

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 21-0067

JOSE FLEITES,

Respondent.

RECOMMENDED ORDER

A hearing was conducted in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021),¹ by Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on May 20, 2021, by Zoom Conference.

APPEARANCES

For Petitioner: Christopher J. La Piano, Esquire
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 430
Miami, Florida 33132

For Respondent: Teri Guttman Valdes, Esquire
1501 Venera Avenue, Suite 300
Miami, Florida 33146

¹ All references to chapter 120 are to the 2021 version. All other statutory references are to the 2019 and 2020 versions of Florida Statutes, which were in effect at the time of the alleged conduct giving rise to this proceeding. As a practical matter, none of the substantive statutory provisions applicable to this proceeding were amended in the 2020 legislative session, so the 2019 and 2020 versions are the same.

STATEMENT OF THE ISSUE

The issue in this case is whether just and good cause exists to terminate Respondent from his employment as an educational support employee with Miami-Dade County Public Schools.

PRELIMINARY STATEMENT

On December 10, 2020, Petitioner, Miami-Dade County School Board, took agency action to suspend Respondent, Jose Fleites, without pay, and to terminate his employment as an electrician with Miami-Dade County Public Schools (hereafter, the "District"). Respondent timely requested an administrative hearing, and the matter was referred to DOAH on January 6, 2021, for assignment of an ALJ to conduct the final hearing.

The final hearing was scheduled to be conducted by Zoom conference on March 2, 2021. Pursuant to the Order Requiring Filing of Notice of Specific Charges issued on January 22, 2021, Petitioner filed its Notice of Specific Charges, which constituted its administrative complaint in this proceeding, on February 1, 2021. Thereafter, pursuant to the parties' motions filed on February 19, and April 16, 2021, the final hearing was continued to April 27 and May 20, 2021.

On April 23, 2021, Petitioner filed a Motion to Admit Business Records Via Written Certification. Respondent's Response in Opposition to Petitioner's Motion to Admit Business Records Via Written Certification was filed on April 30, 2021. On May 4, 2021, the undersigned issued the Order Denying Motion to Admit Business Records Via Written Certification.

On April 26, 2021, Petitioner filed an Amended Motion to Amend Notice of Specific Charges, accompanied by the Amended Notice of Specific Charges. On April 30, 2021, Respondent filed Respondent's Response in Opposition to

Petitioner's Amended Motion to Amend Notice of Specific Charges. On May 4, 2021, the undersigned issued the Order Granting Motion to Amend Administrative Complaint, accepting the Amended Notice of Specific Charges (hereafter, "Amended Administrative Complaint") filed on April 26, 2021, as the operative administrative complaint in this proceeding.

The final hearing was held on May 20, 2021. Petitioner presented the testimony of Avram Polinsky, Timothy Jones, James Tuning, Carlos Diaz, Melissa Vincenti, and Darryl Lyles. Petitioner's Exhibits 1 through 4, 6, 6A, and 6B were admitted into evidence without objection, and Petitioner's Exhibits 5 and 7 were admitted into evidence over objection. Petitioner's Exhibit 6C was tendered but not admitted into evidence. Respondent testified on his own behalf and presented the testimony of Michael Thomas. Respondent's Exhibit 1, consisting of a composite of documents, was admitted into evidence without objection.

The one-volume Transcript of the Final Hearing was filed at DOAH on August 4, 2021, and the parties were given until August 16, 2021, to file their proposed recommended orders. Pursuant to Respondent's agreed motions, the deadline for filing proposed recommended orders was extended to August 31, 2021, then to September 13, 2021.

The parties timely filed their proposed recommended orders on September 13, 2021. Both proposed recommended orders have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. At all times material to this proceeding, Petitioner was a duly-constituted school board charged with the duty to operate, control, and supervise free public schools within Miami-Dade County, pursuant to article IX, section 4(b) of the Florida Constitution, and section 1001.32, Florida Statutes.

2. At all times material to this proceeding, Respondent was employed by the District as an electrician at Maintenance Service Center 4 (hereafter, "MSC4") in Miami-Dade County, Florida. As such, Respondent was subject to applicable Florida Statutes, applicable State Board of Education rules, Petitioner's policies and procedures, and the Dade County Schools Maintenance Employees Committee ("DCSMEC") Contract.²

B. Charges in the Amended Administrative Complaint

3. The Amended Administrative Complaint alleges that between May and July 2019, Respondent misrepresented his working time on daily status forms and forged the signatures of worksite administrators on daily status forms.

4. The Amended Administrative Complaint charges Respondent with having violated Florida Administrative Code Rules 6A-5.056(2) and 6A-10.081 and School Board Policies 4210, 4210.01, and 8700.

5. The Amended Administrative Complaint alleges that the conduct in which Respondent is alleged to have engaged, and the violations with which he has been charged, constitutes just cause to suspend Respondent without pay and terminate him from his employment position with the District.

² The version of the DCSMEC Contract in effect between July 1, 2018, and June 30, 2021, was in effect at the time of the alleged conduct giving rise to this proceeding, and, therefore, applies to this proceeding.

C. Evidence Adduced at the Final Hearing

Background

6. Respondent was hired by the District as an electrician in February 2007. He worked at Maintenance Service Center 3 until September 2008, when he was reassigned to MSC4.

7. MSC4 is one of four District maintenance service centers that the District operates. MSC4 is several acres in area and contains trucks, storage facilities, a fueling station, and dumpsters.

8. The geographic service area for which MSC4 is responsible stretches from Southwest 168th Street, in Miami, southward to the Miami-Dade County/Monroe County line.

9. District employees assigned to MSC4 perform work at District facilities within the MSC4 service area.

10. Respondent's work hours at MSC4 were from 6:00 a.m. to 2:30 p.m. He worked at MSC4 from September 2008 until December 2020, when he was suspended without pay and Petitioner took agency action to terminate his employment with the District.

11. Respondent's home is located approximately 21 miles north of the northern boundary, and over 30 miles north of the southern boundary, of the MSC4 service area.

12. During his employment at MSC4, Respondent engaged in the typical tasks performed by electricians who work for the District. Specifically, he handled work orders sent to MSC4 from District school facilities, entailing a wide range of electrical issues that arose, including loss of power, lighting issues, air conditioning, kitchen equipment, electrical wiring, damaged motors, and other tasks.

13. Electricians are—and, at the time of Respondent's alleged conduct giving rise to this proceeding, were—assigned work by a foreman at MSC4. Work orders for specific jobs at specific facilities would be given by the foreman to the electrician, who would travel to the facility and perform the

requested work. An electrician could be given several work orders on a given day, and if the work assigned through a work order was not completed that day, the electrician would return the following day to complete the work. If the electrician finished all of the work assigned through a work order, he or she was to contact the foreman, who would dispatch the electrician to another location to complete another work order.

14. Electricians kept track of their work each day on a Daily Status Form ("DSF"), which (as the name indicates) was required to be completed by the electrician and submitted to the foreman on a daily basis. On each DSF, the electrician would provide a brief description of the work performed; enter the amount of time spent on a particular job; state whether the job was completed; and obtain the signature of the principal or authorized representative, who, by signing the DSF, verified that the work described on the DSF for that facility was, in fact, performed.

15. At the time of the alleged conduct giving rise to this proceeding, Respondent's supervisors were Michael Thomas and a person referred to in the record as "Mr. Hetzer."³ At that time, and at the time of the final hearing in this proceeding, Timothy Jones was the director of MSC4, so was the supervisor for Thomas, Hetzer, and Respondent.

16. At the time of Respondent's alleged conduct giving rise to this proceeding, he was assigned a District work vehicle having Vehicle Number 202209.

Telogis Vehicle Tracking Software Installed in District Vehicles

17. In 2016, the District purchased new Ford trucks for MSC4. The vehicles came equipped with global positioning system ("GPS") hardware and Telogis software, a Verizon Connect software product. Via cellular signal, the Telogis software tracks, among other things, the location and speed of

³ The record does not refer to Mr. Hetzer's first name. Hetzer died in January 2020, so was unavailable to testify at the final hearing.

equipped District vehicles. The software enables the District to efficiently manage its fleet of vehicles.

18. Respondent, along with the other MSC4 employees and the members of the DCSMEC union, was informed by Jones that the District vehicles used by employees at MSC4 were equipped with the Telogis software.

19. The work vehicle assigned to Respondent, Vehicle Number 202209, was equipped with the Telogis software. The evidence establishes that Respondent knew his vehicle was equipped with the Telogis software.

20. The data for each District vehicle is gathered by the Telogis software and electronically stored by Verizon Connect in a records storage and maintenance platform called Fleet. Verizon Connect customers have access to the data stored in the Fleet platform for purposes of monitoring the location and performance of their vehicles, and they can print out reports of their vehicle data that is stored in the Fleet platform.

21. The competent, substantial, and persuasive evidence establishes that the Telogis software functions accurately in recording the vehicle location, speed, and other monitored features. No competent or persuasive evidence was provided showing that the Telogis software was generally unreliable or that it had a significant error rate.⁴

Respondent's Alleged Conduct Giving Rise to this Proceeding

22. On or about July 12, 2019, Hetzer, who was Respondent's immediate supervisor at the time, and Jones found Respondent sleeping in his work vehicle.

23. This incident caused Jones to investigate Respondent's work-related records for the preceding few months, because, as Jones put it, "I just wanted to see what Mr. Fleites had been up to." Jones testified, credibly, that had he found other employees sleeping on duty, he also would have accessed the Telogis software reports for their vehicles.

⁴ See paragraph 66, below.

24. As part of the investigation, Jones or Hetzer accessed, and printed out, the Telogis software reports for Respondent's work vehicle for the period from May 1 to July 12, 2019.^{5,6}

25. Also as part of the investigation, Jones reviewed Respondent's DSFs for the period from May 1 to July 12, 2019.

26. Jones compared the Telogis software reports for Respondent's vehicle with the DSFs that Respondent had completed for the period from May 1 to July 12, 2019.

27. Based on the information provided by the Telogis software for Respondent's District vehicle, Jones determined that on numerous days during the period between May 1 and July 12, 2019, Respondent either was not at the specific location he had recorded on the DSF for that day, or he was not present at a specific location for the amount of time he had stated for that day.

28. Specifically, on May 1, 2019, Respondent's DSF stated that he was at Redondo Elementary School ("Redondo") for eight full hours; however, the Telogis report indicated that he was not at Redondo at all that day. Rather, the Telogis report showed that he drove to his home, as indicated by "JF" in

⁵ Jones testified that either he or Hetzer printed out the Telogis software reports for Respondent's work vehicle. He could not specifically recall whether he personally printed out the reports, but he testified, credibly, that he was trained in how to read and analyze the vehicle data in the reports, and he was authorized to print such reports.

⁶ The Telogis reports admitted into the record fall within the business records exception to hearsay rule codified in section 90.803(6), Florida Statutes. Petitioner presented the testimony of Avram Polinsky, a records custodian employed by Verizon Connect, who is directly involved in the preparation and storage of the Telogis records and in making them available in report-form for customer use. Polinsky authenticated the Telogis records and his testimony established that the records were made at or near the time the data comprising the records was compiled by the Telogis software system; that these records were kept in the ordinary course of Verizon Connect's business; and that it was a regular practice of Verizon Connect to keep such records and make them available for use by customers. Accordingly, the Telogis records constitute business records pursuant to section 90.803(6). *See Jackson v. State*, 877 So. 2d 816, 817 (Fla. 4th DCA 2004)(computer printouts generated at the request of a party in connection with litigation fall within the business records exception). Moreover, the Telogis reports are directly relevant to the charges against Respondent, and, therefore, are admissible in this de novo proceeding.

the report, which, as found above, was approximately 21 miles north of the northern boundary of the MSC4 service area, and spent close to an hour there. He also drove to unidentified locations in Miami-Dade County, to the District's Redland vehicle fueling station, to the MSC4 facility, and then back to the fueling station.

29. Respondent's DSF for May 2, 2019, stated that he worked eight hours at the South Dade Skills Center ("SDSC"). However, the Telogis report shows that he was only at SDSC for approximately 17 minutes. Had Respondent completed the work ordered at SDSC in that amount of time, as discussed above, he was supposed to contact his foreman to receive another work assignment for that day—which he did not do. The Telogis report also shows that Respondent drove to his home, to unidentified locations in Miami-Dade County, to the Redland fueling station, and to the MSC4 facility.

30. Respondent's DSF for May 3, 2019, stated that he spent eight hours at Miami Heights Elementary School. However, according to the Telogis report for that day, he did not go to the school, but instead, went home and also drove to the Redland fueling station and the MSC4 facility.

31. Respondent's DSF for May 7, 2019, stated that he was at the Air Base K-8 Center for eight hours; however, the Telogis report for that day shows that he was not at that facility at any time on that date. The Telogis report shows that he went home, went to various unknown locations in Miami-Dade County, went to the Redland fueling station multiple times, and went to the MSC4 facility.

32. Respondent's DSF for May 8, 2019, stated that he was at the Peskoe K-8 Elementary School for eight hours; however, the Telogis report for that day shows that he was not at that facility at any time on that date, but, instead, went home, went to unknown locations in Miami-Dade County, went to the Redland fueling station multiple times, and went to the MSC4 facility.

33. Respondent's DSF for May 9, 2019, states that he worked eight hours at the MSC4 facility. However, the Telogis report for that day showed that, in

addition to being present at the MSC4 facility for two short periods of time, he drove 68 miles that day, to several unknown locations in Miami-Dade County, and to the Redland fueling station five times.

34. Respondent's DSF for May 13, 2019, states that he worked eight hours at Redland Elementary School; however, the Telogis report for that day shows that he was only present at that location for slightly over seven minutes. The Telogis report shows that he made several stops at the Redland fueling station, three stops at the MSC4 facility, and three stops at unknown locations in Miami-Dade County.

35. Respondent's DSF for June 3, 2019, states that he worked eight hours at Miami Heights Elementary School. However, the Telogis report for that day shows that he did not go to that school at all on that date, but, instead, went home, drove to the Redlands fueling station several times, and drove to unknown locations in Miami-Dade County.

36. Respondent's DSF for June 4, 2019, states that he worked eight hours at Redondo. However, the Telogis report for that day indicates that he did not go to the school at all on that date, and that instead, he drove home, made four stops at the Redland fueling station, and made two stops at unknown locations in Miami-Dade County.

37. Respondent's DSF for June 5, 2019, states that he worked eight hours at South Miami Heights Elementary School. The Telogis report for that day shows that Respondent did not go to this school at all on this date, but instead went to Redondo, drove home, made four stops at the Redland fueling station, and made two stops at the MSC4 facility.

38. Respondent's DSF for June 6, 2019, states that he worked eight hours at Gulfstream Elementary School; however, the Telogis report for that day shows that he did not go to that school at all on that date, but instead drove home; went to various locations in Miami-Dade County, including a busway station; made five stops at the Redland fueling station; and made multiple stops at the MSC4 facility.

39. Respondent's DSF for June 10, 2019, states that he worked eight hours at South Dade Middle School. However, the Telogis report for that day shows that he did not go to that school, but instead made two very brief stops at two other schools, and made stops at the Redland fueling station and the MSC4 facility.

40. Respondent's DSF for June 11, 2019, states that he worked eight hours at South Dade Middle School. However, the Telogis report for that day shows that he was only present at that school for slightly over 41 minutes. The Telogis report shows that he went to three unknown locations in Miami-Dade County, made five stops at the Redland fueling station, and multiple stops at the MSC4 facility.

41. Respondent's DSF for June 13, 2019, states that he worked eight hours at Laura Saunders Elementary School. However, the Telogis report for that day shows that he was at the school for slightly over 42 minutes, and that he made stops at unknown locations in Miami-Dade County, at the Redland fueling station, and at the MSC4 facility.

42. Respondent's DSF for June 17, 2019, states that Respondent worked eight hours at Homestead Elementary School. However, the Telogis report for that day shows that he did not go to that school on that date, and instead stopped at McArthur South High School—for which no work had been requested—for slightly over 26 minutes. He also made stops at an unknown location in Miami-Dade County and two stops at the Redland fueling station.

43. Respondent's DSF for June 18, 2019, states that Respondent worked eight hours at Redondo. However, the Telogis report for that day shows that he did not go to that school on that date, and instead briefly stopped at South Miami Heights Elementary and Herbert A. Ammons Middle School, although no work had been requested for either school. He also drove home, made five stops at the Redland fueling station, and made two stops at the MSC4 facility.

44. Respondent's DSF for June 19, 2019, states that Respondent worked eight hours at Miami Heights Elementary School. However, the Telogis report for that day shows that he did not go to that school, or to any other school, on that date. He made three stops at unknown locations in Miami-Dade County and two stops at the Redland fueling station.

45. Respondent's DSF for June 24, 2019, states that he worked eight hours at the Medical Academy for Science and Technology. However, the Telogis report for that day shows that he was on site at this school for slightly over 21 minutes. The Telogis report also shows that he made a brief stop at Redland Elementary School, despite no work order being issued for that school that day; and that he made stops at three unknown locations in Miami-Dade County, three stops at the Redland fueling station, and stops at the MSC4 facility.

46. Respondent's DSF for June 25, 2019, states that he worked eight hours at Whigham Elementary School; however, the Telogis report for that day shows that he did not go to that school on that date. The Telogis report shows that Respondent stopped at Redland Elementary School for slightly over 28 minutes, notwithstanding that no work had been requested for that school on that day. The Telogis reports also shows that he made five stops at the Redland fueling station and two stops at unknown locations in Miami-Dade County.

47. Respondent's DSF for June 26, 2019, states that he worked eight hours at Air Base Elementary School; however, the Telogis report for that day shows that he did not go to that school on that date. The Telogis report also shows that he made two stops at unknown locations in Miami-Dade County.

48. Respondent's DSF for June 28, 2019, states that he worked eight hours at Air Base Elementary School; however, the Telogis report for that day shows that he only was present on site at that location for approximately 53 minutes. The Telogis report shows that Respondent drove home, stopped

at three unknown locations in Miami-Dade County, and made four stops at the Redland fueling station.

49. Respondent's DSF for July 8, 2019, states that he worked 6.5 hours at Caribbean K-8 Center; however, the Telogis report for that day shows that he did not go to that school on that date. The Telogis report shows that Respondent drove home, made three stops at unknown locations in Miami-Dade County, and three stops at the Redland fueling station.

50. Respondent's DSF for July 9, 2019, states that he worked eight hours at R.R. Morton Elementary School; however, the Telogis report for that day shows that he was at that location for slightly over one hour and 36 minutes, and that he briefly stopped at Redland Elementary School, notwithstanding that no work had been requested for that school on that day. The Telogis report also shows that he made four stops at the Redland fueling station and four stops at unknown locations in Miami-Dade County.

51. Respondent's DSF for July 10, 2019, states that he worked eight hours at Campbell K-8 Center; however, the Telogis report for that day shows that he was at this location for slightly over 39 minutes. The Telogis report shows that Respondent drove home, made three stops at the Redland fueling station and two stops at unknown locations in Miami-Dade County.

52. Respondent's DSF for July 11, 2019, states that he worked eight hours at Caribbean K-8 Center. However, the Telogis report for that day shows that he was only present at that location for one hour and 36 minutes. The Telogis report shows that Respondent made two brief stops at Miami Heights Elementary School, notwithstanding that no work had been requested for that school on that day, and that Respondent made two stops at unknown locations in Miami-Dade County.

53. Respondent's DSF for July 12, 2019, states that he worked eight hours at Redland Elementary School; however, the Telogis report for that day shows that he was present at that location for a total of three hours and 21 minutes. The Telogis report shows that Respondent stopped at the Caribbean

K-8 Center, notwithstanding that no work had been requested for that school on that day. The Telogis report also shows that he made four stops at the Redland fueling station, three stops at unknown locations in Miami-Dade County, and one stop at the MSC4 facility.

54. As discussed above, when maintenance work is performed at a District facility, the employee must fill out the DSF, describing the work and stating the number of hours of work performed at the facility, and the employee must obtain the signature of the school's principal or authorized designee. The purpose of obtaining that signature was to verify that the work addressed on the DSF was performed. Here, the persuasive evidence establishes that Respondent falsified or forged signatures on some of the DSFs he submitted.

55. Specifically, Respondent's DSF for May 8, 2019, contains the employee number of James Tuning, a foreman at MSC4, and a signature purported to be Tuning's. Tuning testified, credibly, that the employee number on the form was his, but was not written in his handwriting, and the signature on the DSF was not his. He further testified that, under any circumstances, he would not have been authorized to sign DSFs for work performed at the facilities serviced by employees at MSC4.

56. Respondent's DSFs for June 17, 26, and 28, 2019, contain the employee number of Melissa Vincenti, the principal's secretary at Air Base Elementary School, and a signature purported to be Vincenti's. Vincenti testified, credibly, that the DSFs did contain her employee number, but that the number was not written in her handwriting, and the signature on the DSFs was not hers. The evidence establishes that she did not give permission for Respondent, or anyone else, to sign the DSF for her.

57. Respondent's DSF for July 8, 2019, contains the employee number of Darryl Lyles, the head custodian at Caribbean K-8 Center, and a signature purported to be Lyles's. Lyles testified, credibly, that the employee number on the DSF was his, but the signature was not his. The evidence establishes

that he did not give permission for Respondent, or anyone else, to sign the DSF for him.

Respondent's Prior Disciplinary History

58. Respondent previously has been disciplined by Petitioner.

59. Specifically, in 2010, Respondent was suspended from his employment with the District for eight days without pay for having left work early, which constituted payroll fraud.

60. In addition to being suspended without pay, Respondent entered into a settlement agreement with Petitioner under which he agreed to reimburse the District for 20 work hours.

Respondent's Defenses

61. Michael Thomas, a retired supervisor who worked at MSC4 in 2019, testified that when the Telogis software was installed in District vehicles, he repeatedly assured the District employees at MSC4 who were using the Telogis-equipped vehicles that the data generated by the software system would "never be used against them in a derogatory or disciplinary manner."

62. Thomas testified that he was authorized by his supervisor, Timothy Jones, to tell the employees that the data gathered by Telogis for their vehicles would not be used for disciplinary purposes.

63. However, Jones directly contradicted Thomas's testimony on this point. Jones testified that he did not direct anyone, including Thomas, to tell employees that the Telogis data would not be used for disciplinary purposes. Rather, he told his foremen that he was not using the data for disciplinary purposes at that time.

64. On questioning, Thomas acknowledged that he never had given written assurances to employees that the Telogis data would not be used to support disciplinary action.

65. Furthermore, in any event, there is nothing in the DCSME Contract—which establishes the terms and conditions of employment for those to whom the contract applies, including Respondent—that provides that the Telogis

data would not be used as a basis of, or to support, disciplinary action against District employees who violate School Board policies.⁷

66. Thomas also testified that the Telogis system had a 20 percent inaccuracy rate. However, on questioning, Thomas acknowledged that this assertion was "anecdotal," and that he did not have any data to support this assertion. He also acknowledged that he was aware of only one vehicle, out of the 21 vehicles dispatched from MSC4, that ever had any Telogis software accuracy issues. He further testified that that particular vehicle was not assigned to Respondent, and that to his knowledge, the Telogis software installed on Respondent's vehicle did not have any accuracy issues.

67. Respondent testified that on July 12, 2019, the day that Jones and Hetzer found Respondent in his vehicle at the MSC4 facility, he was not sleeping, but was instead waiting for rain to pass so he could pick up materials and return to the school to complete the work.

68. However, as found above, this testimony was directly contradicted by Jones, who testified that on that day, he, along with Hetzer, found Respondent sleeping in his vehicle. Thus, Respondent's testimony on this point was not credible.

69. Respondent also testified that Tuning, Vincente, and Lyles gave him their employee numbers and gave him permission to sign the DSFs on their behalf.

70. Respondent's testimony was directly contradicted by the testimony of Tuning, Vincenti, and Lyles, all of whom testified that they had not given Respondent their employee numbers; had not signed the DSFs; and had not authorized Respondent to do so on their behalf. Thus, Respondent's testimony on this point was not credible.

71. Respondent also testified that on the days he had driven home during the work day, he had done so in order to take medication for pain he

⁷ To that point, any verbal representations made to employees regarding the use of the Telogis software would not, and did not, supersede the DCSME Contract.

experienced due to medical issues.⁸ He testified that he had been given permission to do so by a former supervisor, William Barroso, and that he did not know if his subsequent supervisors were aware that Barroso had given him such permission.

72. In any event, Jones testified that permission to return home for personal reasons, such as to take medication, during work hours could only have been granted by a current supervisor. During the operative time period of May 1 through July 12, 2019, Barroso was not Respondent's supervisor. Therefore, in order for Respondent to have been excused from his job duties during his work hours, he would have needed to obtain permission from his supervisor at the time. There was no evidence presented showing that Respondent had obtained such permission, and the most plausible inference from Respondent's own testimony is that he did not obtain such permission.

73. Respondent also asserts that in using the Telogis records for his District vehicle in support of its proposed disciplinary action at issue in this proceeding, Petitioner has singled out Respondent and treated him disparately as compared to other employees, who have not been subjected to discipline on the basis of Telogis records for their District vehicles.

74. However, this assertion is undercut by the credible testimony of Carlos Diaz, Director of Professional Standards for the District, who stated that Telogis records have, in fact, been used to impose discipline on other District employees.

IV. Findings of Ultimate Fact

75. As noted above, Petitioner has charged Respondent with misconduct in office under rule 6A-5.056(2) for having violated specified provisions of rule 6A-10.081, Principles of Professional Conduct for the Education Profession; School Board Policy 4210, Standards of Ethical Conduct; School

⁸ Respondent testified that he kept his pain medication at home, rather than with him at work, so that he would not be tempted to take more than the prescribed amount.

Board Policy 4210.01, Code of Ethics; and School Board Policy 8700, Anti-Fraud.⁹

76. Whether an offense constitutes a violation of applicable statutes, rules, and policies is a question of ultimate fact to be determined by the trier of fact in the context of each violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995)(whether particular conduct violates a statute, rule, or policy is a factual question); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995)(whether the conduct, as found, constitutes a violation of statutes, rules, or policies is a question of ultimate fact); *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985)(whether there was a deviation from a standard of conduct is not a conclusion of law, but is instead an ultimate fact).

77. The competent, substantial, credible, and persuasive evidence presented in this proceeding establishes that on multiple occasions, Respondent submitted, to his supervisors, DSFs on which he had intentionally misrepresented the description of the work that he ostensibly had performed and the number of hours he had worked.

78. As further discussed below, Respondent's conduct in this regard violated School Board Policies 4210, 4210.01, and 8700.

79. The competent, substantial, credible, and persuasive evidence also establishes that on several occasions, Respondent falsified or forged signatures of persons, without their permission, on DSFs that he submitted to his supervisors for the purpose of representing that he had performed the work described on the DSF and/or had worked the number of hours represented on the DSF.

⁹ As further discussed below, it is determined that rules 6A-5.056 and 6A-10.081 do not apply to Respondent, who is not a Florida educator and has no interaction with students in the District.

80. As further discussed below, Respondent's conduct in this regard violated School Board policies 4210, 4210.01, and 8700.

CONCLUSIONS OF LAW

81. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding, pursuant to sections 120.569 and 120.57(1).

82. Because this case is a proceeding in which Petitioner seeks to terminate Respondent's employment with the District, and does not involve the loss of a license or certification, Petitioner has the burden of proving the factual basis for termination by a preponderance of the evidence. *Cisneros v. Sch. Bd. of Miami-Dade Cty.*, 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); *McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476, 477 (Fla. 2d DCA 1996).

83. Petitioner is authorized to suspend Respondent and terminate his employment pursuant to section 1012.22(1)(f), Florida Statutes.

84. Respondent is an "educational support employee" as defined in section 1012.40(1)(a), which states:

“Educational support employee” means any person employed by a district school system who is employed as a teacher assistant, an education paraprofessional, a member of the transportation department, a member of the operations department, a member of the maintenance department, a member of food service, a secretary, or a clerical employee, or any other person who by virtue of his or her position of employment is not required to be certified by the Department of Education or district school board pursuant to s. 1012.39. This section does not apply to persons employed in confidential or management positions. This section applies to all employees who are not temporary or casual and whose duties require 20 or more hours in each normal working week.

85. Section 1012.40(1)(c) states:

In the event a district school superintendent seeks termination of an employee, the district school

board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event there is no collective bargaining agreement.

86. Section 1012.40(2) authorizes the termination of educational support employees for reasons stated in the applicable collective bargaining agreement.

87. Section 447.209, Florida Statutes, regarding public employer's rights, states:

It is the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons. However, the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation.

88. The DCSME Contract is the applicable collective bargaining agreement. Article IV, titled "Employer Rights," authorizes Petitioner to discipline or discharge employees to which the DCSME Contract applies for just and good cause.

89. The DCSME Contract, article XI, titled "Disciplinary Action," section 1., authorizes Petitioner to impose disciplinary sanctions for violations of applicable rules and policies.

90. Article XI, section 1, also recognizes the principle of progressive discipline. This section states, in pertinent part:

The Board and the Union recognize the principle of progressive discipline. The parties agree that disciplinary action may be consistent with the concept of progressive discipline when the Board deems it appropriate, and that the degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record.

91. Article XI, section 3, of the DCSME Contract establishes the right, and applicable procedures, for an employee who is subject to disciplinary action for violating applicable rules and policies to appeal the disciplinary action. Section 3 states that "[a]ll such proceedings shall be conducted in accordance with School Board Policy 0133." Pursuant to this provision and School Board Policy 0133, Respondent has availed himself of his right to challenge Petitioner's proposed suspension and termination of his employment in this proceeding conducted under sections 120.569 and 120.57(1).

Rule 6A-5.056 Criteria for Suspension and Dismissal

92. As stated above, the Amended Administrative Complaint charges Respondent with having violated provisions of rule 6A-5.056(2).

93. Rule 6A-5.056 states, in its prefatory provision: "[]Just cause[] means cause that is legally sufficient. Each of the charges upon which just cause for a dismissal action against specified school personnel may be pursued *are set forth in Sections 1012.33 and 1012.335, F.S.*" Fla. Admin. Code R. 6A-5.056 (emphasis added).

94. By its plain terms, section 1012.33 applies only to instructional staff, supervisors, and school principals. As such, it does not apply to educational support employees, such as Respondent.

95. Additionally, by its plain terms, section 1012.315 applies only to persons who would be required to have an educator certificate or who otherwise would be in direct contact with students. Because Respondent is an

electrician, and, therefore, is employed in a position that neither requires an educator certificate nor entails direct contact with students, section 1012.315 does not apply to Respondent's employment position.

96. Accordingly, it is concluded that rule 6A-5.056(2) does not apply in this proceeding to determine whether there is just cause to suspend and terminate Respondent from his employment as an electrician with the District.

97. For the same reason, rule 6A-10.081, which is incorporated into rule 6A-5.056(2) and, by its plain terms, applies to "Florida educators"—which does not include Respondent, an electrician—does not apply in this proceeding to determine whether there is just cause to suspend and terminate Respondent from his employment as an electrician with the District.

School Board Policy 4210

98. The Amended Administrative Complaint charges Respondent with having violated School Board Policy 4210, titled "Standards of Ethical Conduct." This policy states, in pertinent part¹⁰:

All employees are representatives of the District and shall conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

A support staff member shall:

* * *

I. not use institutional privileges for personal gain or advantage . . . ;

* * *

¹⁰ Respondent also was charged with violating paragraph H of this policy. That paragraph applies to situations involving "educational matters" and direct or indirect "public expression." Here, the evidence did not establish that Respondent's actions in falsifying information on DSFs regarding electrical work he ostensibly performed involved either "educational matters" or "public expression."

L. maintain honesty in all dealings;

* * *

Q. not submit fraudulent information on any documents in connection with employment[.]

99. As discussed above, the competent, substantial, and persuasive evidence establishes that on many occasions in the period between May 1 and July 12, 2019, Respondent submitted, to his supervisors, DSFs which intentionally misrepresented the description of the work that he ostensibly had performed and the number of hours he had worked. As discussed above, the competent, substantial, and persuasive evidence also establishes that on several occasions, Respondent falsified or forged signatures of persons on DSFs that he submitted to his supervisors for the purpose of representing that he had performed the work described on the DSF and/or had worked the number of hours represented on the DSF.

100. In doing so, Respondent used his institutional privileges as a District employee for his personal gain, in violation of School Board Policy 4210, paragraph I.

101. In doing so, Respondent also did not maintain honesty in all dealings, in violation of School Board Policy 4210, paragraph L.

102. In doing so, Respondent submitted fraudulent information on documents in connection with his employment, in violation of School Board Policy 4210, paragraph Q.

103. For these reasons, it is concluded that Respondent violated School Board Policy 4210.

School Board Policy 4210.01

104. The Amended Administrative Complaint also charges Respondent with having violated School Board Policy 4210.01, titled "Code of Ethics." By its plain terms, this policy applies to "all members of the School Board,

administrators, teachers, and *all other employees of the District.*" Sch. Bd. Policy 4210.01 (emphasis added).

105. This policy states, in pertinent part:

Fundamental Principles:

The fundamental principles upon which this Code of Ethics is predicated are as follows:

* * *

D. Honesty – Dealing truthfully with people, being sincere, not deceiving them or stealing from them, not cheating nor lying;

E. Integrity – Standing up for their beliefs about what is right and what is wrong and resisting social pressure to do wrong;

* * *

I. Responsibility – Thinking before acting and being accountable for their actions, paying attention to others, and responding to their needs.

Each employee agrees and pledges:

A. To abide by this Code of Ethics, making the . . . honest performance of professional duties core guiding principles;

B. To obey local, State, and national laws, codes, and regulations;

* * *

E. To take responsibility and be accountable for his/her actions;

F. To avoid conflicts of interest . . . ;

* * *

H. To be efficient and effective in the performance of job duties.

106. As discussed above, the competent, substantial, and persuasive evidence establishes that during the period from May 1 to July 12, 2019, Respondent submitted, to his supervisors, DSFs which intentionally misrepresented the description of the work that he ostensibly had performed and the number of hours that he had worked. As discussed above, the competent, substantial, and persuasive evidence also establishes that on several occasions, Respondent falsified or forged signatures of persons on DSFs that he submitted to his supervisors for the purpose of representing that he had performed the work described on the DSF and/or had worked the number of hours represented on the DSF. In doing so, Respondent violated School Board Policy 4210.01.

107. Specifically, Respondent did not adhere to the fundamental ethical principles of honesty, integrity, and responsibility established in School Board Policy 4201.01. His conduct, which constituted dishonesty in the performance of his professional duties, violated Petitioner's policies; constituted a conflict of interest between him and Petitioner, as his employer; and did not entail efficient and effective performance of his job duties.

108. For these reasons, it is concluded that Respondent violated School Board Policy 4210.01.

School Board Policy 8700

109. The Amended Administrative Complaint also charges Respondent with having violated School Board Policy 8700, titled "Anti-Fraud." This policy states, in pertinent part:

The District will not tolerate fraudulent, illegal, or otherwise unethical activities and employees must report them. These activities could result in criminal prosecution and disciplinary action may also be taken.

A. Scope

This policy applies to any fraud, or suspected fraud, involving elected officials, employees, consultants, vendors, contractors, outside agencies and

employees of such agencies, and any other parties with a business relationship with the District.

B. Policy

Fraud and fraudulent activity is strictly prohibited.

C. Definition

Fraud is defined as the intentional, false representation or concealment of a material fact in order to personally benefit or induce another to act to his/her detriment, and includes:

1. falsifying, unauthorized altering, or forging District documents, including but not limited to:

a. claims of payments or reimbursements, which include, but are not limited to, submitting false claims for travel or overtime;

* * *

c. electronic or printed files, photographic records or audio records that are maintained by the District, or accounts belonging to the District[.]

110. As discussed above, the competent, substantial, and persuasive evidence establishes that during the period from May 1 to July 12, 2019, Respondent submitted, to his supervisors, DSFs which intentionally misrepresented the description of the work that he ostensibly had performed and the number of hours he had worked. As discussed above, the competent, substantial, and persuasive evidence also establishes that on several occasions, Respondent falsified or forged signatures of persons on DSFs that he submitted to his supervisors for the purpose of representing that he had performed the work described on the DSF and/or had worked the number of hours represented on the DSF. In doing so, Respondent violated School Board Policy 8700.

111. Specifically, his conduct, which entailed the intentional false representation of material facts on his DSFs in connection with his employment and for his personal benefit, was fraudulent and unethical.

112. For these reasons, it is concluded that Respondent violated School Board Policy 8700.

Progressive Discipline

113. As discussed above, Respondent previously has been disciplined for having left work early, which constituted payroll fraud.

114. Here, the evidence establishes that Respondent, by misrepresenting the description of work that he ostensibly had performed and the number of hours he had worked, engaged in conduct similar to that for which he previously was disciplined, in that both matters giving rise to discipline involved him not performing his assigned work duties and/or misrepresenting the number of hours that he worked.

115. Respondent's conduct, which has been established by the preponderance of the competent substantial evidence in this proceeding, constitutes fraud under School Board Policy 8700, and calls into question his honesty and integrity.

116. Given the seriousness of the School Board policy violations that Respondent committed by engaging in the conduct that is the subject of this proceeding, and given that he previously has been subjected to discipline by Petitioner for a serious, similar offense, it is concluded that, pursuant to the DCSMEC Contract progressive discipline provision, the appropriate disciplinary sanction is to suspend Respondent without pay and terminate his employment with the District.

Conclusion

117. In sum, it is concluded that Respondent violated School Board policies 4210, 4210.01, and 8700.

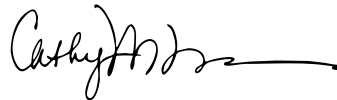
118. Pursuant to these policies, and consistent with articles IV and XI of the DCSME Contract, just and good cause exists to suspend Respondent

without pay and terminate his employment as an electrician with the District.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Miami-Dade County School Board, enter a Final Order suspending Respondent without pay and terminating his employment.

DONE AND ENTERED this 22nd day of November, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of November, 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.