

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN ROQUES

Petitioner,

vs.

DEPARTMENT OF EDUCATION,

Respondent.

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Case No. 06-1031

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee, Florida, on May 22, 2006. Petitioner, three of Respondent's witnesses, and the court reporter participated by videoconference in Miami, Florida. Respondent's counsel and one of its witnesses attended the hearing in Tallahassee.

APPEARANCES

For Petitioner: John Roques, pro se
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Miami, Florida 33187

For Respondent: Scott Odenbach
Department of Education
1244 Turlington Building
325 West Gaines Street
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to the validation and scoring of his test scores on the Florida Educational Leadership Examination on January 21, 2006.

PRELIMINARY STATEMENT

By letter dated March 1, 2006, Respondent advised Petitioner that it had invalidated his test scores for subtest one of the Florida Educational Leadership Examination on January 21, 2006. The letter states that Petitioner had an earpiece for a cell phone in his ear during subtest one. By letter dated March 6, 2006, Petitioner requested a formal hearing.

At the hearing, Petitioner called one witness and offered into evidence two exhibits: Petitioner Exhibits 1-2. Respondent called four witnesses and offered into evidence nine exhibits: Respondent Exhibits 1-9. All exhibits were admitted. However, the Administrative Law Judge allowed Petitioner ten days to file Petitioner Exhibit 1. When Petitioner failed to do so, the exhibit was deemed withdrawn.

The court reporter filed the transcript on June 12, 2006. Respondent filed a Proposed Recommended Order on June 20, 2006.

FINDINGS OF FACT

1. On January 21, 2006, Petitioner took the Florida Educational Leadership Examination (FELE) at a site in Miami. Persons who take and pass the FELE are eligible for certification as administrators. As is the case with all persons taking the FELE, prior to attending the examination, Petitioner received the "Certification Examinations for Florida Educators . . . Registration Bulletin" (Registration Bulletin).

2. The Registration Bulletin warns prominently on page 14:

I understand that examinees cannot bring any electronic communication or recording device, including a cellular phone, beeper, personal digital assistant (PDA) such as a Palm Pilot, or listening device such as a compact disc or tape player, into the testing room or break areas around the testing room.

3. Prior to taking the FELE, Petitioner also received a document titled, "Important Information about Cheating Behaviors" (Booklet). Section 1 of the Booklet warns that "cheating" is defined as, among other things: "During the examination, using, or attempting to use, prohibited aids, as identified in Section 2."

4. Section 2 of the Booklet describes "prohibited aids" as follows:

You cannot bring any of the following prohibited aids to the test room. They include: cell phones or any other electronic communication or recording device

such as a beeper, personal digital assistant (PDA) such as a Palm Pilot, or listening device such as a compact disc or tape player. . . .

5. The last section of the Booklet is titled, "General Testing Information and Procedures." This section warns: "If you bring any prohibited items such as a cell phone to the test, you will not be admitted to the test room." The second to last page of the Booklet restates: "I understand that examinees cannot bring any electronic communication or recording device, including a cellular phone, beeper, personal digital assistant (PDA) such as a Palm Pilot, or listening device such as a compact disc or tape player, into the testing room or break areas around the testing room." Paragraph 4 of the last page of the Booklet warns one last time: "Do not bring to the test room any prohibited aids **such as cell phones** (see the enclosed letter for other prohibited aids); leave them locked in your car. You will not be admitted to the test if you bring them with you. If you are discovered to have prohibited aids during the test, your test scores may be invalidated."

6. Test administrators, room supervisors, and proctors receive a Test Administration Manual for the Florida Educational Leadership Examination. Page 17 of the manual advises that the examinees receive several warnings not to bring prohibited aids,

including cell phone, into the test room or break areas around the test room. The manual informs the testing staff:

DO NOT ADMIT an examinee to a test room if you observe a cell phone or other prohibited device. Tell the examinee he or she cannot enter with the device but may be admitted if he or she can return without it (e.g., lock it in the car) **AS LONG AS IT IS POSSIBLE TO DO SO AND RETURN TO CHECK IN BY THE TIME TESTING BEGINS (15 minutes after the reporting time on the admission ticket).**

The manual adds:

If the prohibited aid is not discovered until after the examinee has been admitted to the test room, see *Identifying and Documenting Suspected Cheating*, incident number 1 on the next page.

7. The manual lists three incidents, arranged in ascending order of seriousness. These incidents and the appropriate procedures for the testing staff are:

1. Incident: It is discovered that an examinee has a prohibited device, SUCH AS A CELL PHONE, but the examinee is not immediately suspected of using the device (e.g., a cell phone rings and the examinee turns it off without using it).

PROCEDURE:

? Quietly inform the examinee that he or she is in possession of a prohibited aid, which the examinee has been informed is not permitted in the test room.

? Tell the examinee to place the aid in the envelope that has been provided by the Institute for that purpose and write the examinee's name on the envelope.

- ? Hold the envelope in a safe location.
- ? Tell the examinee that the item may be retrieved at the end of the test.
- ? If the examinee refuses to relinquish the prohibited device, follow **MISCONDUCT** guidelines on page 21.
- ? Carefully document the incident, noting the time and duration of the incident, for inclusion in the irregularity reports, C-1 and C-2. Attach the answer folder to the C-1 irregularity report.

2. Incident: An examinee is observed USING a prohibited aid, such as a cell phone or photographic device, to obtain or communicate test content either in the test room or in break areas around the test room.

PROCEDURE:

? If the Room Supervisor does not observe the event, notify him or her immediately; at least two testing staff must observe and document in writing the behavior and one of them must be the Room Supervisor.

? **NOTIFY THE TEST ADMINISTRATOR IMMEDIATELY.** If the examinee is to be dismissed during the test, the Administrator should do the dismissal, if available to do so.

? The Room Supervisor should quietly inform the examinee that his or her test is being stopped because of the prohibited aid and ask him or her to step outside the room. The Room Supervisor should take along and protect the test materials and prohibited aid.

? The prohibited device should be examined to determine if there is the possibility that confidential test information was recorded (for example, if the device is a

scanner pen or if a cell phone has a lens device). If so, document that information on the C-2, Cheating and Misconduct Observation Report. **DO NOT ATTEMPT TO CONFISCATE THE DEVICE.**

? If the examinee hides the device, ask him or her to produce it, but do not touch the examinee.

? The Administrator should inform the examinee that he or she is being dismissed from the test. If asked what will happen next, say only that the Department of Education will provide further information.

? Carefully document the incident, noting the time and duration of the incident, on the irregularity reports, C-1 and C-2. Attach the answer folder to the C-1 irregularity report.

? If the examinee causes a disturbance, such as refusing to leave or return test materials, see **MISCONDUCT** guidelines on page 21.

3. Incident: An examinee is SEEN WITH A "CHEAT SHEET" OR IS OBSERVED USING NOTES OR OTHER WRITTEN MATERIALS to obtain information or pass information to another examinee.

PROCEDURE:

? If the Room Supervisor does not observe the event, notify him or her immediately; at least two testing staff must observe and document in writing the behavior and one of them must be the Room Supervisor.

? **NOTIFY THE TEST ADMINISTRATOR IMMEDIATELY.** If the examinee is to be dismissed during the test, the Administrator should do the dismissal, if available to do so.

? The Room Supervisor should quietly inform the examinee that his or her test is being stopped because of the written notes and ask him or her to step outside the room, taking the test materials and written notes with you.

? The notes should be examined. **CONFISCATE THE NOTES.** If the examinee hides the notes, ask him or her to produce it, but do not touch the examinee.

? The Administrator should inform the examinee that he or she is being dismissed from the test. If asked what will happen next, say only that the Department of Education will provide further information.

? Carefully document the incident, noting the time and duration of the incident, on the irregularity reports, C-1 and C-2. Attach the confiscated notes and answer folder to the C-1 irregularity report.

8. Respondent's exhibit omits page 21 of the manual, which contains the "misconduct guidelines. The only other relevant provision in the portion of the manual included in the exhibit provides that the Room Supervisor should greet the examinees with a scripted introduction. This introduction includes the warning: "Cell phones, books, study aids, calculators, electronic devices, and papers of any kind, including scratch paper, are **NOT** permitted during the testing."

9. The Room Supervisor posted in a prominent place at the front of the test room a notice, in large print, stating: "cell phones are prohibited in test rooms and surrounding break areas." Petitioner could not possibly have avoided seeing the

notice, which was printed on yellow paper, prior to starting subpart one of the FELE.

10. Although Petitioner arrived at the test room in time for the commencement of subpart one of the FELE, he was late enough that he missed some of the pretest instructions. As he entered the test room, he was wearing an earpiece, which communicates with his cell phone by way of Bluetooth wireless technology, provided the cell phone is sufficiently close to the earpiece.

11. As Petitioner walked past the Room Supervisor to take a chair in the test room, the Room Supervisor immediately noticed the ear piece and recognized it as a Bluetooth device, which would allow for wireless, remote communication with a cell phone. The Room Supervisor informed Petitioner that he needed to remove the device, but Petitioner replied only that he would turn it off. Lacking much time for an extended exchange with Petitioner, the Room Supervisor joked that such devices cause cancer and directed one of the proctors to help Petitioner complete the registration application.

12. By the time that Petitioner had entered the test room, the Room Supervisor had already given the instructions on how to complete the registration application. As Petitioner was taking his seat, the Room Supervisor began giving the instructions on how to take the test.

13. For some reason, Respondent introduced into the record a registration application of Petitioner for the October 22, 2005, administration of the FELE. However, Petitioner likely completed the same form for the January 21, 2006, administration of the test. The form states, just above the examinee's signature: "I hereby agree to the conditions set forth in the Registration Bulletin"

14. At least partly due to Petitioner's late arrival, the group in his room was late starting the test, which was being administered simultaneously in several separate rooms at this test center. A few minutes after starting the test, the Test Supervisor was told by the proctor, who had attended to Petitioner, that Petitioner still had the earpiece in his ear. The Room Supervisor informed the proctor to summon the Test Administrator to handle the situation.

15. The Test Administrator entered the room a few minutes later and saw the Bluetooth earpiece in Petitioner's ear while he was taking subpart one of the FELE. During the next break, the Test Administrator approached Petitioner and told him he could not use the Bluetooth earpiece during the test. Petitioner responded that the device was off and other examinees had cell phones in their pockets and purses. The Test Administrator offered to take the device up to his office. Petitioner refused to relinquish the device. After considerable

coaxing, Petitioner finally agreed to remove the device during the next two subparts of the test.

16. By letter dated March 1, 2006, Respondent informed Petitioner that it was invalidating his scores on subtest one, and thus subtests two and three, of the Florida Educational Leadership Examination (FELE) administered on January 21, 2006. The letter states that several witnesses had seen Petitioner, during subtest one, wearing in his ear an earpiece of a cell phone.

17. There is no doubt that the Room Supervisor would have allowed Petitioner to take all three subparts of the FELE, if Petitioner had agreed to the simple request to remove his Bluetooth earpiece. Petitioner tried to justify his intransigence by contending that his earpiece was off and other examinees had cell phones in their pockets or purses. Evidently Petitioner was unaware on the morning of the test that his choice was to remove the earpiece before starting the test or take the test with the earpiece in and have all of his scores invalidated. Petitioner chose the second option, so Respondent properly invalidated all of his scores.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter. § 120.57(1), Fla. Stat. (2005).

19. As an applicant, Petitioner has the burden of proof. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

20. Section 1012.56(8)(a), Florida Statutes (2005), authorizes Respondent to enter into a contract for the administration of the FELE. Florida Administrative Code Rule 6A-4.00821(9)(a) requires that a properly authenticated score on the FELE be free of "irregularity." Florida Administrative Code Rule 6A-4.00821(4)(a)2.a incorporates into the rules the Registration Bulletin described above.

21. Petitioner clearly violated the test-security procedures that Respondent has reasonably imposed on the FELE. Petitioner declined a timely invitation to remove his Bluetooth earpiece prior to starting the test, so Respondent justifiably invalidated his score on subpart one of the FELE. Petitioner has not met his burden of proving that, based on this action, Respondent's invalidation of his scores on subparts two and three was improper.

RECOMMENDATION

It is

RECOMMENDED that the Department of Education enter a final order invalidating Petitioner's scores on subparts one, two, and three of the Florida Educational Leadership Examination administered on January 21, 2006.

DONE AND ENTERED this 20th day of June, 2006, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 2006.

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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 must be filed with the agency that will issue the final order in this case.