:00 a.m. and 2:00 p.m.

5. School Board maintenance employees, including Respondent, are required to complete (and submit to the supervisor) a "daily log sheet," which lists, among other things, the time spent on each work order, the work order number, and the specific action taken. In accordance with the practice and custom of Respondent's fellow employees, time intervals are recorded in the daily logs in half-hour increments.[3/] For instance, an entry of half an hour would be made for a task completed in only ten minutes, while a 40-minute job would be recorded as one hour. As a result of this practice, the first two activities of Respondent's day—i.e., monitoring classroom temperatures and completing paperwork, which in combination take more than 30 minutes—are recorded in each of Respondent's daily logs as a single, one-hour entry.

6. In addition to the daily work logs, maintenance workers are required to keep a separate vehicle log. Each worker's vehicle log is expected to list, with respect to each workday, a beginning odometer reading and most, but not all, of the locations visited. As to the latter requirement, the credible evidence establishes that lunch or break destinations need not

be recorded in the vehicle logs,[4/] an omission tolerated by Respondent's supervisor.[5/] Further, it is customary that multiple visits to a particular location during the same day are recorded as a single trip.[6/]

7. Turning to the merits, the instant charges against Respondent stem from three events, each of which is discussed separately below: Respondent's travel to Key West on October 18, 2011, to attend a grievance hearing; Mr. Barrow's sighting of Respondent on October 21, 2011, at a location where Respondent had no apparent business; and Mr. Barrow's subsequent review of Respondent's daily work logs and vehicle log for the period of October 3 through 21, 2011—an examination that, according to Petitioner, reveals numerous unaccounted-for miles.

B. Events of October 18, 2011

8. On October 18, 2011, Respondent was scheduled to travel to Key West to attend a second-level grievance hearing before the School District's director of human resources, Ms. Cheryl Allen. The grievance, which Respondent filed in an effort to challenge his job title and compensation, had been denied at the first level by Mr. Barrow. In light of Mr. Barrow's previous involvement in the grievance, as well Mr. Barrow's placement of a letter announcing the October 18 hearing's date and time in Respondent's mail folder, Respondent assumed, reasonably, that

it was unnecessary to provide Mr. Barrow with advance notification of his absence from the worksite.

9. On the date in question, Respondent reported to the maintenance office at 7:00 a.m., at which time he performed his daily check of classroom temperatures. Thereafter, at approximately 7:20 a.m., Respondent left the maintenance shop and proceeded to Plantation Key School, where he dropped off his work truck (which was experiencing mechanical issues) and exchanged it for a different vehicle.[7/] At that point, Respondent reviewed his grievance paperwork for a short time and then departed for Key West, a destination some two hours away from Tavernier.

10. Upon his arrival in Key West, Respondent stopped at the office of Mr. Leon Fowler, a union representative, to discuss the impending grievance proceeding. Upon the conclusion of their conference, which lasted approximately 30 minutes, Respondent and Mr. Fowler drove the short distance to Ms. Allen's office, the location of the hearing.

11. The credible evidence establishes that the grievance proceeding began at 11:00 a.m. and ended 30-35 minutes later. At that point, Respondent returned to Mr. Fowler's office and discussed the events of the hearing until roughly 12:00 p.m. Immediately thereafter, Respondent began the return trip to Tavernier, which ultimately took two and one-half

hours—30 minutes more than the usual drive time—due to his unsuccessful efforts to find a suitable place to eat lunch. (As explained during the final hearing, Respondent suffers from high cholesterol and therefore avoids fast food establishments.)

12. Upon his return to Tavernier, Respondent proceeded directly to his residence (his usual lunch spot) and remained there from 2:30 p.m. until 3:45 p.m.—all to the chagrin of Mr. Barrow, who was monitoring Respondent's whereabouts from a nearby location. Respondent then returned to the maintenance office and clocked out at the customary time.

13. As noted previously, Respondent is entitled to a daily lunch period of one hour, as well as two, 15-minute breaks (for a total of 90 minutes). By spending 30 minutes looking for a place to eat on the return trip from Key West, as well as 75 minutes at home, Respondent exceeded his daily allotment of lunch and break time by a total of 15 minutes. There is a lack of credible evidence, however, that Respondent's behavior in this regard was fraudulent or motivated by any intent to steal from his employer; indeed, it is abundantly clear that October 18 was a unique day for Respondent in that he did not expect to perform any repair tasks.

14. Petitioner takes issue with one other aspect of Respondent's October 18, 2011, activities: the truck log did not list Respondent's residence as a location visited. This was

in no manner improper, however, as the undersigned credits the testimony of Respondent and several of his colleagues (namely, Carlos Polanco and Joe Etshokin) that lunch and break locations are not recorded in the vehicle logs.

C. Events of October 21, 2011

15. On October 21, 2011, at approximately 3:35 p.m., Mr. Barrow was traveling northbound on U.S. Highway 1 (near mile marker 91) when Respondent passed him heading in the opposite direction. Mr. Barrow found this odd, since Respondent's work orders for that day would not bring him to that location and the customary break time had long since passed. Further, an examination of Respondent's vehicle log listed no work-related task in that area.

16. Mr. Barrow did not immediately confront Respondent concerning his whereabouts; rather, Mr. Barrow waited until an interview for the record with Respondent on November 17, 2011. By that time, not surprisingly, Respondent had difficulty recalling his reason for being in the area. Ultimately, however, Respondent explained that he had been on a break during that period, notwithstanding the fact that afternoon breaks are expected to be taken earlier—i.e., from 2:00 to 2:15 p.m.

17. Respondent's explanation, which the undersigned credits, accounts for the lack of an entry in his vehicle log. (As noted previously, the prevailing custom is that break and

lunch locations need not be recorded.) At most, the evidence demonstrates that Respondent took a late break—an act that, although inconsistent with previous directives (notably, Respondent is not charged with insubordination in this proceeding), was in no manner fraudulent or dishonest.

D. Review of Work / Vehicle Logs

18. Following the incident detailed above, Mr. Barrow conducted a review of Respondent's work and vehicle logs for the period of October 3, 2011, through October 21, 2011. Mr. Barrow's examination raised two concerns: inconsistencies between the work and vehicle logs on many of the dates; and numerous logged miles that could not be explained from the face of the records.

19. With respect to the first issue, some discrepancies between the logs are indeed apparent. Specifically, the vehicle log entries for October 4, 10, and 11, 2011,[8/] list school locations where Respondent had no work tasks—a fact established by the work orders and daily work logs for those dates.[9/] In addition, Respondent's vehicle log contains no entry for October 13, 2011, despite the fact that his daily work log records maintenance tasks at two schools on that date. The undersigned is not persuaded, however, that these shortcomings were the product of fraudulent or dishonest motives, as opposed to shoddy or careless recordkeeping.

20. Turning to the second concern, Petitioner asserts that Respondent logged 205 unaccounted-for miles during the period reviewed. In an attempt to substantiate this allegation, Petitioner introduced testimony from Mr. Barrow that he compared two figures: the total number of miles Petitioner drove during the period, which was determined from the odometer entries in the vehicle log; and the number of miles Respondent "should" have driven based upon an examination of the maintenance assignments listed in the daily work logs and orders, as well as the locations recorded in the vehicle log. Significantly, Mr. Barrow admits that he calculated the second figure by relying solely upon distances obtained from the "Google Maps" website. Had printouts from Google Maps been made part of the record[10/] (or had Respondent affirmatively stipulated to the distances), Mr. Barrow's reliance on the internet would not be fatal; all Petitioner adduced, however, was Mr. Barrow's hearsay testimony (with no applicable exception) that he derived the mileage data from the Google Maps website.[11/]

21. Even assuming, arguendo, that Mr. Barrow's reliance on Google Maps can be brushed aside, the allegation that Respondent accumulated unauthorized, excess mileage fails nevertheless. As established during cross-examination, Mr. Barrow's "expected" mileage figures were based on his assumption that a work location listed in the vehicle log for any given day was visited

only once, unless the vehicle log expressly indicated otherwise. Mr. Barrow's assumption in this regard is, however, contrary to the prevailing custom among the maintenance employees that multiple trips to the same location, during a single day, are recorded in vehicle logs as one trip. This flaw in the analysis, combined with the fact that Mr. Barrow's calculations made no allowance for distances associated with lunch or breaks unless documented in the vehicle log (as already noted, it is common practice among employees in the maintenance department to omit lunch or break destinations), precludes any finding that Respondent utilized his assigned work vehicle for personal gain or advantage. Indeed, Mr. Barrow conceded during cross-examination that he could not foreclose the possibility that Respondent's mileage was legitimate:

> Q If Mr. Amador does not list on his truck log lunch, where he goes for lunch, where he goes on breaks, if he goes to a school twice, or if he goes to a hardware store on more than one occasion in a day, that could account for the 15, approximately 15 extra miles that's indentified in those 205 excessive miles over 13 days?
>
> A It possibly could.

Final Hearing Transcript, p. 77-78.

E. Determinations of Ultimate Fact

22. The greater weight of the evidence fails to establish that Respondent is guilty of using institutional privileges for personal gain or advantage.

23. The greater weight of the evidence does not establish that Respondent is guilty of failing to maintain honesty in all dealings.

24. The greater weight of the evidence fails to establish that Respondent submitted fraudulent information on any document in connection with his employment.

CONCLUSIONS OF LAW

A. Jurisdiction

25. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

B. Notice of Charges / Burden of Proof

26. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation."

Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring).

27. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

28. In an administrative proceeding to suspend or dismiss an educational support employee or member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996). The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000); see also Williams v. Eau Claire Pub. Sch., 397 F.3d 441, 446 (6th Cir. 2005)(holding trial court properly defined the preponderance of the evidence standard as "such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . [a] belief that what is sought to be proved is more likely true than not true").

29. The charged employee's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

C. Alleged Grounds for Termination

30. As an air-conditioning mechanic, Respondent is an educational support employee as defined by section 1012.40(1)(a), Florida Statutes. See Lee Cnty. Sch. Bd. v. Rasmussen, Case No. 08-6220, 2009 Fla. Div. Adm. Hear. LEXIS 912 (Fla. DOAH June 22, 2009)(finding that a maintenance worker is an educational support employee pursuant to section 1012.40).

31. Section 1012.40(2)(b), Florida Statutes, provides that non-probationary support employees such as Respondent are entitled to maintain their employment from year to year unless:

> [T]he district school superintendent terminates the employee for the reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist, or reduces the number of employees on a districtwide basis for financial reasons.

(emphasis added).

32. In accordance with the plain language of section 1012.40(2)(b), Petitioner was obligated, once it determined to pursue the termination of Respondent's employment, to proceed

forward under the terms of the collective bargaining agreement ("CBA").[12/] Oddly, however, the Complaint contains no reference to the CBA, nor, more importantly, has the CBA been included as part of the record—a fatal error, as explained momentarily. Instead, Petitioner attempts in its Complaint to terminate Respondent's employment based solely upon alleged violations of School Board Policy 4210 (specifically, subsections I, L, and Q), which provides, in relevant part:

> 4210 - Standard for Ethical Conduct
> An effective educational program requires the services of men and women of integrity, high ideals, and human understanding. The School Board expects all support staff members to maintain and promote these essentials. Furthermore, the School Board hereby establishes the following as the standards of ethical conduct <u>for all support staff members in the District who have direct access to students</u>: <u>A support staff member with direct access to students</u> shall:
>
> * * *
>
> I. not use institutional privileges for personal gain or advantage.
>
> * * *
>
> L. maintain honesty in all dealings.
>
> * * *
>
> Q. not submit fraudulent information on any document in connection with employment.

(emphasis added).

33. In light of Petitioner's failure to include the provisions of the CBA in the record, it is impossible to ascertain whether a violation of School Board Policy 4210 provides a valid basis upon which to terminate Respondent's employment. This alone requires the Complaint's dismissal, as illustrated by Miami-Dade School Board v. Alvin, Case No. 03-3515, 2004 Fla. Div. Adm. Hear. LEXIS 1693 (Fla. DOAH Mar. 19, 2004), adopted in toto June 17, 2004. In Alvin, the school district sought to terminate the employment of a school security monitor based upon, among other things, the employee's pleas of no contest to several criminal drug charges. Id. Although the terms of Alvin's employment were governed by a collective bargaining agreement, the school board failed to make the contract part of the evidentiary record—a deficiency that necessitated the dismissal of the administrative complaint:

> In this case, because a collective bargaining agreement does exist, Alvin can be terminated only for reasons stated therein. Such "reasons" are matters of fact that the Board must prove as part of its case-in-chief. Usually this is done by moving the collective bargaining agreement into evidence. Here, however, the Board failed at hearing to introduce the collective bargaining agreement or offer any other competent evidence of its terms.
>
> * * *
>
> By statute, the UTD Contract, as the applicable collective bargaining agreement, prescribes the standards against which the

> undersigned fact-finder must evaluate Alvin's conduct, to determine whether he should be fired. Thus, whether Alvin violated the applicable contractual standard(s) is a question of ultimate fact to be decided in the context of each alleged reason for terminating his employment.
>
> * * *
>
> Without knowing the "reasons stated in the collective bargaining agreement" as potential grounds for termination, the undersigned obviously cannot determine, as a matter of ultimate fact, whether Alvin should be terminated. To learn what those reasons are, the undersigned is required to rely "exclusively on the evidence of record and on matters officially recognized." See § 120.57(1)(j), Fla. Stat. (emphasis added). Consequently . . . the Board's failure to introduce the UTD Contract (or some competent evidence of its terms) is fatal to the Board's case.

Id. at *6-8 (emphasis in original).[13/] Persuaded by Alvin's reasoning, it is concluded that Petitioner's failure to introduce competent evidence of the terms of the collective bargaining agreement is fatal to its case.

34. Assuming for the sake of argument that the CBA's omission from the record is of no consequence, the rule under which Petitioner seeks to discipline Respondent (School Board Policy 4210) applies, by its express terms, only to support employees who have direct access to students. The record is devoid of evidence that Respondent has such access, and the nature of his position (an air-conditioning mechanic) does not

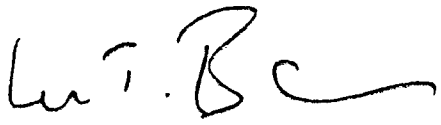
permit the undersigned to infer as much.[14/] Petitioner has, therefore, failed to demonstrate that Respondent is subject to the proscriptions of School Board Policy 4210.

35. Finally, Petitioner's evidence demonstrates, at most, that Respondent maintained inconsistent and incomplete records, took a late break on one occasion, and spent an extra 15 minutes away from the work site on a day—October 18, 2011, the date of his grievance hearing—when no repair tasks were to be performed. Petitioner has not proven, however, that these acts, while arguably insubordinate (a charge not brought in this proceeding), were fraudulent, dishonest, or constituted a misuse of institutional privileges for personal gain or advantage.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the Monroe County School Board enter a final order: dismissing the Administrative Complaint; and immediately reinstating Respondent's employment.

DONE AND ENTERED this 6th day of February, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of February, 2013.

ENDNOTES

[1/] Petitioner's Exhibit 15 consists of the deposition transcripts of Sterling Paul, Carlos Polanco, and Joe Etshokin, which have been admitted, by stipulation of the parties, in lieu of the witnesses' live testimony. Exhibit 15 also includes the transcript of Petitioner's May 2, 2012, deposition of Respondent.

[2/] Unless otherwise noted, citations to the Florida Statutes are to the 2011 codification.

[3/] See Deposition Transcripts of Sterling Paul, p. 7-8; Carlos Polanco, p. 7; and Joe Etshokin, p. 5; see also Final Hearing Transcript, p. 104, lines 1-3

[4/] See Deposition Transcripts of Joe Etshokin, p. 10, lines 4-6; and Carlos Polanco, p. 8, lines 16-18.

[5/] See Deposition Transcript of Carlos Polanco, p. 11, lines 3-8.

[6/] See Deposition Transcripts of Sterling Paul, p. 11-12; and Carlos Polanco, p. 12, lines 3-12; see also Final Hearing Transcript, p. 99.

[7/] See Deposition Transcript of Respondent, p. 11, lines 16-23.

[8/] Contrary to Mr. Barrow's final hearing testimony, there are no inconsistencies between Respondent's vehicle log and the daily work log of October 12, 2011. Each indicates repair tasks at two locations: Coral Shores School and Plantation Key School. See Petitioner's Exhibits 2 & 14.

[9/] Respondent's October 4, 2011, vehicle log lists travel to both Plantation Key School and Coral Shores School, while the daily work log (and the work order for that date) indicates no work at Plantation Key School on that date. Similarly, the October 10 and 11, 2011, vehicle log entries each record travel to an additional school location that is not justified by the daily work log or work orders.

[10/] Judicial notice may be properly taken of distances indicated in printouts from Mapquest, Google Maps, and similar websites. See, e.g., Jianniney v. State, 962 A.2d 229, 232 (Del. 2008).

[11/] Respondent's lack of objection to Mr. Barrow's testimony is of no moment. See Dep't of Health, Bd. of Med. v. Christensen, Case No. 11-4936, 2012 Fla. Div. Adm. Hear. LEXIS 135, *16-17 (DOAH Mar. 16, 2012)("[I]t must be remembered that although hearsay is admissible in administrative proceedings to supplement or explain other evidence, hearsay is insufficient by itself—even where the opposing party did not object to its introduction—to sustain a finding of fact unless the hearsay evidence would be admissible over objection in a civil action."); Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 103.2, p. 10 (2008 ed.)("[M]ost cases hold that where there is no objection to the hearsay, even when the party does not appear at the hearing, it cannot be the sole basis to support a finding.").

[12/] The existence of a collective bargaining agreement is confirmed by several brief references to the document (by Petitioner's counsel and a witness) during the final hearing. See Final Hearing Transcript, p. 23; 34; 45-46; Petitioner's Exhibit 1(a).

[13/] The administrative law judge in Alvin declined, properly, to re-open the record (which would have provided the school board an opportunity introduce the bargaining agreement) or take official recognition of the agreement's terms. As the judge in Alvin explained:

> First, . . . receiving additional evidence (or officially recognizing facts) after the record has been closed is disfavored and should be avoided.
>
> * * *
>
> Second, as the Florida Supreme Court has explained, "courts should exercise great caution when using judicial notice. As has been held in this state and elsewhere, judicial notice is not intended to fill the vacuum created by the failure of a party to prove an essential fact."
>
> * * *
>
> Third, the Board will not be authorized to "reopen the record, receive additional evidence and make additional findings" when this case is again before the agency for the purposes of entering the final order. Nor will the Board be allowed to officially recognize the UTD Contract, because "[o]fficial recognition is not a device for agencies to circumvent the hearing officer's findings of fact by building a new record on which to make findings." Given these circumstances, the undersigned is reluctant to take a discretionary action on his own motion that would look to any objective observer like bending-over-backwards to rescue the Board from its failure to introduce sufficient evidence at hearing.
>
> Finally, it is concluded that giving the Board a mulligan here would require the undersigned improperly to assume a patently adversarial posture vis-à-vis Alvin.

Alvin, 2004 Fla. Div. Adm. Hear. LEXIS 1693 at *9-11 (internal citations omitted)(emphasis in original).

[14/] Indeed, it is difficult to imagine a support employee whose contact with students is more attenuated than an air conditioning mechanic's. In contrast to many support employees, whose duties contemplate direct student contact (e.g., bus drivers, nurses, front-office workers, paraprofessionals, security monitors, etc.), it is perfectly conceivable that an air conditioning mechanic could accomplish all work-related tasks without direct student interaction.

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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 must be filed with the agency that will issue the final order in this case.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MONROE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 12-0760TTS
	)	
THOMAS AMADOR,	)	
	)	
Respondent.	)	

PETITIONER MONROE COUNTY SCHOOL BOARD'S EXCEPTIONS TO RECOMMENDED ORDER AND RECOMMENDED ORDER ON REMAND

The Petitioner, MONROE COUNTY SCHOOL BOARD ("School Board"), by and through undersigned counsel, hereby submits its exceptions, pursuant to Florida Administrative Rule 28-106.217(1), to Administrative Law Judge Edward T. Bauer's ("ALJ Bauer") Recommended Order dated June 21, 2012, and Recommended Order On Remand dated February 6th, 2013 and states:

1. ALJ Bauer filed a Recommended Order with the Clerk of the Division of Administrative Hearings on June 21st, 2012, attached hereto as Exhibit "A".
2. The School Board of Monroe County, Florida, on November 30th, 2012 remanded the matter to DOAH for a determination of the merits of the case.
3. Pursuant to Florida Administrative Rule 28-106.217(1), parties may file Exceptions to the Recommended Order with the agency rendering the Final Order, the School Board, within fifteen (15) days from the date the

Recommended Order was filed.

4. The Petitioner previously submitted exceptions to the recommended order and is supplementing the previously filed exceptions with exceptions to the Recommended Order On Remand attached hereto as "Exhibit B".

5. The following memorandum of law will discuss and outline the six (6) Exceptions the Petitioner is hereby submitting and the additional exceptions to the Recommended Order On Remand.

MEMORANDUM OF LAW

Exception I - Direct Student Access

1. The School Board Policy 4210 applies to all support personnel that have direct access to students.

2. Disputed portions of the ALJ Bauer's Recommended Order regarding direct student access are as follows:

> Page 5, Paragraph 5: "the record is devoid of evidence that Respondent has direct access to students, and the nature of Respondent's position (an air-conditioning mechanic) does not permit the undersigned to infer as much; therefore, Petitioner has failed to demonstrate that Respondent is subject to the proscriptions of School Board Policy 4210."
>
> Page 8, Paragraph 12: "the rule under which Petitioner seeks to discipline Respondent (School Board Policy 4210) applies, by its express terms, only to support employees who have direct contact with students. As found above, Petitioner adduced no evidence that Respondent has such contact."

3. While ALJ Bauer does not address how direct access is defined, a reasonable interpretation of the School Board Policy is it requires the same standard of contact as required by the Jessica Lunsford Act for purposes of background screening for District employees. Florida Statute § 1012.465(1) requires that "non-instructional school district employees or contractual personnel who are permitted access on school grounds when students are present, who have direct contact with students or who have access to or control of school funds must meet level 2 screening requirements. . ."

4. Testimony at the final hearing was well-established that Respondent Amador was responsible for maintenance of air conditioning units at District schools while students

were present. *See e.g.* Final Hearing Transcript p. 11, l. 6, p. 50, l. 7, p. 55, ll. 18-25. The record does not support a finding that an employee that is responsible for maintenance of air conditioning units at District schools while students are present somehow does not have direct contact or access to students. To hold otherwise would be to also hold that the same maintenance employee is not subject to the Jessica Lunsford Act.

Exception II – Violation of School Board Policies

1. Respondent Amador was recommended for termination based upon violation of School Board Policy 4120, 4210, Theft of time; Inappropriate use of a School Board owned vehicle; Insubordination; and Fraudulent statements in required School Board paperwork and logs.

2. The disputed portion of ALJ Bauer's Recommended Order is as follows:

> Page 4, paragraph 4: "Petitioner seeks in its Complaint to terminate Respondent's employment based solely upon alleged violations of School Board Policy 4210."
>
> Page 8, paragraph 12: "[A]s the rule under which Petitioner seeks to discipline Respondent (School Board Policy 4210) applies, by its express terms, only to support employees who have direct contact with students."

3. ALJ Bauer's Recommended Order ignores the Petition and submitted evidence of School Board Policy 4120. School Board Policy 4120, which was submitted into evidence during the Final Hearing and attached to the Petition requires, among other things, that "All support personnel shall become familiar with the policies of the Board and other such policies, regulations, memoranda, bulletins, and handbooks that pertain to their duties in the District. **Any support staff member employed by the Board who shall be guilty of any**

willful violation of the policies of the Board shall be guilty of gross insubordination and shall be subject to dismissal or such other lesser penalty as the Board may prescribe. (Emphasis added).

4. School Board Policy 4120 allows for dismissal should an employee violate a policy. ALJ Bauer's Recommended Order does not address 4120, but only 4210.

Exception III – Violation of Florida Statute

1. Respondent Amador was recommended for termination based upon violation of School Board Policy 4120, 4210, Theft of time; Inappropriate use of a District owned vehicle; Insubordination; and Fraudulent statements in required District paperwork and logs.

2. The disputed portion of ALJ Bauer's Recommended Order is as follows:

> Page 4, Paragraph 4: "Petitioner seeks in its Complaint to terminate Respondent's employment based solely upon alleged violations of School Board Policy 4210."
>
> Page 8, Paragraph 12: "[A]s the rule under which Petitioner seeks to discipline Respondent (School Board Policy 4210) applies, by its express terms, only to support employees who have direct contact with students."
>
> Page 6, Paragraph 11: "Pursuant to section 1012.40(2)(b), Petitioner was obligated, once it determined to pursue the termination of Respondent's employment, to proceed forward under the terms of the collective bargaining agreement. However, Petitioner did not do so—and, as a natural consequence, has not made the bargaining agreement part of the record—which makes it impossible to ascertain whether Respondent's alleged misconduct provides a basis for discipline. This alone requires the Complaint's dismissal, as illustrated by Miami-Dade School Board v. Alvin, Case No. 03-3515, 2004 Fla. Div. Adm. Hearing. LEXIS 1693 (Fla. DOAH Mar. 19, 2004), adopted in toto June 17, 2004. In Alvin, the school district sought to terminate the employment of a school security

> monitor based upon, among other things, the employee's pleas of no contest to several criminal drug charges. Id. Although the terms of the employment were governed by a collective bargaining agreement, the school board failed to make the contract part of the evidentiary record—a deficiency that necessitated dismissal of the administrative complaint . . . Persuaded by Alvin's reasoning, it is concluded that Petitioner's failure to introduce competent evidence of the terms of the collective bargaining agreement is fatal to its case."

3. Unlike Alvin, the present case is clearly distinguished. Alvin did not involve the allegation that the employee had violated school board policy or state statutes governing district employees. The theft of time by the Respondent is a violation of Florida Statute §1012.67 which provides in pertinent part that "[a]ny district school board employee who is willfully absent from a duty without leave . . . shall be subject to termination by the district school board."

4. As the Court noted in Dietz v. County School Bd., 647 So.2d 217 (Fla. 2nd DCA, 1994), "[n]o one could argue that, if proven, these charges would not constitute grounds for dismissal . . . [a]s it is required to do, the school board accepted the factual findings but determined there was just cause to terminate [the employee's] contract." Id. at 218. However, just cause is not defined as "the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause'." Id. at 219.

5. Florida Statute §1001.43(11) provides that "[t]he district school board may adopt policies and procedures necessary for the management of all personnel of the school system." The School Board has done so by adopting School Board Policy 4120 and 4210, the

Policies themselves refer to the legislation allowing the implementation of those procedures.

6. Thus, pursuant to case law and Florida Statute, it is the domain of the School Board to determine if 'just cause' exists for the termination of Respondent's employment for violation of State statute and School Board Policies.

Exception IV – Violation of Florida Statute

1. Respondent Amador was recommended for termination based upon violation of School Board Policy 4120, 4210, Theft of time; Inappropriate use of a District owned vehicle; Insubordination; and Fraudulent statements in required District paperwork and logs.

2. The disputed portion of ALJ Bauer's Recommended Order is as follows:

> Page 6, Paragraph 11: "Pursuant to section 1012.40(2)(b), Petitioner was obligated, once it determined to pursue the termination of Respondent's employment, to proceed forward under the terms of the collective bargaining agreement. However, Petitioner did not do so—and, as a natural consequence, has not made the bargaining agreement part of the record—which makes it impossible to ascertain whether Respondent's alleged misconduct provides a basis for discipline. This alone requires the Complaint's dismissal, as illustrated by Miami-Dade School Board v. Alvin, Case No. 03-3515, 2004 Fla. Div. Adm. Hearing. LEXIS 1693 (Fla. DOAH Mar. 19, 2004), adopted in toto June 17, 2004. In Alvin, the school district sought to terminate the employment of a school security monitor based upon, among other things, the employee's pleas of no contest to several criminal drug charges. Id. Although the terms of the employment were governed by a collective bargaining agreement, the school board failed to make the contract part of the evidentiary record—a deficiency that necessitated dismissal of the administrative complaint . . . Persuaded by Alvin's reasoning, it is concluded that Petitioner's failure to introduce competent evidence of the terms of the collective bargaining agreement is fatal to its case."
>
> Page 8, Paragraph 12: "Assuming arguendo that no bargaining

> agreement exists, Petitioner's case nevertheless fails, as the rule under which Petitioner seeks to discipline Respondent (school board policy 4210) applies, by its express terms, only to support employees who have direct contact with students. As found above, Petitioner adduced no evidence that Respondent has such a contact."

3. ALJ Bauer, in his recommended order, relies heavily on Miami-Dade School Board v. Alvin, Case No. 03-3515, 2004 Fla. Div. Adm. Hearing. LEXIS 1693 (Fla. DOAH Mar. 19, 2004), adopted in toto June 17, 2004.

4. As discussed, *supra*, Alvin involved a school security monitor that pled no contest to several criminal charges. While Alvin did contain an allegation involving violation of one School Board Policy, the ALJ in Alvin determined there was no competent evidence to prove Alvin committed the acts that would have violated the School Board Policy.

5. The instant case is much more similar to Pinellas County School Board v. Brown, 2011 WL 6019172 (Fla. DOAH, Nov. 29, 2011). This recent decision involved a maintenance worker that later became the 'night lead' for the night cleaning and maintenance crew. Id. at *2.

6. In Brown, the Superintendent moved to terminate Brown based upon violation of School Board Policy 4140 dealing with possession of drugs. The ALJ in Brown noted that "[n]either party offered into evidence the collective bargaining agreement that apparently exists for educational support employees." However, the School Board's representative testified that she was familiar with the applicable collective bargaining agreement and that Policy 4140, discipline of support staff, is consistent with the terms of the applicable

collective bargaining agreement. No evidence to the contrary was presented. Thus, although the better practice would have been for the School Board to offer into evidence the relevant portions of the collective bargaining agreement, the undersigned concludes that based upon the unrebutted testimony, Policy 4140 sets forth reasons for termination that are in accord with the applicable collective bargaining agreement.

7. Similarly in Broward County School Board v. Maddox, 2009 WL 438724 (Fla. DOAH, Feb. 19, 2009), the Broward County School Board initiated proceedings to terminate a school nurse and the ALJ noted that though the nurse was an educational support employee and that the "Petitioner did not establish whether any collective bargaining agreement sets forth applicable criteria for terminating a school nurse. Petitioner also did not establish whether School Board has adopted a rule containing such criteria."

8. Despite the lack of a collective bargaining agreement or policies setting forth applicable criteria for terminating a support employee, the ALJ in Maddox determined that "Petitioner established by the requisite standard that Respondent's performance as a school nurse established a pattern of failing to follow basic nursing protocol, School Board policy . . . and the attendant documentation thereof. . . Respondent's pattern of non-compliance with accepted policy and protocol justifies the termination of her employment."

9. Finally, in Manatee County School Board v. Heaven, 2010 WL 2888020 (Fla. DOAH, July 21, 2010), the Manatee County School Board moved to terminate a bus driver based upon violation of Florida Statute, Florida Administrative Code and School Board Policy for the reasons set forth in the collective bargaining agreement. Id. However, the

Manatee County School Board did not enter into evidence the collective bargaining agreement. Id. at FN3.

10. The ALJ in Heaven found that, regardless of the existence of a collective bargaining agreement, the Respondent Heaven violated Florida Statute § 1012.67 and subject to discipline pursuant to School Board Policy.

11. In the case at hand, ALJ Bauer found the conclusion of ALJ Laningham to be persuasive without addressing the other opinions. Since ALJ Bauer had legal authority to find on either side of this issue, this exception is submitted. The School Board, in its role as the agency, is not required to accept ALJ Bauer's choice of which legal authority he finds more persuasive.

Exception V – Merits of the Underlying Allegations

1. The disputed portion of ALJ Bauer's Recommended Order is as follows:

> Page 5, Paragraph 6: "In light of these circumstances—i.e., Petitioner has not proceeded against Respondent under the terms of the collective bargaining agreement (as it should have), but rather, under a school board policy that applies only to employees that have direct access to students—it is unnecessary to reach the merits of the underlying allegations of misconduct.

2. It is unknown what law or fact ALJ Bauer relied upon to deny a review of the merits of the case. Insofar as this conclusion can be considered a factual finding, the record is devoid of competent substantial evidence supporting the conclusion.

3. Cheryl Allen, during the final hearing, testified as follows:

Q. And what were the results of the investigation?

A. The allegations were founded for violation of various School

Board policies including theft of time and inappropriate use of a District-owned vehicle and fraudulent statements in paperwork.

Q. And are you aware that one of the allegations of theft of time includes the date that he had a grievance hearing in Key West?

A. Yes.

Q. Have you identified the Administrative Complaint. Have you seen that before?

A. Yes. It's the Petition for Suspension and Termination from the superintendent to the Board.

Transcript Final Hearing P. 14; ll 1-13.

3. In addition, Jeff Barrows testified regarding the fraudulent statements on required School Board paperwork as follows:

Q. What are some of the discrepancies that you noticed?

A. The discrepancies I noticed were that on almost every day there were more miles driven than were recorded in the logbook, and on many days the locations in the logbook didn't match the locations of the work orders that he said he worked on that day. So nothing matched up the way it should match up.

Q. Could you give us an example of a work order that says something different than what the truck log indicates?

A. Let's see.

Q. Here are the logs if you need to look through the detailed log sheets.

A. October 12th he indicated that he only worked at Coral Shores, and yet his truck logbook indicated he worked at Plantation Key School and Coral Shores. October 10th he indicated he only worked at Coral Shores, and his logbook indicated he worked at Coral Shores and Plantation Key School. October 11th it is indicated that he worked at Coral Shores and Plantation Key

School, and yet his truck log has Plantation Key School, Coral Shores, and Key Largo School.

Q. Just because I pulled it up, October 11th shows, his truck log shows he worked where?

A. Coral Shores and Plantation Key Schools.

Q. And his work order shows he worked where?

A. His truck log shows that he worked at Plantation Key, Coral Shores, and Key Largo.

Q. Looking at the log sheet and the truck log are you able to arrive at any conclusions about that information?

A. They don't match.

Q. Does that mean that one of them wasn't done, or does it mean – I'm just trying to figure out if they don't match, obviously they should, but if they don't what are some of the issues that could arise?

A. One was recorded inaccurately. It either was done to hide time or to hide mileage. Either one could have been falsified for a reason.

Final Hearing Transcript P. 55; ll6-16,

4. Jeff Barrow also testified regarding theft of time:

Q. Going to the first one, theft of time, what were the findings of the Interview for the Record for that?
A. They were substantiated.

Q. Based upon what?
A. By his own admission he was at his home from approximately 2:30 until 3:45 when he should have been at work.

Q. If he took, if he hadn't had worked that day and he took it at that time would it also be okay to lump break time with lunch time so that he could get that amount of time?

A. No. The SRP contract does not allow you to –

MR. HERDMAN: Objection. Competency. Predicate.
. . . [discussion regarding objection]

THE COURT: I'll allow him to testify about what his understanding is. Whether that's enough to carry the day, I guess I'll figure it out. But go ahead.

Q. What's your understanding of taking a break with a lunch?
A. The break periods are not allowed to extend the meal break. It's in the SRP contract. It's also been discussed verbally at meetings.

Final Hearing Transcript p. 44, l. 25, p. 45, ll. 1-25, p.46, ll. 1-7

5. Thus, while there was competent substantial evidence that Respondent's actions constituted violations of School Board Policy, and even testimony (unrefuted) that Respondent Amador's actions violated the collective bargaining agreement, ALJ Bauer did not address the merits of the case.

6. Based upon a review of the record, there exists competent substantial evidence, both in the form of testimony and documentary evidence submitted, to find that Respondent Amador violated School Board Policies.

Exception VI – Recommendation

1. The disputed portion of ALJ Bauer's Recommended Order is as follows:

Page 8: "Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the Monroe County School Board enter a final order: dismissing the Administrative Complaint; and immediately reinstating Respondent's employment".

2. Based upon the above exceptions, the Petitioner requests ALJ Bauer enter a Final Order terminating the employment of Respondent Amador for violation of School

Board Policies.

Exceptions to Recommended Order on Remand

1. As previously submitted, Petitioner again takes exception to ALJ Bauer's determination that the Respondent could not be terminated based upon the School Board Policies. Florida Administrative Code 28-106.204(2) requires a Motion to Dismiss an Administrative Complaint to be filed within 20 days of assignment of an ALJ in a DOAH proceeding. The Administrative Complaint adequately stated the grounds upon which the Petitioner was seeking to terminate Respondent's employment. Respondent, having failed to file a motion to dismiss the administrative complaint has waived the right to challenge that the Policies are insufficient grounds for termination.

2. Petitioner takes exception to the ALJ's findings of fact that Respondent's taking additional time for lunches and breaks did not constitute grounds for termination. Specifically the ALJ states:

Page 8, Paragraph 13 "By spending 30 minutes looking for a place to eat on the return trip from Key West, as well as 75 minutes at home, Respondent exceeded his daily allotment of lunch and break time by a total of 15 minutes. There is a lack of credible evidence, however, that Respondent's behavior in this regard was fraudulent or motivated by any intent to steal from his employer."

3. Petitioner contends that such a finding constitutes use of an institutional privilege for personal gain or advantage, regardless of the intent to steal.

4. Petitioner takes exception to the ALJ's findings of fact that inconsistencies in truck logs and work logs do not constitute grounds for termination. Specifically the ALJ states:

Page 10, Paragraph 19 "[S]ome discrepancies between the logs are indeed apparent . . . [t]he undersigned is not persuaded, however, that these shortcomings were the product of fraudulent or dishonest motives, as opposed to shoddy or careless recordkeeping." The evidence demonstrated that the daily log sheets were preprinted by Respondent, and as such were intentional acts, not careless or negligent behavior. In addition, the evidence demonstrated that Respondent had been warned numerous times in the past regarding such conduct and continued to submit documents he knew could not be correct. As such, intentional acts containing false statements are fraudulent.

5. Pursuant to School Board Policy 4139.01 Respondent was obligated under 4120 to abide by such policies. Failure to do so is grounds for termination particularly given the previous incidents which demonstrates a pattern of conduct intended to deceive his employer. At the very least, such actions were dishonest and grounds for termination under 4210(L).

WHEREFORE, the Petitioner, MONROE COUNTY SCHOOL BOARD, submits the aforementioned Exceptions to Administrative Law Judge Edward T. Bauer's Recommended Order dated June 21, 2012 and Recommended Order On Remand dated February 6th, 2013 to be considered and incorporated into the Final Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via email transmission and U.S. Mail to: Mark Herdman, Esq., *Attorney for Respondent,* Herdman & Sakellarides, P.A., 29605 U.S. Hwy. 19 North, Suite 110, Clearwater, FL 33761 on this 21st day of February 2013.

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