STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS COMMISSIONER OF EDUCATION,	)	
Petitioner,	)	
vs.	)	Case No. 10-1839PL
AUDREY LYNETTE JOHNSON,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the final hearing was held in this case on April 15, 2011, by video teleconference in Sarasota and Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Todd P. Resavage, Esquire
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For Respondent: Christine R. Sensenig, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated sections 1012.795(1)(d), 1012.795(1)(g), and 1012.795(1)(j),

Florida Statutes (2008),[1] and Florida Administrative Code Rule 6B-1.006(3)(a), and, if so, what discipline should be imposed; and further, what discipline should be imposed for Respondent's admitted violation of section 1012.795(1)(f).

PRELIMINARY STATEMENT

On November 29, 2009, Petitioner, Dr. Eric J. Smith, as Commissioner of Education (Petitioner), issued a five-count Administrative Complaint against Respondent, Audrey Lynette Johnson (Respondent or Ms. Johnson), a middle-school teacher. The complaint alleged that Ms. Johnson was involved in an incident on October 20, 2007, for which Ms. Johnson was criminally charged with, and pled guilty to, trespass after warning and resisting arrest with violence. In addition, the complaint alleged that on September 25, 2008, Ms. Johnson reported to work at her school under the influence of alcohol. Based on the alleged conduct, the complaint charged statutory and rule violations and sought to impose sanctions authorized by sections 1012.795(1) and 1012.796(7).

Ms. Johnson timely requested an administrative hearing involving disputed issues of material fact, and on April 5, 2010, the case was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the requested hearing.

The final hearing was initially scheduled for June 4, 2010. The parties filed three joint motions for continuance, which were granted, and the hearing was ultimately rescheduled and held on April 15, 2011.

The parties entered into a Joint Pre-Hearing Stipulation in which they stipulated to certain facts, which are incorporated in the Findings of Fact below to the extent relevant. In addition, as clarified at the hearing, Respondent stipulated to the violation of section 1012.795(1)(f) charged in Count 2, but Respondent reserved the right to present evidence to explain the circumstances and argue in mitigation of the statutory violation.

At the final hearing, Petitioner presented the testimony of Dr. William Bolander, Jean Thompson, Dr. George Kenney, and Sheri K. Miller. Petitioner's Exhibits A through D were received into evidence. Respondent testified on her own behalf. Respondent's Exhibits A, B, and D through G were received into evidence.

The one-volume Transcript of the final hearing was filed on April 27, 2011. The parties initially agreed to file proposed recommended orders within ten days of the filing of the Transcript. Respondent filed an unopposed motion to extend that deadline by 15 days, which was granted. The parties timely

filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ms. Johnson holds Florida Educator's Certificate No. 886672, covering the area of mathematics (grades six to 12), which is valid through June 30, 2015.

2. At all times material to the charges in this proceeding, Ms. Johnson was employed as a mathematics teacher at Heron Creek Middle School (Heron Creek) in the Sarasota County School District (School District).

3. On October 20, 2007, Ms. Johnson was arrested and charged with committing the crimes of trespass after warning, resisting arrest with violence, and aggravated assault on a law enforcement officer. Ms. Johnson subsequently pled guilty to resisting arrest with violence, a third-degree felony, and trespassing after warning, a first-degree misdemeanor. Adjudication of guilt was withheld, and Respondent was placed on probation for a period of 18 months. Ms. Johnson met the conditions for community service hours, payment of fines and court costs, and other probation terms faster than required, and as a result, was released early from probation.

4. By way of background leading to this incident, Ms. Johnson testified that she was in a car accident in 2004, from which she had lingering issues with her ankles and ribs,

and she also believed she had nerve damage. She testified that she went to as many as 20 doctors in the aftermath of the 2004 car accident. She saw numerous doctors to get several opinions when she was not satisfied with the outcome, particularly with respect to her belief that she had nerve damage.

5. On the day of Ms. Johnson's arrest in 2007, she testified that she went to a walk-in clinic because of her nerve damage issue and that the physician she saw at the walk-in clinic prescribed Oxycodone.

6. According to Ms. Johnson, she had never taken Oxycodone before, and she claimed that the physician did not tell her about the drug's potential side effects. Ms. Johnson's testimony is not credible in this regard; by this time, Ms. Johnson was quite experienced with a variety of physicians and had explained how she questioned their opinions and sought second opinions, particularly with regard to her belief that she had nerve damage. It is hard to believe that she would seek out nerve damage treatment at a walk-in clinic or that she would accept a new pain medication without at least asking questions about it to the extent information was not volunteered by the physician.

7. Ms. Johnson put into evidence a copy of the drug store's prescription purchase summary to show that her prescription for Oxycodone was filled that day, October 20,

2007. Readily apparent from a quick glance at the summary information regarding the drug was the following phrase, deemed sufficiently important to highlight in all capital letters: "AVOID ALCOHOLIC BEVERAGES while taking this medicine." Thus, even if the walk-in clinic physician did not adequately brief Respondent regarding the pain medication being prescribed, the pharmacy that filled the prescription provided the basic information, including the specific warning to avoid alcohol when taking the drug. Despite this warning, Ms. Johnson admitted that in addition to taking Oxycodone for the first time on October 20, 2007, she also had a "few beers."

8. At the time of the 2007 incident, Ms. Johnson apparently had just broken up with a boyfriend. Ms. Johnson had been on her ex-boyfriend's property three days earlier, and her ex-boyfriend called the police. The police issued a trespass "warning" to Ms. Johnson, advising her that she was trespassing on her ex-boyfriend's property and that if she returned to the property, she would be arrested for trespass after warning.

9. Ms. Johnson claimed that she talked to her ex-boyfriend by telephone on October 20, 2007, and that he had invited her over to return some of his belongings and to pick up items of hers that were in his possession. Ms. Johnson claims that her ex-boyfriend told her that the trespass warning had been lifted. Other than Ms. Johnson's own testimony recounting what her

ex-boyfriend said, no evidence was presented to corroborate this hearsay testimony such that it could provide the basis for a finding of fact.

10. Ms. Johnson did not say when on October 20, 2007, she claims to have spoken with her ex-boyfriend--before or after she went to the walk-in clinic, then to a drugstore to get the prescription filled, then took the Oxycodone and drank a few beers. Ms. Johnson's explanation as to why she thought she could go to her ex-boyfriend's residence, despite having been warned by a law enforcement officer three days earlier not to go there, was neither credible, nor sufficient, to justify her actions.

11. Ms. Johnson testified that in her impaired state, she went alone to her ex-boyfriend's place, presumably driving a vehicle to get there. Ms. Johnson testified that she was shocked, panicked, and angry when her ex-boyfriend called the police, and she ended up being arrested.

12. Ms. Johnson admitted that her recollection of the incident is spotty:

> There was this cop there. I was on the medication that was affecting me. I didn't – I was not thinking clearly at all . . . It was just kind of awkward. I was on medications and it was something that when I panicked I don't recall all of the – everything that I said to [the officer].

13. According to the officer's probable cause affidavit, Ms. Johnson was belligerent, refusing to give the officer identification upon request, and struggling with him when he attempted to take her into custody. The officer arrested Ms. Johnson, handcuffed her, and put her in the back seat of the patrol car. Ms. Johnson, however, was far from subdued. Somehow, she managed to get out of the handcuffs and banged on the patrol car window. The officer opened the car door to see what was going on, and Ms. Johnson jumped out of the car and threw a high-heeled shoe at the officer. While Ms. Johnson claims she was not actually aiming at the officer, she admitted that she was mad and threw the shoe out of anger. She was ultimately handcuffed again, although she continued to struggle. Ms. Johnson was taken to the police station where she was booked and charged with more than just trespass, having elevated the incident from a misdemeanor situation to one involving felony charges because of her outbursts.

14. There is not a great deal of evidence in the record regarding Ms. Johnson's employment history with the School District. The evidence that is of record demonstrates that Ms. Johnson was in school herself until 2002, when she received her master's degree. She was employed later that same year by the School District. Dr. George Kenney, principal at a high school across the street from Heron Creek, was the one who hired

Ms. Johnson. She worked for Dr. Kenney for two years, teaching middle school classes that were being held at the high school site while Heron Creek was being built.

15. As noted, Ms. Johnson was in a car accident in 2004. No specific evidence was offered with respect to Ms. Johnson's performance or attendance between 2004 and 2008, but Ms. Johnson testified generally that throughout this period, she had many medical issues, many encounters with physicians, pain, and treatment (including the Oxycodone prescription in October 2007).

16. There is documentation in the record of problems that Ms. Johnson was having early on in the 2008-09 school year, with numerous incidents of being late or absent without following reporting requirements. The documentation was provided by the middle school's new principal that year, Dr. Bill Bolander. The numerous incidents were of sufficient concern that Ms. Johnson was given notice of a Weingarten meeting[2/]; Ms. Johnson was absent on the day of the scheduled meeting, and so the meeting was rescheduled for September 26, 2008.

17. On September 25, 2008, the day before the rescheduled Weingarten meeting, at approximately 8:30 a.m., before school started, Ms. Johnson went to the School District's administrative offices to obtain copies from her personnel file.

The staff person who assisted Ms. Johnson called Heron Creek to report that she smelled alcohol on Ms. Johnson's breath.

18. Meanwhile, Ms. Johnson went to Heron Creek and proceeded to her classroom. At 9:30 a.m., when middle school classes were about to begin, Dr. Bolander and Jean Thompson, assistant principal, went to Ms. Johnson's classroom. Rather than confront her in the classroom in front of the students, Dr. Bolander had Ms. Thompson go into the classroom to ask Ms. Johnson to step outside to speak with Dr. Bolander, while Ms. Thompson took over supervision of Ms. Johnson's class.

19. Dr. Bolander spoke with Ms. Johnson briefly in the hall outside her classroom, and he noticed the smell of alcohol on Ms. Johnson's breath. He told Ms. Johnson that he had been informed about her suspected alcohol consumption and asked her to go with him to his office where they could speak privately.

20. Back at his office, Dr. Bolander notified the School District's human resources department and was advised that another principal within the School District would come to Heron Creek to conduct an evaluation of Ms. Johnson.

21. Dr. George Kenney, the high school principal across the street--the person who had hired Ms. Johnson and for whom she worked for two years--was asked by the School District to go to Heron Creek to evaluate a teacher. Dr. Kenney has received specialized training to evaluate individuals to determine

whether there is a reasonable suspicion that an individual is under the influence of alcohol or drugs. Dr. Kenney went to Heron Creek, unaware of the identity of the teacher to be evaluated.

22. Dr. Kenney went to Dr. Bolander's office where he was waiting with Ms. Johnson. Dr. Kenney explained to Ms. Johnson why he was there, and Ms. Johnson had no objection to Dr. Kenney performing the evaluation. Apparently the School District, likewise, had no objection to Dr. Kenney, despite the fact that he had made known he favored Ms. Johnson in the past by hiring her. While there were no formal written consents or agreements to the selection of the evaluator, the evidence clearly establishes that the parties mutually agreed to the choice of Dr. Kenney as the evaluator.[3/]

23. Dr. Kenney spent at least 30 minutes conducting a thorough evaluation of Ms. Johnson. He testified that he was concerned from the beginning about the signs of impairment. He noted the following indicators: slurred speech, bloodshot and glassy eyes, disheveled appearance, difficulty in organizing thoughts, and confused answers to reasonably straightforward questions. For example, Dr. Kenney testified that he asked Ms. Johnson about what her teaching assignment was--what she was teaching at that time. He also asked her what her lesson plans were for that day. Ms. Johnson was unable to focus and respond

to these reasonable questions directed to a teacher at the start of a teaching day.

24. Dr. Kenney could not confirm the smell of alcohol on Ms. Johnson's breath, but he testified that he would not expect to be able to smell alcohol on someone's breath because he has a very poor sense of smell. Thus, he focuses more keenly on the other indicators of alcohol consumption, because he knows he cannot rely on that one indicator. However, Dr. Bolander confirmed what had been reported to him by the School District staff in the human resources department: that as of the time period from 8:30 a.m to 9:30 a.m., the smell of alcohol was noticeable on Ms. Johnson's breath.

25. Dr. Kenney's opinion at the conclusion of his evaluation was that there was a reasonable suspicion that Ms. Johnson was under the influence of alcohol and possibly drugs also. As such, Dr. Kenney requested that Respondent undergo reasonable suspicion alcohol and drug testing at a laboratory.

26. Ms. Johnson did not object to the requested testing. To the contrary, she advised Dr. Kenney that she had no fear of being tested. Ms. Johnson testified that the reason she had no fear is because she "knew I wouldn't test positive to any of these--to any of their tests that they had."

27. Ms. Thompson was asked to transport Ms. Johnson to a lab for a breathalyzer test for alcohol and a urine test for drugs. Ms. Thompson testified that upon opening Dr. Bolander's office door to get Ms. Johnson, she noticed a "definite smell" of alcohol released from that confined environment. Dr. Kenney left to return to his high school when Ms. Thompson came to collect Ms. Johnson at about 10:30 a.m.

28. Ms. Thompson drove Ms. Johnson to a lab at Fawcett Memorial Hospital in Port Charlotte, Florida. At the lab, Ms. Johnson was first asked to submit to a breath test for the purpose of measuring alcohol level.

29. The breath test was performed by Sheri Miller. Ms. Miller is a registered nurse and a certified breath test technician, who has performed at least 300 such breath tests since her initial certification in 2002.

30. Before the test, Ms. Miller completed information on an Alcohol Testing Form, including Ms. Johnson's name and identification number (social security number) and the reason for the test to be performed--a reasonable suspicion test requested by an employer. Next, Ms. Miller had Ms. Johnson review the information for accuracy. Ms. Johnson signed a certification that she knew she was about to submit to alcohol testing and that the identifying information on the form was correct.

31. To conduct the breath test, Ms. Miller used the Random Breath Testing Intoximeter, which has been approved by the U.S. Department of Transportation. Ms. Miller instructed Ms. Johnson on how to blow into the mouthpiece to give a breath sample, and Ms. Johnson did so. The results generated by the Intoximeter show that Ms. Johnson's breath sample, time-recorded at 11:28 a.m., yielded an alcohol content measurement of .074, which is a positive reading. Anything over .02 is considered positive for alcohol content, and by protocol, the lab automatically does a second breath test 15 minutes after the first test, when the first test results in a positive reading.

32. A second breath test was performed on Ms. Johnson at 11:45 a.m. The results were still well above the positive mark, at .063.

33. After the two tests, Ms. Miller performed a calibration check on the machine to verify its accuracy. The breath test lab report included Ms. Miller's confirmation that she performed this check: "Cal. Check okay."

34. Finally, Ms. Miller had Ms. Johnson review the results and sign the form to acknowledge the test results shown on the form, and that because the test results were positive (.02 or higher), she was not to drive, perform safety-sensitive duties, or operate heavy machinery.

35. After completion of the breath test, Ms. Johnson also provided a urine sample to be tested for drug content. The lab did not perform the urinalysis on site. Instead, the lab performed the sample collection function, but then the samples were transported to a lab facility in Pennsylvania for testing and issuance of a report.

36. Ultimately, Ms. Johnson learned that the results from her urine drug panel test were negative. However, there was a discrepancy on the report. Although the report identified the donor name as Ms. Johnson, the donor ID number did not match Ms. Johnson's social security number.[4/]

37. Ms. Johnson testified that she knew the results were wrong, because the drug panel test was negative. According to Ms. Johnson, she should have tested positive for opiates, because she was taking a prescription opiate. Ms. Johnson did not elaborate, nor did she explain the inconsistency of this statement with her testimony that she had no fear of being tested for alcohol and drugs because she knew she would not test positive.

38. Ms. Johnson denied, at the time in 2008 and at the final hearing, that she had consumed a substantial amount of alcohol before going to the School District's administrative offices on September 25, 2008; she claimed she only had one glass of wine at 8:00 p.m., the previous evening. However, she

had no other explanation for the positive breath test results, the first of which was a full three hours after a staff person first noticed the smell of alcohol on Ms. Johnson's breath. Likewise, Ms. Johnson did not refute or otherwise contradict Dr. Kenney's description of her physical and mental state that morning--slurred speech, bloodshot and glassy eyes, disheveled appearance, inability to organize thoughts, or respond lucidly to reasonable questions.

39. Ms. Johnson attempted to blame the breath test results on the fact that she had visited another walk-in clinic the previous day because of broken ribs and a reaction to a bug bite, and the physician she saw that day gave her a shot of some form of steroids for the bug bite. No competent evidence or expert testimony was offered to prove the suggestion that somehow a steroid shot would result in a positive alcohol breath test the next day, much less that it would cause slurred speech, confusion, inability to organize thoughts, glassy and bloodshot eyes, or a disheveled appearance.

40. Ms. Johnson's denial of substantial alcohol consumption is rejected as not credible. Instead the clear and convincing evidence established that Ms. Johnson consumed enough alcohol at some point before going to the School District's administrative offices on the morning of September 25, 2008, to make the alcohol odor on her breath noticeable, to cause the

other indicators of impairment found by Dr. Kenney in support of his reasonable suspicion determination, and to result in two consecutive positive breath tests more than three hours later.

41. As in 2007, Ms. Johnson, in an impaired state, drove to the School District's administrative offices, then drove to Heron Creek and proceeded to her classroom, fully intending to teach the gathering middle-school students. As in 2007, it was fortuitous that Ms. Johnson did not cause serious injury or worse, to herself or others, because of her driving under the influence. And it was fortuitous that Ms. Johnson's time in the classroom with her students on September 25, 2008, was brief.

42. Dr. Bolander testified that because of the September 25, 2008, incident, plus Ms. Johnson's attendance and reporting issues that were significant in the beginning of the 2008-09 school year, prior to the incident, and continued after the incident, he recommended that her employment be terminated. In lieu of termination, Ms. Johnson agreed to enter into a "Last Chance Agreement" with the School District, whereby she was suspended for five days without pay. Thereafter, she took FMLA leave for 12 weeks, during which she went through intensive physical therapy and alternative pain management therapy to reduce her use of pain medications. She returned to Heron Creek to teach for the final nine weeks of the 2008-09 school year.

43. Dr. Bolander credited Ms. Johnson with an excellent attendance record during this nine-week period. He also indicated that her performance as a teacher was good during this time. A single performance evaluation for Ms. Johnson was offered into evidence, completed halfway through this nine-week period. Ms. Johnson was deemed "proficient" in all categories.

44. While Ms. Johnson benefited from the leave, in that she was able to undergo intensive therapy that she said would not have been possible while she was teaching, it would not be fair to conclude, as Respondent suggests, that her problems, including the incidents underlying the charges at issue here, should be attributed to the School District for failing to recognize her need for FMLA leave at some point before she requested it. As Ms. Johnson admitted, she was well aware of the availability of FMLA leave, having used it previously to take leave when her mother was experiencing a serious medical problem.

45. Ms. Johnson was invited back to the School District to teach for the 2009-10 school year. However, over the summer of 2009, Ms. Johnson had another accident, falling and severely breaking her leg. This injury triggered another round of multiple doctor visits, a surgery that did not go well, and a second surgery, which was as successful as possible. Nonetheless, Ms. Johnson testified that she suffered a permanent

injury as a result of this accident to compound the permanent injury she said she had from her 2004 car accident. Ms. Johnson testified that as soon as she obtains clearance from her physician, she would like to return to teaching.

46. In contrast to Ms. Johnson's testimony addressing her 2009 FMLA leave experience, during which she worked on physical therapy and alternative pain management techniques that enabled her to reduce her use of pain medication, no similar testimony was offered with respect to how Ms. Johnson has dealt with the new challenge presented by her accident in the summer of 2009. Ms. Johnson did not really speak to how she has managed in the two years since she had a successful nine-week period of teaching, other than to recount the new medical problems caused by her 2009 accident, another parade of doctors and second opinions, and the subsequent surgeries from which she said she will never fully recover. Ms. Johnson's experiences are unfortunate, and one can certainly sympathize with her plights; however, the limited information and absence of explanation leave some concerns, given her track record for dealing with these issues in the past.[5/]

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

48. In this proceeding, Petitioner seeks to discipline Respondent's educator's certificate pursuant to the authority set forth in sections 1012.795(1) and 1012.796(7). Petitioner bears the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). "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." Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983).

49. The first four counts of the Administrative Complaint charge Respondent with violating section 1012.795(1)(d), (f), (g), and (j), respectively. Section 1012.795 provides in pertinent part:

> (1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby

> denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:
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> * * *
>
> (d) Has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.
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> * * *
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> (f) Has been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation.
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> (g) Upon investigation, has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board.
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> * * *
>
> (j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

50. Count 1 charges Respondent with violating section 1012.795(1)(d), by being guilty of gross immorality or an act involving moral turpitude.

51. Neither of the terms "gross immorality" or "an act involving moral turpitude" are defined in the subject statute or in rule. However, Florida Administrative Code Rule 6B-4.009, which contains definitions for use by school districts in disciplining instructional staff, provides assistance and has been used in agency precedent interpreting this statute. John L. Winn, as Comm'r of Educ. v. Adela Popescu, Case No. 06-1620 (Fla. DOAH Aug. 23, 2006; Fla. EPC Jan. 23, 2006); accord Dr. Eric J. Smith, as Comm'r of Educ. v. Maria Elena Malvar, Case No. 10-2784 (Fla. DOAH Sept. 13, 2010; Fla. EPC Jan. 11, 2011).

52. Rule 6B-4.009(2) defines the term "immorality" as follows:

> Immorality is defined 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.

53. "Gross immorality" has been described in agency precedent to mean an act of misconduct that is serious, rather than minor in nature; it is a flagrant disregard of proper moral standards. Brogan v. Mansfield, Case No. 96-0286 (Fla. DOAH Aug. 1, 1996; Fla. EPC Oct. 18, 1996).

54. The moral standard to be upheld must be viewed in context with the profession at issue. As leaders and role models in the community, teachers are held to a high moral standard. Adams v. Prof'l Practices Council, 406 So. 2d 1170, 1172 (Fla. 1st DCA 1981).

55. As argued by Respondent, Petitioner has failed to prove by clear and convincing evidence that Respondent's conduct on October 20, 2007, meets the standard for gross immorality, not because it was not a flagrant disregard of proper moral standards, but rather, because it was not sufficiently notorious. The incident occurred away from the school grounds and was not associated with any school activity. No evidence was presented as to any publicity about the incident. Likewise, this incident cannot be considered conduct involving moral turpitude, i.e., an act of vileness, baseness, or depravity. See Jamerson v. Lenczyk, Case No. 94-0151 (Fla. DOAH Feb. 22, 1995)(concluding that misdemeanor crimes of trespass after warning, disorderly conduct and resisting arrest without violence cannot be classified as acts of vileness, baseness, or depravity so as to constitute an act involving moral turpitude.).[6/]

56. The same cannot be concluded, however, with respect to the September 25, 2008, incident, in which Ms. Johnson drove to the School District's administrative offices where a staff

member smelled alcohol on her breath; and then Ms. Johnson proceeded to drive to Heron Creek and report to her classroom intending to teach. As found above, Petitioner clearly and convincingly proved that Ms. Johnson reported to work to teach her middle school class in an impaired state, under the influence of alcohol. "Being intoxicated in a classroom in which students are present is action which exhibits both gross immorality and moral turpitude." Winn v. O'Neill, Case No. 08-1597 (Fla. DOAH May 9, 2008), Rec. Order, ¶ 17.

57. Count 2 charges Respondent with a violation of section 1012.795(1)(f), and Respondent stipulated to this statutory violation. Respondent claims that the circumstances leading to the charges of one misdemeanor and one felony, to which Ms. Johnson pled guilty, should be considered mitigating. In essence, Respondent claims that she was not really at fault because the Oxycodone (and alcohol) made her act the way she did. However, Respondent intentionally ingested a potent pain medication, disregarded the prescription's strong warning to "AVOID ALCOHOLIC BEVERAGES" with the drug, and then went to her ex-boyfriend's place despite having been warned by police that she would be arrested for trespass if she went there. Respondent is fully responsible for those actions. If anything, her guilty plea to both a misdemeanor and a felony should be

considered an aggravating circumstance under the statute, which would be violated by either guilty plea alone.

58. Count 3 charges Respondent with violating section 1012.795(1)(g) by engaging in personal conduct which seriously reduces her effectiveness as an employee of the school board. The same analysis applied to Count 1 applies here: Petitioner did not prove a violation of this statute by virtue of Respondent's conduct on October 20, 2007, but did meet its burden of proving a violation of this statute by virtue of Respondent's conduct on September 25, 2008. Winn v. O'Neill, supra.

59. Count 4 charges a violation of the Principles of Professional Conduct for the Education Profession (Principles of Professional Conduct) prescribed by State Board of Education rules. This charge in turn leads to Count 5, which charges that Respondent's alleged conduct violated Florida Administrative Code Rule 64B-1.006(3)(a). Rule 64B-1.006 codifies the Principles of Professional Conduct, referred to in section 1012.795(1)(j). Thus, establishing a violation of the rule as charged in Count 5 would establish a violation of section 1012.795(1)(j).

60. Rule 6B-1.006(3)(a) requires that an education professional, such as Respondent, "[s]hall make reasonable effort to protect the student from conditions harmful to

learning and/or to the student's mental and/or physical health and/or safety."

61. Petitioner met its burden of proving by clear and convincing evidence that Respondent's conduct on September 25, 2008, violated her obligations under Rule 6B-1.006(3)(a) to protect her students from conditions harmful to learning and/or to the students' mental and/or physical health and/or safety. Instead, as found above, Ms. Johnson was responsible for exposing her students to such harmful conditions. See Winn v. O'Neill, supra.

62. In making a penalty recommendation, the undersigned has taken into account Ms. Johnson's unfortunate history with medical problems, both prior to and subsequent to the incidents that gave rise to this Administrative Complaint. The undersigned has also considered the positive impact of the 12-week FMLA leave and Respondent's good performance teaching for a brief nine-week period following her FMLA leave. However, the undersigned disagrees with Respondent's attempt to paint herself as a blameless victim of accidents, pain medication, alcohol, and a School District not pushing Respondent to take FMLA leave sooner than she did. Instead, it is troubling that Respondent has not come to accept responsibility for her actions taken when she voluntarily ingested pain medications and alcohol, instead of expecting others to take responsibility that

she should have taken for herself. If Respondent needed help, she knew she could have asked for help. If Respondent needed FMLA leave sooner, she knew she could have asked for it. The solution was not to jeopardize the well-being of her middle school students by going to class impaired by alcohol.

63. Florida Administrative Code Rule 6B-11.007(2) sets forth disciplinary guidelines that should normally be followed, absent mitigating or aggravating circumstances warranting deviation outside of the normal penalty ranges. The undersigned concludes that under the totality of the circumstances, including the multiple violations found above and the slight mitigating circumstances offset to some degree by Respondent's troublesome tendency to blame others instead of accepting responsibility for her own actions, that deviation from the normal penalty ranges is not warranted. Accordingly, within the normal penalty ranges for the statutory violations found above, a two-year suspension of Respondent's educator's certificate is warranted. While not quite as harsh as Petitioner's request for a two-year revocation (which is also within the normal penalty ranges), such a penalty should, nonetheless, send the message to Respondent that she must accept responsibility, and consequences, for her actions.

64. The undersigned determines that under the circumstances, rather than impose the harsher penalty urged by

Petitioner, what would make more sense would be to impose an additional probationary period following the suspension. Given the absence of sufficient information about Respondent's conduct over the last two years since her most recent serious accident, a two-year probationary period following the suspension would allow for monitoring and other terms to ensure that Respondent's past conduct will not be repeated. For example, participation to successful completion in a Professional Recovery Network Program would seem appropriate under the circumstances.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

RECOMMENDED that a final order be entered by the Florida Education Practices Commission finding that Respondent, Audrey Lynette Johnson, violated sections 1012.795(1)(d), (1)(f), (1)(g), and (1)(j) and Rule 6B-1.006(3)(a); and imposing the following as the penalty for such violations: (1) suspension of Respondent's educator's certificate for two years; and (2) imposition of a two-year probationary period following the two-year suspension, subject to such terms and conditions, including participation through completion in a Professional Recovery Network Program, as the Education Practices Commission deems appropriate.

DONE AND ENTERED this 28th day of June, 2011, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of June, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2008 version. The two incidents underlying the charges in the Administrative Complaint occurred in October 2007 and September 2008, respectively. The statutory provisions allegedly violated that remain in dispute were not changed from the 2007 statute to the 2008 statute, although due to a new statutory grounds for discipline added in 2008 in section 1012.795(1)(b) (failure to report suspected child abuse or suspected misconduct), the lettered paragraphs corresponding to the charged statutory provisions each moved by one letter between 2007 and 2008.

[2/] A Weingarten meeting, named after NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), is a fact-finding meeting, with the possibility that discipline may result. Because of the possible discipline, notice is required, as is the right to representation.

[3/] Ms. Johnson admitted that she had no objection to the selection of Dr. Kenney to conduct the evaluation, which stands to reason since he has shown his faith in her in the past and would seem to be an ideal choice to give Ms. Johnson every possible benefit of the doubt. Respondent argues that a

Collective Bargaining Agreement provision, which was not offered into evidence, required that the neutral evaluator be "mutually agreed upon" by Ms. Johnson and the School District. Respondent argues that this requirement can only be met by express, affirmative consent. Particularly under the circumstances presented in this case, that argument is rejected as creating an inappropriate roadblock of form over substance. Mutual agreement to the selection of Dr. Kenney is found here upon consideration of all of the evidence, including Ms. Johnson's testimony, credibility, and demeanor.

[4/] Respondent argued that the identification discrepancy on the report of the urine drug panel test results discredited not only that test, but also, the separate breath test results. That argument is rejected. The clear and convincing evidence established the precise protocol for the breath test, each step of which was taken in Ms. Johnson's presence and with her signed corroboration. The breath test process and results were entirely separate from the report of the urine drug test panel results, generated by a remote lab in Pennsylvania, on which the identification number discrepancy appeared.

[5/] Respondent asserted that the length of time since her last incident at the School District is a mitigating circumstance. However, it is difficult to credit Ms. Johnson for unknown performance and conduct during an extended period of time away from the School District, particularly when Ms. Johnson did not volunteer information to address any lingering concerns about her prior conduct and her tendency to resort to pain medications and alcohol to combat the pain from her old accident. For example, Respondent's Proposed Recommended Order asserted that one of the terms of the Last Chance Agreement required Ms. Johnson to attend Alcoholics Anonymous (AA) meetings. No evidence was presented to support this finding. No testimony was offered by Ms. Johnson on the subject of attending AA meetings, as a condition of her Last Chance Agreement or otherwise. If, as the proposed finding seems to suggest, Ms. Johnson started attending AA meetings after the Last Chance Agreement in 2009 as a condition of that Agreement, it would be important to know whether she continued doing so after her 2009 accident or whether she let that effort lapse over the last two years.

[6/] As Petitioner notes, the Lenczyk Recommended Order concluded that although the misdemeanor crimes of trespass after warning, disorderly conduct, and resisting arrest without violence did not constitute acts of moral turpitude, they did constitute acts

of gross immorality, since they are inconsistent with the standards of public conscience and good morals and would be sufficiently notorious to bring the respondent into disrespect. However, the rule definition of immorality does not include conduct that "would be" sufficiently notorious to disgrace the teaching profession and impair the teacher's service in the community (such as if the conduct were publicized); the conduct must actually be sufficiently notorious to disgrace the teaching profession and impair the teacher's service in the community. See McNeill v. Pinellas Cnty Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996).

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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.