

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARASOTA COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 08-4726
)
VIRGIL MAE,)
)
 Respondent.)

)

RECOMMENDED ORDER

On November 6, 2008, an administrative hearing in this case was held in Sarasota, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Hunter W. Carroll, Esquire
 Matthews, Eastmoore, Hardy
 Crauwels & Garcia, P.A.
 1777 Main Street, Suite 500
 Sarasota, Florida 34236

For Respondent: Virgil Mae, pro se
 1575 20th Street
 Sarasota, Florida 34234

STATEMENT OF THE ISSUE

The issue in the case is whether the Sarasota County School Board (Petitioner) has cause for terminating the employment of Virgil Mae (Respondent).

PRELIMINARY STATEMENT

By letter dated August 25, 2008, the Petitioner notified the Respondent that the Petitioner intended to terminate the Respondent's employment. The Respondent filed a request for hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits numbered 1, 2, 4, 5, and 6 admitted into evidence. The Respondent testified on his own behalf.

A Transcript of the hearing was filed on November 19, 2008. The Petitioner filed a Proposed Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was employed by the Petitioner as a school bus driver.

2. The Respondent was subject to the provisions for "classified" employees as identified in the Collective Bargaining Agreement (CBA) between the Petitioner and the "Sarasota Classified/Teachers Association."

3. Under the terms of the CBA, the Petitioner's school bus drivers must comply with various requirements including: possession of a commercial driver's license (CDL) and automobile insurance, passage of an annual health physical, passage of a

"reflex" or dexterity test, and completion of in-service training.

4. In May of each year, the Petitioner makes physicians available to provide health physicals for school bus drivers at no charge. In the alternative, the Petitioner pays the insurance co-payment for drivers who choose to obtain physicals from their personal physicians.

5. School board policy requires that the reflex test be conducted within 30 days of the physical. Accordingly, the Petitioner provides reflex testing in May, so that it may be completed in conjunction with physicals. The reflex testing is also at the Petitioner's expense.

6. Prior to May of each year, the Petitioner posts flyers at the school bus compounds to remind bus drivers of the requirements and advise of the dates of the tests. The Transportation Department also broadcasts the information through a radio dispatch system that provides communications links to all drivers. Written notices are also sent to the drivers.

7. Most drivers complete both tests during May, but drivers may complete the tests in their own time. If a driver chooses to obtain a physical through a private physician, the Transportation Department will schedule the reflex test to

accommodate the driver's physical, so that both are completed within 30 days.

8. The Respondent asserted that he was unaware of the requirement that the reflex test be conducted within 30 days of the physical, but the greater weight of the evidence establishes that he has been a bus driver for the Petitioner since October 2003, that he has complied with the annual requirement in previous years, and that the policy has not changed during the term of his employment.

9. The evidence further establishes that the Respondent had not completed the physical even by the time of the administrative hearing.

10. Each fall, during the week preceding the commencement of school, the Petitioner's Transportation Department conducts a "Safety School," during which the school bus drivers receive in-service training sufficient to meet the relevant requirements applicable to drivers.

11. School bus drivers are paid their regular wages to attend Safety School.

12. On the second day of Safety School, the Petitioner conducts a "bid day," through which drivers bid on routes based on their employment seniority.

13. Under the terms of the CBA, school bus drivers must have the valid CDL and have completed the health physical and in-service training no later than the time of the initial bid.

14. Article XXI, Section M, of the CBA provides as follows:

An employee who fails to return to duty for each of the first three work days of a new school year and who fails to notify his/her cost center head of his/her intentions will be considered to have abandoned his/her job and may be terminated.

15. At the hearing, the Respondent asserted that he did not return to work because he believed his insurance had lapsed and that his driver's license was suspended and that he was trying to resolve the matter so that he could return to work. He further asserted that he contacted his supervisor and advised him of the matter, by leaving the information with the receptionist who answered the calls.

16. At the hearing, the receptionist acknowledged that the Respondent had called, but stated that he declined to leave a message or a telephone number to which the supervisor could have returned the calls. She testified that according to the "Caller ID" telephone number information, the Respondent was calling from a storage company.

17. The evidence establishes that the Respondent did not appear for the first three work days of the 2008-2009 school

year and, in fact, was absent through the first eight days of the school year, extending over a two-week period. The Respondent's explanation for his failure to return to work lacks sufficient credibility and is rejected.

18. Additionally, the evidence establishes that the Respondent failed to obtain the required annual health physical or to complete the in-service training prior to bid day and, accordingly, was not in compliance with the requirements of the CBA.

19. During his employment by the Petitioner, the Respondent has been cited for excessive absences on several occasions. At the hearing, the Respondent asserted that the absences were related to health matters. The evidence establishes that the Respondent failed to supply medical documentation for some of the absences, and they were deemed to be "unexcused."

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

21. The Petitioner has the burden of establishing the facts of the case by a preponderance of the evidence sufficient to warrant termination of the Respondent's employment. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA

1996); Dileo v. School Board of Dade County, 569 So. 2d 883

(Fla. 3d DCA 1990). In this case, the burden has been met.

22. Section 1012.67, Florida Statutes (2008), provides as follows:

Absence without leave. Any district school board employee who is willfully absent from duty without leave shall forfeit compensation for the time of such absence, and his or her employment shall be subject to termination by the district school board.

23. Article XXI, Section M, of the CBA provides as follows:

An employee who fails to return to duty for each of the first three work days of a new school year and who fails to notify his/her cost center head of his/her intentions will be considered to have abandoned his/her job and may be terminated.

24. In this case, the Respondent failed to return to duty on a timely basis or to provide notice of his intentions to the head of the Petitioner's Transportation Department.

25. Subsection 1012.45(1), Florida Statutes (2008), provides as follows:

Each school bus driver must be of good moral character, of good vision and hearing, able-bodied, free from communicable disease, mentally alert, and sufficiently strong physically to handle the bus with ease, and he or she must possess other qualifications prescribed by the Commissioner of Education, including those qualifications described in 49 C.F.R. s. 391, relating to physical qualifications and examinations, and 49 C.F.R. part 40 and part 382, relating to

controlled substance and alcohol use and testing, and he or she must hold a valid commercial driver's license with a passenger endorsement.

26. The Code of Federal Regulation (C.F.R.) references identified in the statute are those related to the completion of health physicals restated within the CBA.

27. Subsection 316.15(3), Florida Statutes (2008), provides as follows:

A person may not operate or cause to be operated a motor vehicle covered by subsection (1) or subsection (2) when transporting school children unless the operator has met the physical examination requirements established by law and by rule of the State Board of Education. The operator of such a motor vehicle shall pass an annual physical examination and have posted in the vehicle a certificate to drive the vehicle.

28. Florida Administrative Code Rule 6A-3.0141 sets forth the annual physical examination requirements applicable to school bus drivers.

29. The evidence establishes that, in addition to the Respondent's failure to appear for employment at the beginning of the school year, the Respondent failed to meet the physical examination requirements prior to commencement of the 2008-2009 school year and, accordingly, was not eligible for employment as a school bus driver. The failure of the Respondent to complete

the physical was not related to any issue regarding lack of insurance or driver's license.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner enter a final order terminating the employment of Virgil Mae.

DONE AND ENTERED this 24th day of December, 2008, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of December, 2008.

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.