

# You'll have to get in line to grieve me!

## Mid-year Meeting for Transportation Administrators

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## About John Palmerini

- Graduated from the University of Florida with degrees in journalism and political science in 1998.
- Graduated from University of Florida Levin College of Law in 2002.
- A member of the Florida Bar since 2002.
- Associate General Counsel for the Orange County School Board since 2010.
- Board certified by the Florida Bar in both Education Law and Labor and Employment Law.
- Litigated numerous cases arising out of transportation employees.



## Agenda

- Statutory and Regulatory Provisions
  - Collective Bargaining Agreement
  - Safe Driver Plan
  - Case Studies
  - Suggestions for Prosecuting Disciplinary Actions
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## **Statutory and Regulatory Provisions**



## Statutory Provisions

- F.S. 1012.40(1)(a) defines “a member of the transportation department” as an “educational support employee.”
- Educational support employees probationary period is that as defined by the collective bargaining agreement or by district school board rule where no collective bargaining agreement exists. (F.S. 1012.40(2)(a))
- Educational support employees are employed from year-to-year. (F.S. 1012.40(2)(b))
- Educational support employees, when terminated, “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.”

## Statutory Provisions

- F.S. 1012.45(1) requires each school bus driver:
  - Be of good moral character;
  - Of good vision and hearing;
  - Able-bodied;
  - Free from communicable diseases;
  - Mentally alert; and
  - Sufficiently strong physically to handle the bus with ease.
- F.S. 1012.45(2) states that each bus driver has the authority and responsibility to control students during the time students are on the bus.

## Statutory Provisions

- Under F.S. 1006.10, the power to control students while on the bus include:
  - Requiring order and good behavior by all students being transported;
  - Drivers shall employ a system of progressive discipline of transported students for actions which are prohibited by the code of conduct;
  - Control of all students during time students are on the bus, but not while the student is at the bus stop unless the bus is at the bus stop;
  - During emergencies, make such steps as are immediately necessary to protect students on the bus; and
  - Drivers shall not be required to operate a bus under conditions in which one or more students pose a clear and present danger to the safety of the driver and other student.

## Regulatory Provisions

- Florida Administrative Code Rule 6A-3.0141
  - Drivers shall have:
    - Five years of licensed driving experience;
    - Written application and fingerprints;
    - Commercial Drivers License (CDL) with a passenger endorsement and a school bus endorsement; and
    - Forty hours of preservice training consisting of twenty hours of classroom instruction and 8 hours of behind the wheel training based upon DOE's Basic School Bus Operator Curriculum.

## Regulatory Provisions

- Rule 6A-3.0141 (4) requires that Transportation Departments must obtain from the Department of Highway Safety and Motor Vehicles a driver's history record:
  - Prior to initial employment;
  - Prior to the first date of the fall semester; and
  - Thereafter, the district shall continuously screen operator records using automated weekly updates.
- Rule 6A-3.0141(7) requires that at least annually, districts must ensure:
  - Driver has a valid CDL;
  - Driver has completed 8 hours of in-service training related to operator's responsibility for transporting students; and
  - Driver must pass dexterity test.

## Regulatory Provisions

- Rule 6A-3.0171(2)(b): Requires districts to ensure that drivers know State DOE rules for transporting students.
- Rule 6A-3.0171(2)(e): Requires adoption of policies for prohibiting usage of cell phone while actively driving bus.
- Rule 6A-3.0171(2)(g)(3): Requires that drivers do some of the following:
  - Be neat and clean in appearance;
  - Refrain from using tobacco, alcohol, illicit drugs or any other substance which impairs the driver while on duty;
  - Refrain from profane language;
  - Keep all passengers seated and keep aisles and exits clear;
  - Only transport students to and from school with bus (non-school usage is prohibited);
  - Inspect bus at least daily prior to beginning of first trip; and
  - Fill out accident reports (honestly).



# Collective Bargaining Agreement



## Collective Bargaining Agreements

- Educational support employees may only be disciplined for just cause.
  - What is just cause?
    - Does collective bargaining agreement or school board policy define it or not?
    - OCPS defines it as a violation of an “expressed rule, an expressed order, an expressed policy and/or reasonable expectation of management.”
    - If no definition, arbitrators will employ seven tests of just cause:
      - Reasonable Rule or Work Order.
      - Notice.
      - Sufficient Investigation.
      - Fair Investigation.
      - Proof.
      - Equal Treatment.
      - Appropriate discipline.
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## Collective Bargaining Agreement

- Does your collective bargaining agreement or policy track teacher dismissal standards?
  - OCPS does in its collective bargaining agreement: “The following shall be grounds for suspension without pay or for dismissal: conviction of a crime involving moral turpitude, drunkenness, gross insubordination, immorality, misconduct in office, willful neglect of duty, or continued failure to satisfactorily meet performance standard of job.”
  - These provisions also meet the seven tests of just cause justifying dismissal.

## Collective Bargaining Agreement

- Misconduct in office is a violation of an adopted school board rule (such as violations of the transportation manual given to drivers) or adoptions of statutory and/or regulatory provisions applicable to drivers.
- Gross insubordination: Repeated instances of insubordination.
- Immorality: Will normally have to be work related (i.e. inappropriate relationships with students).
- Willful neglect of duty: Intentional or reckless failure to carry out assigned duty as required by school board policy or by statutory and/or regulatory provisions.

## Collective Bargaining Agreement

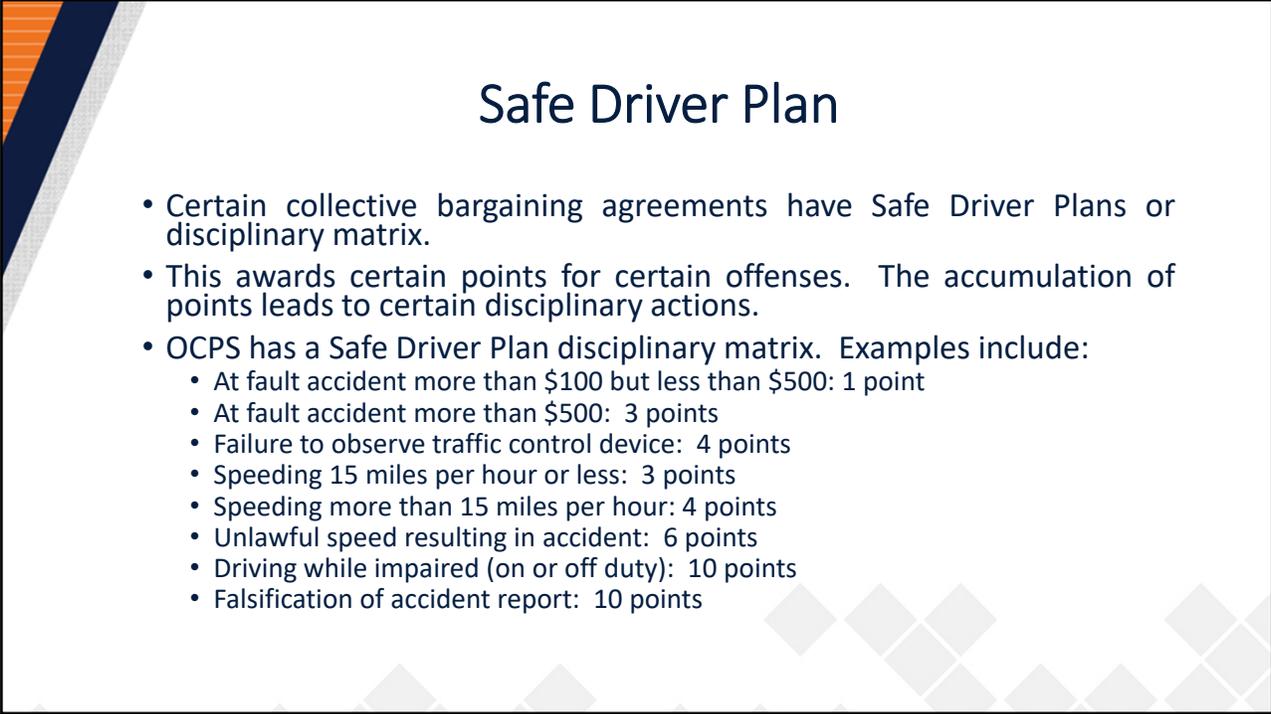
- Does your collective bargaining agreement or school board policy require progressive discipline?
  - Progressive discipline: sequentially higher forms of discipline for like offenses in order to correct performance or behavioral deficiencies.
  - Normal progression: verbal counseling, written counseling, written reprimand, suspension, dismissal.
  - OCPS collective bargaining agreement, like most collective bargaining agreements, usually requires progressive discipline. However, egregious offenses may be terminable without resort to progressive discipline.

## Collective Bargaining Procedure

- Disciplinary process.
  - Receipt of allegations.
  - Investigation (collection of statements, documents, etc.).
  - Predetermination meeting where allegations and evidence is presented to employee for response. Employee is entitled to representation at the meeting.
  - Imposition of discipline, if any.
  - Grievance to challenge any issued disciplinary action up to and including arbitration. See F.S. 447.401, which requires all collective bargaining agreements to have a grievance procedure ending in arbitration.



## Safe Driver Plans



### Safe Driver Plan

- Certain collective bargaining agreements have Safe Driver Plans or disciplinary matrix.
- This awards certain points for certain offenses. The accumulation of points leads to certain disciplinary actions.
- OCPS has a Safe Driver Plan disciplinary matrix. Examples include:
  - At fault accident more than \$100 but less than \$500: 1 point
  - At fault accident more than \$500: 3 points
  - Failure to observe traffic control device: 4 points
  - Speeding 15 miles per hour or less: 3 points
  - Speeding more than 15 miles per hour: 4 points
  - Unlawful speed resulting in accident: 6 points
  - Driving while impaired (on or off duty): 10 points
  - Falsification of accident report: 10 points

## Safe Driver Plan

- Penalties
  - 2-3 points in 24-month period: verbal reprimand
  - 4-5 points in 24-month period: written reprimand
  - 6-7 points in 24-month period: one-day suspension
  - 8-9 points in 24-month period: three-day suspension
  - 10 points within 12-month period: dismissal
  - 10-13 points within a 24-month period: five-day suspension
  - 14 points within a 24-month period: dismissal

## Safe Driver Plan

- There is a caveat to this plan: The School Board reserves the right to take disciplinary action up to and including dismissal when it considers the offense serious enough, especially when the occupant's safety and welfare are at risk, and/or in cases of restriction, suspension or revocation of a driver's license.



## Case Studies



## Case Studies

- OESPA o/b/o Chandrasian v. OCPS: A driver did not report an out-of-state citation and did not do so within 72 hours as required by transportation department policy. Driver received a 5-day suspension under the Safe Driver Plan. Driver challenged saying there was no just cause. The arbitrator rejected the challenge based upon the express provisions of the Safe Driver Plan.
  - “The Grievant by his own admission accumulated over 10 points within a 24-month period, thereby triggering the mandatory and agreed upon 5-day suspension. Unfortunately, this CBA provides for no arbitrator discretion as to the assessed penalty, other than the general ‘just cause’ disciplinary standard. Specific language always trumps more general contract language as a matter of accepted contract interpretation law.”

## Case Studies

- OESPA o/b/o Jorcelin v. OCPS: Driver ran a red light and hit a vehicle, causing serious, life threatening injuries. The District paid out statutory maximum of \$100,000 to driver who was hit without the need for lawsuit filing.
- OCPS fired, citing Safe Driver Plan caveat that it can terminate when the offense is serious enough.
- The Arbitrator ruled for the bus driver, reducing termination to a five-day suspension:
  - “Yes, as OCSB has argued, the accident qualifies as serious, although not a ‘serious’ accident delineated in the Safe Driver Plan. The ‘delineated language’ reserves the right to take disciplinary action up to and including dismissal, when the offense is considered serious enough, not when the accident is considered serious enough.”
- OCPS responded by reemploying the driver at his driver salary but in a monitor position.

## Case Studies

- OESPA o/b/o Charles v. OCPS: Driver was terminated for using a cell-phone while driving his bus. Driver was suspended eight months before his termination for three days for using his cell phone while driving.
- Remember Rule 6A-3.0171(2)(e) requires School Boards to adopt policies prohibiting cell phone usage. OCPS did so through its Transportation Operating Procedure 85.
- The Arbitrator upheld the termination of the employee.

## Case Studies

- OESPA o/b/o Cote Arenas v. OCPS: Driver backed his car into a stationary vehicle.
- Driver filled out an accident report saying the car in back of him made contact with the bus. OCPS terminated the driver for falsifying his accident report.
- The Arbitrator upheld the termination holding that the driver's dishonesty in filling out the accident report justified his termination under the Safe Driver Plan, which states a falsification of an accident report is a 10-point offense, justifying dismissal.

## Case Studies

- OESPA o/b/o Miranda v. OCPS: Driver hit a stationary vehicle in front of him because he was looking down at his cell phone while driving. Video showed he dropped the cellphone on the floor of his vehicle and the cellphone is heard ringing after the accident.
- The driver wrote an accident report saying his foot slipped off the brake due to numbness.
- The arbitrator upheld the driver's termination for falsifying the accident report:
  - "The direct observation of Grievant's conduct, reflected on the video, immediately before the crash leaves no doubt that he was looking at his cellphone to find directions to the school. His claim that his foot slipped off the brake is rejected as not credible, thus, he falsified the accident report by not being truthful about the cause of the accident."

## Case Studies

- OESPA o/b/o Sinclair v. OCPS: Driver took her bus to drop off her child at day care. She left the bus running for 3 minutes unattended with the door open while putting her child in day care.
- She utilized toll roads without permission to get to her route in violation of Transportation Operating Procedures.
- She showed up late at her stops by 10 minutes without calling dispatch, also in violation of Transportation Operating Procedure.
- Arbitrator upheld termination of the driver because of her violation of adopted school board rules, i.e. Transportation Operating Procedures.

## Suggestions for Prosecuting Disciplinary Actions

## Suggestions for Prosecuting Disciplinary Actions

- First, check your collective bargaining agreement and/or school board policies for procedural requirements for disciplinary action.
- Is there a delineated disciplinary matrix like the OCPS Safe Driver Plan or is there just a general just cause provision?
- Is there a requirement to engage in progressive discipline in the collective bargaining agreement or school board policy or may you proceed directly to termination?
- Who is responsible for conducting investigations into employee misconduct. Is that you or does your district have an investigatory arm responsible for investigations?

## Suggestions for Prosecuting Disciplinary Actions

- If you are responsible for investigating misconduct, gather your evidence as quickly as possible.
- Obtain witness statements as soon as possible, as memories fade over time.
- If you have AVL or video evidence, secure that evidence prior to it being lost due to a lack of preservation.
- Before the predetermination meeting, make sure you have identified all statutory and regulatory provisions you are charging the driver with violating, as well as any School Board policies and procedures you are charging the driver with violating. Any charges not raised in the predetermination meeting cannot be used in an eventual arbitration.
- When you have a predetermination meeting, make sure you present all evidence you intend to use. Evidence not presented in the predetermination meeting cannot be used in an eventual arbitration.

## Suggestions for Prosecuting Disciplinary Actions

- If you have counsel which will represent you in the matter, speak with counsel before bringing a termination action before the School Board so as to ensure that the termination will survive muster if it goes to arbitration.
- Before the action comes up for a Board decision, make sure you have spoken with Board members about the facts of the case, as well as the policies violated by the driver. Also, your Board members may want to know what the driver plans to argue. Tell the Board member what the driver's argument is and why it is not well taken.

## Questions?

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