

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDO COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 17-1357

MILDRED RODGERS,

Respondent.

_____ /

RECOMMENDED ORDER

On October 5, 2017, a hearing was conducted pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Yolonda Y. Green, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), in Brooksville, Florida.

APPEARANCES

For Petitioner: Thomas Martin Gonzalez, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate Respondent from employment as a bus driver, a non-instructional position.

PRELIMINARY STATEMENT

By letter dated January 3, 2017, Lori Romano, Ph.D., superintendent of schools, Hernando County School District, issued a Notice letter to Respondent ("Respondent" or "Ms. Rodgers"), notifying her that the Superintendent intended to recommend to the Hernando County School Board ("Petitioner" or "School Board") that her employment as a bus driver be terminated. The Notice alleged that Respondent engaged in misconduct in the scope of her employment. Specifically, the Notice alleged Respondent violated the School Board-approved Safe Driver Plan by being assigned 10 points in a 12-month period. The Notice further alleged that Respondent violated School Board policy 6.37(5)(d), by committing a Group III offense. On January 18, 2017, Petitioner received Respondent's timely request for an appeal hearing to dispute Petitioner's intended action. On March 2, 2017, this matter was referred to DOAH for assignment of an administrative law judge to conduct an evidentiary hearing in this matter.

On March 22, 2017, the undersigned issued a Notice of Hearing scheduling this matter for May 10, 2017. After several motions for continuance, the final hearing was rescheduled for October 5, 2017.

The hearing commenced as scheduled on October 5, 2017, with both parties represented by counsel. Petitioner presented the

testimony of four witnesses: William Hall, manager of fire, safety, and security; Matthew Goldrick, supervisor of professional standards; Joseph Handzus, chairman of the Safe Driver Committee Review Board ("Review Board"); and Karen Sartin, safety and training specialist. Petitioner's Exhibits 1 through 3, 5, 6, 11, 12, 14, and 19 through 21 were admitted into evidence. Respondent did not testify and did not present any witnesses. Respondent's Exhibits 1 through 3 and 5 through 9 were admitted into evidence.

A one-volume Transcript of the hearing was filed on October 23, 2017. The parties timely filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2016), unless otherwise noted.

FINDINGS OF FACT

Background

1. The School Board is the duly authorized entity responsible for the operation, control, and supervision of all public schools (grades kindergarten through 12) in Hernando

County, Florida, and for otherwise providing public education to school-aged children in the county. § 4(b), Art. IX, Fla. Const.

2. At all times material to this proceeding, Respondent was employed by Petitioner as a bus driver, a position she held for approximately 16 years. Bus drivers are considered educational support or non-instructional employees.

3. The School Board has adopted a Safe Driver Plan that applies to all bus drivers. All bus drivers receive a copy of the Safe Driver Plan annually, and are required to sign the Safe Driver Acknowledgement Form indicating that he/she has reviewed and understands the plan.

4. The Safe Driver Plan specifically provides guidelines for assignment of points based on alleged driving-related incidents and maximum number of points that may be assigned for each violation. A recommendation for disciplinary action is based on the number of points assigned during a 12-month time period. Under the Safe Driver Plan, the recommendation for disciplinary action for the designated points within a 12-month period is as follows: 1-4 points, a documented warning; 5-6 points, a one-day suspension without pay; 7-9 points, three days' suspension without pay; and 10 points, recommendation for termination.

5. Pursuant to the Safe Driver Plan, the Review Board "assesses points for any violation or incident/crash from 0 through 10 following the approved point system outlined in the plan." Specifically, the Review Board, made up of five members, as designated by the Safe Driver Plan, is responsible for reviewing driver incidents, determining whether the incidents were preventable or unpreventable, listening to any evidence provided by the driver regarding the incidents, and assessing points pursuant to the Safe Driver Plan. The Review Board does not have discretion regarding the recommendation made to the driver's site administrator.

6. Regarding assignment of points, the Safe Driver Plan provides in relevant part:

If court action is required to determine fault in an incident/crash, and the assignment of points would be five (5) points or less, the driver shall not be assigned points until court action is taken. Effective date of points assigned shall be the date of the violation.

* * *

If a driver is assigned points, he/she will be informed of the assignment of points by the Safe Driver Review Board in writing. The driver may then accept the point assignment or he/she may appeal the assignment of points to the Coordinator of Safety and Security.

7. When points are assessed by the Review Board, the driver who is the recipient of the points has an opportunity to

appeal the decision. The Safe Driver Plan includes an appeal process which provides, in relevant part, the following:

The driver must inform his/her supervisor in writing of their decision to appeal within five working days of notification of assigned points. The request shall state the driver's objections to the assignment of points in detail. The supervisor shall then forward the request for appeal to the Coordinator of Safety and Security.

A driver who chooses to appeal the assignment of points will be given a copy of all accident information for their review by the investigator prior to the date of the meeting. This will give the driver the opportunity to review all information that will be presented at the hearing and prepare for the hearing in order to rebut any of the information that will be presented. It will also give the driver the opportunity to present testimony and information to the Coordinator of Safety and Security or to offer an explanation of mitigating circumstances prior to points being upheld.

After the Safe Driver Review Board's final recommendation of administrative action is made and any driver's appeal is heard, all disciplinary action taken by the driver's supervisor must follow the School Board approved disciplinary policy.

8. For purposes of this matter, the driver appeals the assignment of points to William Hall, the manager of fire, safety, and security. Mr. Hall testified that he reviews all of the information submitted by the driver, and if there is additional evidence or mitigating circumstances that were not before the Review Board, he would meet with the driver for a

hearing. If there is no new evidence or mitigating circumstances, Mr. Hall then unilaterally determines the appeal based on the documents.

9. After a driver has exhausted the appeal process, a driver, who is facing a potential suspension or termination based on the accumulation of points, may appeal the coordinator's decision by using the School Board's approved complaint process. For purposes of this matter, that appeal goes to the supervisor of professional standards, Matthew Goldrick, who serves as the designee for the superintendent and handles the driver's predetermination meetings. At the predetermination hearing, the driver is given an opportunity to present any information that she wants prior to any decision being made for a suspension or termination. The superintendent then decides whether to proceed with a recommendation for discipline.

10. The School Board has adopted policy 6.37, which establishes standards for the separation, discipline, and discharge of non-instructional employees, including Respondent. Paragraph (5)(d) recognizes three categories of offenses and a guide for recommended penalties. Relevant to this proceeding are the offenses and recommended penalties for Group III. The penalty for Group III offenses carry a recommended penalty of "up to discharge" for the first violation.

11. The School Board has charged Respondent with violating the Safe Driver Plan by accumulating 10 points within a 12-month period, which results in a recommendation of termination. Respondent was also charged with a violation of a Group III offense, namely accumulating disciplinary actions, no one of which standing alone would warrant discharge. The accumulation of points resulted from four driving violations, which are discussed further below.

Driving Violations

12. On Tuesday, December 8, 2015, Respondent was issued a traffic citation for careless driving while operating her bus. Respondent did not immediately report the citation as required by the Safe Driver Plan.

13. On January 6, 2016, the Review Board reviewed Respondent's December 8, 2015, incident. The Review Board assessed Respondent with a violation for "[f]ailure to report an incident/crash or citation, no matter how minor, while operating a School Board vehicle immediately during regular working hours and as soon as reasonably possible after working hours," a Category 3 violation. The Review Board determined the incident was preventable and assigned Respondent 10 points.

14. Respondent appealed the Review Board's assignment of 10 points for the December 8, 2015, incident. On January 21, 2016, a Safe Driver Appeals Meeting was held before Mr. Hall.

As a result of the appeal, Respondent's assigned points were reduced to four points.

15. On April 25, 2016, Respondent was involved in an accident while operating her bus. The Review Board met and assigned Respondent the maximum of two points for improper backing, a Category 25 violation of the Safe Driver Plan. The assessment brought Respondent up to six points in a 12-month period. Respondent did not appeal this assessment of points.

16. On May 23, 2016, Respondent was issued a citation for running a red traffic light signal. On September 14, 2016, the Review Board reviewed Respondent's alleged violation from May 23, 2016, at which time the Review Board listened to Respondent's evidence and reviewed the available video. The Review Board determined that the video reflected that Respondent failed to obey the red light traffic signal, a Category 13 violation of the Safe Driver Plan. While such a violation could result in a maximum of four points under the Safe Driver Plan, the Review Board assigned Respondent two points for the violation. The Review Board's assignment of points placed Respondent at an accumulated eight points for the past 12-months.

17. Mr. Handzus and Mr. Goldrick credibly testified that court action was not necessary to determine fault because the video clearly depicted Respondent failing to obey the red light.

18. On September 14, 2016, Respondent wrote a letter to Mr. Hall seeking to appeal the assessment of two points for failure to obey the red light traffic signal. In the appeal letter, Respondent indicated her objection to the assessment in detail by stating that she ran the red light, because she "had almost no choice but to go through it." Mr. Hall denied her request for an appeal.^{1/}

19. Respondent was brought in for a predetermination hearing as part of the disciplinary process because her eight points in a 12-month period would result in a three-day suspension. After the predetermination hearing, and listening to Respondent's arguments, the recommendation was made to suspend Respondent for three days without pay. Respondent did not appeal the disciplinary action resulting in the three-day suspension.^{2/}

20. On October 26, 2016, after having been reinstated from her suspension, Respondent was involved in an incident on Deer Run Road where she backed her school bus into a mailbox. On November 7, 2016, the Review Board assigned Respondent the maximum two points for improper backing, a Category 25 violation of the Safe Driver Plan. This was Respondent's second violation for improper backing.

21. On November 7, 2016, Respondent timely sent a letter to Mr. Hall timely requesting an appeal of the assessment of two

points for the October 26, 2016, incident. In the letter, Respondent explained in detail her objection to the assessment of the points by stating that on "[t]he morning of 10/26/2016 at 5:30am . . . I hit a mailbox" and that "[w]hile backing up [she] hit the mailbox." Mr. Hall reviewed the appeal letter and denied the request for appeal.

22. Mr. Hall testified that he denied the request for appeal because there was no information in the letter that would mitigate Respondent's conduct and there was an admission regarding the violation. However, Mr. Hall's actions were a direct contradiction to the appeal process as expressly written in the Safe Driver Plan.

23. The Safe Driver Plan does not provide Mr. Hall the authority to unilaterally deny a driver's "request for an appeal" or exercise discretion in granting or denying an appeal. Ms. Rodgers was entitled to an appeal so long as she made that request in writing within five days of notification of the assigned points. Respondent complied with that requirement. The appeal process also provides that Respondent would be entitled to a copy of all information for review prior to the date of the meeting to prepare for hearing and given an opportunity to present testimony and mitigation *before* the points are upheld. Mr. Hall testified that he considered the comments in Respondent's letter as mitigation. However, under

the Safe Driver Plan appeal process, mitigating evidence would be offered at the hearing, not in the notice of appeal letter. Further, the driver checklist in items 7 through 9 restates the procedure as outlined in the appeal process. Simply put, the appeal request letter is only required to include details regarding any objection, nothing more.

24. Mr. Hall did not properly comply with the appeal process in the Safe Driver Plan as written. Pursuant to the Safe Driver Plan, “[c]hanges to the plan may not be implemented without Board approval.” There was no evidence offered at hearing that the written Safe Driver Plan had been changed.

25. Mr. Hall improperly denied Respondent’s request for an appeal and, thus, improperly upheld the Review Board’s decision to assess the two points for the October 26, 2016, violation.

26. Based on the alleged accumulation of 10 points within a 12-month period, Respondent appeared for a predetermination meeting regarding the recommendation for termination of employment. At the predetermination meeting, Respondent was provided the opportunity to offer any mitigating circumstances to the recommendation for termination. The recommendation for termination included the assessment of the two points for the October 26, 2016, incident. Mr. Goldrick considered Respondent’s arguments and determined that there were no

mitigating circumstances that would warrant discipline short of termination. The record does not include evidence regarding the mitigation considered by Mr. Goldrick.

27. Following the predetermination meeting, on January 3, 2017, the School District's superintendent notified Respondent by letter of the recommendation to terminate Respondent's employment for misconduct. Respondent timely disputed the allegations in the Notice and requested a hearing to appeal the recommendation of termination.

28. By letter dated January 20, 2017, Respondent was notified that the recommendation to the School Board would be modified to one of suspension without pay, effective January 25, 2017, and referral of her appeal to the Division of Administrative Hearings. At the January 24, 2017, meeting of the School Board, the School Board authorized that this case be referred to the Division of Administrative Hearings, whereupon this case ensued.

29. The evidence at hearing demonstrates that Mr. Hall improperly denied Respondent's request for an appeal of the October 26, 2016, violation. However, given the procedural posture of this case the undersigned has considered whether the Review Board appropriately assigned the two points for the October 26, 2016, incident.

30. The undersigned finds evidence of mitigation in the record. The record demonstrates that on October 26, 2016, Respondent had been driving a new, unfamiliar route for approximately two days before the incident. Respondent stated in her request for appeal letter that it was "pitch-black outside" and her ability to turn was impeded by an oncoming vehicle using its high beam lights. After considering the above mitigating factors, the undersigned finds that the evidence in the record does not warrant a deviation from the Review Board's assignment of the standard two points for the October 26, 2016, improper backing violation.

31. The evidence supports that the assignment of two points against Respondent for the October 26, 2016, incident was appropriate. The mitigation did not warrant reduction of the points assessed. As a result, the record correctly demonstrates that Respondent accumulated 10 points.

32. Petitioner demonstrated by a preponderance of evidence that there is just cause to terminate Respondent's employment.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), and 1012.40(2)(c), Florida Statutes (2017).

34. Section 1012.22(1) provides, in part, that a district school board shall "[d]esignate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees . . . , subject to the requirements of [chapter 1012]."

35. Bus drivers are educational support employees, as defined by Florida Statutes. § 1012.40, Fla. Stat. A bus driver is a member of the support staff, and may be terminated from employment for the "reasons stated . . . in [a] district school board rule." § 1012.40(2)(b), Fla. Stat.

36. Here, the School Board has adopted policy 6.37, which establishes the grounds upon which a school bus driver may be terminated.

37. Respondent is an employee of Petitioner pursuant to the authority of section 1012.33.

38. Petitioner seeks to terminate Respondent's employment, which does not involve the loss of a license or certification. Thus, Petitioner has the burden of proving the allegations in its notice of recommendation of termination by a preponderance of the evidence. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009); Cisneros v. Sch. Bd. of Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996);

Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

39. The preponderance of the evidence standard "is defined as 'the greater weight of the evidence,' Black's Law Dictionary 1201 (7th ed. 1999), or evidence that 'more likely than not' tends to prove a certain proposition." Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000). See also Haines v. Dep't of Child. & Fams., 983 So. 2d 602, 606 (Fla. 5th DCA 2008).

40. Based on the Safe Driver Plan and School Board rules, the School Board met its burden of showing just cause to terminate Respondent's employment.

41. It is undisputed that Respondent had accumulated eight points before the October 26, 2016, incident. It is undisputed that Respondent struck a mailbox while backing the bus she was driving. It is also undisputed that Respondent violated the Safe Driver Plan by improperly backing her bus. While the evidence at hearing reflects there were mitigating circumstances regarding the October 26, 2016 incident, they were not sufficient to reduce the two points assessed for the violation. Thus, Respondent had an accumulated 10 points for driving-related incidents.

42. Therefore, the undersigned finds that the School Board proved by the preponderance of evidence that just cause exists to terminate Respondent's employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Hernando County School Board, enter a final order terminating the employment of Mildred Rodgers as a bus driver.

DONE AND ENTERED this 30th day of November, 2017, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2017.

ENDNOTES

^{1/} Mr. Hall testified that he considered the video feed, Respondent's admission of guilt in her letter to running the red light, and the fact that the Review Board only assessed Respondent two points rather than the full four points for the infraction, to support his denial of the appeal.

^{2/} The issue regarding whether Respondent was entitled to an appeal for the May 23, 2016, incident is not before the undersigned. The time to dispute that issue would have been at the predetermination proceeding on October 3, 2016, or through appeal of the disciplinary action imposed on October 17, 2016.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.