

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 14-1364PL

ANGEL CASADY,

Respondent.

_____ /

RECOMMENDED ORDER

On May 29, 2014, a hearing was conducted pursuant to section 120.57(1), Florida Statutes (2013), by means of video teleconference with sites in Tallahassee and Panama City, Florida, before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Angel Casady, pro se
3401 Country Club Court
Lynn Haven, Florida 32444

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent, Angel Casady (Ms. Casady or Respondent), violated section 1012.795(1)(d) and (j), Florida Statutes (2012), and Florida

Administrative Code Rule 6A-10.081(5) (a), as alleged in the Administrative Complaint, and if so, what penalty shall be imposed?

PRELIMINARY STATEMENT

On January 15, 2014, Petitioner Pam Stewart, as Commissioner of the Department of Education (Petitioner or Commissioner), filed an Administrative Complaint against Respondent, alleging violations of section 1012.795(1) (d) and (j), and rule 6A-10.081(5) (a). Respondent filed an Election of Rights form on February 7, 2014, disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On March 24, 2014, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was noticed for hearing to commence May 29, 2014, and proceeded as scheduled. At hearing, Petitioner presented the testimony of Douglas Clunan, N.C., Joy Chonko, Cheryl Denise Kelley, Janet Bailey, Camilla Hudson, and Sharon Michalik, and Petitioner's Exhibits 1-16 were admitted into evidence.

Respondent presented the testimony of Leah Margulies, and Respondent's Composite Exhibit 1 was admitted into evidence.

The Transcript of the proceeding was filed with the Division on June 17, 2014. On June 25, 2014, counsel for Petitioner wrote to the court reporter asking for corrections to several pages in

the Transcript. Those corrections were filed with the Division on July 1, 2014. Both parties timely filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order. All references to Florida Statutes are to the 2012 codification unless otherwise indicated.

FINDINGS OF FACT

1. Respondent is a teacher licensed by the Florida Department of Education, and has been issued Florida Educator's Certificate 1204471. The certificate covers the area of elementary education, and is valid through June 30, 2015.

2. At all times relevant to the allegations in the Administrative Complaint, Respondent was employed as an associate teacher at Breakfast Pointe Academy in Panama City, Florida. Breakfast Pointe is a K-8 school in the Bay County School District.

3. Respondent worked in a fourth-grade "overflow" classroom with lead teacher, Joy Chonko. An overflow classroom is a classroom that has more than 25 students because the actual number of enrolled students exceeded the projection for the grade level. In that instance, the lead teacher is assigned an associate teacher to assist her. Ms. Chonko's classroom had between 30 and 37 students.

4. Ms. Chonko is in the fourth year of her teaching career. She worked for two years in Montana before moving to the Panama

City area and starting at Breakfast Pointe. The events giving rise to this case occurred during her first year at Breakfast Pointe. Ms. Chonko is generally regarded as a good teacher. According to her principal, Denise Kelley, her students and their parents love her, and she is always going the "extra mile" to help them, both in and out of the classroom. She is very involved with both students and other teachers on her grade level, and those teachers wanted her to return so that they could continue working as a team. When asked if she recommended her return, Ms. Kelley's response was "absolutely."

5. Ms. Chonko was assigned to an overflow class a few weeks into the school year, and an associate teacher was assigned to help her. However, in December 2012, that teacher was let go because she was not performing the duties assigned to her. Respondent previously worked at Northside Elementary School and was let go from that assignment, and then placed at Breakfast Pointe in Ms. Chonko's class.

6. Ms. Chonko described the relationship between the two women as cooperative, like team teachers.^{1/} She did not think of Ms. Casady as a subordinate, although it is clear from Ms. Casady's job description that she was to work under the direction of one or more lead teachers. Further, it is clear from the assignments in the classroom that Ms. Chonko shouldered the bulk of the instruction responsibilities. For at least part

of the spring semester, Ms. Chonko taught language arts, social studies, and science, with Ms. Casady assisting her, while Ms. Casady taught math with Ms. Chonko's assistance.

7. On March 5, 2013, there was a meeting with Ms. Kelley, Ms. Chonko, Ms. Casady, and Leah Margulies, a classroom coach, to address Ms. Casady's role in the classroom. The plan at that time was for Ms. Chonko to continue teaching the language arts, social studies, and science classes. Ms. Casady was to observe, with Ms. Margulies, another fourth-grade teacher at Breakfast Pointe teaching math; another teacher off-campus teaching math; and Ms. Chonko teaching math. Then Ms. Chonko would teach math on Mondays, Wednesdays, and Fridays, while Ms. Casady taught math on Tuesdays and Thursdays.^{2/} All of these observations were planned to help Ms. Casady improve her teaching skills.

8. In April 2013, both Ms. Chonko and Ms. Casady were involved in the administration of the FCAT. Both teachers participated in the training for those who administered the exam, and were given a testing administration manual. Included in the manual are the Prohibited Activities Agreement and the Test Security Agreement, which teachers are to sign and date once training is completed.

9. The Test Administration and Security Agreement includes the following text:

Examples of prohibited activities are listed below:

- Reading or reviewing 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

* * *

The use of untrained test administrators increases the risk of test invalidation due to test irregularities or breaches in test security. Inappropriate actions by district or school personnel will result in further investigation and possible loss of teacher certification.

I, _____, have received adequate training regarding the administration of the Spring 2013 Florida Comprehensive Assessment Test (FCAT/FCAT 2.0) and 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 Spring 2013 Reading, Mathematics, and Science Test Administration Manual. I agree to administer the 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.

10. Respondent signed the Security Agreement on April 9, 2013.

11. Respondent also signed the Test Administrator Prohibited Activities Agreement on April 9, 2013. This document provided in pertinent part:

It is important for you, as a test administrator of a statewide assessment, to know that the following activities are prohibited. Engaging in such activities may result in an investigation, loss of teaching certification, and/or prosecution for violation of the law. Please read the following list of prohibited activities and sign your name on the signature line at the bottom of this page indicating that you understand these actions and their consequences:

* * *

I understand that during the test I may not:

* * *

- Give students more time than is allotted for the session (unless the student has an extended time accommodation)

* * *

- Instruct students to test in a session other than the one designated for that day/allotted testing time (going on to Session 2 during Session 1, reviewing work in Session 1 during Session 2)

- Coach students during testing regarding test-taking strategies

* * *

I understand that after testing I may not:

* * *

- Discuss the content of the test with anyone, including students or other school personnel

12. The FCAT is a very structured test. Administrators are given the actual script to use as instructions for the test. The Script for Administering Grade 4 Reading, Session 2, includes the following directions to be given orally to students:

- You may not change any answers from Session 1. Remove all materials from your desk except a No. 2 pencil.
- You'll have 70 minutes to complete Session 2 of the Reading test. Open your test and answer book to Session 2 on page 33. The session number is at the top of each page. You may work only in Session 2.
- Remember the following:

* * *

- When you have finished, check through your answers in this session only to make sure you have filled in only one bubble for each question.
- Try to answer every question. If you aren't sure how to answer a question, skip it and keep going. After you have answered all the other questions, go back and answer any questions you skipped in this session only.
- When you come to the STOP sign, you have finished Session 2. If you complete Session 2 before time is called, go back and check your work. Do not go back and work in Session 1.
- Please remember that during this test session you MUST NOT
 - work in Session 1

- talk to other students or make any disturbance
- look at another student's test and answer book
- allow another student to look at your test and answer book
- ask for help answering any test questions
- give help to another student in answering test questions
- have notes or scratch paper
- have any electronic or recording devices in your possession at any time, including breaks, even if you do not use them
- fail to follow any other instructions given
- After the test you may not discuss the test items with anyone.
- You have 10 minutes to finish Session 2. Remember, do not go back to Session 1.

13. Administration of the FCAT began on Monday, April 15, 2013. Although Ms. Chonko and Ms. Casady would see each other and talk in the mornings each day before the testing began, they had separate groups of children for testing, and were not testing in the same classroom.

14. N.C. was a fourth-grade student in Ms. Chonko's classroom. Ms. Chonko described him as a very respectful, polite, hard-working student who presented no discipline problems. She could not remember specific grades but thought he was a good student. N.C. described his grades as good, although when asked for more specifics, he said he got As, Bs, Cs, and

maybe a couple of Ds.^{3/} N.C. was in the group of students to whom Ms. Chonko administered the FCAT.

15. Session 1 of the reading portion of the FCAT was administered Monday, April 15, 2013. After testing for the day was over, N.C. told Ms. Chonko that he did not finish all of the questions in Session 1, and asked if he would be able to finish the session. Ms. Chonko told him he would not be able to go back into Session 1, that Monday was for Session 1, and Tuesday they would be doing Session 2. Ms. Chonko was not overly concerned that N.C. did not finish, because she recognized that with a timed test not all children are going to finish.^{4/}

16. Tuesday morning, Ms. Chonko mentioned her conversation with N.C. to Ms. Casady. Ms. Casady told Ms. Chonko she should tell N.C. to go back and finish Session 1. Ms. Chonko reminded Ms. Casady that it was against the rules to do so.

17. Ms. Chonko did not see Ms. Casady speak to N.C. after their conversation Tuesday morning, and she thought the issue was over. However, on Wednesday, April 17, Ms. Casady told her that she had encouraged N.C. to go back and finish the questions he did not complete on Monday. The following day, Ms. Casady told her that N.C. had in fact gone back and finished Session 1.

18. Ms. Chonko believed that there was a violation of the testing protocol, and she reported it to her principal, Ms. Kelley, on Thursday afternoon. According to Ms. Kelley,

Ms. Chonko appeared hesitant, but came to her office on Thursday, saying, "I think I need to tell you something." Ms. Chonko told Ms. Kelley about N.C. going back into Session 1. Ms. Kelley asked Ms. Chonko to write a statement regarding the incident, which she did. She also called Camilla Hudson, the District's assessment coordinator, and Sharon Michalik, the executive director for human resources for the District. After direction from Ms. Hudson, Ms. Kelley and the assistant principal, Ms. Weatherly, interviewed N.C. and asked him to write a statement as well. A Testing Incident Report was prepared by Ms. Kelley and Ms. Bailey, the school's testing coordinator, and N.C.'s FCAT reading score was invalidated.

19. N.C. was interviewed by Ms. Kelley and Ms. Weatherly on Friday, April 19, 2013. N.C. confirmed that he told Ms. Chonko that he did not finish Session 1 and that she told him he could not work in Session 1 anymore. He told Ms. Casady on Tuesday morning that he had not finished the first session, and she told him, "if you are at one minute, you should always mark them B or C." She also told him if you have enough time after session 2, you should go back and mark B or C. N.C. told Ms. Kelley and Ms. Weatherly that after he finished Session 2, he went back and marked the unanswered questions in Session 1 with the answer "B." The testing coordinator confirmed that the last six questions of Session 1 were marked B.

20. N.C.'s statement was prepared in Ms. Kelley's office. He identified it at hearing and testified that the contents of the statement were true. N.C. also testified that he liked both Ms. Chonko and Ms. Casady and that Ms. Casady had never written him up for disciplinary problems. N.C.'s statement reads as follows:

I didn't finish session 1 reading I had 6 questions left Mrs. Chonko told me to work in session 2 I told Mrs. Cassady that I didn't finish she said if I'm not finished and thairs 1 minute left I should mark B or C. She also said if I had a enough time left after session 2 I should go back in session 1 and mark the questions that I didn't finish B or C. And I did mark them B.^{5/}

21. There was no problem with the group of students for whom Ms. Casady administered the FCAT.

22. Ms. Michalik came to Breakfast Pointe on Friday, April 19, 2013. She interviewed Ms. Chonko, and then, with Ms. Kelley and Ms. Weatherly present, interviewed Ms. Casady.

23. The meeting was lengthy. Its purpose was to inform Ms. Casady of the investigation and give her an opportunity to present her side of the story. At the beginning of the meeting, Ms. Casady did not seem all that concerned, but as the meeting progressed and she realized that others viewed the matter more seriously and that there could be repercussions for what happened, she became quite upset. She denied that the incident occurred and said that Ms. Chonko was a "nervous wreck" about

students not finishing the test, and that the two of them were trying to brainstorm ways the boys could finish. According to Ms. Michalik, Ms. Casady said that she thought it would be fine if the boys went back into Session 1 as long as no one knew. Ms. Casady also expressed frustration over the incident, stating that she could not understand why it was "such a big deal over two FCAT questions and a fourth grader." When Ms. Michalik asked her why she would not have known about the prohibition on going back, since it is in the testing manual, she said that while she did attend the training, she did not study the manual's script for day two until she read it on the second day of testing.

24. During the meeting, Respondent also claimed that it was N.C.'s father who told him to go back into Session 1 on the second day of testing. While N.C.'s father told him that if he was not going to be able to finish a session, to answer B or C for remaining questions, he never told him to go back and finish during another session of the test, and never told anyone that he had given such advice.

25. It was clear after the meeting that Ms. Casady was very upset with Ms. Chonko, and Ms. Kelley and Ms. Michalik decided it would not be best for the two women to be in the same room with the students.^{6/} Ms. Michalik elected to transfer Ms. Casady to another school. There was an unanticipated opening as a media specialist at another school due to the death of an employee, so

she was transferred there for the rest of the school year. She was not recommended for return the following year.

CONCLUSIONS OF LAW

26. 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).

27. This is a proceeding in which Petitioner seeks to revoke Respondent's educator certification. Because disciplinary proceedings are considered penal in nature, Petitioner is required to prove the allegations in the 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).

28. 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).

29. 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.

30. The Administrative Complaint makes the following factual allegations against Respondent:

3. On or about April 9, 2013, Respondent signed a Test Administrator Prohibited Activities Agreement with respect to administering the Florida Comprehensive Assessment Test (FCAT) which stated, in part: "I understand that during testing I may not . . . Instruct students to test in a session other than the one designated for that day/allotted testing time (going on to Session 2 during Session 1, reviewing work in Session 1 during Session 2).

4. On or about April 16, 2013, Respondent encouraged another teacher to violate FCAT testing procedures in that Respondent told the teacher to instruct fourth grade students N.C. and T.R. to revisit the previous day's session of the FCAT and fill in any unanswered questions After instructed to do so by Respondent, and after completing Session 2, N.C. went back to Session 1 and filled in unanswered questions. As a result of the conduct alleged herein, N.C.'s FCAT test was invalidated.

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 for certification or administered by school districts pursuant to s. 1008.22.

6. The Respondent is in violation of Section 1008.24(1)(f), Florida Statutes, in that Respondent knowingly and willfully failed to follow test administration directions specified in the test administration manuals.

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), Florida Administrative Code, in that Respondent failed to maintain/administer tests in a manner to preserve test integrity.

9. 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, counseled, assisted in, or encouraged an activity which could result in the inaccurate measurement or reporting of examinee's achievement.

31. Petitioner has proven the allegations contained in paragraphs three and four, with respect to student N.C., by clear and convincing evidence. The witnesses who testified had no motive to cast Respondent in a negative light, and there was no indication that any of these witnesses disliked her. To the contrary, both Ms. Chonko and N.C., the witnesses most closely

involved in the incident, professed to liking Ms. Casady. Indeed, both had something to lose by the reporting of the incident, as opposed to something to gain.^{7/} All the witnesses who testified were candid, straightforward, and consistent. However, no significant evidence was presented with respect to student, T.R.

32. Paragraphs five, six, and seven deal with purported violations of section 1008.24, Florida Statutes (2012), which provides in pertinent part:

- (1) It is unlawful for anyone knowingly and willfully to violate 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 for certification or administered by school districts pursuant to s. 1008.22, or, with respect to any such test, knowingly and willfully to:
 - (a) Give examinees access to test questions prior to testing;
 - (b) Copy, reproduce, or use in any manner inconsistent with test security rules all or any portion of any secure test booklet;
 - (c) Coach examinees during testing or alter or interfere with examinees' responses in any way;
 - (d) Make answer keys available to examinees;
 - (e) Fail to follow security rules for distribution and return of secure test as directed, or fail to account for all secure

test materials before, during, and after testing;

(f) Fail to follow test administration directions specified in the test administration manuals; or

(g) Participate in, direct, aid, counsel, assist in, or encourage any of the acts prohibited in this section.

(2) Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

33. While the evidence supports a conclusion that Respondent violated the provisions cited by encouraging N.C. to go back into Session 1, section 1008.24 makes a violation a criminal offense, not a disciplinary offense. Notably, the Administrative Complaint does not charge Respondent with a violation of section 1012.795(1)(k) ("has otherwise violated the provisions of law, the penalty for which is the revocation of the educator's certificate"). Compare Godwin v. Dep't of Prof'l Reg., 461 So. 2d 226 (Fla. 1st DCA 1984) (contractor violated section 489.127, containing criminal penalties, and by doing so, violated section 489.129(1)(j), by failing in any material respect to comply with the provisions of this act). Therefore, the only utility of these paragraphs would be as they relate to the charge in Count 1 or Count 3, discussed below.

34. Paragraphs eight and nine alleged violations of Florida Administrative Code Rule 6A-10.042(1) and (1)(f), with respect to

test administration. The rule in effect at the time of the incident provided in pertinent part:

(1) Tests implemented in accordance with the requirements of Sections 1004.93, 1008.22, 1008.30, 1012.55, and 1012.56, F.S., shall be maintained and administered in a secure manner such that the integrity of the tests shall be preserved.

* * *

(f) Persons who are involved in administering or proctoring the tests or persons who teach or otherwise prepare examinees for the tests shall not participate in, direct, aid, counsel, assist in, or encourage any activity which could result in the inaccurate measurement or reporting of the examinees' achievement.

35. Subsection (4) of the rule provided that "violations of test security provisions shall be subject to penalties provided in statute and State Board Rules." Once again, nothing in the rule itself indicates that it is a basis for disciplinary action, and Petitioner has not specifically pled any statute or rule provision authorizing discipline for violation of this provision, such as section 1012.795(1)(k).

36. Because licensing statutes are penal in nature, they are strictly construed in favor of the licensee. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes and rules must be construed in terms of their literal meaning, and words used by the Legislature may not

be expanded to broaden their application. Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 99-100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991). Therefore, in order for the Commission to discipline a licensee such as Respondent for a violation of section 1008.24 or rule 6A-10.042, these provisions must be tied to a provision in section 1012.795 authorizing discipline.

37. Count 1 charges Respondent with violating section 1012.795(1)(d), which requires a finding that Respondent has been guilty of gross immorality or an act involving moral turpitude "as defined by rule of the State Board of Education." (emphasis added).

38. The Ethics in Education Act, chapter 2008-108, section 32, Laws of Florida, amended section 1012.795(1)(d) to add the phrase "as defined by rule of the State Board of Education," creating the statute as it presently appears.

39. Judge F. Scott Boyd analyzed the effect of the 2008 legislative amendment in Arroyo v. Smith, Case No. 11-2799, ¶ 109 (Fla. DOAH May 31, 2012; Fla. EPC Nov. 13, 2012), as follows:

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 [the Respondent] 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.

40. The Final Order in Arroyo v. Smith considered the Recommended Order and it was "adopted in full and becomes the Final Order of the Education Practices Commission." The Final Order in Arroyo and the conclusions of Judge Boyd adopted in that Final Order must be applied here as well. Gessler v. Dep't of Prof'l Reg., 627 So. 2d 501 (Fla. 4th DCA 1993).

41. As noted by Judge Boyd, "[t]he State Board of Education has not defined the term 'gross immorality' by rule." Arroyo v. Smith, at ¶ 110.

42. Petitioner does not address the failure to define gross immorality by rule, instead relying on cases construing the term that were decided prior to the 2008 legislative amendment to section 1012.795(1)(d). Given the amendment, those cases are inapplicable to the current standard established by the Legislature.

43. Rule 6A-5.056 defines the terms "immorality" (not gross immorality) and "moral turpitude." "Immorality" is defined as "conduct that is inconsistent with the standards of public conscience and good morals. It is conduct that brings the

individual concerned for the education profession into public disgrace or disrespect and impairs the individual's service in the community." However, rule 6A-5.056 implements sections 1012.33 and 1012.335. Section 1012.33(1) defines just cause for termination of a contract by a district school system as including "but not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office" Section 1012.335 also directs the State Board of Education to adopt rules defining "just cause," including, but not limited to immorality, misconduct in office, incompetency, gross insubordination, willfull neglect of duty, and being found guilty of, entering a plea to, regardless of adjudication, any crime of moral turpitude. Neither of these provisions require a definition of gross immorality, while section 1012.795(1)(d) clearly does so. As the State Board of Education has not defined the term as required by section 1012.795(1)(d), it cannot serve as a basis for discipline in this case. Arias v. Dep't of Bus. & Prof'l Reg., 710 So. 2d 655 (Fla. 3d DCA 1998).

44. Section 1012.795(1)(d) also authorizes discipline for crimes of moral turpitude, as defined by the State Board of Education. Rule 6A-5.056 does define crimes of moral turpitude as follows:

(8) "Crimes involving moral turpitude" means offenses listed in Section 1012.315, F.S., and the following crimes:

- (a) Section 775.085, F.S., relating to evidencing prejudice while committing offense, if reclassified as a felony.
- (b) Section 782.051, F.S., relating to attempted felony murder.
- (c) Section 782.09(1), F.S., relating to killing of unborn quick child by injury to mother.
- (d) Section 787.06, F.S., relating to human trafficking.
- (e) Section 790.166, F.S., relating to weapons of mass destruction.
- (f) Section 838.015, F.S., relating to bribery.
- (g) Section 847.0135, F.S., relating to computer pornography and/or traveling to meet a minor.
- (h) Section 859.01, F.S., relating to poisoning of food or water.
- (i) Section 876.32, F.S., relating to treason.
- (j) An out-of-state offense, federal offense or an offense in another nation, which, if committed in this state, constitutes an offense prohibited under Section 1012.315(6), F.S.

45. Section 1012.315 provides an extensive list of criminal penalties that disqualify an applicant from certification as an educator. Neither the offenses listed in section 1012.315 nor the offenses listed in rule 6A-5.056 include a violation of section 1008.24 as a crime of moral turpitude. Count 1 has not been proven by clear and convincing evidence.

46. Count 2 is not truly a separate disciplinary violation, but rather section 1012.795(1)(j) provides the necessary statutory authority for violations of the Principles of

Professional Conduct for the Education Profession, a violation which is charged in Count 3.

47. Count 3 alleges that Respondent violated rule 6A-10.081(5)(a), which provides that "obligation to the profession of education requires that the individual shall maintain honesty in all professional dealings." The term "honesty" is not defined in the rule.

48. Where a term is not defined in statute or rule, its common ordinary meaning applies. Donato v. American Tel. & Tel. Co., 767 So. 2d 1146 (Fla. 2000); Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 410 (Fla. 1st DCA 1997). The plain and ordinary meaning of a word may be ascertained by reference to a dictionary. Green v. State, 604 So. 2d 471, 473 (Fla. 1992). The term "honesty" is defined as "fairness and straightforwardness of conduct; adherence to the facts." www.merriam-webster.com/dictionary/honesty. The term "honest" is similarly defined as "free from fraud or deception; genuine, real; reputable, respectable; creditable, praiseworthy; marked by integrity." www.merriam-webster.com/dictionary/honest.

49. In this case, the conduct at issue is essentially encouraging a child to do something that both the teacher and the child knew was against the rules for testing: in other words, to cheat. This behavior, by common ordinary standards, is the antithesis of maintaining honesty. A violation of testing

standards also violates this provision. By virtue of a teacher's special role in mentoring and instructing students, teachers are held to a high moral standard. Adams v. Prof'l Practices Council, 406 So. 2d 1170 (Fla. 1st DCA 1981). Encouraging children to violate the testing protocols sends the opposite message from that which a teacher is expected to convey.

Petitioner has proven Count 3 by clear and convincing evidence.

50. The Education Practices Commission has adopted disciplinary guidelines for the imposition of penalties authorized by section 1012.795. Fla. Admin. Code R. 6B-11.007. For improperly assisting a student with testing in violation of rule 6B-1.006(3)(a), or (5)(a),^{8/} the penalty range is probation to revocation.

51. Rule 6B-11.007(3) also identifies aggravating and mitigating factors for consideration in reducing or increasing the penalty from the ranges identified in the rule. No evidence in mitigation was presented. Moreover, the theme presented in this case was one of a person who was willing to blame anyone else who might be part of the process rather than any effort to take responsibility for her own conduct. Respondent reacted by casting blame on N.C.'s father; excoriating the character of her lead teacher; and accusing Ms. Michalik of lies and unprofessional behavior. These actions do not model the professionalism expected of educators placed in a position of leadership with our children.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that that the Education Practices Commission enter a Final Order finding Respondent guilty of Counts two and three of the Administrative Complaint. It is further recommended that the Commission suspend Respondent's educator's certificate for one year; impose an administrative fine of \$500; and that upon reinstatement, Respondent serve three years of probation, subject to terms and conditions determined by the Commission.

DONE AND ENTERED this 28th day of July, 2014, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2014.

ENDNOTES

^{1/} Ms. Chonko's description of her relationship with Ms. Casady appears to be viewed through rose-colored glasses. She reported no real problems or concerns with Ms. Casady, and could not think

of any concerns she reported to Ms. Kelley. Ms. Kelley said that they appeared to work well together and there was no reason to think they disliked one another. She believed that there were a few times where Ms. Chonko mentioned concerns to her, and several times where Ms. Casady did so.

On the other hand, Ms. Casady complained several times to her teaching coach, Leah Margulies, that Ms. Chonko wanted to play a larger role in the teaching in the classroom, and that she found Ms. Chonko difficult to work with. As the investigation unfolded, her comments about Ms. Chonko were less and less flattering. During rebuttal, Petitioner called Ms. Chonko back to the stand to give her the opportunity to rebut some of Ms. Casady's statements. She seemed truly taken aback by the things Ms. Casady said about her, and said she did not know why she would do so. She said, "I am required to report what was reported to me, and that's what I did. It's nothing personal. I just had to."

^{2/} It is unclear whether these assignment changes, which were designed to help Ms. Casady improve her skills, ever took place. Breakfast Pointe was not a school assigned to Ms. Margulies, but she had been working with teachers there because the assigned coach had other temporary duties monopolizing her time. The day after the referenced meeting, Ms. Margulies was notified that she no longer needed to work at Breakfast Pointe, and the record does not indicate whether the plans were carried out with another teaching coach.

^{3/} To be fair, the question posed did not specify whether the query meant to elicit grades throughout the year on individual assignments, or grades on his report card. One can be a very good student and still have a hiccup now and then.

^{4/} Ms. Casady attempted to portray Ms. Chonko as extremely nervous about the FCAT and worried about how the students' scores would affect her evaluations. Ms. Chonko, however, testified credibly that while it is important to any teacher that the students do as well as they can, the FCAT is simply part of the job.

^{5/} The text is produced exactly as N.C. wrote it.

^{6/} In a follow-up call to Ms. Casady, she continued to make disparaging comments about Ms. Chonko, calling her "a real piece of work" and "a snake in the grass."

^{7/} Moreover, Ms. Chonko was required to report the testing violation under rule 6A-10.081(5)(m), or be subject to discipline for failing to do so.

^{8/} This rule has been transferred to rule 6A-10.081. The relevant text is the same.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.