STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS COMMISSIONER OF EDUCATION,	)	
Petitioner,	)	
vs.	)	Case No. 11-3431PL
JAMES KING MCINTYRE,	)	
Respondent.	)	

RECOMMENDED ORDER

This case was heard on September 19, 2011, by video teleconference at sites in Tallahassee, Florida and Jacksonville, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. David Holder, Esquire
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For Respondent: Anthony D. Demma, Esquire
Meyer, Brooks, Demma and Blohm, P.A.
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STATEMENT OF THE ISSUE

Whether there are sufficient grounds for the imposition of disciplinary sanctions against Respondent's educator's certificate, and if so, the nature of the sanctions.

PRELIMINARY STATEMENT

On May 11, 2011, the Department executed an Administrative Complaint against Respondent which alleged that on or about October 7, 2010, Respondent stole items valued at approximately $10.00 from a department store, and was charged with Petit Theft.

On June 16, 2011, Respondent filed an election of rights by which he requested a formal hearing. The record is silent as to when the Administrative Complaint was served on Respondent, though there has been no suggestion that the request for hearing was not timely filed.

The final hearing was noticed for September 19, 2011. On September 12, 2011, the parties filed their pre-hearing stipulation in which they stipulated to certain facts. Those facts have been incorporated in this Recommended Order.

The hearing was held on September 19, 2011 as scheduled. Petitioner presented the testimony of Roger L. Esckelson, Assistant Manager of Fred's Department Store; Christopher Kopinski, a patrol officer with the City of Fernandina Beach police department; and Dr. John Ruis, Superintendant for the Nassau County School District. Respondent testified on his own behalf, and offered Respondent's Composite Exhibit 1, consisting of Respondent's Classroom Teacher Performance Appraisals for the preceding four school years, which was admitted into evidence.

On October 5, 2011, counsel for Petitioner filed a motion requesting that Proposed Recommended Orders be filed thirty days from the filing of the transcript. The motion was unopposed. Good cause having been shown, the motion was granted.

A Transcript of the proceedings was filed on October 13, 2011. Both parties timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, as Commissioner of the Florida Department of Education, is charged with the duty to investigate and take disciplinary action against individuals who hold a Florida educator's certificate and are alleged to have violated section 1012.795, Florida Statutes, and the Department's rules establishing standards of teacher conduct.

2. Respondent holds an educator's certificate, No. 726067, covering the areas of biology and general science, issued by the Florida Department of Education.

3. At all times material to this proceeding, Respondent was employed as a science teacher at Callahan Middle School in Nassau County, Florida.

4. Respondent was first employed by the Nassau County School Board in 1995. He taught special education courses for

his first two years, and "at-risk" classes for the following two years. Since then he has taught middle school science.

5. In addition to his normal teaching duties, Respondent has coached the middle school football team and the boys and girls track teams for 11 years.

6. Respondent is a capable and competent teacher, and has a good reputation. Respondent has not previously been the subject of a disciplinary proceeding.

7. On October 7, 2010, at the end of the school day, Respondent went to the Fred's discount department store located at 22 South 8th Street, Fernandina Beach, Florida. The purpose of the visit was to purchase reading glasses to replace a pair that was broken that day at the school.

8. Respondent testified that he entered Fred's and went immediately to the glasses display. Since the glasses were inexpensive -- $4.95 a pair -- he decided to buy 2 pairs. After selecting the glasses, Respondent noticed a display of candy. As a reward for students scoring 90 or above on an assignment, Respondent places them in the "smarty party" and allows them to take a piece of candy from a supply he keeps. He was low on candy, and decided to buy some to replenish his stock. He picked up three large bags of candy, and given that he was running out of space in his hands, placed the glasses in his left pants pocket. On his way to the checkout line, Respondent

noticed that Fred's had a sale on dog food. He picked up a bag of dog food, slung it on his shoulder, and proceeded to the checkout line.

9. When he reached the checkout line, Respondent testified that he forgot about the glasses in his pocket, and proceeded to pay for the candy and dog food with a credit card. The candy was placed in a plastic "T-sack." He exited the store with his plastic bag and dog food, whereupon an alarm sounded. Not thinking the alarm was a result of his action, Respondent continued towards his car. As he was about halfway to his car, the cashier came to the door and said "Hey honey, that might be you. That sometimes happens with dog food." Respondent testified that he turned to walk back in and at that time noticed Mr. Esckelson, who was returning from assisting a customer in the parking lot, walking about four steps in front of Respondent.

10. As he was about halfway back to the store, Respondent testified that he remembered the glasses in his pocket, and that he had forgotten to pay for them. He knew that Fred's had a reputation for implementing an aggressive, "hard-core" policy against shoplifters, and in a split-second and ill-conceived decision, decided to toss the glasses into a nearby display of mums. In his haste, he thought that he had grabbed both pairs of glasses from his pocket and tossed them into the flowers.

However, he managed to grab only one pair, while the second pair remained in his pocket without his knowledge.

11. Respondent testified that his action was observed by Mr. Esckelson, despite his being a few steps in front of Respondent, who then said "OK, get in here." Mr. Esckelson asked what Respondent threw, and he replied that he threw glasses. Respondent was asked to stand by the register, and Mr. Esckelson advised the cashier to call the police. Respondent testified that he spoke with Mr. Esckelson, and asked, "is there any way to make this right?" He told Mr. Esckelson that he had taken the glasses out of the store by accident, and wanted to pay for them. Respondent's intent in making that statement was to offer payment, and was not an attempt to bribe Mr. Esckelson. The offer was, in any event, declined.

12. Although Respondent had his Nassau County School District employee badge attached to his belt on the right side of his pants, Respondent testified that there was no discussion regarding his employment as a teacher.

13. When the police arrived, Respondent was taken into custody almost immediately. The two officers at the scene arrived in separate cars. Officer Kopinski, who was first on the scene, had separate conversations with Respondent and Mr. Esckelson. Officer Kozak arrived sometime after and took

control of the situation since Fred's was in his zone. Officer Kopinski, who testified at the hearing, had little independent recollection of the events, his testimony being based almost exclusively on Office Kozak's arrest report to which he referred frequently during the hearing to refresh his recollection. The arrest report was not entered in evidence by either party. Officer Kopinski could not recall whether Mr. Esckelson provided him with the pair of glasses at the time of his placing Respondent in custody.

14. Respondent testified that when he was being placed in handcuffs, the officer, having noticed his school district identification badge, asked if Respondent was a school district employee. Respondent replied that he was a school teacher, and that the arrest would be a bad situation for him.

15. Respondent testified that as he was being escorted from the store to the police car, Mr. Esckelson was searching in the display of flowers for the glasses he had thrown. Respondent told Mr. Esckelson where he had thrown the glasses, at which time he was able to locate and retrieve them.

16. Prior to his being placed in the police car for transport, Respondent was searched. At that time, Officer Kopinski discovered the second pair of glasses in Respondent's pants pocket, and returned them to Mr. Esckelson. Officer Kopinski testified, based on the police report, that Respondent

also had $12.20 and several credit cards in his possession. Although Officer Kopinski had no independent recollection of the money and cards, and the police report is not in evidence, Respondent did not dispute that he had that amount in his possession.

17. Mr. Esckelson's testimony differed in several respects from that of Respondent. Mr. Esckelson testified that at the time of the incident, he was in the parking lot returning a train of shopping carts to the store. As Respondent was exiting the store, Mr. Esckelson was approximately 15 feet from the door heading in. When the alarm went off, Mr. Esckelson testified that Respondent was pushing the door open with his left hand, and as soon as he opened the door, he removed an object from his right pants pocket, later found to be a pair of glasses, and tossed it into the display of mums. Mr. Esckelson asked Respondent to return to the store, and immediately retrieved the glasses from the display. He asked Respondent to stand by register 2, which was subject to video surveillance, and signaled the clerk to call the police.

18. Although Mr. Esckelson indicated that he said nothing to Respondent, he testified that Respondent asked if there was "anything we can do to take care of this now?" and later stated that "you can't arrest me, I'm a teacher." Mr. Esckelson testified that he advised the police officers of Respondent's

statements. Officer Kopinski could not corroborate either of those statements.

19. Mr. Esckelson could not recall whether Respondent was carrying a large bag of dog food. He recalled asking the clerk what Respondent had purchased, but could not remember what the clerk told him. However, there are no sensor tags on dog food that would have caused the alarm to trigger.

20. Mr. Esckelson confirmed that Fred's has a policy of discouraging shoplifting, and will always prosecute when shoplifters are caught. Over the years that he worked for Fred's, Mr. Esckelson's involvement with shoplifters, though not routine, was still relatively frequent.

21. Despite the differences in their descriptions of the events, differences which for the most part were as to peripheral matters, both Respondent and Mr. Esckelson appeared to be forthright and credible. As to the material elements of the event, their testimony was generally consistent. However, Mr. Esckelson had no involvement in Respondent's matter from the time of the incident until he received a subpoena on August 11, 2011. As was the case with Officer Kopinski, who had almost no independent recollection of the incident, it stands to reason that Mr. Esckelson's memory of the incident would blur over time, particularly since he was involved with recurring incidents of a similar nature in the intervening period.

Respondent on the other hand would be expected to retain a more vivid memory of the incident given its singular affect on him.

22. The differences in Respondent's and Mr. Esckelson's testimony do little to affect the outcome of this case. For example, whether Mr. Esckelson was returning carts to the store or returning to the store from assisting a customer, whether the glasses were found before or after the police arrived, and whether the glasses were removed from Respondent's left or right pocket have little to do with the salient facts of the case. Those and other similarly insignificant differences in the testimony were more likely due to the passage of time than to an attempt to obfuscate the facts of the incident. However, the testimony of Respondent is found to be a more accurate statement of the facts of the incident.

23. At the time of the incident, there were customers and employees in Fred's. Respondent was acquainted with several of the store clerks from previous times at which he shopped at Fred's. There was no evidence offered to indicate that Respondent knew any one clerk from another other than from a purely employee/customer standpoint, nor was there any evidence offered that any customer or employee who witnessed the events knew Respondent, or was aware that he was a school teacher.

24. Within a short period after his arrest, Respondent called John Ruis, the Superintendant of Schools for Nassau

County, to advise him of the situation. His first calls were over the weekend, at which time he left messages. By the time Respondent spoke with Mr. Ruis, Mr. Ruis had been notified of the arrest, having received a computer notification.

25. Respondent asked to meet with Mr. Ruis to provide his side of the story. When they met, Respondent appeared to be humiliated, humbled, and embarrassed. Respondent advised Mr. Ruis of all pertinent facts of the incident, including the fact that he tossed the glasses into the flower display. He asserted that his failure to pay for the glasses was inadvertent.

26. Mr. Ruis informed the principal of Callahan Middle School and the school district's personnel director of the situation involving Respondent. Mr. Ruis did not know if any other employee of the Nassau County School District knew of the incident.

27. It is not the practice of Mr. Ruis, as Superintendant, to remove a teacher from the classroom in an alleged disciplinary matter unless the teacher presents a threat of harm to the students. When there is no perceived harm to students, the district allows the legal system to take its course. Mr. Ruis determined that Respondent presented no threat to any student, and he was therefore not removed. Respondent has

taught continuously since the incident with no subsequent indication of any problem.

28. As the judicial resolution of the incident, Respondent entered into a deferred prosecution agreement, the precise terms of which were not disclosed. The Petit Theft charge was subsequently nolle prossed, and the record of Respondent's arrest has since been expunged.

29. The conduct alleged was not known to anyone outside of the arresting officers, the Superintendant, the principal of Callahan Middle School, and the personnel director. Although there were customers and employees of Fred's in the store at the time of Respondent's arrest, there was no evidence that any of them knew Respondent, or knew that he was a Nassau County School District employee. There was no evidence that any student, parent, or other teacher had any knowledge of Respondent's arrest. There was no media coverage of the incident, and no complaints filed with the school district regarding Respondent. Respondent's conduct was not, in any sense of the term, "notorious."

30. Respondent denied any intent to steal the glasses. The testimony as to how the glasses came to be in his pocket upon buying the candy and dog food is plausible. Other than his split-second decision to toss the glasses into the flower display -- a decision that Respondent stated was based upon his

knowledge of Fred's aggressive stance on shoplifting -- there is no direct evidence of intent to steal the glasses. While there is evidence from which one could infer consciousness of guilt from the circumstances of this case, Respondent's act of tossing the glasses when he realized he had exited the store without paying, under the particular facts and circumstances of this case, does not rise to the level of clear and convincing evidence of Respondent's intent to shoplift the glasses.

CONCLUSIONS OF LAW

A. Jurisdiction.

31. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

B. Standards

32. Section 1012.795(1), Florida Statutes, which establishes the violations that subject a holder of an educator certificate to disciplinary sanctions, provides, in pertinent part, that:

> (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:

* * *

(d) Has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.

33. Section 1012.796(7) provides, in pertinent part, that:

1012.796 Complaints against teachers and administrators; procedure:

* * *

(7) A panel of the commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:

(a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. The denial may provide that the applicant may not reapply for certification, and that the department may refuse to consider that applicant's

application, for a specified period of time or permanently.

(b) Revocation or suspension of a certificate.

(c) Imposition of an administrative fine not to exceed $2000 for each count or separate offense.

(d) Placement of the teacher, administrator, or supervisor on probation for a period of time and subject to such conditions as the commission may specify, including requiring the certified teacher, administrator, or supervisor to complete additional appropriate college courses or work with another certified educator, with the administrative costs of monitoring the probation assessed to the educator placed on probation. An educator who has been placed on probation shall, at a minimum:

1. Immediately notify the investigative office in the Department of Education upon termination of employment in the state in any public or private position requiring an educator's certificate.

2. Have his or her immediate supervisor submit annual performance reports to the investigative office in the Department of Education.

3. Pay to the commission within the first 6 months of each probation year the administrative costs of monitoring probation assessed to the educator.

4. Violate no law and shall fully comply with all district school board policies, school rules, and State Board of Education rules.

5. Satisfactorily perform his or her assigned duties in a competent, professional manner.

6. Bear all costs of complying with the terms of a final order entered by the commission.

(e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.

(f) Reprimand of the teacher, administrator, or supervisor in writing, with a copy to be placed in the certification file of such person.

(g) Imposition of an administrative sanction, upon a person whose teaching certificate has expired, for an act or acts committed while that person possessed a teaching certificate or an expired certificate subject to late renewal, which sanction bars that person from applying for a new certificate for a period of 10 years or less, or permanently.

(h) Refer the teacher, administrator, or supervisor to the recovery network program provided in s. 1012.798 under such terms and conditions as the commission may specify.

C. The Burden and Standard of Proof.

34. The Petitioner bears the burden of proving the specific allegations of wrongdoing that support the charges alleged in the Administrative Complaint by clear and convincing evidence before disciplinary action may be taken against the professional license of a teacher. Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); § 120.57(1)(j), Fla. Stat.; see also Dep't of Banking & Fin., Div. of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996);

Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

35. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof

> entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> > Clear and convincing evidence 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is

ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

36. Section 1012.795 is penal in nature, and must be strictly construed, with any ambiguity construed against the Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Latham v. Fla. Comm'n on Ethics, 694 So.2d 83 (Fla. 1st DCA 1997); see also Beckett v. Dep't of Fin. Svcs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008; Dyer v. Dep't of Ins. & Treasurer, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

37. 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).

38. The Administrative Complaint charges Respondent with violating section 1012.795(1)(d) by being guilty of gross immorality or an act involving moral turpitude as defined by rule of the Department.

39. Section 1012.795(1)(d) does not define "gross immorality" or "an act involving moral turpitude". "Gross immorality" is not defined by rule. However, Florida Administrative Code Rule 6B-4.009, which contains definitions for use by school districts in disciplining instructional staff, has been used as a tool for interpreting section 1012.795(1)(d),

Florida Statutes. 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); Jim Horne, as Comm'r of Educ. v. Mark S. Sanchez, Case No. 04-0733PL (Fla. DOAH Oct. 29, 2004; Fla. EPC June 15, 2005); 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).

40. Rule 6B-4.009(2), defines "immorality" as:

> . . . conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

41. "Gross immorality" has been described as 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).

42. Retail theft is a crime that meets the definitions of gross immorality and moral turpitude. See In re: Garrett, 613 So. 2d 463 (Fla. 1993); Broward Co. Sch. Bd. v. Rachel Von Hagan, Case No. 11-0567 (Fla. DOAH June 12, 2011; Sch. Bd. of Broward Co. Aug. 16, 2011); Dr. Eric J. Smith, as Comm'r of Educ. v. Seneka Rachel Arrington, Case No. 08-3475 (Fla. DOAH Mar. 24, 2009; Fla. EPC July 13, 2009).

43. In order to discipline a teacher for immoral conduct the factfinder must conclude: a) that the teacher engaged in conduct inconsistent with the standards of public conscience and good morals, and b) that the conduct was sufficiently notorious so as to disgrace the teaching profession and impair the teacher's service in the community. McNeill v. Pinellas Cty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996), (citing McKinney v. Castor, 677 So. 2d 387 (Fla. 1st DCA 1991)).

44. The allegations underlying the violation are that "[o]n or about October 7, 2010, in Nassau County, Florida, the Respondent attempted to remove approximately $10.00 worth of merchandise from a department store without paying for the merchandise. The Respondent was charged with Petit Theft. On or about October 18, 2010, the Respondent entered into a deferred prosecution agreement and the charge was later nolle prossed. The Administrative Complaint is devoid of any allegation that the act was intentional, and such intent was not proven.

45. As to the element of intent, an inference of innocent inadvertence combined with a rash and panicked reaction is as plausible as an inference of consciousness of guilt. While the act of throwing the glasses into the flower display raises suspicion, in the absence of more, and in the circumstances of this case, it is merely a suspicion that does not support

disciplinary action against Respondent's license. See Tenbroeck v. Castor, 640 So. 2d at 167.

46. Petitioner has failed to prove that the act of leaving Fred's Department Store with the glasses, without clear and convincing evidence of the intent to commit an act of theft, constitutes a flagrant disregard of proper moral standards. In addition, neither the conduct itself, nor the investigation or interview of Respondent was in any sense of the term "notorious." Thus, in the absence of proof that the incident was more than an oversight, Petitioner has failed to meet its clear and convincing evidence burden of proof that the act was one of gross immorality.

47. Likewise, this incident cannot be considered conduct involving moral turpitude. Rule 6B-4.009(6) defines the term "moral turpitude" as "a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude." Furthermore, moral turpitude has been defined by the Supreme Court as

> involv[ing] the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. . . . It has also been defined as anything done contrary to justice, honesty,

> principle or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated. (citations omitted)(emphasis supplied)

State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 611 (Fla. 1933)

48. The evidence in this case was not clear and convincing that Respondent intended to steal the reading glasses when he exited Fred's with his purchases. The act of taking the glasses without paying for them, without proof of intent to steal the glasses, did not show a "baseness or depravity" so as to constitute an act involving moral turpitude. Rather, the facts proven support a conclusion that this case falls into the category of an act "unintentionally committed through error of judgment when wrong was not contemplated."

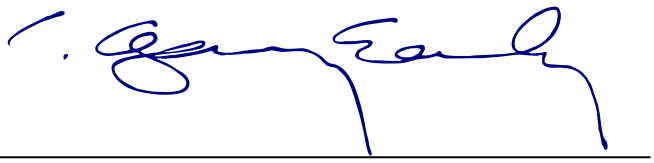
49. Petitioner has failed to prove the statutory and rule violations alleged in the Administrative Complaint by clear and convincing evidence. Thus, Respondent is not guilty of the violation alleged in the Administrative Complaint.

RECOMMENDATION

Upon consideration of the findings of fact and conclusions of law reached herein, it is

RECOMMENDED that a final order be entered dismissing the Administrative Complaint.

DONE AND ENTERED this 18th day of November, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.