

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER
OF EDUCATION,

Petitioner,

vs.

Case No. 14-0987PL

TUNISIA HAIRSTON,

Respondent.

_____ /

RECOMMENDED ORDER

On October 14-15, 2014, Administrative Law Judge Lisa Shearer Nelson conducted a duly-noticed hearing in this case in Greensboro, Florida.

APPEARANCES

For Petitioner: J. David Holder, Esquire
J. David Holder, P.A.
387 Lakeside Drive
Defuniak Springs, Florida 32435

For Respondent: Peter J. Caldwell, Esquire
Florida Education Association
213 South Adams Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent, Tunisia Hairston, violated the provisions of section 1012.795(1)(d), (j), or (k), Florida Statutes (2010), and/or Florida Administrative

Code Rule 6A-10.081(3) (a) and (5) (a). If any violations of these provisions are found, then it must be determined what penalty may be appropriate.

PRELIMINARY STATEMENT

On September 18, 2013, Pam Stewart, as Commissioner of Education of the State of Florida (Petitioner or the Commissioner), filed an Administrative Complaint against Respondent Tunisia Hairston, asserting that she provided inappropriate assistance to students as they took the 2011 Science Florida Comprehensive Assessment Test (FCAT) by pointing to incorrect answers or telling students to look again at certain answers, and that she was removed as a testing administrator from future testing environments. Based upon these allegations, the Administrative Complaint charged Respondent with violating section 1012.795(1) (d) and (g). On September 30, 2013, through counsel, Respondent filed an Election of Rights form which disputed the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. The matter was forwarded to the Division of Administrative Hearings on March 3, 2014, for the assignment of an administrative law judge.

A Notice of Hearing was issued on March 7, 2014, scheduling the case to be heard on May 14, 2014, in Tallahassee, Florida.

At Respondent's request, the case was continued and rescheduled for July 22, 2014.

On June 11, 2014, an Administrative Complaint against Annette Jones Walker, who is Respondent Hairston's mother and teaches at the same school, was referred to DOAH for the assignment of an administrative law judge and docketed as DOAH Case No. 14-2705. The case was assigned to the same administrative law judge, who scheduled the hearing in the Walker case for August 28, 2014. On June 30, 2014, counsel for both Respondents filed a Motion to Hold Proceedings in Abeyance or to Consolidate. The motion noted that the allegations against the Respondents were identical, involving the same FCAT test administration, and would involve the testimony of many common witnesses. Respondents requested that the cases either be heard together or that the Walker case be abated until a disposition was entered in this case against Respondent Hairston. Petitioner objected to the motion, noting that while the allegations involved the same factual scenario, the alleged violations occurred in different classrooms and would involve the testimony of different students for each case. On July 2, 2014, the Motion to Hold Proceeding in Abeyance or to Consolidate was denied.

On July 7, 2014, Petitioner filed a Motion for Leave to Amend Administrative Complaint, which was opposed by Respondent. Petitioner indicated in its motion that if Respondent required

a continuance in order to prepare for any amendments in the Administrative Complaint, Petitioner was not opposed.

On July 10, 2014, an Order Granting Leave to Amend Administrative Complaint, Canceling Hearing, and Requiring New Dates for Hearing was issued. The Order changed the venue of the hearing to Quincy, Florida, in order to reduce the inconvenience for the witnesses, particularly the students. After input from the parties, the case was rescheduled for September 26, 2014, in Quincy, Florida.

On July 16, 2014, Respondent moved to strike legal conclusions from the Amended Administrative Complaint, which Petitioner opposed. On July 22, 2014, an Order was entered denying Respondent's motion. The Order noted, however, that only statutory and rule provisions listed under the enumerated counts in the Amended Administrative Complaint would be the basis for any penalties against Respondent, and that if Petitioner wished to charge any additional violations, she would need to further amend the complaint. Petitioner did so and on August 5, 2014, Petitioner's Second Motion to Amend Administrative Complaint was granted.

On August 19, 2014, the parties in Case No. 14-2705 (Stewart v. Walker) filed a Joint Motion for Continuance and Joinder. In the motion, the parties indicated that Respondent Walker needed more time to prepare for additional allegations in the Second

Amended Administrative Complaint filed in that case, and that the parties had concluded that it would be more efficient to try both cases together. The parties also asserted that the cases tried together would take two days to complete. In both cases, Motions for Change of Venue had been filed, requesting that the location of the hearing be changed to West Gadsden High School in Greensboro, Florida. As a result, on August 25, 2014, the two cases were consolidated for the purpose of hearing, and rescheduled for October 14-15, 2014, at West Gadsden High School in Greensboro.

The parties filed Amended Joint Pre-hearing Stipulations in each case which included stipulated facts for which no evidence at hearing was required. Those facts, where relevant, have been incorporated into the findings of fact below. The hearing commenced as scheduled and was completed on October 15, 2014.^{1/}

At hearing, Petitioner presented the testimony of Dr. Pink Hightower, Veronica White, Victoria Ash, Bridget Royster, Anthony Jackson, students S.B., T.W., D.M., and L.T.,^{2/} Rosalyn Smith, Cedric Chandler, and Stephen Pitts. Petitioner's Exhibits 1 and 2 were marked for identification but not offered into evidence. Petitioner's Exhibits 3-15 were admitted. Respondent testified on her own behalf and presented the testimony of Valorie Sanders, Tamika Battles, Tracey Shelley, students K.M., A.F., R.A., M.C.,

D.Y., A.C., J.J., A.M., and E.S., and Annette Jones Walker. Respondents' Exhibits 1-4 were admitted into evidence.

Many of the people listed on both parties' witness lists were students, some of whom apparently no longer reside in Gadsden County. Petitioner's counsel filed a return of non-service with respect to K.B., and learned the morning of the hearing that K.B. was now in Atlanta. Petitioner requested that the record remain open for a period of 30 days in order to take K.B.'s deposition. The request was granted over objection, with the provision that Respondent could also depose identified students listed in the prehearing stipulation as witnesses for whom service could not be obtained. Although two students were initially identified for Respondent, counsel indicated later in the hearing that it appeared no attempt at service had been made for those students, and he could not demonstrate unavailability for them. On October 31, 2014, Petitioner filed a Notice of Taking Deposition with respect to K.B., scheduling the deposition for November 13, 2014. However, on November 14, 2014, Petitioner filed a Sworn Motion for Admission of Witness Statement of Student K.B. in Lieu of Deposition testimony, asserting that K.B.'s father refused to allow him to be deposed, and seeking to admit his written statement in lieu of his written testimony. The remedy for the failure to honor a subpoena is to file a petition in circuit court. § 120.569(2)(k)2., Fla. Stat. (2014).

Accordingly, the motion was denied by Order dated November 25, 2014.

The transcript for the hearing was filed with the Division on December 3, 2014. Corrections to several pages in the transcript were filed on December 30, 2014. At Respondent's request, the deadline for filing proposed recommended orders was extended to January 9, 2015. Both parties timely filed their Proposed Recommended Orders which have been carefully considered in the preparation of this Recommended Order. After submission of the Proposed Recommended Orders, the cases were severed for preparation of separate recommended orders.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses and other evidence presented at hearing, and upon the entire record of this proceeding, the following facts are found:

1. Respondent, Tunisia Hairston, holds Florida Educator's Certificate 886347, covering the areas of elementary education and English for speakers of other languages, which is valid through June 30, 2017.

2. At all times relevant to the allegations in the Second Amended Administrative Complaint, Respondent was employed as a fifth-grade teacher at Greensboro Elementary School in the Gadsden County School District (District).

3. In April of 2011, Respondent was teaching fifth grade. Her mother, Annette Jones Walker, taught fifth grade in the classroom adjacent to hers. Respondent is in her thirteenth year of teaching and currently teaches first grade at the same school.

4. The Florida Comprehensive Assessment Test (FCAT) is a state-wide assessment administered pursuant to section 1008.22(3)(c), Florida Statutes (2010). For the 2010-2011 school year, the reading component was given to grades three through ten; math was given to grades three through eight; science was given to grades five and eight; and writing was given to grades four, eight, and ten. At issue in this case is the administration of the science portion of the FCAT to fifth graders in Ms. Hairston's and Ms. Walker's classrooms at Greensboro Elementary.

5. Pearson, Inc., was the company with whom the State of Florida contracted to provide the 2011 FCAT. The evidence presented indicates that Pearson provided the test booklets to each county, which then distributed the test booklets to each school. The school's test assessment coordinator would then distribute the tests to each teacher, matched with a list of the students each teacher was supposed to test. After the tests were completed, they were returned by the teacher to the assessment coordinator, who in turn returned the test booklets to the district. Pearson picked up each district's test booklets and

transported them to either Austin, Texas, or Cedar Rapids, Iowa, for scoring.

6. There is no allegation or evidence presented to indicate that there was any irregularity with regard to the test booklets before they arrived at Greensboro Elementary or after the test was completed.

7. Test booklets are "consumable," meaning that there is no separate answer sheet. Multiple-choice answers are recorded in the test booklet itself. A subcontractor of Pearson's, Caveon Data Forensics (Caveon), ran an analysis on the erasure marks on the answer portion of the test booklets for each grade, in order to set baseline data for similarities of answers in a particular test group code or school with respect to erasures. Generally, erasure analysis is performed to identify potential anomalies in the testing and to identify potential questions for review in terms of question validity. Standing alone, the erasure analysis provides nothing useful. It must be viewed in conjunction with other information.

8. The erasure analysis performed by Caveon identified 21 Florida schools with scores that were above the threshold set for erasures. Gadsden County had three schools fitting within that category: Stewart Street Elementary School for third-grade reading, Greensboro Elementary School for fifth-grade science, and West Gadsden High School for tenth-grade reading retake.

The science classes affected at Greensboro Elementary were those of Ms. Hairston and Ms. Walker.

9. The Superintendent for each district with a high erasure index, including Superintendent Reginald James of Gadsden County, was notified by letter dated June 9, 2011, of the testing groups involved. The letter requested the Superintendent to conduct an internal investigation to examine the administration of the affected tests for any testing irregularities, including testing conditions and test security protocols at the schools. The Superintendent was notified that each school would initially receive an "I" for its 2010-2011 accountability outcomes until the erasure issue was resolved, or the Commissioner determined that sufficient data was available to accurately assign the schools a grade.

10. Deputy Superintendent Rosalyn Smith conducted an internal investigation for Gadsden County, with the assistance of the District's testing coordinator, Shaia Beckwith-James. According to Ms. Smith, the two of them collected documents and submitted them to the Department of Education, with Ms. Beckwith-James performing a lot of "legwork" on the investigation.^{3/} Both Ms. Hairston and Ms. Walker were interviewed and the interviews recorded. Ms. Smith testified that she did not find that either teacher had violated any testing protocols, but could not explain the high erasures. Both Ms. Walker and Ms. Hairston were removed

as administrators from future administrations of the FCAT, a move that both teachers welcomed. No evidence was presented to indicate that the District considered, or that either teacher was notified, that removal as a test administrator was considered discipline.

11. On June 16, 2011, Superintendent James forwarded to DOE information collected as part of the District's internal investigation related to those schools with high erasure indexes. Superintendent James asked that the Department exclude the scores of any students with an erasure index of 1.3 or higher from the school's letter grade calculation in order to assign the schools a letter grade as opposed to an "I" rating.

12. On June 29, 2011, Deputy Commissioner Chris Ellington wrote back to Superintendent James regarding the schools in Gadsden County with high erasure indexes. With respect to Greensboro Elementary, he stated,

While your investigation found no improprieties for Grade 5 Science at Greensboro Elementary School, there is sufficient statistical evidence that student test results may have been advantaged in some way. . . . Because this high percentage of three or more net wrong-to-right erasures is extremely unusual, the Department's decision is to remove these test results from the 2010-2011 accountability outcomes for this school. Consequently, the "I" designation will be removed and the accountability outcomes will be calculated without these student test results.

13. Greensboro Elementary subsequently received an A grade for the year.

14. On March 6, 2012, then-Commissioner Gerard Robinson notified Superintendent James that he was requesting the Department's Office of Inspector General to investigate whether there was any fraud with respect to the administration of the 2011 FCAT. The Inspector General's Office then conducted an administrative investigation of four schools state-wide: Chaffee Trail Elementary; Charter School of Excellence; Greensboro Elementary; and Jefferson County Elementary.

15. The Inspector General's investigation was conducted by Bridget Royster and Anthony Jackson. They received the results from the District's investigation, and requested testing booklets from the Division of Accountability and Research Management, who had the students' test booklets for fifth-grade science shipped from Texas. Ms. Royster counted the number of erasures on each test booklet and created answer keys for each student. She also developed questions to ask each student to determine if the erasures were theirs. She and Mr. Jackson interviewed some, but not all, of the students from the two classes based upon their availability at the time, and interviewed Principal Stephen Pitts; Cedric Chandler, the school's guidance counselor who served as the testing coordinator; and Tamika Battles and Valorie Sanders, who both served as proctors for the 2011 FCAT. They

attempted to interview Ms. Walker and Ms. Hairston, who both declined to be interviewed,^{4/} preferring instead to seek counsel.

16. Ms. Royster and Mr. Jackson recorded answers from the students on the questionnaire form they had developed. However, a review of the handwriting on the forms submitted into evidence reveals that they were filled out by Ms. Royster and Mr. Jackson, as opposed to being filled out by the students themselves. The statements made also refer to the students in the third person, supporting the belief that these are statements as understood by the investigators, as opposed to the actual statements of the students. Based on these interviews, the investigative report prepared by Ms. Royster and Mr. Jackson states in part:

"although evidence does not support that fifth-grade teachers, Annette Walker and Tunisia Hairston, altered student answer tests, statements taken during the investigation reveal that they did coach or interfere with their students' responses during the administration of the FCAT." Ms. Royster acknowledged that erasures can be caused by students going over their answers a second time; by cheating; by a student's confusion; by a student changing his or her mind about the answer; and by other unspecified reasons. She also acknowledged that they did not ask the students whether they cheated, as that was not the focus of the investigation.

17. Respondent administered the 2011 Science Comprehensive Assessment Test (FCAT) for students in her classroom on April 19 and 20, 2011.

18. The science portion of the FCAT was the last portion to be administered. It consisted of two sessions on successive days, with 29 questions on one day and 31 questions on the other. Both sessions were 55 minutes long. All 60 questions are in the same booklet. There may be one or two questions per page, depending on the question, so the test booklet is approximately 50-60 pages long. There are different forms of the test, but the core items are the same for each student.

19. Teachers were trained regarding testing protocols and security measures by Cedric Chandler, Greensboro Elementary's Guidance Counselor and Assessment Coordinator. Each teacher responsible for administering the FCAT was provided with a testing administration manual, including a copy of Florida Administrative Code Rule 6A-10.042, which governs the administration of the test. There is also a form that is signed by educators when they attend the training that indicates that they understand and have read the rules. The FCAT/FCAT 2. Administration and Security Agreement signed by Respondent states in pertinent part:

Florida State Board of Education Rule 6A-10.042, F.A.C., was developed to meet the requirements of the Test Security Statutes,

s. 1008.24, F.S., and applies to anyone involved in the administration of a statewide assessment. The Rule prohibits activities that may threaten the integrity of the test. . . . Examples of prohibited activities are listed below:

- Reading the passages or test items
- Revealing the passages or test items
- Copying the passages or test items
- Explaining or reading passages or test items for students
- Changing or otherwise interfering with student responses to test items
- Copying or reading student responses
- Causing achievement of schools to be inaccurately measured or reported

* * *

All personnel are prohibited from examining or copying the test items and/or the contents of student test books and answer documents. The security of all test materials must be maintained before, during, and after the test administration. Please remember that after ANY test administration, initial OR make-up, materials must be returned immediately to the school assessment coordinator and placed in locked storage. Secure materials should not remain in classrooms or be taken out of the building overnight.

The use of untrained test administrators increases the risk of test invalidation due to test irregularities or breaches in test security.

I, (insert name), have read the Florida Test Security Statute and State Board of Education Rule in Appendix B, and the information and instructions provided in all applicable sections of the 2011 Reading, Mathematics, and Science Test Administration Manual. I agree to administer the Florida

Comprehensive Assessment Test (FCAT/FCAT 2.0) according to these procedures.

Further, I will not reveal or disclose any information about the test items or engage in any acts that would violate the security of the FCAT/FCAT 2.0 and cause student achievement to be inaccurately represented or reported.

20. Respondent signed the Security Agreement on April 7, 2011.

21. Teachers are also given a specific script to read for every grade and subject being tested. For the fifth-grade science test, the script is approximately five pages long. Teachers are instructed that they are to read the script and that their actions should comport with the directions in the script.

22. Victoria Ash is the bureau chief for K-12 assessment at the Florida Department of Education. Her office is charged with the development, administration, assessment, scoring, and reporting of the FCAT. Ms. Ash indicated that there are no stakes attached to the science test at the state level. When asked about protocols to follow in the administration of the FCAT, Ms. Ash indicated that it is not permissible for teachers to assist students, as teacher interference would cause results not to be an accurate measure of the students' ability. It is not permissible to walk up to a student, point to a question and answer and tell the student to take another look at that question. Such behavior is not permitted either verbally or by some other physical cue.

When a student calls a teacher over during the FCAT to ask a question, the teacher is to avoid any specific response. However, it is acceptable, according to Ms. Ash, for a teacher to say things such as "just keep working hard," "think about it more, you will eventually get it," or "do your best." To say something like "just remember the strategies we discussed" would be, in Ms. Ash's view, "going right up to the edge" of permissible responses. As long as the response is not to a specific question, a teacher would not be violating the protocols to tell students to read over their answers again, and to make sure the students answered every question.

23. The Second Amended Administrative Complaint alleges that Respondent provided inappropriate assistance to students in her fifth-grade class as they took the 2011 Science FCAT by pointing to incorrect test answers or telling students to look again at certain answers.

24. Eight students from Ms. Hairston's 2011 fifth-grade class testified at hearing. Of those 8 students, two testified that they had received assistance from Ms. Hairston during the test.

25. T.W. was a male student in Ms. Hairston's class. He testified that "in a certain period of time, she would point out answers for me." He testified that she did not say anything to him, but "I just got the meaning that she was telling me to check

it over again." He also stated that she told the whole class to go over their tests again at the end of the test.

26. L.T. was a female student in Ms. Hairston's class. She referred to Mr. Pitts or Ms. Dixon being in the room. She testified that after Ms. Dixon or Mr. Pitts left the room, Ms. Hairston would walk around and "point out questions that maybe we would get wrong." She testified that Mr. Pitts or Ms. Dixon came in 3-4 times. L.T. also stated that while Ms. Hairston told the class at the beginning of the test they could go back and recheck their answers when they were finished, she did not make a similar statement at the end of the test.

27. On the other hand, students K.M., A.F., R.A., M.C., D.Y., and A.C. all testified that they did not remember Ms. Hairston giving any type of hints during the science FCAT, and that she did not point to answers on the tests. None of the students, including T.W. and L.T., had incredibly clear memories of the test, which is understandable given that they took the test over three years prior to the hearing. To the extent that these six students remembered Ms. Hairston saying anything, they remember her telling them to go back and read the questions over, in terms of the whole test.

28. Tamika Battles was the proctor assigned to Ms. Hairston's room. Although there was some dispute about how many days she was present during the science part of the FCAT, it

is found that she was present for one of the two testing sessions.^{5/} Ms. Battles does not recall Ms. Hairston saying anything out of the ordinary, but rather simply walked around telling students to stay on task, and making general statements about test taking. She did not ever see her point to a particular student's test. Ms. Battles had been trained in testing protocols, and believed that they were followed.

29. Ms. Hairston also denied coaching any of the students or pointing out incorrect answers. She acknowledged pointing toward test booklets on occasion, not to point to a specific answer but to remind a student to focus or stay on task. Her testimony was credible.

30. After careful review of the evidence, it is found that Ms. Hairston did not violate testing protocols by providing assistance to students during the 2011 science FCAT. She did not point to specific questions/answers or tell a student (or indicate without talking) that the student should change the answer to any particular question.

31. T.W. was in Ms. Hairston's class for the second time, having failed fifth grade the year before. He testified that Ms. Hairston did not say anything to him, but rather that he understood her to mean something that she never verbalized. While L.T. testified that Ms. Hairston would point to a question and say, "check your answers again," she tied these actions to times

when Ms. Dixon or Mr. Pitts came in the room. Neither Mr. Pitts nor Ms. Dixon signed the security log for Ms. Hairston's class for either day of the science examination. Ms. Dixon signed in for one testing session on April 13, but not for either day of science testing, and Mr. Pitts is not signed in for any session at all. Credible testimony was also presented to indicate that while perhaps Ms. Dixon was present at some time during testing (and not necessarily science), Mr. Pitts was not. In addition, L.T.'s written statement focuses more on math questions than science questions. It is entirely possible, given the vague nature of her answers, that she was confusing the science FCAT with some other testing experience. In any event, T.W. and L.T.'s testimony, taken together or apart, does not rise to the level of credible, clear and convincing evidence of providing inappropriate assistance to students during the FCAT.

32. Further, the type of coaching alleged in the Second Amended Administrative Complaint would be quite difficult to do, given the structure of the test and the testing environment. There is no answer key to the test, and according to Ms. Ash, there are different forms of the test. Some pages have one question while others have two. Students are given a set amount of time to complete the test, but worked at different speeds. Many finished early, while some may not have completed it. In order for Ms. Hairston to give the kind of assistance alleged, she

would have to stand by the testing student, read the question on the page, see the answer given, recognize it as wrong, and point out the error to the student. Such a scenario is improbable at best, given that testimony is uniform that she walked around the room, not that she stopped for significant periods at any student's desk. Ms. Hairston's explanation that she commonly points in order to gain a child's attention and get them to focus is reasonable.

33. Several years of Respondent's performance evaluations were submitted. Only those that were complete were considered. Those evaluations indicate that Ms. Hairston consistently has achieved effective, highly effective, or outstanding evaluations during her tenure at Greensboro Elementary School.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1).

35. This is a proceeding in which Petitioner seeks to discipline Respondent's educator certification. Because disciplinary proceedings are considered penal in nature, Petitioner is required to prove the allegations in the Second Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co.,

670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

36. 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). 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 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elect. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

37. Section 1012.796 describes the disciplinary process for educators, and provides in pertinent part:

(6) Upon the finding of probable cause, the commissioner shall file a formal complaint and prosecute the complaint pursuant to the provisions of chapter 120. An administrative law judge shall be assigned by the Division of Administrative Hearings of the Department of Management Services to hear the complaint if there are disputed issues of material fact. The administrative law judge shall make recommendations in

accordance with the provisions of subsection (7) to the appropriate Education Practices Commission panel which shall conduct a formal review of such recommendations and other pertinent information and issue a final order. The commission shall consult with its legal counsel prior to issuance of a final order.

(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 \$2,000 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 employment or termination of employment in the state in any public or private position requiring a Florida 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.

38. The Second Amended Administrative Complaint makes the following factual allegations against Respondent:

3. On or about April 19 and 20, 2011, in Gadsden County, Florida, Respondent provided inappropriate assistance to fifth grade students as they took the 2011 Science Florida Comprehensive Assessment Test (FCAT) by pointing to incorrect test answers or telling students to look again at certain answers.

4. Respondent was removed as a test administrator from future testing environments. Respondent's students' FCAT scores were recommended to be invalidated by the district.
5. The Respondent is in violation of Section 1008.24(1), Florida Statutes, in that Respondent knowingly and willfully violated test security rules adopted by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants or certification or administered by school districts pursuant to s. 1008.22.
6. The Respondent is in violation of Section 1008.24(1)(c), Florida Statutes, in that Respondent coached examinees during testing or altered or interfered with examinees' responses.
7. The Respondent is in violation of Section 1008.24(1)(g), Florida Statutes, in that Respondent participated in, directed, aided, counseled, assisted in, or encouraged any of the acts prohibited in this section.
8. The allegations of misconduct set forth herein are in violation of Rule 6A-10.042(1)(c), Florida Administrative Code, in that Respondent assisted examinees in answering questions.
9. The allegations of misconduct set forth herein are in violation of Rule 6A-10.042(1)(d), Florida Administrative Code, in that Respondent interfered with examinees answers while administering test [sic].
10. The allegations of misconduct set forth herein are in violation of Rule 6A-10.042(1)(f), Florida Administrative Code, in that Respondent has participated in, directed, aided, counsel, assisted in, or encouraged an activity which could result in

the inaccurate measurement or reporting of examinees' achievement.

39. Based upon these assertions, Petitioner alleges that Respondent violated section 1012.795(1)(d), (j), and (k); and Florida Administrative Code Rule 6A-10.081(3)(a) and (5)(a). Section 1012.795(1) provides in pertinent part:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:

* * *

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

* * *

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

(k) Has otherwise violated the provisions of law, the penalty for which is the revocation of the educator certificate.

40. Rule 6A-10.081 was not in effect at the time of the alleged conduct giving rise to the allegations against Respondent. Childers v. Dep't of Env'tl. Prot., 696 So. 2d 962, 964 (Fla. 1st DCA 1997) ("The version of a statute in effect at the time grounds for disciplinary action arise controls."). However, its predecessor, rule 6B-1.006, contained the same provisions with respect to the subsections charged. Sections (3) (a) and (5) (a) in both rules provide:

(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.

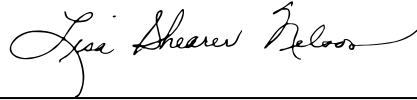
41. Petitioner did not prove the allegations against Respondent by clear and convincing evidence. The burden of proof in this proceeding is a high burden for Petitioner to meet. After careful review of the evidence presented, the evidence is

insufficient to demonstrate that Respondent provided inappropriate assistance to students as alleged in the Second Amended Administrative Complaint. Further, it appears that Respondent's removal as a test administrator and invalidation of student test scores was undertaken, not as an indication that Respondent did anything wrong, but as a measure to insure that Greensboro Elementary School received a letter grade for accountability purposes. The record presented at hearing demonstrated that Respondent continues to be a valued member of the teaching staff at Greensboro Elementary. Given the failure to prove that Respondent gave inappropriate assistance to students during the science FCAT administration, Petitioner has not established that Respondent violated the provisions alleged in the Administrative Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Education Practices Commission enter a Final Order dismissing the Second Amended Administrative Complaint.

DONE AND ENTERED this 6th day of February, 2015, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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 6th day of February, 2015.

ENDNOTES

^{1/} The undersigned notes that Pauline West, the principal of West Gadsden High School, and her assistant, Ms. Conyers, were more than accommodating and went out of their way to make sure that the participants in the hearing had everything they could need. Without their hospitality, it would have been much more difficult to obtain the presence of the many students who testified, and their efforts to provide a hearing space is much appreciated.

^{2/} All students testifying in this proceeding are identified by their initials.

^{3/} Ms. Beckwith-James did not testify.

^{4/} Both women voiced a concern that Ms. Beckwith-James had been involved in the District investigation. Not only was Ms. Beckwith-James the District assessment coordinator, but she was also a distant relative of theirs. According to the Respondents, there had been a family dispute over the appropriate disposition of some land, and Ms. Beckwith-James' allegiance on the issue was not aligned with theirs. Her involvement gave them little confidence in the investigative process. As Ms. Beckwith-James did not testify, no findings are made with respect to her motivations in this case.

^{5/} The dispute involved the fact that Ms. Battles did not sign the security log for either testing day. People coming in and out of the room during the FCAT are supposed to sign and record the time they enter and exit the room. Ms. Battles signed in and out for other test sessions, but not for the days the science test was administered, although testimony is consistent that she was present for one of the two days. After considering the evidence as a whole, it is found that she was present for one of the days, but not both, and simply neglected to sign the security log.

COPIES FURNISHED:

Gretchen Kelley Brantley, Executive Director
Education Practices Commission
Department of Education
Suite 316
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Peter James Caldwell, Esquire
Florida Education Association
213 South Adams Street
Tallahassee, Florida 32301
(eServed)

David Holder, Esquire
J. David Holder P.A.
387 Lakeside Drive
Defuniak Springs, Florida 32435
(eServed)

Matthew Mears, General Counsel
Department of Education
Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Marian Lambeth, Bureau Chief
Bureau of Professional Practices Services
Suite 224-E
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

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.