

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 22-0248

DANIEL DELGADO,

Respondent.

RECOMMENDED ORDER

This case came before Administrative Law Judge (“ALJ”) Darren A. Schwartz of the Division of Administrative Hearings (“DOAH”) for final hearing on August 11, 2022, by Zoom conference.

APPEARANCES

For Petitioner: Michelle Lara Jones, Esquire
Miami-Dade County School Board
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Miami, Florida 33132

For Respondent: Adolfo Antonio Gil, Esquire
Gil & Gil, P.A.
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Hialeah, Florida 33012

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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend without pay and terminate Respondent’s employment as a journeyman/plumber.

PRELIMINARY STATEMENT

By letter dated January 13, 2022, Petitioner, Miami-Dade County School Board (“School Board”), notified Respondent, Daniel Delgado (“Respondent”), of the School Board’s action to suspend without pay and terminate his employment as a journeyman/plumber. Respondent timely requested an administrative hearing. On January 25, 2022, the School Board referred the matter to DOAH to assign an ALJ to conduct the final hearing.

The Notice of Specific Charges contains certain factual allegations and, based on those factual allegations, the School Board charged Respondent with Misconduct in Office. The final hearing was initially set for April 12, 2022. On April 7, 2022, the School Board filed an unopposed motion for continuance. On April 11, 2022, the undersigned entered an Order granting the motion and resetting the final hearing for June 13, 2022. On June 8, 2022, Respondent filed an unopposed motion for continuance. On June 10, 2022, the undersigned entered an Order granting the motion and resetting the final hearing for August 11, 2022.

The final hearing was conducted on August 11, 2022, with all parties present. At the outset of the final hearing, the School Board abandoned the allegations contained in paragraph nine of the Notice of Specific Charges and proceeded on the allegations contained in paragraph eight, only. The School Board presented the testimony of Timor Brik, Connor Bell, Henry Felipe, and Ann-Marie Duboulay. Petitioner’s Exhibits 1 through 6, 8, and 16 through 18 were received into evidence. Petitioner testified on his own behalf and presented the additional testimony of Gary Sneesby. Respondent’s Exhibits 1, 2, 4, 5, and 8 were received into evidence.

The one-volume final hearing Transcript was filed at DOAH on September 12, 2022. The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order.

On April 7, 2022, the parties filed their Joint Pre-Hearing Stipulation, in which they stipulated to certain facts. These facts have been incorporated into this Recommended Order, to the extent relevant, as indicated below. Unless otherwise indicated, all rule and statutory violations refer to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise the public schools within Miami-Dade County, Florida.

2. Since 2006, Respondent has been employed by the School Board as a journeyman/plumber in the maintenance department. At all times material to this proceeding, Respondent has been supervised by Mr. Felipe, who is employed by the School Board as a plumbing foreperson.

3. At all times relevant to this case, Respondent's employment with the School Board was governed by Florida law, the School Board's policies, and the collective bargaining agreement ("CBA") between the School Board and the Dade County Schools Maintenance Employee Committee ("DCSMEC").

Disciplinary History

4. On June 18, 2021, Respondent was issued a reprimand for allegedly using an unauthorized lockup at a school site. The reprimand directed Respondent, among other things, to: (1) strictly adhere to all School Board policies, specifically 4210, Standards of Ethical Conduct; 4210.01, Code of Ethics; and 7440.02, Vandalism, Damage, Loss, and Malicious Mischief; (2) cease and desist from any behavior which has the appearance of impropriety; (3) adhere to all policies and procedures regarding storage of School Board

equipment and tools; (4) adhere to all job responsibilities and duties as delineated in his job description and adhere to his assigned work schedule; and (5) conduct himself in a manner that will reflect credit upon himself and the School Board. Respondent was informed that failure to comply with the directives may result in further disciplinary action, up to and including dismissal. At the hearing, counsel for the School Board acknowledged that the reprimand is relevant for the limited purpose of showing progressive discipline required by the CBA.

Paragraph Eight of the Notice of Specific Charges

5. The alleged conduct giving rise to the School Board's suspension and proposed termination of Respondent is contained in paragraph eight of the Notice of Specific Charges. Interestingly, the alleged conduct occurred before the June 2021 reprimand. In addition, the alleged conduct in paragraph nine, which was abandoned by the School Board at the outset of the hearing, occurred before the June 2021 reprimand.

6. In paragraph eight of the Notice of Specific Charges, the School Board alleges that:

From January 2001 through April 2001, Respondent repeatedly made unauthorized stops in the vehicle owned by Petitioner and assigned to Respondent during the work day. In addition, Respondent forged the signature with corresponding employee numbers on daily status report forms and/or provided false information to his supervisors regarding his whereabouts during the workday.

Respondent's Vehicle Use and Daily Status Forms Submitted to Mr. Felipe

7. As a plumbing foreperson, Mr. Felipe's job duties include dispatching plumbers every morning and checking the plumber's jobs at different school sites. Every morning, plumbers report to Mr. Felipe's office and he dispatches them to any emergency that has been reported to his office. The plumbers are required to respond to the school sites they are dispatched to by Mr. Felipe.

8. Every day, plumbers are required to submit a Daily Status Form to Mr. Felipe in his office for each school visited by the plumber. Mr. Felipe testified that he reviewed the Daily Status Forms as part of his duties. The Daily Status Form contains the school name, work hours of the plumber, and a brief description of the work performed by the plumber at a school site. The Daily Status Form also contains a space for the principal or an authorized representative of the school to sign.

9. During the COVID-19 pandemic, and in order to prevent contact between the plumbers and authorized office and administrative personnel at school sites, plumbers were allowed to have Mr. Felipe sign the Daily Status Form instead of the principal or other authorized representative of the school.

10. Plumbers may be required to travel to multiple school locations in a single day. Respondent traveled to school job sites in a vehicle equipped with a GPS tracker (“GPS”). DataRemote, Inc. (“DataRemote”), is a wireless technology company located in Miami, Florida, which manufactures and sells GPS trackers. DataRemote is the provider of GPS for the School Board.

11. Mr. Bell has been employed by DataRemote as a Senior Technical Specialist for almost six years. Mr. Bell explained in detail how the GPS works; that the GPS operates similar to a cellular phone which includes a receiver and cellular modem. The GPS receiver calculates its location based on the amount of time it takes for a signal to travel from the receiver to the exact GPS satellite position in orbit. The GPS then periodically uses the internal cellular modem to back-haul the data to DataRemote’s server and platform, where the data is stored. The GPS is accurate to approximately six feet.

12. On January 28, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at Dr. Rolando Espinosa K-8 Center that day. However, the GPS shows Respondent spent most of the day at other school sites.

13. On February 10, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at Hialeah Gardens Senior High School (“HGSHS”) all day. However, the GPS shows Respondent spent most of the day at other school sites.

14. On March 8, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at Ben Sheppard Elementary School (“BSES”) all day. However, the GPS shows Respondent spent most of the day at other school sites.

15. On March 10, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at BSES all day. However, the GPS shows Respondent spent the entire day at other school sites.

16. On March 17, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at HGSHS all day. However, the GPS shows Respondent spent much of the day at other school sites.

17. On March 19, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at John I. Smith K-8 Center (“JIS K-8 Center”) all day. However, the GPS shows Respondent spent the entire day at other school sites.

18. On March 22, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at JIS K-8 Center all day. However, the GPS shows Respondent spent the entire day at other school sites.

19. On April 7, 2021, Respondent submitted a Daily Status Form to Mr. Felipe, stating that he had been at Dr. Rolando Espinosa K-8 Center all day. However, the GPS shows Respondent spent the entire day at other school sites.

20. During the COVID-19 pandemic, Respondent scribbled an unidentifiable signature on Daily Status Forms where Mr. Felipe should have signed. Respondent then submitted the forms to Mr. Felipe.

21. Respondent erred in his handling of Daily Status Forms. He should have had Mr. Felipe sign them instead of scribbling an unidentifiable

signature on the forms. Respondent also should have identified all the school sites he visited each day on separate Daily Status Forms.

22. At the hearing, Respondent testified that he always went to the workplaces where he was assigned. Mr. Felipe also acknowledged that Respondent completed the work on all plumbing jobs he was assigned.

23. No persuasive or credible evidence was presented at the hearing demonstrating that Respondent made unauthorized stops.

24. No evidence was presented that Mr. Felipe had any concerns about Respondent's handling and submission of Daily Status Forms at the time of his review of the forms when they were submitted by Respondent.

25. Respondent's submission of the forms to Mr. Felipe, and Mr. Felipe's review of the forms, occurred over a period of many months. As part of his duties, Mr. Felipe went to Respondent's job sites.

26. Had Mr. Felipe been concerned about Respondent's conduct of scribbling a signature on Daily Status Forms that should have been signed by Mr. Felipe, and not completing the form as required to show multiple stops at school sites, he should have said something to Respondent at the time he reviewed the forms and checked on Respondent's job sites.

27. It was not until sometime after April 27, 2021, that the School Board conducted a GPS tracking review of the vehicle driven by Respondent, and reviewed Respondent's Daily Status Reports.

28. The persuasive and credible evidence adduced at the hearing demonstrates that Respondent violated School Board Policy 4210L. By failing to identify all the school sites he visited each day on separate Daily Status Forms and scribbling a signature on the form in the space reserved for Mr. Felipe, Respondent failed to maintain honesty in all dealings.

Respondent's conduct also violated School Board Policy 4210.01 because it was untruthful. However, the School Board failed to present persuasive and credible evidence demonstrating that Respondent's conduct violated School Board Policy 4210Q, S, or any other provision of School Board Policy 4210.01.

29. The School Board failed to present persuasive and credible evidence that Respondent violated School Board Policy 8700. Although Respondent's handling and submission of the Daily Status Forms to Mr. Felipe was dishonest, the School Board failed to demonstrate that Respondent repeatedly made unauthorized stops in the vehicle from January 2021 through April 2021, and forged the signature with corresponding employee numbers on daily status report forms, as alleged in paragraph eight of the Notice of Specific Charges. The School Board failed to demonstrate that Respondent's submission of the Daily Status Forms amounted to an intentional, false representation, or concealment of a material fact in order to personally benefit or induce another to act to his/her detriment.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction of the subject matter and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021).

31. Respondent is an "educational support employee" as that term is defined in section 1012.40(1)(a), Florida Statutes. The School Board has the authority to suspend and terminate educational support employees pursuant to section 1012.40(1)(c). Section 1012.40(1)(c) authorizes the termination of educational support employees for reasons stated in the applicable CBA.

32. The CBA provides that employees who have not complied with School Board policies and/or department regulations may be dismissed or suspended for up to 30 calendar days without pay.

33. The School Board has the burden of proving, by a preponderance of the evidence, that Respondent committed the violations alleged in the Notice of Specific Charges. *Cisneros v. Sch. Bd. of Miami-Dade Cnty*, 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008).

34. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends

to prove a certain proposition. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000). The preponderance of the evidence standard is less stringent than the standard of clear and convincing evidence applicable to loss of a license or certification. *Dileo v. Sch. Bd. of Dade Cnty*, 569 So. 2d 883 (Fla. 3d DCA 2008).

35. Whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier-of-fact in the context of each alleged violation. *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985); *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995).

36. The Notice of Specific Charges alleges that Respondent violated Florida Administrative Code Rule 6A-5.056(2). Section 1012.33(1)(a) and (6)(a) provide, in pertinent part, that instructional staff may be suspended during the term of their employment contract only for “just cause.” § 1012.33(1)(a) and (6)(a), Fla. Stat. “Just cause” is defined in section 1012.33(1)(a) to include “misconduct in office.”

37. Section 1001.02(1), Florida Statutes, grants the State Board of Education authority to adopt rules pursuant to sections 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

38. Consistent with this rulemaking authority, the State Board of Education has defined “misconduct in office” in rule 6A-5.056(2), which provides:

(2) “Misconduct in Office” means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student’s learning environment; or

(e) Behavior that reduces the teacher’s ability or his or her colleagues’ ability to effectively perform duties.

39. Respondent is not an instructional staff employee. Rather, Respondent is an educational support employee. Accordingly, rule 6A-5.056(2) is inapplicable to the instant case. *Miami-Dade Cnty. Sch. Bd. v. Fleites*, Case No. 21-0067, ¶ 94-97 (Fla. DOAH Nov. 22, 2021; MDCSB Feb. 15, 2022).

40. School Board Policy 4210, Standards of Ethical Conduct, provides, in pertinent part:

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:

L. Maintain honesty in all dealings;

* * *

Q. not submit fraudulent information on any document in connection with employment.

41. School Board Policy 4210.01, Code of Ethics, provides, in pertinent part:

All members of the School Board, administrators, teachers and all other employees of the District, regardless of their position, because of their dual roles as public servants and educators are to be bound by the following Code of Ethics. Adherence to the Code of Ethics will create an environment of honesty and integrity and will aid in achieving the common mission of providing a safe and high quality education to all District students.

* * *

Application

This Code of Ethics applies to all members of the Board, administrators, teachers, and all other employees regardless of full or part time status. It also applies to all persons who receive any direct economic benefit such as membership in Board funded insurance programs.

Employees are subject to various other laws, rules, and regulations including but not limited to The Code of Ethics for the Education Profession in Florida and the Principles of Professional Conduct of the Education Profession in Florida, F.A.C. Chapter 6A-10.081, the Code of Ethics for Public Officers and Employees, found in F.S. Chapter 112, Part III, and Policy 3129, which are incorporated by reference and this Code of Ethics should be viewed as additive to these laws, rules and regulations. To the extent not in conflict with any laws, Board policies, or governmental regulations, this Code of Ethics shall control with regard to conduct. In the event of any conflict, the law, regulation, or Board policy shall control.

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 nor stealing from them, not cheating or lying;

* * *

H. Respect – Showing regard for the worth and dignity of someone or something, being courteous and polite, and judging all people on their merits. It takes three (3) major forms: respect for oneself, respect for other people, and respect for all forms of life and the environment.

I. Responsibility – Thinking before acting and being accountable for their actions, paying attention to others and responding to their needs. Responsibility emphasizes our positive obligation to care for each other.

Each employee agrees and pledges:

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

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

C. To support the principles of due process to protect the civil and human rights of all individuals;

D. To treat all persons with respect and to strive to be fair in all matters;

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

* * *

G. To cooperate with others to protect and advance the District and its students;

42. School Board Policy 8700, Anti-Fraud, provides, 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:

* * *

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

* * *

10. Using District equipment or work time for any outside business activity.

43. Turning to the present case, the School Board proved, by a preponderance of the evidence, that Respondent violated School Board Policy 4210L. As detailed above, by failing to identify all the school sites he visited each day on separate Daily Status Forms and scribbling an unidentifiable signature on the forms in the space for Mr. Felipe to sign, Respondent failed to maintain honesty in all dealings. Respondent's conduct also violated School Board Policy 4210.01 because it was untruthful. However, the School Board failed to prove, by a preponderance of the evidence, that Respondent violated School Board Policy 4210Q, S, or any other provision of School Board Policy 4210.01.

44. The School Board failed to present persuasive and credible evidence that Respondent violated School Board Policy 8700. Although Respondent's

handling and submission of the Daily Status Forms to Mr. Felipe was dishonest, the School Board failed to demonstrate by persuasive or credible evidence that Respondent made unauthorized stops in the vehicle from January 2021 through April 2021 and forged the signature with corresponding employee numbers on Daily Status Forms, as alleged in the Notice of Specific Charges. The School Board failed to demonstrate that Respondent's submission of the Daily Status Forms amounted to an intentional, false representation, or concealment of a material fact in order to personally benefit or induce another to act to his/her detriment.

45. This case is unlike the facts presented in *Miami-Dade County School Board v. Fleites*, Case No. 21-0067 (Fla. DOAH Nov. 22, 2021; MDCSB Feb. 15, 2022). In *Fleites*, an electrician was found sleeping in his work truck during work hours. A subsequent review of the GPS tracker demonstrated that on multiple occasions during 2019, Mr. Fleites had driven to his home during work hours and to numerous other unidentified locations. In addition, Mr. Fleites had been suspended by the School Board in 2010.

46. In the present case, Respondent testified that he always went to the workplaces where he was assigned. Mr. Felipe also acknowledged that Respondent completed the work on all plumbing jobs he was assigned. The GPS tracker shows that Respondent went to school sites on each of the dates in question.

47. No persuasive or credible evidence was presented at the hearing demonstrating that Respondent made unauthorized stops and Mr. Felipe did not have any concerns about Respondent's handling and submission of Daily Status Forms at the time of his review of the forms when they were submitted by Respondent. Mr. Felipe went to Respondent's job sites and reviewed the forms. Had Mr. Felipe been concerned about Respondent's conduct of scribbling a signature on Daily Status Forms that should have been signed by Mr. Felipe, and not completing the form as required to show multiple stops at school sites, Mr. Felipe should have said something to

Respondent at the time he reviewed the forms and checked on Respondent's job sites.

Penalty

48. The School Board seeks the ultimate penalty of termination based on allegations of fraud that were not proven.

49. The School Board also abandoned the allegations in paragraph nine of the Notice of Specific Charges, which alleged that "[o]n or about May 4, 2021, Respondent behaved unprofessionally and engaged in a verbal altercation with another employee."

50. The School Board also did not prevail under rule 6A-5.056(2) and other School Board policies alleged in the Notice of Specific Charges.

51. The School Board also failed to offer into evidence the CBA provision governing progressive discipline.

52. Nevertheless, Respondent is governed by the same CBA addressed in *Miami-Dade County School Board v. Fleites*, Case No. 21-0067 (Fla. DOAH Nov. 22, 2021; MDCSB Feb. 15, 2022), which incorporates the concept of progressive discipline in administering discipline. *Bell v. The Sch. Bd. of Dade Cnty.*, 681 So. 2d 843, 844 (Fla. 3d DCA 1996)(reversing penalty of dismissal based on progressive discipline policy in CBA).

53. Article XI, section 1, of the CBA provides, as quoted in *Fleites* and in Respondent's Proposed Recommended Order:

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.

54. Turning to the instant case, Respondent has been employed by the School Board as a journeyman/plumber since 2006. The only discipline on Respondent's record is a single reprimand issued by the School Board on

June 18, 2021, after the alleged conduct giving rise to the allegations against Respondent in paragraph eight of the Notice of Specific Charges.

55. Respondent has performed his job as a journeyman/plumber competently for approximately 16 years and should not be given the ultimate punishment of termination based solely on his poor handling and submission of Daily Status Forms, particularly where Mr. Felipe acknowledges that Respondent performed the work; Mr. Felipe reviewed the forms and went to Respondent's job sites; and it was not demonstrated that Respondent obtained a financial gain and, therefore, committed fraud by virtue of his conduct.

56. Under the particular facts of this case, the undersigned finds that an appropriate penalty is a 30-calendar day suspension without pay.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order rescinding the proposed termination; upholding a 30-calendar day suspension without pay; and reinstating Respondent to the position of journeyman/plumber with back pay (except for the 30-calendar day period of suspension without pay).

DONE AND ENTERED this 5th day of October, 2022, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2022.

COPIES FURNISHED:

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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.