

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 20-0013

BERNARD JEAN LOUIS,

Respondent.

RECOMMENDED ORDER

A final hearing was held in this matter via Zoom Conference on January 6 and 7, 2021, before Robert L. Kilbride, an Administrative Law Judge at the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Jean Marie Middleton, Esquire
V. Danielle Williams, Esquire
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For Respondent: Charles D. Thomas, Esquire
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STATEMENT OF THE ISSUE

Whether the School District of Palm Beach County properly suspended Respondent for 15 days and, subsequently, terminated his employment for an incident at the bus facility compound on December 12, 2018.

PRELIMINARY STATEMENT

On October 29, 2019, a Notice of Recommendation for Termination of Employment was sent to Bernard Jean Louis (“Louis” or “Respondent”) by Superintendent of Schools, Donald E. Fennoy, II.

Taking exception to his proposed termination, Louis submitted a Request for Administrative Hearing on December 18, 2019.

After conducting discovery and filing several motions and requests for continuances, the case was set for a final hearing beginning January 6, 2021.

In support of the hearing, the parties submitted a Joint Amended Pre-Hearing Stipulation on November 30, 2020. The administrative hearing involving disputed facts began on January 6, 2021, via Zoom Conference.

Petitioner submitted the testimony of Respondent, as well as Cynthia Holloman, Gary Mosely, Jeanette Williams, Elbert Niston, Dorinda Patterson, Jose Pacheco, Bonnie Smith, Leatrice Burroughs, Casandra Joseph, Carol Bello, Shane Searchwell, and Carol Stewart Martin. Respondent submitted the testimony of Bernard Jean Louis, Cynthia Holloman, Shane Searchwell, Jose Pacheco, Marvin Jackson, Donald Fennoy, II, Vicki Evans-Paré, Leatrice Burroughs, and Shannon Armstrong.

Petitioner’s Exhibits 2, 4, 5, 7, 8, 11 through 20, 32 through 34, 36 through 47, 49 through 51, 53, 56, 58, 59, 64, 65, 69 through 77, and 89 through 96 were admitted into evidence. Respondent’s Exhibits 1 through 11 and 13 through 19 were also admitted into evidence.

The Transcript of the final hearing was filed with DOAH on January 25, 2021. Proposed recommended orders were timely filed by both parties after an extension of time was granted.¹

All references to statutes, rules, or policies are to those in effect when the conduct, action, or omission occurred.

FINDINGS OF FACT

The undersigned makes the following findings of material and relevant fact:

Stipulated Facts

1. Respondent was hired by the School District of Palm Beach County (“District”) on March 9, 2007.
2. At all times relevant to this Administrative Complaint, Respondent was employed as a School Bus Driver I at the Royal Palm Beach Transportation Facility (“Royal Palm Facility”) with the District.
3. Employee and Labor Relations commenced an investigation on September 9, 2019, that was assigned Case No. 19/20-026.
4. On October 29, 2019, Respondent was notified that the superintendent intended to recommend a 15-day suspension without pay and termination of Respondent’s employment to the Palm Beach County School Board (“School Board”) at the November 20, 2019, School Board meeting.
5. On December 18, 2019, Respondent requested a hearing at DOAH regarding the suspension and termination of his employment.

¹ Instead of recapping or summarizing the relevant and material testimony of witnesses, one of the parties submitted a Proposed Recommended Order with Findings of Fact that included and recited significant provisions of the hearing Transcript verbatim. This was not helpful and is contrary to the custom and practice at DOAH. This practice is discouraged in the future.

Facts Presented At The Hearing

6. The School Board operates, controls, and supervises the District, pursuant to Article IX, section 4(b), Florida Constitution, and section 1001.32, Florida Statutes. Petitioner has the authority to discipline employees pursuant to section 1012.22(1), Florida Statutes.

7. Respondent was an experienced bus driver who had been trained in the proper method of interacting with supervisors, co-workers, and students, and exercising good professional judgment, and knew to follow certain rules, policies and directives.

8. Respondent's employment was governed by: a collective bargaining agreement ("CBA") between the District and Service Employees International Union/Florida Public Services Union ("SEIU/FPSU")(SB Ex. 77; Resp't Ex. 11); School Board Policies (SB Exs. 70-74); Florida law (SB Ex. 75); and the School Bus Operators and Bus-Attendant Handbook (SB Ex. 76).

9. Respondent was notified that he was being recommended for termination due to insubordination, ethical misconduct, and failure to follow policies, rules, or directives when he screamed and yelled at Senior Transportation Coordinator Cynthia Holloman ("Holloman"); used profanity, impolite language, and derogatory terms directed at Holloman which were heard by other employees as well; and left a school bus unattended in the middle of the bus driveway. SB Ex. 1; SB Ex. 4 at p. SB000022-35; and Pet'r Admin. Compl.

10. Holloman testified at the hearing and her deposition transcript was filed. She was the senior coordinator at the Royal Palm Facility on December 12, 2018. However, the assignment of buses to the drivers was primarily handled by another employee, Bonnie Smith ("Smith").

11. As background, Holloman outlined that bus drivers would report to the facility in the morning to pick up their bus. If the driver's regularly assigned bus was down or inoperative, the bus driver would be reassigned and take a substitute bus.

12. The bus drivers were required to perform a pre-trip inspection each day to look for issues with their assigned bus. The pre-trip inspection would include, among other things, the drivers starting up their assigned bus.

13. If the driver discovered an issue with the bus, the driver was required to fill out a form, bring it inside, and a mechanic would be assigned to fix the problem. If the problem could not be corrected, the driver would be assigned another bus.

14. If another bus was not available, then Petitioner's staff would assign an available driver a "double route" to cover the route. If a mechanic determined the bus was not safe to operate, then a bus would not be put on the road.

15. Respondent testified that the morning of December 12, 2018, was an unusually cold morning. He had been assigned a bus that he believed did not have a working heater. His indirect concern with the heat not working was that the defroster linked to it would not function properly, creating a potential safety risk for the bus driver and the passengers.

16. That morning, Respondent reported the problem with his assigned bus to Smith, and told her that he would not drive the bus in that condition.

17. Marvin Jackson ("Jackson"), a bus driver at the Royal Palm Facility, also had a problem with the heater not functioning in his bus.

18. Jackson testified that he would carry a rag or paper towels to wipe the windshield when driving. He took this action to operate his bus safely. Jackson indicated that on the morning of December 12, 2018, he also went into the office to complain about his heat not working properly.

19. Leatrice Burroughs ("Burroughs"), another bus driver, testified that she also went to see Holloman on the morning of December 12, 2018, to complain about the heater on her bus not working properly.

20. Holloman was in the dispatch office with Burroughs. Holloman was attempting to locate a bus with a functioning heater for Burroughs when Respondent arrived at the dispatch office. Holloman acknowledged that if the

bus defroster was not working and the front windshield was fogging up, it would create a dangerous condition for the bus drivers.

21. When Holloman was inside with Burroughs, Holloman heard Respondent outside raising his voice and cursing at Smith. Holloman agreed that Burroughs was in position where she could have heard Respondent using any profane or inappropriate language outside.

22. Holloman heard Respondent cursing at Smith telling her he would not drive the bus without heat.

23. Burroughs testified that she did not hear Respondent swearing or using any profanity.

24. Holloman then spoke directly with Respondent and explained to him that there were no buses with heat available for him. He angrily responded and told her she was “full of sh_t,” in front of Burroughs. Burroughs denied hearing Respondent say that.²

25. Holloman related that during this same conversation Respondent, told her to “go f_ck herself” and that she instructed him to punch out and go home.

26. Holloman also stated that Respondent called her a “b_tch,” and said he would park his bus and “sit on the clock.”

27. When Holloman asked him if he was refusing to do his route that morning he replied “I’m not gonna do my route. I’m gonna sit here and I’m gonna get paid for it.”

28. She responded that she was not going to pay him if there was work available and he was not willing to do the work. In response, Respondent told her “to go f_ck herself.”

29. Notably, during this encounter with Holloman, Respondent made no mention or complaint to her about any problem with the defroster, nor did he claim that the bus was unsafe to drive.

² It was not clear from the evidence what Burroughs’s proximity was to Holloman and Respondent during this discussion.

30. Gary Mosley (“Mosley”), one of Holloman’s supervisors, arrived at the bus facility at some point after the heated exchange began. Respondent came back into the office. Holloman claims that, in the presence of Mosley, Respondent swore at her, at which time she stood up from her desk and told him she was not afraid of him.

31. Mosley testified. He did not recall Louis swearing at Holloman, while he was in the office. However, when he spoke with Respondent outside, Respondent admitted that he said “f_ck you” to Holloman before Mosley arrived.

32. Holloman also stated that Jackson was sitting in a chair right outside her office and could hear everything being said, including Respondent using profanity with her. Jackson testified that he never heard Respondent use any profanity that day.

33. Jeanette Williams, a fellow bus driver, testified that she heard Respondent say he would not drive that “piece of sh_t” bus. Pet’r Ex. 23.

34. Dorinda Patterson (“Patterson”), another bus driver, provided a written statement for these proceedings. Patterson said that when Respondent left the office area she heard him say he was “not driving that piece of sh_t bus,” because it was “too f_cking cold.”

35. Casandra Joseph (“Joseph”), who was a union steward, testified. She was contacted soon after the incident by Holloman regarding Respondent’s conduct on the morning of December 12, 2018. She was already at the Royal Palm Facility that morning.

36. She spoke to Respondent immediately after the incident. He seemed very upset, was raising his voice, yelling and cursing, and used the word “sh_t.” However, Joseph did not hear what Respondent had said to Holloman earlier.

37. Jose Pacheco (“Pacheco”), the bus shop foreman at the facility, testified. He was responsible for maintenance of the school buses. He testified that bus drivers are supposed to conduct pre- and post-trip inspections of

their buses. If a bus driver has an issue during the pre-trip inspection they are required to contact dispatch, and dispatch will contact maintenance to see if they can resolve the matter. If maintenance cannot resolve the matter, they refer the bus driver back to dispatch.

38. Pacheco was present on December 12, 2018, when Respondent complained about the heat not working on his bus. Pacheco testified clearly and distinctly that Respondent was yelling and using profanity. Respondent drove his bus in an area of the bus driveway and left it there, obstructing other bus traffic.

39. His testimony was consistent with the testimony of other employees and was uncontroverted. The undersigned found his recollection of the incident to be particularly unbiased, credible, and persuasive.

40. Of significance, Louis never mentioned to Pacheco that he would not drive his bus because the bus windows would fog up making the bus unsafe. Rather, it was Pacheco's opinion that Louis was upset because it was too cold and his bus heater did not work properly.

41. Smith, a transportation coordinator, also testified. Smith's responsibilities included helping bus drivers get their buses on the road, helping with directions, and assisting bus drivers with their paperwork.

42. Smith was assigned to the Royal Palm Facility. Prior to becoming a transportation coordinator, she was a bus driver.

43. Smith testified that on December 12, 2018, she witnessed Respondent screaming at Holloman, stating that he did not want to drive his assigned bus because it was too cold. She overheard Holloman advise Respondent that if he was not going to drive his assigned bus, then he would need to clock out.

44. Smith testified that during his heated exchange with Holloman, Respondent said "he was not driving a f_ cking cold bus." And then he told her to go and "f_ck herself."

45. She related that Respondent then said that the administration did not know “how to treat the f_ cking drivers” and that is why he was acting the way he was acting.

46. Because Respondent refused to drive the cold bus, Smith was asked to cover Respondent’s route. However, Respondent never gave Smith any paperwork to document or support his alleged concern with the heater or defroster.

47. Carol Bello, a bus driver assigned to the Royal Palm Facility, also testified.

48. Although she was not certain about the date, she recalled an incident approximately two years ago. Respondent was upset, loud, verbally abusive, and calling people names. She specifically recalled him stating, “F_ck you guys, I’m not driving that piece of sh_t.”

49. She also saw him point his finger at Smith and call her “a bitch,” while ranting and raving in the bus compound around other workers and supervisors. She acknowledged that while some occasional profanity was used by bus drivers while clowning around, people did not talk to their supervisors like that.

50. Joseph, another bus driver, testified that she had been a bus driver for fourteen years. On December 12, 2018, she observed Respondent come out of the office yelling and cursing at Holloman in the dispatch office. Respondent went on and on, cursing at Holloman and being very disrespectful to her.

51. Respondent, Bernard Jean Louis, testified. While he admitted that he was upset that day, he essentially denied all allegations that he cursed at Holloman, or that he refused to follow his supervisor’s instruction. The undersigned did not find this self-serving testimony to be credible or persuasive, particularly considering the contrary and distinct recollection of events by several other trustworthy and more credible witnesses.

52. The undersigned finds that Respondent’s profanity-laced tirade went on for some time and was done in different areas of the dispatch office and

the outside areas of the bus compound. It is not surprising that some employees heard parts of Respondent's outburst, while other employees heard other parts.

53. Nonetheless, what clearly and convincingly emerged from the incident on December 12, 2018, is that Respondent was extremely upset because it was cold and he felt that the heater in his bus did not work properly.

54. As a result of his uncontrollable and growing anger and frustration, he resorted to yelling, arguing, and cursing at his supervisor, Holloman, and failed to follow her directions. The undersigned credits and accepts the testimony of several witnesses on these points.

55. Upon questions from the undersigned to clarify his testimony, Respondent admitted that he had not actually tested or inspected his assigned bus that morning before confronting Holloman about the problem. Rather, he concluded that his bus had an inoperable heater based on how this same bus had operated in the past.

56. While there was a good deal of evidence relating to questions about a drug test taken by Respondent and second-hand evidence regarding the investigative role of other school board employees, this evidence was not particularly useful or relevant in this case.³

57. Despite no objection by either party to this broad array of other less relevant evidence, the issues in this case are framed and limited to the allegations of the Administrative Complaint filed by Petitioner, to wit: whether Respondent's conduct or behavior on December 12, 2018, at the bus facility violated the law or school board rules or policies. *Christian v. Dep't of Health, Bd. of Chiropractic Med.*, 161 So. 3d. 416 (Fla. 2d DCA 2014) and cases cited therein.

³ More directly, the School Board abandoned and did not pursue the drug test as a basis for the termination. Respondent acknowledged this in the Amended Joint Pre-Hearing Stipulation. *See* Joint Pre-Hr'g Stip, § B., p. 2.

58. To the extent other issues need to be resolved, the undersigned finds that the matter is properly before DOAH. Further, there was no persuasive evidence presented to prove that Petitioner failed to exhaust any administrative remedies, violated Respondent's due process, or that Respondent failed to receive proper or sufficient notice of the conduct being relied upon by the School Board for his proposed suspension or termination. *See generally, Fla. Bd. of Massage v. Thrall*, 164 So. 2d 20 (Fla. 3rd DCA 1964).

CONCLUSIONS OF LAW

59. DOAH has jurisdiction over the subject matter and parties. §§ 120.569 and 120.57(1), Fla. Stat.

60. Section 1012.27(5)(a) provides that a school superintendent shall "recommend employees for dismissal under the terms prescribed herein."

61. Article 17, section 1 of the parties' CBA states:

ARTICLE 17 DISCIPLINE OF EMPLOYEES (PROGRESSIVE DISCIPLINE)

1. Without the consent of the employee and the Union, disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action.

62. Ordinarily, the evidentiary burden in school board disciplinary proceedings is a "preponderance of the evidence." *See, e.g., McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990). However, in this case where the School Board has agreed through collective bargaining to a more demanding evidentiary standard, it is bound by the terms of the CBA. *See generally, Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672-73 (Fla. 1993).

63. Clear and convincing evidence requires that the evidence must be found to be credible, the facts to which the witnesses testify must be distinctly remembered, and the testimony must be precise and lacking in confusion as to the facts at issue. *In re Henson*, 913 So. 2d 579, 590 (Fla. 2005). The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *Id.* (quoting with approval *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

64. In this case the School Board carried its burden of proving facts by clear and convincing evidence, which established several violations of School Board rules and policies by Respondent during the December 12, 2018, incident.

General Principles of Law

65. In a DOAH hearing, the case is reviewed de novo by the Administrative Law Judge (“ALJ”). This means, essentially, that the evidence is heard and considered again. Likewise, there is no “presumption of correctness” that attaches to the preliminary decision of the school board or agency. *Fla. Dep’t of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); and *Boca Raton Artificial Kidney Ctr., Inc. v. Fla. Dep’t of HRS*, 475 So. 2d 260 (Fla. 1st DCA 1985).

66. Factual findings in a recommended order are uniquely within the province of the ALJ, based on the broad discretion afforded to her or him. *Goin v. Comm’n on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995). *See also Heifetz v. Dep’t of Bus. Reg., Div. of Alcoholic Bev. & Tobacco* 475 So. 2d 1277 (Fla. 1st DCA 1985).

67. It has been explained that an ALJ has the best vantage point to resolve conflicts, determine the credibility of witnesses, draw permissible and reasonable inferences from the evidence, and reach ultimate findings of fact,

based on the evidence presented. *Goin*, 658 So. 2d at 1138; *Dep't of Bus. & Prof'l Reg. v. McCarthy*, 638 So. 2d 574 (Fla. 1st DCA 1994).

68. Whether Respondent committed the charged offense(s) is a question of ultimate fact to be decided by the trier of fact 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).

69. Finally, an agency may not substitute its own facts for that of the ALJ, so long as there is adequate evidence in the record to support the ALJ's findings. *Lantz v. Smith*, 106 So. 3d 518 (Fla. 1st DCA 2013). *See also Resnick v. Flagler Cty. Sch. Bd.*, 46 So. 3d 1110, 1112 (Fla. 5th DCA 2010) (“In a fact-driven case such as this, where an employee’s conduct is at issue, great weight is given to the findings of the [ALJ], who has the opportunity to hear the witnesses’ testimony and evaluate their credibility.”).

70. The clear and convincing evidence at the hearing, and as generally defined by the pleadings, demonstrated that the superintendent’s recommended termination was not related to a failed drug test. It was related to the allegations of misconduct by Respondent at the bus facility on December 12, 2018.

71. A voluminous and comprehensive collection of school board policies, rules, reports, witness statements, and disciplinary documents were admitted into evidence. It is not necessary to recite or enumerate them in this Recommended Order. Suffice it to say, however, that the relevant and applicable documents were reviewed and considered by the undersigned and given the appropriate weight.

72. On October 13, 2017, Respondent electronically signed the Code of Ethics Acknowledgement Receipt, indicating that he was aware of and had completed the mandatory annual Code of Ethics training and agreed to comply with School Board Policy 3.02, Code of Ethics, throughout his employment. SB Ex. 69.

Consideration of Specific Violations
Outlined in Petitioner's Administrative Complaint

Violation of School Board Policy 3.02(3) and (4)

73. The clear and convincing evidence establishes that there is just cause to suspend and terminate Respondent's employment as a bus driver for his violation of School Board Policy 3.02, Code of Ethics. His screaming and yelling at his supervisor, Senior Transportation Coordinator Cynthia Holloman, heard by others, and his use of profanity, impolite language, and derogatory terms directed to Holloman constituted a complete disregard and breach of his duty to exercise high ethical standards and use good judgment. By his conduct and profane language, he failed to cooperate with his supervisor and was very demeaning towards her.

Failure to Follow Policy/Rule or Directive

74. The clear and convincing evidence in this case also establishes that there is just cause to terminate Respondent for Failure to Follow Policy/Rule or Directive in violation of School Board Policy 1.013(1). By his conduct on December 12, 2018, he failed to carry out his assigned duties in compliance with several rules and policies of the School Board.

Violation of School Board Policy 3.21

75. Furthermore, the record in this case establishes that there is just cause to terminate Respondent's employment as a bus driver for a violation of Policy 3.10(6) in that he failed to follow reasonable directives of his supervisor.

76. Lastly, Respondent's willful and intentional abandonment of his bus in the bus driveway breached his obligation to safely operate his bus in violation of Policy 3.21(3).

Applicability of CBA and Progressive Discipline

77. The CBA followed by the parties in this case contains a provision for progressive discipline in article 17. Like many progressive discipline policies, it imposes progressively stiffer discipline as offenses or violations continue, and allows for immediate termination under certain limited circumstances.

78. As with this case, and in the absence of an express list of specific conduct and progressive penalties for each type of offense, there are generally no hard and fast rules for progressive discipline. Rather, there is a progression of discipline for each offense committed. It is largely understood that the employer retains a fair amount of discretion to reasonably determine what discipline would be appropriate.

79. Respondent's disciplinary history was introduced by way of several exhibits, which were admitted without objection. His history included the following:

1. A Written Reprimand issued on or about April 25, 2017, for Respondent exhibiting unethical conduct by engaging in a verbal confrontation with a school staff member and utilizing profane language in front of students, as well as engaging in unsafe operation of a District School Bus by exiting the bus and leaving students onboard unattended while the bus was running, placing the bus in motion while students were standing, and neglecting his seatbelt. [SB Ex. 44.]

2. A ten-day suspension without Pay for on or about April 18, 2018. The suspension was based on violations related to Failure to Provide for the Health, Safety, or Welfare of Students; Failure to Exercise Best Professional Judgment; and Gross Insubordination: Failure to Follow Policy, Rule, or Directive. [SB Ex. 43.]

80. Considering Respondent's disciplinary history and the step progression of discipline, the next authorized step of discipline for Respondent under article 17 of the CBA included termination. As a result,

the undersigned concludes that Petitioner had the authority to suspend and terminate Respondent for the violations found in this Order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Palm Beach County School Board enter a final order suspending Respondent without pay and terminating his employment.

DONE AND ENTERED this 14th day of April, 2021, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
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this 14th day of April, 2021.

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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.