STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. TONY BENNETT, AS
COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 13-4253PL

REBECCA SAMPSON CAREY,

Respondent.
_____/

RECOMMENDED ORDER

On February 21, 2014, the final hearing was held in this case in Largo, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ron Weaver, Esquire
Post Office Box 5675
Douglasville, Georgia 30154

For Respondent: Aaron J. Hilligas, Esquire
Florida Education Association
Suite 109
1516 East Hillcrest Street
Orlando, Florida 32803

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the acts alleged and violations charged in the Administrative Complaint and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On July 8, 2013, Dr. Tony Bennett, as Commissioner of Education (Petitioner), issued an Administrative Complaint alleging that Rebecca Sampson Carey (Respondent) violated section 1012.795(1)(d) and (j), Florida Statutes (2011),[1/] and Florida Administrative Code Rule 6A-10.081(3)(a) and (5)(a).[2/]

Respondent timely requested an administrative hearing to contest the alleged facts and charges. The case was forwarded to the Division of Administrative Hearings, where it was assigned to Administrative Law Judge Lawrence Johnston and set for hearing on December 9, 2013. Respondent's unopposed motion for continuance was granted, and the hearing was reset for January 14, 2014. On December 20, 2013, the parties jointly moved for a second continuance, which was granted, and the hearing was rescheduled for February 21, 2014. The case was transferred to the undersigned, who conducted the hearing as rescheduled.

Prior to the final hearing, the parties filed a joint pre-hearing stipulation, in which they stipulated to a number of facts. To the extent relevant, the parties' stipulated facts have been incorporated in the findings below.

At the hearing, Petitioner presented the testimony of Susan Vilardi, Reuben Hepburn, Valencia Walker, and students B.H. and J.S. (students are referred to by initials for privacy reasons). Petitioner's Exhibits 1 through 5 were admitted in evidence.

Respondent testified on her own behalf and also presented the testimony of student T.P., Julie Clark, and Princess Fleming. Respondent's Exhibits 1, 2, and 4 through 9 were admitted.

The two-volume Transcript of the final hearing was filed on March 19, 2014. Respondent's two unopposed motions to extend the deadline for filing proposed recommended orders (PROs) were granted. The parties timely filed PROs by the extended deadline, which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner, on behalf of the Education Practices Commission, is charged with the responsibility of certifying and regulating public school teachers in Florida.

2. Respondent is a teacher. She holds Florida Educator's Certificate 92881, covering the areas of biology and earth-space science. The certificate is valid through June 30, 2018. Respondent has never had any disciplinary action taken against her educator's certificate, which she has had for 11 years.

3. At all times pertinent to this proceeding, Respondent was employed as a science teacher at Dunedin High School in the Pinellas County School District. Except for a letter of reprimand regarding the events giving rise to Petitioner's Administrative Complaint, there was no evidence that Respondent has a history of discipline by Pinellas County School District.

4. By all accounts, Respondent is an excellent teacher. She has never received an evaluation rating less than "effective," and most recently, she was rated as "highly effective," the highest rating available. Two of her students who testified at the final hearing described Respondent as an excellent teacher; and beyond their words, the demeanor of the students conveyed their admiration for Respondent. Her students were plainly troubled by giving testimony that could result in trouble for their teacher; nonetheless, the students gave honest, credible testimony and they are to be credited for doing so.

5. The charges in the Administrative Complaint are based on Respondent's role in connection with a small live bat found on the Dunedin High School campus.

6. On December 7, 2011, in the early morning before classes began, Dunedin High School student J.S. found a small bat (approximately three inches long) next to a vending machine in a courtyard on campus. The bat appeared to be injured or ill. J.S. scooped up the bat with his hands and went inside the school.

7. T.P., another Dunedin High School student, saw J.S. in a hallway holding the bat. J.S. asked T.P. what he should do with the bat, and T.P. said they should take the bat to one of the science teachers, because "[w]hat else are you going to do with it? You don't want to let it die. [A science teacher]

can probably take care of it or something and let it go." Respondent was T.P.'s science teacher, so the students brought the bat to Respondent.

8. There was no protocol established at Dunedin High School for dealing with animals found on campus. Informally, when students found animals, they would often bring them to the science teachers, following the logic expressed by T.P. The science teachers kept a few cages for small animals, and they would use those cages to secure animals brought to them on these occasions. However, the evidence established that as of December 2011, teachers and students had received no instructions or guidance of any kind from the school administration or the district regarding what they should do, or were required to do, if they find animals on campus.

9. Dunedin High School Principal Reuben Hepburn offered testimony suggesting that teachers were required to alert administration if a student brought an animal to the teacher. When asked to identify the source of this requirement, he was unable to do so, admitting in effect that there was no such requirement. Instead, Mr. Hepburn could only cite his belief that, as of December 2011, it was "common knowledge" among teachers that they should alert administration if a student brings an animal to the teacher. He also said that it was "common knowledge" that teachers should not take an animal

found on campus into the classroom. However, he admitted that he did not know how Respondent would know that.

10. Mr. Hepburn knew of the presence of bats on campus before December 2011. He described a significant problem with bats in the summer of 2011, when bats were getting in the walls of the "band room." Mr. Hepburn said that the bats "were dealt with" and they had to clean, spray, and wipe down the whole area to eliminate the bat urine and fecal matter, "because [the bats] carry rabies and they carry diseases[.]" The problem had not been corrected by the time students returned to school in the late summer, and the band students had to be temporarily relocated to the auditorium and cafeteria until the band room could be used again. Mr. Hepburn did not provide any specific notice to the teachers about this bat problem or provide information about rabies; again, he expressed his belief that it was "commonly known among staff members," because there were conversations about it. No non-hearsay evidence substantiated that belief.

11. Rather than assuming that the presence of bats to such a degree as to require substantial corrective measures to the band room was "commonly known," and rather than assuming that all teachers, staff, and students would understand the risks and know exactly what to do if they saw a bat or signs of bat presence, a reasonable effort to protect the physical

health and safety of students and others on campus would have been to provide written guidance or instructions to teachers, staff, and students on exactly what to do, and what not to do, if they encounter a bat or other animal. Information regarding rabies should have been made available to educate those on campus of the risks presented by the presence of bats, and to alleviate misconceptions that are prevalent in "common knowledge" about the disease.

12. In the absence of such information, instructions, or guidance, Respondent acted reasonably on the morning of December 7, 2011, when she took the bat from the students, immediately secured the bat in a cage that she had in her stockroom, and admonished T.P. and J.S. to wash their hands and to tell any other persons who had touched the bat to wash their hands. Respondent thought that the hand-washing directive was appropriate because the bat could be carrying diseases or germs. However, Respondent did not think that rabies was a concern with this lethargic bat. Although Respondent knew about rabies in general, she was under the misimpression that an animal with rabies would display signs of aggression and would be foaming at the mouth.

13. By the time Respondent secured the bat in a cage, students were entering the classroom for the first period class, and were clamoring around to see the caged animal.

However, Respondent removed the caged bat from the classroom, placing it out of sight in the stockroom, which is attached to the classroom through a doorway behind Respondent's desk.

14. The bat remained in the cage out of sight in the stockroom through the first four periods, while Respondent taught. After fourth period, there was a lunch break; it was common for several students to come to Respondent's classroom for their break. This day, N.H., a student in Respondent's fourth period, lingered after class; another student, B.H., joined them for her lunch break; and then T.P. came by with a friend to check on the bat and ask if they could take the bat home. Respondent told them no, because they did not know what was wrong with the bat.

15. Respondent brought the cage out to her desk for the students to look at during their break. Respondent told the students not to touch the bat. However, the students were excited to see the bat and kept asking Respondent to let them touch the bat. The students managed to touch the bat without Respondent knowing about it at first; apparently there was enough room between the cage's narrow slats for fingertips to come in contact with the bat. Ultimately, Respondent gave in to the students' urgings and allowed them to touch the bat. She believed her concerns were moot by then, because the students had already touched the bat before she relented.

16. Julie Clark, another science teacher whose classroom was across the hall, and a good friend of Respondent's, also came into Respondent's classroom during the break. She looked at the bat and was not sure if it was alive, because it was so lethargic. She reached in the cage and touched the bat on its back; the bat barely moved its head in response. Although Ms. Clark testified that the reason why teachers would secure animals in the small cages was to keep students from being able to touch the animals that could have diseases such as rabies, Ms. Clark did not believe that she risked contracting rabies by touching the bat on its back.

17. The impression given from all of the testimony describing the post-fourth period break was that these few students and Ms. Clark made brief contact with the bat while the bat remained in its cage, very lethargic and barely responsive to the contact. There was no evidence indicating that the bat was removed from the cage and passed around; the students did not play with the bat or handle the bat (as J.S. had in scooping the bat up and walking through the hallways cradling the bat). Instead, they touched the bat, making only brief contact. As one student described the brief contact, she just wanted to see how the bat felt, so she touched the bat on its head, because that was the softest part. Respondent made the students wash their hands after touching

the bat. At the end of the break, Respondent secured the cage and returned the caged bat to her stockroom.

18. At several points throughout the school day, T.P. returned to Respondent's classroom to repeat his request to take the bat home. He added that his family likes to rehabilitate animals. Nonetheless, Respondent told T.P. it would not be a good idea for T.P. to take the bat home.

19. At the end of the school day, T.P. returned to Respondent's classroom to again ask if he could take the bat home; this time, he said that his father gave his permission. T.P. was holding his cell phone and told Respondent that his father was on the line, and would confirm that it was all right to let the bat go home with T.P. Respondent took the phone, and saw that the cell phone display showed the phone number and identified the caller as "Dad." Respondent also looked up T.P.'s contact information to verify that the same phone number was in their system for T.P.'s father. T.P.'s father told Respondent that he agreed to let T.P. take the bat home with him, and that if the bat was still alive the next day, they would take it to an animal hospital. Respondent agreed to let the bat go home with T.P.

20. Respondent determined from T.P. and his father that T.P. had a ride home from school and would not be taking the school bus. T.P. confirmed that he told Respondent that he

had a ride waiting for him. Respondent made a carrier for the bat, placing the bat in a styrofoam cup and then securing a piece of cheesecloth over the top and around the sides of the cup, held in place with a rubber band. T.P. then put the bat carrier in his backpack.

21. Although T.P. thought he had a ride with another student, by the time he got to the parking lot, his ride had left. He did not go back to report that to Respondent, but instead, just boarded the school bus. He did not tell others on the bus that he had a bat secreted in his backpack, and he rode home with the bat hidden away, without incident.

22. Sometime after school, student N.H. told her mother about the exciting day she had at school, where she got to touch a bat. Her mother, who was the public information officer for Pinellas County Health Department, called Susan Vilardi, a senior community health nurse for the health department, to ask Ms. Vilardi if she heard about the bat at Dunedin High School. N.H.'s mother identified Respondent as the teacher who had the bat that student N.H. touched.

23. Ms. Vilardi began an investigation. She did not try to contact Respondent that evening. Instead, Ms. Vilardi went to Dunedin High School the following morning before classes began, arriving at 6:30 a.m. She went to the office first and explained that she wanted to talk with Respondent about the

bat incident. Principal Hepburn was not yet in; the secretary manning the office told Ms. Vilardi where Respondent's classroom was, but did not issue a visitor's pass to Ms. Vilardi in accordance with the school's security procedures, so that persons seeing her would know that she was authorized to be in the school.

24. Ms. Vilardi went unescorted to Respondent's classroom to wait for Respondent, who was not there yet. Respondent was getting ready for classes, making copies and talking to Ms. Clark.

25. Respondent arrived at her classroom just before the "five-minute bell" sounded to signal that school would begin in five minutes, at 7:00 a.m. At 6:55 a.m., Ms. Vilardi approached Respondent outside her classroom and told her she wanted to talk to her about the bat. Although the evidence was conflicting, Respondent credibly testified that Ms. Vilardi did not clearly and immediately identify herself as an investigator with the health department. She wore a Department of Health, Pinellas County Health Department, identification badge, but it was not clearly visible. Even if the badge had been visible, Ms. Vilardi should have immediately identified herself and announced the official purpose for her visit. The more credible evidence established that she failed to do so, giving Respondent some reasonable

doubt as to whether the person confronting her may have been a disgruntled parent (who also could have been an employee of the health department, like N.H.'s mother was).

26. Despite her concerns, Respondent allowed Ms. Vilardi into the classroom. In the five minutes remaining before school began: Ms. Vilardi asked Respondent questions about the bat and its whereabouts; Ms. Vilardi addressed the risk that the bat could have rabies; Respondent then expressed concern about a prior bat encounter on campus, when Respondent brought a bat home and all of her family handled the bat; Ms. Vilardi filled out part of an intake form in which she wrote down what she characterized as direct quotes from Respondent; Ms. Vilardi had Respondent fill out the part of the intake form with her address,[3/] telephone number, and other personal information; and while Respondent was trying to fill out the form, Ms. Vilardi asked for the names of the students Respondent knew had touched the bat.

27. Respondent did not tell Ms. Vilardi that she let the bat go home with T.P. with his father's permission; instead, Respondent was vague, telling Ms. Vilardi only that the bat was no longer on the premises, and that "we let it go." Although Respondent was not dishonest, Respondent should have been more forthcoming about where the bat went. Respondent did, however, give Ms. Vilardi T.P.'s name, and the name of

the few other students she knew had touched the bat, and told Ms. Vilardi that she should follow up with the students. Ms. Vilardi wanted all of the named students' addresses and phone numbers, but Respondent directed Ms. Vilardi to the administrative office, as she was not comfortable giving out that information.[4/]

28. While Respondent and Ms. Vilardi were talking and filling out paperwork, students began coming into Respondent's classroom. Ms. Vilardi attempted to get Respondent to keep the students out so she could finish her questioning and complete her forms; Respondent agreed for a brief period of time, but then the students were getting restless and curious, and Respondent told Ms. Vilardi that she needed to let the students come in because it was time for school to start and she had a class to teach.

29. Ms. Vilardi left Respondent's classroom and proceeded to the administrative office, as suggested by Respondent, with the student names provided by Respondent. By the time Ms. Vilardi arrived at the office, between 7:00 a.m. and 7:05 a.m., Mr. Hepburn had arrived, and after morning announcements he "cleared his decks" to work with Ms. Vilardi, beginning at 7:08 a.m., to interview the students named by Respondent.[5/]

30. By 8:50 a.m., Ms. Vilardi had interviewed T.P., learned that Respondent had let the bat go home with T.P. with his father's permission, and knew that the bat had spent the night in a box on T.P.'s front porch. Ms. Vilardi immediately went to T.P.'s home and retrieved the bat from the porch. The bat had not survived overnight, as it had been a cold night.

31. Ms. Vilardi made arrangements for the dead bat to be transported to the nearest lab, in Tampa, where it was tested. It was not until mid-afternoon the next day, Friday, December 9, 2011, when Ms. Vilardi received the test results, which were positive for rabies.

32. Ms. Vilardi tracked down Principal Hepburn at around 2:30 p.m. Friday afternoon, calling him on his cell phone. He had left work early that day and was tending to personal matters. Ms. Vilardi informed the principal of the positive rabies results, and they agreed that Ms. Vilardi would come to the school the following Monday, December 12, 2011, to explain about the rabies vaccine protocol and begin administration to any of the students and teachers who had touched the bat and who agreed to vaccinations. No evidence was offered to suggest that it was imprudent or risky to wait until Monday, December 12, 2011, to address the potential exposures to a rabid bat that occurred on Wednesday, December 7, 2011.

33. Respondent was on pre-arranged leave Friday, December 9, 2011, to take her three-year old daughter to a hospital for testing for a serious medical condition. Respondent did not return to her home until Friday evening. She had messages on her phone from both Mr. Hepburn and Ms. Vilardi, to inform Respondent of the positive rabies result. Ms. Vilardi asked that Respondent call her to work out a schedule for the rabies vaccines, and Respondent did so.

34. Beginning on Monday, Respondent, Ms. Clark, and four students received the rabies vaccination series.[6/] Petitioner offered no evidence to prove any actual harm suffered by students or teachers because of their contact with the bat, or because of having to undergo the vaccinations.

35. The evidence established that the most common rabies variants responsible for human rabies in the United States are bat-related. While 94 percent of the bats tested for rabies are not rabid, any potential exposure to a bat should be taken seriously. As Mr. Hepburn acknowledged, any bat encounter should be treated as if the bat has rabies.

36. The most common way to transmit rabies is by bites or scratches from an infected bat. Non-bite transmission of rabies is rare. However, it is at least theoretically possible for a rabid bat to transmit the disease through mucous membranes coming into contact with a microscopic cut or

scratch on someone's skin. For example, if a bat licks itself and while the saliva is still wet on its fur, a person's skin opening, cut cuticle, or tiny scratch comes into contact with the saliva, the rabies virus could be transmitted that way. Anything short of this type of non-bite contact--such as if saliva comes into contact with intact skin, or a skin opening comes into contact with a part of the bat that is not wet with saliva--is not considered an "exposure," and the vaccination protocol is not necessary.

37. Under the circumstances described above, the chances of there actually having been an exposure are extremely remote if not impossible. There was no proof that the hypothetical of a bat licking its fur and being touched on fur still wet with saliva was actually possible for the lethargic bat that could barely move its head when touched.

38. Nonetheless, even the slightest chance of exposure to rabies presents a tremendous risk of danger, absent timely vaccinations. The result of untreated rabies is nearly always death.

39. No evidence was presented to suggest that the rabies vaccination protocol followed for the four Dunedin High School students and two teachers was insufficient or too late to completely eliminate the risk of any adverse consequences from having touched the bat.

40. The credible evidence did not establish that Respondent's failure to provide more details regarding the whereabouts of the bat had any adverse impact on Ms. Vilardi's investigation or the timeliness of rabies vaccines to those who touched the rabid bat. Instead, the evidence established that Ms. Vilardi learned all of the details by 8:50 a.m., less than two hours after she spoke with Respondent. Even if Respondent had given Ms. Vilardi all of the information at 7:00 a.m., no evidence was offered to prove that Ms. Vilardi would have learned of the positive rabies results any earlier on Friday afternoon. Moreover, even if Ms. Vilardi had learned of the positive results earlier on Friday afternoon, it is by no means clear that the rabies vaccines would have started any sooner. By the time Ms. Vilardi reached Mr. Hepburn, they still might have opted for the same Monday meeting to discuss and begin the rabies vaccine protocol.

41. Petitioner contends that Respondent should be punished for "knowingly providing false information to Ms. Vilardi during the investigation." (Pet. PRO at 10). Petitioner points to Ms. Vilardi's intake notes indicating that Respondent said that she took the bat home and then released it.

42. The evidence did not substantiate Ms. Vilardi's notes regarding what Respondent told her about the bat. Respondent

credibly explained that Ms. Vilardi confused what Respondent had told her about a bat that Ms. Clark had found on campus the prior year--it was that bat which Respondent took home, and that is what Respondent told Ms. Vilardi.

43. Respondent acknowledged that she did not provide all of the details to Ms. Vilardi regarding where the bat went, telling her only that Respondent did not have the bat, and "we let it go." It was true that Respondent did not have the bat, and it was true that Respondent, T.P., and T.P.'s father together agreed to "let the bat go" home with T.P. While Respondent should have been more forthcoming with Ms. Vilardi in saying exactly what was done with the bat, Respondent gave the investigator the names of T.P. and the other students, and told the investigator to follow up with the students. The investigator did so and learned in a short time exactly where the bat was. Respondent did not give Ms. Vilardi false information; Respondent gave Ms. Vilardi incomplete information, while also giving accurate information that allowed Ms. Vilardi to quickly obtain the complete information she needed. Respondent did not intend to deceive or mislead Ms. Vilardi; otherwise, Respondent would not have given T.P.'s name to Ms. Vilardi, nor would she have told Ms. Vilardi that she should follow up with T.P.

44. On December 15, 2011, Respondent was called to a meeting with the Pinellas County School Board's Office of Professional

Standards (OPS), for an investigation conducted by OPS investigator Valencia Walker. Respondent explained what happened, why she did not provide more details to Ms. Vilardi, and why she made a mistake writing down her new address.

45. At that meeting, Valencia Walker and Principal Hepburn talked about previous bat problems at Dunedin High School. Respondent and Julie Clark, in attendance as the faculty representative, were quite surprised to hear the matter-of-fact discussion about a history of bat problems, when nothing had been done in the aftermath of those problems to ensure that all students and teachers know exactly what they needed to do when they encounter a bat. Ms. Clark urged Ms. Walker and Mr. Hepburn to establish written protocols right away for teachers, students, and others, so they would know exactly what to do when encountering a bat or other animal. Ms. Walker and Mr. Hepburn assured Ms. Clark they would do so as soon as possible. However, according to Ms. Clark, nothing has been done to this day.

46. Mr. Hepburn said that after this incident, he had something put in the teacher's manual to say that teachers should report animals to administration or to the plant operator. Under these circumstances, it is somewhat alarming that more specific, more widely-circulated written guidance was not immediately provided by the school or the district when requested in early 2012. Moreover, a statement in the teacher's manual that teachers

are to report animals to administration or the plant operator does little to address the lack of specific protocols directing everyone on school campus what to do and what not to do when a bat is encountered, or the lack of specific information about the risks and signs of rabies.

47. Had the school and/or the district reacted to prior evidence of "bat problems" on the Dunedin High School campus by ensuring that specific information and instructions were provided so that teachers, students, and others who might encounter bats or other animals would know exactly what was expected of them and exactly what to do, the December 2011 incident likely would never have occurred. Students like J.S. and T.P. would not have been left to wonder what they should do with a bat they were cradling in their hands; they would know, because they would have been told, not to touch animals, particularly bats, if they find them on campus. Instead, those with knowledge of the bat problem were willing to leave the matter to "common knowledge" instead of factual information and specific protocols.

48. Under the circumstances, with the information provided and not provided by school administration and by the district, it is difficult to fault Respondent for her actions. Respondent did not share in the "common knowledge" of a bat problem, or what she should do when encountering a bat. Respondent did not have sufficient knowledge of the risks and signs of rabies. No

credible evidence was offered to prove that Respondent should have somehow known these things. Thus, for the most part, Respondent acted reasonably. However, Respondent could have done two things that would have been more reasonable to protect students from potential harm. First, Respondent should have exercised better judgment by not relenting to the pleas of a few students to let them touch the bat, when a more reasonable precaution would have been to keep the caged bat away from students in her classroom.[7/] Respondent also should have been more forthcoming with Ms. Vilardi by telling her that Respondent let the bat go home with T.P. and that T.P. should be interviewed first. That would have been a reasonable step that would have allowed Ms. Vilardi to retrieve the dead bat a little sooner, even if that would not have made a difference for the reasons previously noted.

49. The OPS meeting and investigation resulted in issuance of a February 22, 2012, letter of reprimand to Respondent regarding the bat incident. Ms. Walker wrote the letter, which contains comments about Respondent's actions that were not borne out by the credible evidence in this record, and that were inappropriate.[8/] Respondent objected to the letter because of the inappropriate comments, and a revised letter was issued on March 13, 2012, to address a few, but not all, of the concerns Respondent had expressed. Ms. Walker's strident tone and harsh

characterization of Respondent's actions were not proven to be justified, based on the more credible evidence.

Ultimate Findings

50. It is determined, as a matter of ultimate fact, that Respondent's actions, as found above, were neither "gross immorality" nor "act[s] involving moral turpitude."

51. It is determined, as a matter of ultimate fact, that Respondent failed to make reasonable effort to protect students from conditions harmful to their physical health and/or safety. Respondent had two judgment lapses that fell short of the required reasonable effort: Respondent should not have relented and allowed a few students to touch the bat; and Respondent should have been more forthcoming by telling Ms. Vilardi that Respondent let the bat go home with T.P., instead of just naming T.P. and the other students and telling Ms. Vilardi to follow up with them.

52. It is determined, as a matter of ultimate fact, that Respondent was not dishonest with Ms. Vilardi, and, thus, did not fail to maintain honesty in all of her professional dealings.

CONCLUSIONS OF LAW

53. 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. (2013).

54. In this proceeding, Petitioner seeks to discipline Respondent's educator's certificate. Petitioner bears the burden

of proving the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Florida Supreme Court:

> 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), (quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983). Accord Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991)) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

55. The Administrative Complaint charges Respondent with violating section 1012.795(1)(d) and (j), Florida Statutes. In pertinent part, section 1012.795 provides:

> (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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> * * *
>
> (j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

"Gross Immorality" Charge

56. Petitioner contends that Respondent's actions in December 2011 constituted "gross immorality." As a matter of law and as a matter of fact, that charge does not fit Respondent's actions. The charge is so ill-fitting that it can only be characterized as overreaching.

57. There is no State Board of Education rule defining "gross immorality." Absent a rule definition, as a matter of law and agency precedent, the charge cannot be lodged.

58. The viability of "gross immorality" charges under section 1012.795(1)(d) in the absence of a rule definition has been the subject of recent analysis in a series of cases resulting in final orders by the Education Practices Commission.

59. In Cappi Arroyo v. Dr. Eric J. Smith, as Commissioner of Education (Arroyo), Case No. 11-2799 (Fla. DOAH May 31, 2012; Fla. EPC Nov. 5, 2012), Administrative Law Judge F. Scott Boyd analyzed the charged violation of "gross immorality" under section 1012.795(1)(d), as follows:

> 109. The Ethics in Education Act, Chapter 2008-108, Laws of Florida, added the phrase "as defined by rule of the State Board of Education" to what now appears as section 1012.795(1)(d). It is unclear whether this new language modifies only "an act involving moral turpitude" or if it instead modifies the entire phrase "gross immorality or an act involving moral turpitude." The absence of a comma after the word "immorality" suggests that it modifies the entire phrase. In any event, when construing penal statutes, any statutory ambiguity should be resolved in favor of Petitioner. Cilento v. State, 377 So. 2d 663, 668 (Fla. 1979) (where criminal statute is ambiguous, construction most favorable to accused should be adopted). See also § 775.021, Fla. Stat. ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."). This portion of the statute is

> thus only violated if an educator is guilty of gross immorality as defined by rule of the State Board of Education.
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> 110. The State Board of Education has not defined the term "gross immorality" by rule. No evidence was presented that Petitioner's behavior met any such rule definition. No evidence shows that Petitioner was guilty of gross immorality as defined by rule of the State Board of Education.

Arroyo Rec. Order at 41-42. The Education Practices Commission adopted the Recommended Order, including these conclusions of law, as its Final Order, issued on November 5, 2012.

60. The Arroyo analysis has been followed in Recommended Orders, which, in turn, have been adopted in Education Practices Commission Final Orders, as recently as last month. See, e.g., Torreya Davis v. Pam Stewart, as Comm'r of Ed., Case No. 13-2501 (Fla. DOAH Dec. 13, 2013; Fla. EPC March 28, 2014); Pam Stewart, as Comm'r of Ed. v. Elaine Anderson, Case No. 13-1347 (Fla. DOAH Dec. 16, 2013; Fla. EPC March 28, 2014); Dr. Tony Bennett as Comm'r of Ed. v. Doreen Whitfield, Case No. 13-3360PL (Fla. DOAH Jan. 18, 2014; Fla. EPC May 20, 2014).

61. In its PRO, Petitioner did not mention this precedent, nor offer any explanation as to why the legal analysis set forth in these orders is not correct and controlling. It is concluded that the agency precedent adopting and following Arroyo is correct and controlling. Respondent cannot be found guilty of gross immorality in violation of section 1012.795(1)(d), because

there is no rule of the State Board of Education defining "gross immorality" as required by the statute.[9/]

62. Even if the older interpretations of "gross immorality" were still agency precedent, the conclusion would be that Petitioner did not prove "gross immorality." The credible evidence did not show that Respondent violated proper moral standards, much less that she acted in "flagrant disregard" of proper moral standards. Petitioner proved only that Respondent had a lapse in judgment on one occasion by letting a few students to touch the bat. While teachers are held to a high moral standard, that high standard does not function to transform mere bad judgment calls into acts of gross immorality.

"Moral Turpitude" Charge

63. Petitioner also contends that Respondent is guilty of engaging in acts of moral turpitude, in violation of section 1012.795(1)(d). As of December 2011, the pertinent rule definition of "moral turpitude" was as follows:

> Moral turpitude is 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.

Fla. Admin. Code R. 6A-5.056(6).

64. Petitioner failed to prove that Respondent is guilty of "moral turpitude" as so defined. The Administrative Complaint does not charge, and Petitioner did not prove, that Respondent committed a crime of any kind. It follows that there was no charge and no proof that Respondent committed the particular sort of crime defined as moral turpitude, i.e., one that is evidenced by an act of baseness, vileness or depravity.

65. As with the "gross immorality" charge, it is unfathomable that Petitioner contends that Respondent's acts could possibly be considered crimes, or even mere acts, of baseness, vileness, or depravity. The evidence established no act even remotely within the specter of moral turpitude.

Principles of Professional Conduct Charges

66. The remaining statutory violation charged in the Administrative Complaint is section 1012.795(1)(j), which requires proof of a violation of the Principles of Professional Conduct for the Education Profession prescribed by rule of the state Board of Education. This charge is linked to, and predicated on, the charged rule violations. The Administrative Complaint charges Respondent with violating rule 6A-10.081(3)(a) and (5)(a), which are two provisions in the rule codification of the Principles of Professional Conduct for the Education Profession. Thus, there can be no violation of section 1012.795(1)(j) alone; instead, there is no statutory violation

unless there is a predicate rule violation under one of the two provisions charged.

67. In pertinent part, rule 6A-10.081 provides:

> (1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
>
> (2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.
>
> (3) Obligation to the student requires that the individual:
>
> (a) Shall 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.
>
> * * *
>
> (5) Obligation to the profession of education requires that the individual:
>
> (a) Shall maintain honesty in all professional dealings.

68. Petitioner proved that Respondent violated rule 6A-10.081(3)(a) by not making reasonable effort to protect students' physical health or safety. As found above, Respondent acted reasonably to protect students by taking the bat from J.S. and T.P. when they brought it to her, securing the bat in a cage, and placing the cage in Respondent's stockroom during the school day while Respondent taught her classes. Respondent acted reasonably by acquiescing with T.P.'s father's request to let the bat go home

with T.P., with the father's permission. However, by acceding to the requests of a few students during the post-fourth period break to let them touch the bat (after they had already done so surreptitiously), Respondent crossed the line. Respondent failed to make reasonable effort to protect those students' physical health or safety when she allowed the students to open the cage and touch the bat.

69. Respondent's actions in this regard were neither malicious nor patently dangerous. Nonetheless, Respondent knew that there was at least a generalized risk that the bat could carry diseases and that it was not a good idea for the bat to be handled. Even though Respondent believed that having the students wash their hands after touching the bat was sufficient to protect them from harm, Respondent was at least partially responsible for the students' potential exposure to harm to begin with by agreeing to let them open the cage and touch the bat.

70. Respondent also fell short of the required reasonable effort to protect students by not being more forthcoming with Ms. Vilardi. Respondent should have said that she let the bat go home with T.P. That would have been a more reasonable effort to protect students than just disclosing T.P.'s name and telling Ms. Vilardi to follow up with T.P. and the other students.

71. Petitioner argued that Respondent was dishonest with Ms. Vilardi, in violation of rule 6A-10.080(5)(a), by intentionally

giving Ms. Vilardi false information. The evidence on this point was conflicting; the more credible evidence did not establish that Respondent was dishonest, based on the facts found above.

Discipline/Mitigating Circumstances

72. Petitioner charged Respondent with four distinct violations: gross immorality; moral turpitude; failure to make reasonable effort to protect students from conditions harmful to health or safety; and failure to maintain honesty in all professional dealings. The discipline proposed by Petitioner for all four violations is suspension of Respondent's educator's certificate for two years, followed by two years of probation.

73. Petitioner did not meet its burden of proving three of the four violations charged. Accordingly, the proposed discipline is plainly out of proportion to the single violation established.

74. Petitioner's proposed discipline was not explained by reference to Petitioner's disciplinary guidelines rule. See Fla. Admin. Code R. 6B-11.007.

75. The low end of the normal discipline range for the violation found in this case is probation, before consideration of any mitigating or aggravating circumstances. If mitigating circumstances did not warrant reduced discipline in this case below the low end of the range, then probation would be the recommended discipline, for no longer than one school year.

76. The record evidence does not support any disciplinary action that would remove Respondent from the classroom for even a short period. Respondent's lapse in judgment does not detract from her value and contributions as a high school teacher. Under the circumstances found here, any such discipline would be wholly out of proportion to the violation.

77. Consideration of mitigating circumstances supports a reduction in discipline below the normal range.

78. A compelling mitigating circumstance that makes Respondent's violation only slight is that Respondent was not armed with the specific information that could have, and should have, been made available to her and to everyone on a school campus with a history of bat problems. Respondent was never instructed regarding what should and should not be done when encountering a bat. Respondent had no actual knowledge of the risks and signs of rabies and other diseases, and how to minimize those risks. Respondent's failure to exercise better judgment means that she fell short of making reasonable effort to protect students, but it was not a knowing failure. Respondent's lack of actual knowledge mitigates against the severity of discipline that should be imposed. See Fla. Admin. Code R. 6B-11.007(3)(k).

79. Consideration of the other factors in Petitioner's disciplinary guidelines rule adds to the weight in favor of leniency. Respondent has a spotless record; her contributions as

an excellent, highly effective teacher are unquestioned. No actual harm was shown to have been caused by Respondent's lapse in judgment. Respondent is contrite, having gotten quite an education through this process; she would not make the same judgment calls again. See Fla. Admin. Code R. 6B-11.007(3)(a) through (j), (r).

80. Recognizing that despite Ms. Walker's harsh comments, Pinellas County School District deemed the appropriate discipline (under a lower standard of proof) to be a letter of reprimand, the undersigned recommends that a letter of reprimand be issued, as the appropriate mitigated discipline for Respondent's violation of one rule that was established by the record evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a Final Order:

(1) determining that Respondent, Rebecca Sampson Carey, committed a single violation of section 1012.795(1)(j) by violating Florida Administrative Code Rule 6A-10.080(3)(a);

(2) dismissing all other charges in the Administrative Complaint; and

(3) issuing a letter of reprimand to Respondent for her violation of rule 6A-10.080(3)(a).

DONE AND ENTERED this 30th day of June, 2014, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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 30th day of June, 2014.

ENDNOTES

[1/] The Administrative Complaint is based on events that occurred in December 2011. Accordingly, although the Administrative Complaint does not identify the version of the statutes or rules on which charges are predicated, the charges must be based on the law in effect at the time of the acts claimed to be violations. Childers v. Dep't of Envtl. Prot., 696 So. 2d 962, 964 (Fla. 1st DCA 1997). Therefore, unless otherwise indicated, references herein to statutes are to the Florida Statutes (2011).

[2/] As of December 2011, the Principles of Professional Conduct for the Education Profession in Florida were codified in Florida Administrative Code Rule 6B-1.006. Effective January 1, 2013, the rule was re-designated as rule 6A-10.081. The Administrative Complaint charges Respondent with violating paragraphs (3)(a) and (5)(a) of the re-designated rule, which, as a matter of form, did not exist in December 2011. However, since the substance of the rule paragraphs charged has not changed since the events at issue took place, all references herein will be to the re-designated rule to avoid confusion.

[3/] Respondent made a mistake when writing down her address on Ms. Vilardi's intake form, as she had recently moved. Although Petitioner questioned Respondent at the hearing about whether she intended to mislead Ms. Vilardi with this false information, the

Administrative Complaint does not allege facts regarding the address error as a basis for charges against Respondent, nor does Petitioner contend in its PRO that Respondent's address mistake was a violation of the statutes or rules charged. Had the Administrative Complaint alleged that Respondent's address mistake violated the rule requiring Respondent to maintain honesty, the undersigned would have found that no violation was proven, because the credible evidence does not establish that Respondent was being dishonest. Respondent explained that she had recently moved, and in the confusion of the rush interview session, she made a mistake. The mistake was understandable, easily correctable, and corrected by Respondent as soon as it was called to her attention. The error did not impede or affect the investigation at all.

[4/] Respondent said that she was concerned about the privacy laws protecting student information, including their names, addresses, and phone numbers. Respondent explained that when Ms. Vilardi said that there was a risk of rabies, Respondent decided that she needed to provide the student names, notwithstanding privacy concerns. However, Respondent directed Ms. Vilardi to the administrative office to ask for student addresses and phone numbers from someone who knew what information could be disclosed. While Respondent's concerns about privacy laws were reasonable, after Respondent revealed the student names, including T.P.'s name, she would not have been disclosing any additional protected information if Respondent had disclosed that she let the bat go home with T.P. and that Ms. Vilardi should question T.P. first. Respondent could have exercised better judgment in this regard, although it is recognized that the conditions of Respondent's interview with Ms. Vilardi were challenging and may have contributed to the lapse in judgment.

[5/] Given the length of time that has passed since the events at issue, details offered by witnesses were often sketchy, and witnesses often expressed their inability to recall. Petitioner's witnesses Ms. Vilardi and Mr. Hepburn did not admit to lack of recall, but perhaps they should have, because there were many inconsistencies between their versions of what took place. The most reliable testimony they offered was with respect to the timeline of certain events that they had recorded in contemporaneous or near-contemporaneous notes. Their testimony about other aspects of the investigation, even when recorded in their notes, was not reliable. For example, Ms. Vilardi testified from her notes that she and Mr. Hepburn interviewed seven students and three adults. However, Mr. Hepburn recorded in his "bat incident timeline" memo that he and Ms. Vilardi

interviewed only four students: J.S., N.H., T.P., and B.H. In addition, Ms. Vilardi testified that she and Mr. Hepburn interviewed T.P. with his mother, who had come to school for the interview, and that the mother interrupted the interview to say that she wanted Ms. Vilardi to go get the bat from her front porch. In contrast, Mr. Hepburn testified that after he and Ms. Vilardi interviewed T.P., Ms. Vilardi telephoned the family and reached T.P.'s mother at home to ask for permission for Ms. Vilardi to come get the bat. Ms. Vilardi also testified that her intake form "was the documentation of [her] conversation [with Respondent]," but Ms. Vilardi later said that she believed Respondent provided her the names of a couple of students who had touched the bat. Inexplicably, Ms. Vilardi did not write down on the intake form the names of students identified by Respondent as having touched the bat. While the undersigned does not attribute malicious motives on the part of Ms. Vilardi or Mr. Hepburn as the reason for the inconsistencies in their testimony and notes, the unexplained inconsistencies cast doubt on their credibility and the reliability of their testimony.

[6/] A stipulated finding of fact in the joint pre-hearing stipulation was that following the positive rabies test, "four students and two adults were administered rabies vaccines." The evidence was consistent with the parties' stipulation. However, Ms. Vilardi's testimony was inconsistent with the other evidence and the parties' stipulation. She testified from her notes that rabies vaccines were given to the same seven students and three adults that she claimed to have interviewed with Mr. Hepburn.

[7/] Respondent did not fail to make reasonable efforts to protect students from harm by acceding to T.P.'s father's request to let the bat go home with T.P., because T.P.'s father told Respondent that he had given T.P. his permission to do so. When T.P.'s father approved of T.P. taking the bat home, Respondent's role as protector of T.P.'s health and safety was displaced by T.P.'s father asserting his prerogative over T.P. Since Respondent was never instructed that she was required to do something different with the bat, she drew on her experience from one year earlier, when Ms. Clark kept a bat found on campus in a cage for the school day and then agreed to let Respondent take the bat home to her family. Had Respondent and Ms. Clark been briefed on the risks of rabies and provided specific protocols for encounters with bats, they would have acted differently on both occasions.

[8/] The February 22, 2012, letter of reprimand included the following: "[Y]ou stated that a Pinellas County Health Service employee came to visit you at school on December 8, 2011, because

a rabid bat was exposed to students." The letter emphasized Respondent's mistake when she wrote down her new address: "You stated, 'You do not know why, but you gave her the wrong address.' You wanted to clarify your statement by stating a second response to me that 'you mistakenly gave her the wrong address.'" The letter did not describe the timing and setting of Ms. Vilardi's "visit" with Respondent (i.e., a rushed meeting in the five minutes before class began), and instead, suggested a leisurely meeting of some length: "You stated that you eventually sent the Health Service Employee to the front office as they would provide the needed student information." The letter did not mention that Respondent provided student names and directed Ms. Vilardi to the administrative office to follow up with the students known to have come in contact with the bat (which was not yet known to be rabid). Instead, the letter gave the contrary impression: "[Y]ou admitted that you did not communicate with administration the conversation with the Health Service Employee or the fact that the Health Service Employee had concerns that a rabid bat was exposed to students." The inaccurate facts and misplaced tone of this letter lend credence to Respondent's testimony that at the OPS meeting, Ms. Walker was belligerent, badgered Respondent until she broke out in tears, and told Respondent that she lied.

[9/] In its PRO, Petitioner offered older administrative cases as "agency precedent" that resorted to the following definition of "immorality" in Florida Administrative Code Rule 6A-5.056(2):

> 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.

Extrapolating from that definition, the term "gross immorality" was described in prior administrative cases as "an act of misconduct that is serious, rather than minor in nature; it is a flagrant disregard of proper moral standards." Frank T. Brogan, as Comm'r of Ed. v. Mansfield, Case No. 96-0286 (Fla. DOAH Aug. 1, 1996; Fla EPC Oct. 18, 1996). The administrative decisions relied on by Petitioner cannot be fairly characterized as "agency precedent" that survived the 2008 legislative mandate for the promulgation of rule definitions, particularly in light of the very recent agency precedent so concluding.

COPIES FURNISHED:

Ron Weaver, Esquire
Post Office Box 5675
Douglasville, Georgia 30154

Aaron J. Hilligas, Esquire
Florida Education Association
Suite 109
1516 East Hillcrest Street
Orlando, Florida 32803

Gretchen Kelley Brantley, Executive Director
Education Practices Commission
Department of Education
Suite 224
325 West Gaines Street
Tallahassee, Florida 32399-0400

Matthew Carson, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Marian Lambeth, Bureau Chief
Bureau of Professional Practices Services
Department of Education
Turlington Building, Suite 224E
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.