

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS)
COMMISSIONER OF EDUCATION)
)
Petitioner,)
) Case No. 11-2386PL
vs.)
)
DIANE ROBINSON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Administrative Law Judge Cathy M. Sellers of the Division of Administrative Hearings on September 12, 2011. The hearing was held by video teleconference at sites in Fort Lauderdale and Tallahassee.

APPEARANCES

For Petitioner: Charles Whitelock, Esquire
300 Southeast Thirteenth Street
Fort Lauderdale, Florida 33316

For Respondent: Johnny Gaspard, Esquire
15025 Northwest 77th Avenue
Miami Lakes, Florida 33014

STATEMENT OF THE ISSUE

The issue is whether Respondent violated paragraph 2(G) of the December 14, 2010, Final Order of the Education Practices

Commission ("EPC"), and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

This matter came before the Division of Administrative Hearings ("Division") on a request from the EPC to conduct a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, on a Notice to Show Cause regarding Respondent's Florida Educator's Certificate. Specifically, Respondent was charged with violating a Final Order entered by the EPC in December 2010, imposing disciplinary sanctions, including placing her on employment probation. The EPC convened a hearing on the Notice to Show Cause. During the hearing, Respondent raised disputed issues of material fact. The EPC terminated the hearing and referred the matter to the Division.

The final hearing initially was scheduled for July 19, 2011, but was continued and rescheduled for September 12, 2011. The parties filed a Joint Prehearing Statement on August 30, 2011.

The final hearing was held on September 12, 2011. Petitioner presented the testimony of Jackie Scialabba and Christin Visbal, and offered Petitioner's Exhibits 1 through 7 into evidence, all of which were admitted without objection. Respondent testified on her own behalf and offered Respondent's Exhibit 4, which was admitted into evidence over objection.

On October 5, 2011, counsel for Petitioner notified the undersigned by letter, with copy to Respondent's counsel, that the parties had agreed to file their proposed recommended orders on October 21, 2011. The one-volume Transcript was filed with the Division on October 7, 2011. Petitioner's Proposed Recommended Order was filed on October 21, 2011. Respondent's Proposed Recommended Order was filed on October 26, 2011. Both parties' proposed recommended orders were considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, Commissioner of Education, is the head of the Florida Department of Education, the state agency charged with the ultimate responsibility to investigate and take disciplinary actions against persons who hold a Florida Educator's Certificate and are alleged to have violated specified statutes.

2. The EPC is charged with imposing discipline for violations of sections 1012.795 and 1012.796, Florida Statutes.

3. Respondent holds Florida Educator's Certificate Number 519374 issued by the Department.

Respondent's Employment History and Disciplinary History

4. Respondent has been employed in the State of Florida public education system for thirty-one years, twenty-seven of

which she has served as a full-time teacher. During the four years in which she was not a teacher, she served as an occupational specialist and career counselor, involved in helping at-risk students find employment and providing guidance regarding academic training for specific careers. She also served as a counselor for Project Hope, a drug rehabilitation program, and as a substitute teacher. She currently is employed as a classroom teacher by Broward County Public Schools. She has received positive job performance evaluations throughout her career.

5. On or about May 14, 2010, Petitioner filed an Administrative Complaint against Respondent, alleging violations of specified Florida Statutes and agency rules, and seeking to impose disciplinary sanctions against Respondent's Certificate.

6. Following an informal hearing on the Administrative Complaint conducted pursuant to sections 120.569 and 120.57(2), the EPC entered a Final Order dated December 14, 2010, placing Respondent on two employment years of probation, subject to specified conditions.

7. The Final Order provides in pertinent part: "2. Upon employment in any public or private position requiring a Florida educator's certificate, Respondent shall be placed on 2 employment years of probation with the conditions that during that period, she shall: . . . G. [n]ot consume, inject or

ingest any controlled substance unless prescribed or administered for legitimate medical purposes."

8. To ensure compliance with paragraph 2(G)¹ of the Final Order, Respondent is required to submit to random substance abuse testing, as directed by the Recovery Network Program for Educators ("RNP") or her employer.²

9. Pursuant to the Final Order, Respondent submitted to random substance abuse testing on January 28, 2011.

10. Respondent was notified by letter from the RNP dated February 7, 2011, that she was in violation of the Final Order. The letter stated in pertinent part: "you failed to comply with Paragraph 2(G) of the Final Order, to wit: You consumed, ingested, or injected a controlled substance that was not prescribed by a doctor as evidenced by your drug test on January 28, 2011, that was positive for Cocaine Metabolite."

11. On February 17, 2011, the EPC issued a Notice to Show Cause, requiring Respondent to show cause why a penalty for violating the Final Order should not be imposed. A hearing on the Notice to Show Cause was convened before the EPC on April 8, 2011. At the hearing, Respondent claimed that she had not consumed, injected, or ingested a controlled substance not prescribed or administered for legitimate medical purposes.

Respondent's Random Drug Test of January 28, 2011

12. On January 28, 2011, Respondent reported to Occupational Medicine Centers of America ("OMC"), in Miramar, Florida, to submit to a random drug test as required under the Final Order, paragraph 2(H). Because she had to work that day, Respondent reported to OMC in late afternoon, before 5:00 p.m.

13. Respondent brought a chain of custody form, formally known as a Forensic Drug Testing Chain of Custody Form ("Form"), with her to OMC.³ The Form for Respondent's testing was provided by the RNP or Respondent's employer.⁴ The Form is multi-layered, with the pages (or "layers") designated for specific recipients—i.e., the collection laboratory, the testing laboratory, the employer, the medical review officer ("MRO"),⁵ and the donor.

14. The Form lists "8543245" as the "Specimen ID No." for Respondent's random drug test conducted on January 28, 2011.

15. Because Respondent's employer or the RNP provided the Form for her drug testing, OMC could not, and did not, generate a chain of custody form that could be used in collecting Respondent's specimen.

16. The Form is to be filled out by the person collecting the specimen in accordance with the specific steps set forth on the Form.

17. Step 1 lists the employer's name, address, and identification number, and the MRO's name, address, phone

number, and facsimile number. Step 1 requires the specimen collector to fill in the donor's name and social security number or employee identification number; verify the donor's identity; identify the reason for the drug test; identify the type of test to be performed; and provide the collection site name, address, phone number, facsimile number, and collection site code.

18. Step 2 is completed by the collector once the donor has provided the specimen. The collector identifies the type of specimen provided (i.e., split, single, or none provided) on the Form, reads the temperature of the specimen within four minutes of collection, and verifies on the Form whether the temperature is between 90 and 100° Fahrenheit.

19. Step 3 requires the collector to pour the specimen into a bottle, seal the bottle with a tamper-evident label or seal, have the donor initial the seal, and place the specimen bottle in a laboratory bag along with the testing laboratory's copy of the Form.

20. Step 4 requires the collector to certify that "the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed, and released to the Delivery System noted in accordance with applicable requirements." To complete Step 4, the collector must sign and date the form, fill in the time that the specimen was collected, and identify the courier service to

which the specimen bottle is released. After the collector completes Steps 1 through 4 of the Form, the donor completes Step 5.

21. Step 5 requires the donor to certify that he or she provided the specimen to the collector and did not adulterate the specimen, that the specimen bottle was sealed with a tamper-evident seal in his or her presence, and that the information and numbers provided on the Form and label affixed to the bottle were correct.

22. Upon arriving at OMC, Respondent was called into the portion of the facility where drug testing is conducted. She provided the Form to OMC's medical assistant, Jackie Scialabba, who was on duty at that time. Scialabba completed Step 1 of the Form, and instructed Respondent to place her belongings in a locker, wash her hands, and provide a urine specimen in the collection cup.

23. While Respondent was in the restroom providing the specimen, Scialabba completed Step 4 of the Form. Specifically, she signed and dated the form, filled in the portion of the Form stating the "Time of Collection" as 4:25 p.m., and checked the box identifying the delivery service courier.

24. Respondent emerged from the restroom and handed Scialabba the specimen to pour into a specimen bottle for sealing and delivery to the testing laboratory. At that time,

Scialabba discovered that Respondent had not provided a specimen of sufficient quantity to be tested.

25. Scialabba provided water to Respondent so that she would be able to produce a specimen of sufficient quantity for testing. Respondent waited in the lobby of the facility until she was able to provide another specimen.

26. Scialabba's shift ended at 5:00 p.m. and she left for the day. By the time Respondent was able to provide another specimen, Scialabba was gone. Before she left, Scialabba informed Christin Visbal, also a medical assistant at OMC,⁶ that Respondent's drug test was incomplete and that Visbal needed to complete the test. Scialabba left the partially completed Form with Visbal.

27. Scialabba testified that Respondent did not complete Step 5 of the Form in her presence.

28. Once Respondent indicated she was able to provide another specimen, Visbal called Respondent back into the testing facility. Both Visbal and Respondent stated that they were the only people present in the testing facility at that time.⁷

29. Visbal had Respondent wash her hands, gave her the specimen collection cup, and instructed her regarding providing the specimen.

30. At that time, Respondent provided a urine specimen of sufficient quantity to meet the testing requirements.

31. Visbal checked the temperature of the specimen as required on Step 2 of the Form, and completed the portion of Step 2 requiring verification that the specimen temperature was between 90 and 100° Fahrenheit.⁸

32. Visbal poured the urine into a specimen bottle, sealed the bottle with a tamper-evident seal, and had Respondent initial the seal. Respondent then completed Step 5 of the Form, which constituted her certification that the specimen bottle was sealed with a tamper-evident seal in her presence.⁹

33. Visbal placed the sealed urine specimen and the testing laboratory's copy of the Form in a bag, and sealed the bag.

34. Visbal provided Respondent with the donor copy of the Form. Respondent collected her belongings from the locker and left the facility.

35. Because Scialabba had prematurely completed Step 4 of the Form while attempting to collect Respondent's specimen before she left work for the day, Visbal was unable to complete Step 4.

36. However, Visbal provided a sworn statement and testified at hearing regarding the substance of the certification in Step 4—specifically, that the urine specimen given to her by Respondent was collected, labeled, sealed, and released to the delivery service¹⁰ in accordance with applicable

requirements. The evidence establishes, and the undersigned determines, that Visbal correctly followed the established protocol in collecting, labeling, sealing, and releasing the specimen to the courier in accordance with the applicable chain of custody requirements. Accordingly, the chain of custody for Respondent's urine specimen was maintained.

37. Scialabba's paperwork error did not compromise the chain of custody for Respondent's urine specimen.

38. On February 7, 2011, FirstLab provided a document titled "Participant Call Test Edit" to the RNP, showing a positive test result for cocaine metabolite. The document bears "Specimen ID No. 8543245"—the same specimen identification number as was listed on the Form that Respondent brought to OMC on January 28, 2011, for use in her drug test that day.

39. Respondent does not dispute that the tested specimen yielded a positive test result for cocaine metabolite. She maintains that she did not produce the tested specimen.

Respondent's Subsequent Random Drug Test Results

40. Since January 28, 2011, Respondent has been randomly tested for drug use each month. Respondent's drug test results have been negative every time that she has been tested since the January 28, 2011 test—nine times as of the hearing date.

41. Respondent served a subpoena duces tecum on FirstLab in August 2011, seeking to obtain all documents related to

Respondent's random drug test results, including the negative test results. The subpoena provided the correct spelling of Respondent's full name but did not list her social security number, employee identification number, date of birth, address, or school system by which she is employed. Instead of producing Respondent's test results, FirstLab produced test results for another teacher having a similar name who is employed by Miami-Dade County Public Schools.¹¹

Ultimate Facts Regarding Alleged Violation and Penalty

42. For the reasons set forth above, the undersigned determines that the chain of custody for Respondent's urine specimen was maintained. The evidence does not support an inference that Respondent's specimen was tampered with, tainted, or otherwise compromised in the collection, sealing, labeling, or delivery process.

43. Therefore, either Respondent had cocaine metabolite in her system when she donated the urine specimen on January 28, 2011, or the testing laboratory or MRO made a mistake in testing or reporting the test results of her urine specimen. Respondent maintains it is the latter, but did not present any persuasive evidence to support her position.

44. To that point, FirstLab's error in producing the wrong person's records in response to Respondent's subpoena does not provide a sufficient basis to infer that in this case, FirstLab

reported another person's drug test result instead of Respondent's. It shows only that FirstLab makes mistakes when not provided sufficiently specific information about the person whose records are being subpoenaed.

45. Accordingly, the undersigned finds that Petitioner has demonstrated, by clear and convincing evidence, that Respondent, in violation of paragraph 2(G) of the Final Order, consumed, injected, or ingested a controlled substance not prescribed or administered for a legitimate medical purpose, as revealed by the random drug test to which Respondent submitted on January 28, 2011.

46. However, there is no evidence in the record showing that Respondent's violation of the Final Order presented any danger, or caused physical or mental harm to any students or to the public. Nor is there any evidence that the violation caused any actual damage, physical or otherwise, or that Respondent benefited from the violation. To the contrary, the sole evidence shows that Respondent is a good teacher who has performed well as a public school employee for thirty-one years. There is no evidence that the violation has in any way impaired her performance of her duties as a classroom teacher.

47. Moreover, the sole evidence regarding Respondent's subsequent random drug test results shows that Respondent is now complying with the Final Order, and apparently has complied ever

since her January 28, 2011, test. This evidences Respondent's contrition and her recognition of the seriousness of this matter.

48. At hearing, Petitioner elicited testimony from Respondent regarding her criminal history, and an excerpt of the transcript of the EPC hearing, during which her criminal history was discussed, was admitted into evidence.¹² However, her criminal history and alleged failure to report that history were the basis for the EPC's Final Order imposing penalties against Respondent, including the probation that she now is charged with violating. Respondent already has been penalized by the EPC on these bases, and they are not relevant to this proceeding.

49. As justification for the penalty it seeks, Petitioner asserts that Respondent "never accepts responsibility for her own behavior, but blames others for her miscreant deeds." However, the evidence does not support this position. With respect to the hearing before the EPC that resulted in issuance of the Final Order, Respondent offered a plausible explanation for not having previously reported her criminal history on her Florida Educator's Certificate applications—specifically, that when she filled out the previous certification application forms, she did not realize that the form required the reporting of all prior criminal history, including offenses for which adjudication had been withheld. Indeed, when she filled out an

updated version of the application form that apparently was clearer regarding criminal history disclosure requirements, she reported all prior offenses.¹³ Respondent acknowledged responsibility for her actions more than once during the EPC hearing. Moreover, the undersigned finds credible Respondent's testimony that she understood she was to be drug tested on a monthly basis as a condition of her probation.¹⁴ To the extent Respondent may have been incorrect regarding this detail, that mistake is more likely attributable to confusion (which is understandable under the circumstances) rather than lack of truthfulness on her part.

CONCLUSIONS OF LAW

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

51. This is a penal disciplinary proceeding against Respondent's Certificate brought by the EPC pursuant to sections 1012.796(8), 1012.795(6)(a), and 1012.796(1)(1), Florida Statutes.

52. Section 1012.796(8) states in pertinent part:

Violations of the provisions of a final order shall result in an order to show cause issued by the clerk of the Education Practices Commission Upon failure of the educator, at the time and place stated in the order, to show cause satisfactorily to the Education Practices Commission why a

penalty for violating the provisions of a final order should not be imposed, the Education Practices Commission shall impose whatever penalty is appropriate as established in s. 1012.795(6).

53. Section 1012.795(6) (a) provides in pertinent part:

When an individual violates any provision of a final order of the Education Practices Commission, the Department of Education may request an order to show cause be issued by the clerk of the commission. The order shall require the individual to appear before the commission to show cause why further penalties should not be levied against the individual's certificate pursuant to the authority provided to the Education Practices Commission in subsection (1) . . . The Education Practices Commission may fashion further penalties under the authority of subsection (1) as it deems appropriate when it considers the show cause order.

54. Section 1012.795(1) (1) provides in pertinent part:

"(1) The Education Practices Commission ... may impose any ... penalty provided by law, if the person: ... (1) [h]as violated any order of the Education Practices Commission."

55. Collectively, these statutes authorize the EPC to take disciplinary action against persons who violate an EPC final order.

56. It is well-established that in penal disciplinary proceedings, the petitioner has the burden to prove the alleged violations by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987). See In re Henson,

913 So. 2d 579, 590 (Fla. 2005); see also Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

57. The clear and convincing evidence standard requires that:

. . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

58. As discussed herein, Petitioner demonstrated that the chain of custody of the urine specimen donated by Respondent was maintained and was not compromised by what amounted to a paperwork irregularity. See Southern Bakeries, Inc. v. Florida Unemployment Appeals Comm'n, 545 So. 2d 898 (Fla. 2d DCA 1989) (paperwork discrepancy on chain of custody form regarding collection date not a basis for determining urine test results unreliable where donor testified regarding specimen donation date and testing laboratory staff testified regarding integrity of specimen container seal).

59. Respondent did not provide any persuasive evidence to substantiate her position that the urine specimen she donated on January 28, 2011, identified on the chain of custody form as

"Specimen ID No. 8543245," and the urine specimen identified on the February 7, 2011, Participant Call Test Edit document as "Specimen ID No. 8543245" are not the same specimen, and that the specimen was not hers. See State v. Taplis, 684 So. 2d 214 (Fla. 5th DCA 1996), rev. dismissed sub nom. Taplis v. State, 703 So. 2d 453 (Fla. 1997) (party attempting to exclude evidence on chain of custody basis must show probability of mistake or tampering). See also Davis v. State, 788 So. 2d 308 (Fla. 5th DCA 2001) (to bar introduction of evidence on chain of custody basis, defendant must show probability of tampering; mere possibility of tampering insufficient).

60. The evidence clearly and convincingly shows that Respondent violated the Final Order, paragraph 2(G) by consuming, injecting or ingesting a controlled substance not prescribed or administered for a legitimate medical purpose. Accordingly, Respondent violated sections 1012.796(8), 1012.795(6) (a), and 1012.796(1) (1).

61. Having determined that Respondent violated the EPC's Final Order, and, consequently, the cited statutes, the next issue is the penalty that should be imposed against her Certificate. Florida Administrative Code Rule 6B-11.007, entitled "Disciplinary Guidelines," governs the imposition of a penalty in this proceeding.¹⁵ The rule provides in pertinent part:

(1) When the Education Practices Commission finds that a person has committed any act for which the Commission may impose discipline, the Commission shall impose an appropriate penalty within the ranges set forth for various acts or violations in the following disciplinary guidelines....

(2) The following disciplinary guidelines shall apply to violations of the below listed statutory and rule violations and to the described actions which may be basis for determination violations of particular statutory or rule provisions. Each of the following disciplinary guidelines shall be interpreted to include "probation," "Recovery Network Program," "letter of reprimand," "restrict scope of practice," "fine," and "administrative fees and/or costs" with applicable terms thereof as additional penalty provisions. The terms "suspension and revocation" shall mean any length of suspension or revocation, including permanent revocation, permitted by statute, and shall include a comparable period of denial of an application for an educator's certificate.

...

(h) Violating any order of the Education Practices Commission in violation of Section 1012.795(1)(k), F.S., or paragraph 6B-1.006(5)(p), F.A.C. Probation-Revocation

62. Rule 6B-1.006, entitled "Principles of Professional Conduct for the Education Profession in Florida," provides that a violation of any principles listed in the rule shall subject the individual to revocation or suspension of the individual's educator's certificate, or other penalties provided by law. Fla. Admin. Code R. 6B-1.006(2). Rule 6B-1.006(5)(p) states: "(5) Obligation to the profession of education requires that the

individual: ... (p) [s]hall comply with the conditions of an order of the Education Practices Commission imposing probation, imposing a fine, or restricting the authorized scope of practice."

63. Pursuant to these provisions, the penalty that may be imposed on Respondent for violating the EPC's Final Order ranges from probation to revocation of her Certificate.

64. Rule 6B-11.007(3) sets forth a list of aggravating and mitigating factors that may be considered in determining the penalty to be imposed in a particular case. These are:

- (a) The severity of the offense;
- (b) The danger to the public;
- (c) The number of repetitions of offenses;
- (d) The length of time since the violation;
- (e) The number of times the educator has been previously disciplined by the Commission;
- (f) The length of time the educator has practiced and the contribution as an educator;
- (g) The actual damage, physical or otherwise, caused by the violation;
- (h) The deterrent effect of the penalty imposed;
- (i) The effect of the penalty upon the educator's livelihood;
- (j) Any effort of rehabilitation by the educator;
- (k) The actual knowledge of the educator pertaining to the violation;
- (l) Employment status;
- (m) Attempts by the educator to correct or stop the violation or refusal by the educator to correct or stop the violation;
- (n) Related violations against the educator in another state including findings of guilt

or innocence, penalties imposed and penalties served;

- (o) Actual negligence of the educator pertaining to any violation;
- (p) Penalties imposed for related offenses under subsection (2) above;
- (q) Pecuniary benefit or self-gain inuring to the educator;
- (r) Degree of physical and mental harm to a student or a child;
- (s) Present status of physical and/or mental condition contributing to the violation including recovery from addiction;
- (t) Any other relevant mitigating or aggravating factors under the circumstances.

65. Respondent's violation is serious. This is the second time within a year that Respondent has been subject to disciplinary action by the EPC, and her positive drug test occurred barely a month after entry of the EPC's Final Order placing her on probation and imposing the drug testing. These circumstances constitute aggravating factors pursuant to rule 6B-11.007(3)(a), (c), (d), (e), and (k).

66. However, as discussed above, there is no evidence that Respondent's violation of the Final Order presented any danger or caused harm to any students or to the public, caused any damage, or resulted in any pecuniary gain or other benefit to Respondent. Moreover, there is no evidence that her violation in any way impaired her performance of her duties as a teacher. Indeed, the evidence shows that Respondent has a positive history as a good classroom teacher and career counselor for at-risk students. In that vein, the undersigned is concerned that

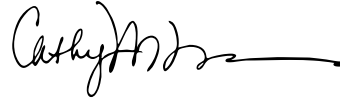
suspending Respondent's Certificate for three years, as Petitioner urges, may effectively end the career of a good classroom teacher, who, by all accounts, is an effective and caring educator. Such a result would be both unduly harsh and counterproductive. Also as discussed above, Respondent has tested negative for every drug test to which she has been subjected since January 28, 2011, evidencing that she is contrite and earnest about complying with the Final Order and keeping her job. Collectively, these circumstances constitute mitigating factors pursuant to rule 6B-11.007(3)(b), (f), (g), (h), (i), (j), (l), (m), (o), (q), and (r).

67. Considering the specific circumstances in this case in light of the aggravating and mitigating factors, the undersigned determines that suspending Respondent's Certificate for a period of six consecutive calendar months, followed by a two-year probationary period, is appropriate.¹⁶

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a Final Order determining that Respondent violated the December 14, 2011, Final Order of the Education Practices Commission, and suspending Respondent's Florida Educator's Certificate for a period of six consecutive calendar months, followed by two years of probation.

DONE AND ENTERED this 17th day of November, 2011, in
Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of November, 2011.

ENDNOTES

¹ The February 7, 2011, RNP letter and May 6, 2011, Education Practices Commission Order refer to a violation of "Paragraph 2(G)" of the Final Order. However, the operative provision is in paragraph "G.", not "(G)", of the Final Order. Nonetheless, to avoid confusion, this Recommended Order refers to "Paragraph 2(G)" and uses similar format in referring to other paragraphs of the Final Order.

² Final Order, paragraph 2(H). Respondent is required to authorize direct reporting of the test results to the RNP and the employer.

³ Respondent has contracted with Quest Diagnostics to conduct the specimen testing laboratory services. The form provided to Respondent to take to OMC was a Quest Diagnostics Form.

⁴ The evidence is not clear as to whether the RNP or Respondent's employer provided the Form; however, that distinction is not material to this proceeding. The relevant facts are that Respondent was provided the Form either by the RNP or her employer and that OMC did not provide the Form.

⁵ The MRO is the physician who reads and certifies the results of the drug test, and reports the results to the RNP and the employer. Here, the MRO is employed by FirstLab, another healthcare services entity. The MRO is identified on Step 1 of the Form.

⁶ OMC has a sister urgent care facility, Urgent Medical Center ("UMC"). OMC closes at 5:00 p.m., but UMC closes at 8:00 p.m. Visbal and Scialabba are employed by both facilities. Visbal was on duty at UMC after 5:00 p.m. on January 28, 2011.

⁷ Respondent testified in deposition and Visbal provided a sworn statement. Both documents were admitted into evidence.

⁸ Visbal initially testified that Scialabba completed Step 2 of the Form, but subsequently clarified that she had taken the urine specimen temperature and completed the portion of Step 2 of the Form verifying that the temperature was within the specified range, and that Scialabba had checked the box indicating the courier service. Visbal's clarified testimony is consistent with her sworn statement that she marked the temperature portion of the Form. The undersigned finds her testimony on this point credible.

⁹ Respondent testified at hearing that she had filled out Step 5 of the Form in Scialabba's, not Visbal's, presence. However, Respondent's testimony conflicts with that of Scialabba and Visbal, both of whom testified to the effect that Respondent completed Step 5 in Visbal's presence. Moreover, Respondent's hearing testimony conflicts with her own deposition testimony, in which she testified that she completed Step 5 after she had provided the specimen to the second laboratory technician (i.e., Visbal). The undersigned finds Respondent's hearing testimony on this point unpersuasive.

¹⁰ In this case, the delivery service was the Quest Diagnostics courier.

¹¹ These test results were admitted into evidence as Respondent's Exhibit 4.

¹² The transcript of the EPC hearing was offered by Petitioner and admitted into evidence for the limited purpose of impeaching Respondent's credibility.

¹³ Respondent's full disclosure on the new application form led to the charges in the Administrative Complaint regarding her prior failure to disclose her criminal history.

¹⁴ Respondent apparently was given a large package of documents in connection with her probation. Respondent testified that she had not closely read the documents, but her understanding was that she was to be drug tested on a monthly basis as a condition of her probation.

¹⁵ The rule citation to section 1012.795(1)(k), Florida Statutes, is incorrect. The correct statutory provision is section 1012.795(1)(1), which authorizes the EPC to impose discipline if the person "[h]as violated any order of the [EPC]." A review of the statutory history reveals that when section 1012.795 was enacted in 2002, this provision was codified at sub-subsection (k); when the statute was amended in 2008, this provision was re-lettered as sub-subsection (1). Rule 6B-11.007(2) was amended in 2007 to add sub-subsection (h), which cited to section 1012.795(1)(k). The most recent amendment to rule 6B-11-007, effective 2009, revised other provisions, but did not update this provision to reflect the 2008 statutory amendment.

¹⁶ In recommending this penalty, the undersigned also considered the range of penalties recommended for different types of violations in other teacher disciplinary cases tried before the Division. See Dr. Eric J. Smith, as Comm'r of Ed. v. Mays, Case No. 11-0743PL (Fla. DOAH June 18, 2011; Fla. EPC Oct. 10, 2011) (two-year suspension recommended for various violations, such as impairment by drugs and alcohol while in the classroom and numerous incidents of being late or absent); Dr. Eric J. Smith, as Comm'r of Ed. v. Brown, Case No. 10-10515PL (Fla. DOAH May 11, 2001; Fla. EPC Oct. 6, 2011) (two-year suspension recommended for falsification of student grade records and misrepresenting completion of courses); Dr. Eric J. Smith, as Comm'r of Ed. v. Amie, Case No. 10-10514PL (Fla. DOAH April 27, 2001; Fla. EPC July 27, 2011) (two-year suspension recommended where teacher behavior caused risk of harm and actual harm to students); Jim Horne, as Comm'r of Ed. v. Adams, Case No. 03-3165PL (Fla. DOAH July 11, 2004; Fla. EPC Dec. 3, 2004) (one-year suspension where teacher behavior caused actual harm to student); John L. Winn, as Comm'r of Ed. v. Parets, Case No. 05-3220PL (Fla. DOAH April 4, 2006; Fla. EPC Feb. 20, 2007) (30-day suspension where teacher assisted students on FCAT exam); Frank T. Brogan, as Comm'r of Ed. v. Sanders, Case No. 98-0705 (Fla.

DOAH Aug. 26, 1998; Fla. EPC Mar. 31, 1999) (six-month suspension where teacher behavior caused severe actual harm to student).

COPIES FURNISHED:

Johnny A. Gaspard, Esquire
15025 Northwest 77th Avenue, Suite 116
Miami, Florida 33014

Brent McNeal, Esquire
Department of Education
325 West Gaines Street, Suite 1244
Tallahassee, Florida 32399-0400

Kathleen M. Richards, Executive Director
Education Practices Commission
Department of Education
Turlington Building, Suite 224
325 West Gaines Street
Tallahassee, Florida 32399-0400

Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
300 Southeast 13th Street, Suite E
Fort Lauderdale, Florida 33316

Gerard Robinson, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Lynn Abbott, Agency Clerk
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.