STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIM HORNE, as Commissioner of Education,	)	
Petitioner,	)	
vs.	)	Case No. 05-0504PL
STACY STINSON,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing of this case on June 2, 2005, in Viera, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Ron Weaver, Esquire
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For Respondent: Mary F. Aspros , Esquire
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STATEMENT OF THE ISSUES

The issues presented are whether Respondent provided prohibited assistance to examinees in a Florida Comprehensive Assessment Test in violation of Subsections 1008.24(1)(c) and 1012.795(1)(c), (f), and (i), Florida Statutes (2002), and

Florida Administrative Code Rules 6A-10.042(1)(c), (d), and 6B-1.006(3)(a), (4)(b), and (5)(a), and, if so, what penalty should be imposed against the teaching certificate of Respondent.

PRELIMINARY STATEMENT

On February 9, 2005, Petitioner filed an Administrative Complaint against Respondent and, upon Respondent's request for hearing, referred the matter to DOAH to conduct a formal hearing. DOAH assigned the matter to ALJ Susan B. Harrell who scheduled the hearing for April 14, 2005, but rescheduled it for June 2, 2005, pursuant to an Unopposed Motion for Continuance. DOAH then transferred the matter to the undersigned.

At the hearing, Petitioner presented the testimony of eight witnesses, including two by deposition, and submitted four exhibits, including the two depositions. Respondent presented the testimony of nine witnesses, including one by deposition, and submitted two exhibits, including the deposition.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing filed with DOAH on June 16, 2005. The ALJ granted Petitioner's unopposed request for an extension of time, until July 12, 2005, to file proposed recommended orders (PROs). The parties timely filed their respective PROs on July 12, 2005.

FINDINGS OF FACT

1. Respondent holds Florida Educator's Certificate Number 685117 that is effective through June 30, 2007 (teaching certificate). Respondent is certified to teach elementary education, including math, science, and social studies.

2. The Brevard County School District (District) has employed Respondent as a teacher for 14 years. In March 2003, the District employed Respondent as a fifth-grade teacher at Gemini Elementary School (Gemini). At Gemini, Respondent proctored the math and science portions of the Florida Comprehensive Assessment Test (FCAT) for some fifth graders.

3. A student identified in the record as L.H. was upset after the first day of the FCAT exam. She told her mother that night that she felt like she had cheated because of assistance she received from Respondent during the FCAT.

4. The next day, the mother of L.H. reported the allegation to administrators at Gemini. The administrators immediately replaced Respondent as a proctor, conducted an investigation, invalidated the test scores of 26 students, and subsequently transferred Respondent to Endeavor Elementary School (Endeavor).

5. While the results of the investigation were pending, District employees conducted a public meeting to allow parents to voice their concerns over the invalidation of FCAT results.

District employees did not address the specific facts surrounding the invalidation of the test results due to the pending investigation. However, the matter gained public attention as a result of the actions of District employees.

6. District employees rely, in part, on FCAT scores to determine whether fifth-grade students progress to the sixth grade. In March 2003, Gemini fifth graders generally needed a passing score on the FCAT to progress to the next level. The District also needed to test at least 95 percent of its fifth-grade students or face applicable sanctions.

7. The invalidation of the FCAT scores did not prevent any of the 26 students from progressing to the sixth grade. Nor did the invalidation of the FCAT scores prevent the District from testing 95 percent of the students in the District.

8. On May 17, 2005, Petitioner issued an Amended Administrative Complaint (Complaint). The Complaint alleges, inter alia, that Respondent violated Subsection 1008.24(1)(c), Florida Statutes (2002). The statute makes it a violation for Respondent to knowingly or willfully coach an examinee during the FCAT or alter or interfere with the response of an examinee.

9. Respondent signed an FCAT Test Administration Security Agreement (security agreement) indicating that she had read and understood the statutes and rules related to the administration of the FCAT. A test manual and training that proctors received

before the FCAT directed Respondent to read test directions to examinees and provide no additional help.

10. No finding is made that Respondent failed to follow test manual and training directions. The Complaint does not allege that Respondent failed to "follow test administration directions specified in . . . test . . . manuals. . . " within the meaning of Subsection 100824(1)(f), Florida Statutes (2002).

11. Evidence of what transpired in Respondent's examination room in March 2003 consists of the testimony of five students and the written statement of another student, all of whom Respondent proctored. Incriminatory evidence consists primarily of the testimony of four students. Two students testified at the formal hearing, and two testified by deposition. The rest of the incriminatory evidence enters the record as a written statement from a fifth student completed in April 2003.[1] Exculpatory evidence consists of the testimony of a sixth student who testified during the formal hearing.

12. The six students are identified in the record, respectively, as T.M., L.M., S.O., J.C., L.H., and W.D. They were approximately 11 years old in March 2003. The five students who testified were approximately 13 years old at the time of the formal hearing, and approximately two years had passed since they took the FCAT. None of the students were enrolled in Gemini at the time of the hearing.

13. For reasons discussed in the Conclusions of Law, it is legally insufficient for incriminatory evidence to merely show that Respondent provided assistance "by any means" or "in any way." The testimony and written statement must be clear and convincing that Respondent committed a specific act that is statutorily prohibited because it coaches an examinee or alters or interferes with the examinee's response (prohibited assistance).[2]

14. Incriminatory evidence must satisfy two standards to be clear and convincing. The two standards have been judicially differentiated as a qualitative standard and a quantitative standard.[3]

15. The qualitative standard requires incriminatory evidence to satisfy several requirements. The five students who testified and provided a written statement for Petitioner must be credible. The memory of each student must be clear and lack confusion. The content of the testimony and written statement must describe what was said and done during the FCAT examination precisely and explicitly and must distinctly recall material facts. The testimony and written statement must be direct, unequivocal, and consistent.[4]

16. Incriminatory evidence opining that Respondent assisted an examinee is conclusory if it is not substantiated by precise and explicit details that are distinctly remembered by

the student and are sufficient for the trier of fact to independently determine whether the conduct of Respondent provided prohibited assistance to an examinee. Conclusory testimony fails the qualitative standard, is not clear and convincing, and invades the province of the trier of fact by denying the trier of fact an evidential basis to independently determine whether the specific acts committed during the FCAT amounted to prohibited assistance.[5]

17. Incriminatory evidence must also satisfy a quantitative standard. The sum total of incriminatory evidence must be of sufficient weight that it produces in the mind of the trier of fact a firm conviction, without hesitation, as to the truth of the factual allegations in the Complaint.[6]

18. The trier of fact bases the remaining findings on a determination of whether it is clear and convincing from the testimony and written statement of the six students that Respondent provided prohibited assistance to an examinee. The trier of fact first weighs the incriminatory evidence to identify evidence that satisfies the qualitative standard (qualitative evidence) and then determines whether the qualitative evidence satisfies the quantitative standard.

19. The testimony of S.O. was credible, but the trier of fact was unable to assess the credibility of T.M. and L.M. by observing their demeanor and candor. The content of the

testimony and written statement is conclusory. The incriminatory evidence lacks the precise and explicit detail needed for the trier of fact to independently substantiate the conclusions of the students.

20. S.O., T.M., and L.M., each stated in conclusory fashion that Respondent provided assistance to the respective examinee on one question in the science portion of the FCAT. However, none of the students distinctly remembered their respective question; the answer each provided; or the details of the conduct or statements of Respondent.[7] It is less than clear and convincing that the answer each student provided was any different from the answer the student would have provided without the alleged assistance from Respondent.

21. The conclusory statements by S.O., T.M., and L.M. are tantamount to opinions on an ultimate issue of fact without precise and explicit details required for the trier of fact to independently find that the statements and conduct of Respondent concerning a specific question and answer provided prohibited assistance. Such conclusory evidence effectively invades the province of the trier of fact.

22. The testimony of J.C. is sufficiently specific to satisfy the qualitative standard for clear and convincing evidence. J.C. testified that he asked Respondent what a waxing crescent moon is, and Respondent stated it is a one-fifth moon

to the left. However, J.C. testified by deposition, and the trier of fact is unable to determine the credibility of J.C. by assessing the demeanor and candor of the witness. Moreover, it is less than clear and convincing that Respondent provided J.C. with the answer to the question, coached J.C., or altered or interfered with the response of J.C.[8] There is no evidence that the response J.C. provided to the question was any different from the response he would have provided in the absence of the alleged assistance from Respondent.

23. The testimony of L.H. is credible and sufficiently detailed to satisfy the qualitative standard for clear and convincing evidence. L.H. testified that Respondent answered an inquiry from L.H. by stating that the test question has nothing to do with the sun and the moon and to take away all the answers about the sun and the moon. L.H. testified that only one answer remained. The testimony of L.H. also provided sufficient detail to enable the trier of fact to make an independent finding as to whether the effect of the alleged assistance was to coach L.H. or to alter or interfere with the response given by L.H.

24. The testimony of L.H. is the only evidence from Petitioner that satisfies the qualitative standard for clear and convincing evidence. However, the testimony of L.H. is not quantitatively sufficient to be clear and convincing evidence.

25. For reasons stated in the Conclusions of Law, the testimony of one fact witness that is not corroborated by other clear and convincing evidence is not legally sufficient to be clear and convincing. Even if uncorroborated testimony were legally sufficient, the testimony of L.H. does not satisfy the quantitative standard for clear and convincing evidence because it is in apparent conflict with exculpatory testimony from W.D.

26. W.D. testified that Respondent refused to assist him during the FCAT and did not assist anyone else.[9] The testimony of W.D. conflicts with that of L.H. if they took the FCAT together. Respondent was the proctor for L.H. and W.D. on the first day of the FCAT. Petitioner did not place W.D. in a different room from L.H. by clear and convincing evidence.[10] Evidence that supports a reasonable inference that L.H. and W.D. were in the same room, although not a preponderance of the evidence, is sufficient to create hesitancy in the mind of the trier of fact and preclude a firm conviction that Respondent committed specific acts prohibited by Subsection 1008.24(1)(c), Florida Statutes (2002), and Florida Administrative Code Rule 6A-10.042(1)(c) and (d).

27. If it were determined that Respondent violated the preceding statute and rule, it is less than clear and convincing that the violation was an act of "moral turpitude" or "gross immorality" within the meaning of Subsection 1012.795(1)(c),

Florida Statutes (2002). No applicable rule defines the quoted terms. However, rules applicable to teacher dismissal proceedings provide definitions that are instructive.

28. The evidence is less than clear and convincing that the alleged prohibited assistance was a base, vile, or depraved act within the meaning of moral turpitude in Florida Administrative Code Rule 6B-4.009(6). Nor did the alleged prohibited assistance satisfy the definition of immorality in Florida Administrative Code Rule 6B-4.009(2). In relevant part, the alleged violation did not impair Respondent's service in the community. It is clear and convincing that Respondent continues to be an effective employee of the District within the meaning of Subsection 1012.795(1)(f), Florida Statutes (2002).

29. After District employees investigated the incident and invalidated the test scores of 26 students, the District did not terminate the employment of Respondent. Rather, the District transferred Respondent to Endeavor.

30. It is clear and convincing from the testimony of District personnel, administrators at Gemini, fellow teachers, parents, and students, and from previous job evaluations, that Respondent has been and continues to be an excellent teacher. Respondent brings out the best in students. Respondent has a wonderful rapport with students, instills in students the desire to learn, and inspires the imagination of students. Respondent

emanates genuine enthusiasm in the classroom as well as a fun loving attitude.

31. Respondent goes out of her way to make sure that children with learning problems achieve their goals and gain satisfaction. Respondent is very good at explaining difficult subjects to students. Respondent tutors students after school. Respondent is able to identify and focus on unique qualities in each student. Respondent does not display bias or prejudice toward any student.

32. Respondent uses a reward system for classroom discipline that is effective and ensures an attentive class. Respondent is very calm in the classroom. Respondent never loses her temper or yells at students.

33. Respondent is professional, consistent, structured, fair, compassionate, nurturing, and punctual. Respondent is intelligent, reliable, and dedicated. Respondent spends a great deal of time preparing her lessons and for her work with students. Respondent teaches math, science, and social studies and is a valuable asset to the District.

34. Any notoriety surrounding the events in March 2003 arose from the action of District employees. For reasons stated in the Conclusions of Law, Petitioner cannot penalize the teaching certificate of Respondent on the ground that the

alleged prohibited assistance became notorious through the actions of District employees.

35. The alleged prohibited assistance did not violate relevant standards of professional conduct within the meaning of Subsection 1012.795(1)(i), Florida Statutes (2002). The evidence is less than clear and convincing that Respondent possessed the culpable intent required in Florida Administrative Code Rule 6B-1.006(3)(e), (4)(b), or (5)(a).

36. L.H. was very upset over the events in March 2003 and over the criticism she received from other students for complaining about Respondent to school officials. However, the evidence is less than clear and convincing that the alleged prohibited assistance failed to protect L.H. from conditions harmful to the learning or mental or physical health or safety of L.H. within the meaning of Florida Administrative Code Rule 6B-1.006(3)(a).

37. There is no evidence that public scorn threatened the safety of L.H. or interfered with what L.H. learned at Gemini. L.H. achieved her educational goals and progressed to the sixth grade. Nor is there any evidence that L.H. suffered any identifiable mental or physical impairment as a result of the alleged assistance from Respondent.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the subject matter and the parties in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005). DOAH provided the parties with adequate notice of the formal hearing.

39. The essential charge in the Complaint is that Respondent violated Subsection 1008.24(1)(c), Florida Statutes (2002), and Florida Administrative Code Rule 6A-10.042(1)(c) and (d), during the FCAT administered at Gemini in March 2003 (the operative statute and rule). The remaining violations charged in the Complaint are rendered moot without proof that Respondent violated the operative statute and rule.

40. Petitioner submitted evidence that Respondent provided assistance to FCAT examinees by any means and in any way. The nature and scope of the proof offered by Petitioner tacitly argues that prohibited assistance is not limited to assistance that coaches an examinee or alters or interferes with the response of the examinee.

41. The operative statute does not contain the term "assistance." Rather, the operative statute prohibits specific acts that have the effect of coaching an examinee or altering or interfering with the response of an examinee. See, e.g., § 1008.24(1)(g), Fla. Stat. (2002) (it is a violation to "assist in . . . any of the acts prohibited in this section")(emphasis supplied).

42. The terms of the operative statute prohibit only those acts that coach an examinee or alter or interfere with the

response of an examinee. Subsection 1008.24(1)(c), Florida Statutes (2004), makes it a violation for Respondent to knowingly and willfully:

> (c) Coach examinees during testing or alter or interfere with examinees' responses in any way. . . . (emphasis supplied)

43. The literal terms of the operative rule do not limit prohibited assistance to the specific acts proscribed in the operative statute. In relevant part, Florida Administrative Code Rule 6A-10.042(1)(c) and (d) provides:

> (1) Tests . . . shall be . . . administered in a secure manner such that the integrity of the tests shall be preserved.
>
> (c) Examinees shall not be assisted in answering test questions by any means by persons administering or proctoring the administration of any test.
>
> * * *
>
> (d) Examinees' answers to questions shall not be interfered with in any way by persons administering, proctoring, or scoring the examinations. (emphasis supplied)

44. Florida Administrative Code Rule 6A-10.042(1)(c) and (d) cannot be construed to expand the reach of Subsection 1008.24(1)(c), Florida Statutes (2002). Petitioner and the State Board of Education (the Board) are statutorily prohibited from interpreting a rule in a manner that enlarges, amends, modifies, or contravenes the specific provisions of the law implemented. Similarly, DOAH has no jurisdiction, in the

exercise of its quasi-judicial responsibility, to interpret a rule in a manner that expands the reach of the statute. § 120.52(8)(c), Fla. Stat. (2002).

> An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. . . . Statutory language . . . generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statue.

§ 120.52(8), Fla. Stat. (2002)(flush paragraph).

45. Petitioner tacitly argues that the operative statute expressly authorizes the rule to expand the reach of the statute. Petitioner relies on language in Subsection 1008.24(1), Florida Statutes (2002), that provides:

> It is unlawful for anyone knowingly and willfully to violate test security rules adopted by the State Board of Education for mandatory tests administered by . . . school districts . . . (emphasis supplied)

46. The preceding statutory language cannot be construed as a delegation of legislative authority for the Board to adopt a rule that enlarges the terms of the enabling legislation. A conclusion that the legislature intended to provide no definite parameters to define prohibited assistance would vest unbridled discretion in the agency and risk violation of the non-delegation doctrine in Florida. Fla. Const., Art. 2, § 3.

47. The non-delegation doctrine requires the legislature to provide standards and guidelines in each enactment that are ascertainable by reference to the terms of the enactment.

Bush v. Shiavo, 885 So. 2d 321 (Fla. 2004); B.H. v. State, 645 So. 2d 987, 992-994 (Fla. 1994); Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978). Petitioner and DOAH should construe the operative statute, whenever possible, in a manner that preserves the constitutionality of the statute. See, e.g., Spurlin v. School Board of Sarasota County, 520 So. 2d 294, 296-297 (Fla. 2d DCA 1988) and Von Stephens v. School Board of Sarasota County, 338 So. 2d 890, 894 (Fla. 2d DCA 1976)(avoiding statutory construction that would authorize unbridled agency discretion even though statute included no express limits). Petitioner and DOAH should also construe the operative rule in a manner that preserves the validity of the rule by limiting the rule to standards and guidelines prescribed in the statute.

48. Petitioner relies on non-rule policy stated in the test manual, security agreement, and pre-test training to enlarge, amend, modify, or contravene the specific acts prohibited in Subsection 1008.24(1)(c), Florida Statutes (2002). However, Petitioner cites no legal authority that authorizes an agency to accomplish by non-rule policy that which the agency is prohibited from accomplishing by rule.

49. The test manual directs a proctor to read the test directions to examinees and to provide no additional help. Subsection 1008.24(1)(f), Florida Statutes (2002), makes it a violation for Respondent to, "Fail to follow test administration directions specified in . . . test . . . manuals. . . ." However, the Complaint does not charge Respondent with violating Subsection 1008.24(1)(f), Florida Statutes (2002).

50. The Administrative Procedure Act limits the scope of this proceeding to the factual grounds and charges alleged in the Complaint. The Complaint alleges that Respondent provided answers, other "inappropriate assistance," and coached examinees or altered or interfered with their responses.[11]

51. Petitioner cannot find Respondent guilty of a charged violation based on evidence of grounds not specifically alleged in the Complaint. Thomas P. Trevisani, M.D. v. Department of Health, Case No. 1D04-2488 (Fla. 1st DCA July 20, 2005); Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Cotrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996). In Cotrill, the court reversed a finding that the licensee violated statutes referred to in the administrative complaint based on factual grounds not alleged in the complaint. Judge Benton explained:

> Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint . . . violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint.

Cotrill, 685 So. 2d at 1372.

52. The Complaint does not allege assistance of any kind or by any means as the factual ground for the charged violation. The alleged assistance is limited to assistance that provided answers or had the effect of coaching an examinee or altering or interfering with the response of an examinee. Petitioner is

limited to proof of the acts specifically alleged as grounds for the charged violations.[12]

53. The record evidence does not set forth a reasonable basis for a finding that an interpretation of terms such as "assistance," "coach," "alter," and "interfere" requires special agency insight or expertise. Petitioner did not articulate any underlying technical reasons for deference to agency expertise. Johnston, M.D. v Department of Professional Regulation, Board of Medical Examiners, 456 So. 2d 939, 943-944 (Fla. 1st DCA 1984).

54. Petitioner relies on the quoted statutory terms to propose disciplinary action against Respondent's teaching certificate. The quoted terms must be construed strictly in favor of the licensee and against the imposition of discipline. State ex. rel. Jordan v. Pattishall, 99 Fla. 296, 126 So. 147 (1930); Ocampo v. Department of Health, 806 So. 2d 633 (1st DCA Fla. 2002); Equity Corp. Holdings, Inc. v. Department of Banking and Finance, Division of Finance, 772 So. 2d 588, 590 (Fla. 1st DCA 2000); Jonas v. Florida Department of Business and Professional Regulation, 746 So. 2d 1261 (Fla. 3d DCA 2000); Loeffler v. Florida Department of Business and Professional Regulation, 739 So. 2d 150 (Fla. 1st DCA 1999); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164 (Fla. 1st DCA 1990); Rush v. Department of Professional Regulation, 448 So. 2d 26 (Fla. 1st DCA 1984);

Ferdego Discount Center v. Department of Professional Regulation, 452 So. 2d 1063 (Fla. 3d DCA 1984); Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981); Lester v. Dept. of Professional and Occupational Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977).

55. Petitioner bears the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondent provided prohibited assistance to an examinee, that the prohibited assistance violated the statutes or rules cited in the Complaint, and that the proposed penalty is reasonable. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973).

56. The requirement for clear and convincing evidence imposes an intermediate level of proof on Petitioner. Petitioner must prove material factual allegations by more than a preponderance of the evidence, but the proof need not be beyond and to the exclusion of a reasonable doubt. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994); Lee County v. Sunbelt Equities, II, Limited Partnership, 619 So. 2d 996, 1006 n. 13 (Fla. 2d DCA 1993).

57. The Florida Supreme Court has addressed the clear and convincing standard of proof with attention to detail. In relevant part, the court stated:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. . . . [T]he facts to which witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witness must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning a Judge, 645 So. 2d at 404 (quoting in part from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

58. In order to satisfy the qualitative standard for clear and convincing evidence, incriminating evidence must be credible, material facts must be "distinctly remembered," and testimony must be "precise" and "explicit." This qualitative standard has been adopted by each District Court of Appeal in the state. E.F. v. State, 889 So. 2d 135, 139 (Fla. 3d DCA 2004); K-Mart Corporation v. Collins, 707 So. 2d 753, 757 n.3 (Fla. 2d DCA 1998); McKesson Drug Co. v. Williams, 706 So. 2d 352, 353 (Fla. 1st DCA 1998); Kingsley v. Kingsley, 623 So. 2d

780, 786-787 (Fla. 5th DCA 1993); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

59. The testimony of T.M. and S.O. and the written statement of L.M. do not satisfy the qualitative standard for clear and convincing evidence. The testimony and written statement contain little more than conclusory statements that Respondent assisted each examinee. None of those students substantiate their conclusions with precise and explicit testimony concerning the statements and conduct of Respondent that the students distinctly remembered. An analogous conclusory statement has been judicially held to be less than clear and convincing. As the court explained:

> [c]onclusory testimony, unsubstantiated by facts in evidence, that a patient has . . . the possibility of substantial harm to herself, is insufficient to satisfy the statutory criteria by the clear and convincing evidence standard.

Boller v. State, 775 So. 2d 408, 410 (Fla. 1st DCA 2000). See also E.F., 889 So. 2d at 139 (delusion that patient is a free man lacks evidence to support a finding that delusion poses a real and present threat of escape). Compare Inquiry Concerning a Judge, 645 So. 2d at 404 (testimony as to when various meetings took place and what transpired during the meetings was direct, unequivocal, and consistent) with Inquiry Concerning a Judge, 645 So. 2d at 405 (testimony that lacks specific

recollection or exhibits doubt or confusion is not clear and convincing).

60. The trier of fact was unable to determine whether the testimony of T.M. and the written statement of L.M. were credible for purposes of the qualitative standard. The trier of fact was unable to observe either student's demeanor or candor.

61. The testimony of J.C. did not satisfy the qualitative standard for clear and convincing evidence. Although the content of the testimony was sufficiently specific, the trier of fact was unable to assess the credibility of the witness by observing his demeanor or candor under oath. Moreover, it is less than clear and convincing that the effect of the alleged assistance from Respondent was to coach J.C. or to alter or interfere with his response to the question. The evidence is less than clear and convincing that the alleged assistance caused J.C. to select an answer to a test question that was any different from the answer he would have selected in the absence of the alleged assistance.

62. The testimony of L.H. is legally insufficient to satisfy the quantitative standard for clear and convincing evidence. Her testimony is not corroborated by other evidence that is clear and convincing.[13] Uncorroborated testimony from one fact witness is insufficient to prove an essential ground for a violation charged in the Complaint. Compare Daniels v.

Gunter, 438 So. 2d 184, 184-185 (Fla. 2d DCA 1983) (uncorroborated testimony of licensee's secretary is not sufficient to sustain relevant findings) with Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So. 2d 607, 609-610 (Fla. 1st DCA 1993)(uncorroborated testimony of applicant is sufficient for preponderance of evidence in challenge to test score achieved in professional license examination). But see Werner v. State, Department of Insurance and Treasurer, 689 So. 2d 1211, 1213 (Fla. 1st DCA 1997)(acknowledging conflict with the decision in Daniels).

63. Assuming arguendo that uncorroborated testimony of a single witness were legally sufficient to satisfy the quantitative standard for clear and convincing evidence, the uncorroborated testimony of L.H. fails the quantitative test for evidential reasons. L.H. and W.D. provided apparently conflicting testimony. Petitioner did not resolve the apparent conflict by clear and convincing evidence. The weight to be accorded conflicting testimony is within the province of the trier of fact. Werner, 689 So. 2d at 1213. Inference and surmise that L.H. and W.D. were not in the same examination room is not clear and convincing evidence. Tenbroeck v. Castor, 640 So. 2d 164, 167-168 (Fla. 1st DCA 1994).

64. The sum total of the testimony from L.H. and W.D. is not of sufficient weight to produce in the mind of the trier of

fact a firm conviction that Respondent provided prohibited assistance in violation of Subsection 1008.24(1)(c), Florida Statutes (2002), and Florida Administrative Code Rule 6A-10.042(1)(c) and (d). The incriminatory evidence provided by the remaining students does not satisfy the qualitative standard for clear and convincing evidence. Inquiry Concerning a Judge, 645 So. 2d at 405; Slomowitz, 429 So. 2d at 800.

65. Subsection 1012.795(1)(c), Florida Statutes (2002), authorizes Petitioner to discipline the teaching certificate of Respondent if Respondent were found guilty of providing prohibited assistance that involved an act of moral turpitude or gross immorality. Moral turpitude and immorality are not synonymous terms. Each term is separately defined by rule and each describes a separate standard of conduct.

66. A determination of whether a teacher deviates from a standard of conduct is not infused with agency expertise. Such a determination is the province of the trier of fact. See Bush v. Brogan, 725 So. 2d 1237, 1239-1240 (Fla. 2d DCA 1999)(finding that conduct was not gross immorality is a finding of fact that is not infused with agency policy); accord Dunham v. Highlands County School Board, 652 So. 2d 894, 896 (Fla. 2d DCA 1995).

67. Florida Administrative Code Rule 6B-4.009(6) is instructive and defines moral turpitude, in relevant part, to be

a crime. If it were determined that Respondent provided prohibited assistance to one or more of the FCAT examinees in March 2003, Subsection 1008.24(2), Florida Statutes (2002), makes the violation a crime. In relevant part, the statute provides:

> (2) Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. (emphasis supplied)

68. The rule further defines moral turpitude to be a crime evidenced by an act of "baseness, vileness, or depravity in the private and social duties" that Respondent owes to her "fellow man or society in general." The quoted terms must be construed strictly in favor of Respondent and against the imposition of discipline. Pattishall, 126 So. 147; Ocampo, 806 So. 2d 633; Equity Corp., 772 So. 2d at 590; Jonas, 746 So. 2d 1261; Loeffler, 739 So. 2d 150; Elmariah, 574 So. 2d 164; Rush, 448 So. 2d 26; Ferdego, 452 So. 2d 1063; Bowling, 394 So. 2d 165; Lester, 348 So. 2d 923. It is less than clear and convincing that the alleged prohibited assistance from Respondent involved an act that was base, vile, or depraved.

69. Florida Administrative Code Rule 6B-4.009(2) is instructive and defines the term "immorality" as:

> . . . conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned

> or the education profession into public disgrace or disrespect and impair the individual's service in the community.

70. A finding that the alleged prohibited assistance is an act of immorality must satisfy a three-part conjunctive test. The conduct of the teacher must be:

> . . .[1]inconsistent with the standards of public conscience and good morals (emphasis supplied), . . . [2]sufficiently notorious . . . to disgrace the teaching profession and [3]impair the teacher's service in the community. (latter emphasis the court's).

Cf. McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)(citing McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995) and Sherburne v. School Board of Suwanee County, 455 So. 2d 1057, 1058 (Fla. 1st DCA 1984)(each case involving teacher dismissal by a local school district).

71. The definition of immorality measures the conduct of Respondent against a standard described in the relevant rule as "good morals." The term "good morals," like the term "good moral character," is unusually ambiguous and can be defined in an almost unlimited number of ways, depending on the views of the person formulating a definition. As the Florida Supreme Court has explained:

> The term "good moral character" . . . by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague

> qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory [agency action]. Konigsberg v. State Bar of California, 353 U.S. 252, 262-263, 77 S. Ct. 722, 728, 1 L. Ed. 2d 810 (1957).

Board of Bar Examiners, 358 So. 2d 7, 8-9 (Fla. 1978).

72. A determination of whether Respondent deviated from a standard of conduct is not infused with agency expertise and is the province of the trier of fact. See Bush, 725 So. 2d at 1239-1240; Dunham, 652 So. 2d at 896. Relevant terms such as "good morals" must be construed strictly in favor of Respondent and against the imposition of discipline. Pattishall, 126 So. 147; Ocampo, 806 So. 2d 633; Equity Corp., 772 So. 2d at 590; Jonas, 746 So. 2d 1261; Loeffler, 739 So. 2d 150; Elmariah, 574 So. 2d 164; Rush, 448 So. 2d 26; Ferdego, 452 So. 2d 1063; Bowling, 394 So. 2d 165; Lester, 348 So. 2d 923. It is less than clear and convincing that the alleged prohibited assistance was inconsistent with good morals.

73. Assuming arguendo that the alleged prohibited assistance was inconsistent with good morals, the alleged conduct was not sufficiently notorious to disgrace the teaching profession. Petitioner cannot rely on its own activities, including the invalidation of test scores, investigative interviews of 26 students, and a public meeting, to prove conduct is widely known. Sherburne, 455 So. 2d at 1061;

Baker v. School Board of Marion County, 450 So. 2d 1194 (Fla. 5th DCA 1984).

74. The alleged prohibited assistance did not impair Respondent's service in the community. Respondent's service in the community is measured by her effectiveness in the classroom. McNeill, 678 So. 2d at 477-478, citing McKinney, 667 So. 2d at 387 and Sherburne, 455 So. 2d at 1062. The evidence is clear and convincing that the alleged prohibited assistance did not impair Respondent's effectiveness in the classroom. Nor did the alleged prohibited assistance seriously reduce Respondent's effectiveness as an employee of the District within the meaning of Subsection 1008.24(1)(f), Florida Statutes (2002).

75. The Complaint charges that the alleged prohibited assistance violated Principles of Professional Conduct for the Education Profession prescribed in Florida Administrative Code Rule 6B-1.006(3)(a) and (e), (4)(b), and (5)(a) (standards of professional conduct). § 1012.795(1)(i), Fla. Stat. (2002). It is less than clear and convincing that the alleged prohibited assistance violated the standards of professional conduct.

76. Except for the standard of professional conduct prescribed in Florida Administrative Code Rule 6B-1.006(3)(a), culpable intent is an essential requirement of the remaining standards. Petitioner did not show by clear and convincing evidence that the alleged prohibited assistance from Respondent

involved the requisite intent to: expose a student to unnecessary embarrassment or disparagement, distort or misrepresent facts concerning an educational matter in direct or indirect public expression, or practice dishonesty in all professional dealings. Fla. Admin. Code R. 6B-1.006(3)(e), (4)(b), and (5)(a).

77. If it were found that Respondent provided prohibited assistance to L.H., that ground would be legally insufficient to support a conclusion that Respondent violated the professional standard for honesty in all professional dealings. The assumed prohibited assistance would involve a single act of misconduct during the first day of the FCAT in March 2003. A single act of misconduct does not constitute a dishonest practice in "all professional dealings." Cf., Werner, 689 So. 2d at 1214 (holding, inter alia, that term "practices" contemplates more than a solitary lapse, and a single act of misconduct does not evidence dishonest "practices").

78. Florida Administrative Code Rule 6B-1.006(2) requires Respondent to make a reasonable effort to protect a student from conditions harmful to learning, a student's mental health, or the student's physical health or safety. The evidence is less than clear and convincing that the alleged prohibited assistance materially harmed the learning experience of L.H. at Gemini; or that L.H. experienced either a temporary or permanent impairment

of her physical or mental health. There is no evidence that the alleged prohibited assistance endangered the physical safety of L.H. Nor is there any evidence that the other students who testified or provided a written statement for Petitioner suffered from the alleged prohibited assistance.

79. If it were determined that Respondent provided prohibited assistance, it is less than clear and convincing that aggravating circumstances exist which would warrant revocation or suspension of Respondent's teaching certificate pursuant to Subsection 1012.795(1), Florida Statutes (2002). Petitioner submitted no evidence of any prior disciplinary history.

80. Numerous mitigating factors in evidence would support a written reprimand authorized in Subsection 1012.796(7)(f), Florida Statutes (2002). Respondent has been and is an excellent teacher and a valuable asset to the District. The alleged prohibited assistance involved a single isolated incident and was neither continuing nor part of a pattern and practice. The invalidation of FCAT results for 26 students did not prevent any of the students from progressing to the sixth grade. Nor did the invalidation of the test results prevent the District from testing 95 percent of the fifth-grade students.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner enter a final order finding Respondent not guilty of the violations charged in the Complaint and imposing no penalty against the teaching certificate of Respondent.

DONE AND ENTERED this 11th day of August, 2005, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2005.

ENDNOTES

1/ Respondent did not object to the admissibility of the written statement of the fifth student or to the deposition testimony of the other two students.

2/ Fla. Admin. Code R. 6A-10.042(1)(c) provides, inter alia, that examinees shall not be assisted in answering questions by any means. Subsection 1008.24(1)(c), Florida Statutes (2002), provides that it is unlawful for any person to knowingly or willfully coach examinees during testing or to alter or

interfere with the response of an examinee. For reasons stated in the Conclusions of Law, the prohibition in the rule against assistance by "any means" must be construed, in relevant part, to be limited to assistance the effect of which is to coach an examinee or to alter or interfere with the response of an examinee.

3/ See Inquiry Concerning A Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994).

4/ Id.

5/ E.F. v. State, 889 So. 2d 135, 139 (Fla. 3d DCA 2004)(citing Boller v. State, 775 So. 2d 408, 409 (Fla. 1st DCA 2000) for the proposition stated).

6/ Inquiry Concerning a Judge, 645 So. 2d at 404.

7/ T.M. "remembered" only one instance, but did not recall the exact question other than it involved something about the moon. He couldn't remember if Respondent answered the question or confirmed his answer, how Respondent assisted him, or what answer he gave. His testimony was inconsistent in that he stated he could recall only one question, but that Respondent gave him hints on other questions. T.M. did not disclose to the trier of fact specific details that would enable the trier of fact to independently determine whether the statements or conduct of Respondent were hints. L.M. stated that Respondent wrote out a problem and offered a guess, but did not provide the trier of fact with details concerning the "problem" or other specifics on which the trier of fact could independently find that Respondent "guessed" an answer. S.O. recalled only one "instance," but could not recall the specific question, the answer he gave, or what Respondent said or did to give him the answer or confirm his answer.

8/ J.C. testified that Respondent did not give him the answer to the question.

9/ W.D. sat near the middle or back of the classroom where he had a good view of the rest of the class and whether the examinees were walking up to the desk of the proctor. On cross examination, W.D. testified that he was not watching the entire time because he was focused on his test. However, no evidence shows that W.D. could not hear questions that other examinees posed to the proctor. L.H. testified that she "told" Respondent she did not understand a question and "asked" her for help.

L.H. was unclear whether she went up to the desk of Respondent or made the statements from where L.H. sat. Even if the testimony were clear and convincing that L.H. went to the desk of Respondent, it is less than clear and convincing that the conversation would not have been audible to W.D.

10/ The weight to be given conflicting evidence concerning a material fact is within the province of the trier of fact. K-Mart Corporation v. Collins, 707 So. 2d 753, 755 (Fla. 2d DCA 1998).

11/ The Complaint supplies a dearth of factual allegations as grounds for the charged violations.

> 3. During March 2003, Respondent knowingly and unlawfully violated standardized testing procedures by providing answers and other inappropriate assistance to students during the administration of the Florida Comprehensive Assessment Test (FCAT). As a result of Respondent's actions, FCAT scores for 42 students were invalidated. On or about March 31, 2003 the school district reassigned Respondent to another location.
>
> Count 4: The . . . Respondent . . . coached examinees during testing or altered or interfered with the examinee's responses on a test. . . .

Complaint at 1-2.

The remainder of the Complaint consists of various recitations of language in the relevant statutes and rules.

12/ The Complaint is patently devoid of specific factual allegations needed to satisfy the notice requirements enunciated in Cotrill and Ghandi. However, Respondent did not object to the sufficiency of the factual allegations in the Complaint and did not object to the admissibility of evidence of facts not alleged in the Complaint. See Department of Children and Families v. Morman, 715 So. 2d 1076, 1077 (Fla. 1st DCA 1998)(reversing ALJ's sua sponte dismissal of a charge in the administrative complaint, in relevant part, because the licensee failed to object to the lack of specificity). Nevertheless, findings that Respondent violated relevant statutes and rules based on factual grounds not alleged in the Complaint would

eviscerate fundamental principles of due process. See Lusskin v. State of Florida Agency for Health Care Administration, Board of Medicine, 731 So. 2d 67, 68 (Fla. 4th DCA 1999)(agency cannot find licensee did not practice medicine in accordance with the applicable standard of care when the administrative complaint does not allege the act or omission evidenced in the record as a ground for the charged violation); Arpayoglou v. Department of Professional Regulation, 603 So. 2d 8 (Fla. 1st DCA 1992)(agency cannot find licensee guilty of statutory violation charged in a Notice of Intent when Notice of Intent fails to make specific factual allegations concerning the charges); Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Barnett, 533 So. 2d 1202, 1206 (Fla. 3d DCA 1988)(Board of Trustees cannot withdraw previously issued "consent to use" on grounds not stated in the written notice of withdrawal); Decola v. Castor, 519 So. 2d 709 (Fla. 2d DCA 1988)(agency cannot use evidence of allegations not in complaint to increase penalty); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985)(agency cannot charge a licensee violated a statute by performing three unnecessary tests and find the licensee guilty of violating the statute by performing a fourth test not alleged in the administrative complaint); Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984)(agency cannot charge licensee with statutory violation on the ground that licensee abandoned one construction project and find licensee violated statute on ground licensee abandoned second project not alleged in the administrative complaint); Wray v. Department of Professional Regulation, Board of Medical Examiners, 435 So. 2d 312, 315 (Fla. 1st DCA 1983)(agency cannot charge licensee with misconduct on alleged ground that licensee prescribed excessive and improper medications and find licensee guilty of misconduct on the un-alleged ground that licensee failed to refer patient).

13/ The remaining testimony and written statement submitted by Petitioner does not explain or supplement the specific acts to which L.H. testified within the meaning of Subsection 120.57(1)(c), Florida Statutes (2004). Rather, the remaining testimony and written statement attest to separate acts that may show similar fact evidence within the meaning of Subsection 120.57(1)(d), Florida Statutes (2004). The written statement is hearsay that does not explain or supplement competent and substantial evidence and cannot form the basis of a finding of fact. See Tenbroeck v. Castor, 640 So. 2d 164, 167-168 n.3 (Fla. 1st DCA 1994)(precluding hearsay evidence that does not explain or supplement competent and substantial evidence).

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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.