

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER
OF EDUCATION,

Petitioner,

vs.

Case No. 14-2705PL

ANNETTE JONES WALKER,

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 ISSUES

The first issue to be determined is whether Respondent, Annette Jones Walker, violated the provisions of section 1012.795(1)(a), (d), (j), or (k), Florida Statutes (2010), and/or Florida Administrative Code Rule 6A-10.081(3)(a), and (5)(a),

(g), and (h). If any violations of these provisions are found, then it must be determined what penalty may be appropriate.

PRELIMINARY STATEMENT

On September 18, 2014, Pam Stewart, as Commissioner of Education (Petitioner or the Commissioner), filed an Administrative Complaint against Respondent, Annette Jones Walker, 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 October 3, 2014, 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 June 11, 2014, for the assignment of an administrative law judge. After input from the parties, a Notice of Hearing was issued on June 20, 2014, scheduling the case for August 28, 2014, in Quincy, Florida.

Previously the Commissioner had referred Stewart v. Tunisia Hairston, DOAH Case No. 14-0987, to the Division for hearing. The case was assigned to the undersigned, and scheduled for hearing on July 22, 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 the Hairston case. 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.

Petitioner filed a Motion for Leave to Amend Administrative Complaint on July 7, 2014, which was granted by Order dated July 10, 2014. Respondent moved to strike legal conclusions from the Amended Administrative Complaint with respect to paragraphs five through ten, arguing that Petitioner impermissibly injected argument and legal conclusions into the factual allegations of the complaint. On July 22, 2014, an Order was issued denying the motion, stating the paragraphs identified did not appear to be in

violation of Florida Administrative Code Rule 28-106.2015.

However, the Order noted that the only provisions upon which any penalties would be imposed, should the evidence support the allegations in the Amended Administrative Complaint, would be those listed in Counts 1-4. If Petitioner was seeking additional penalties based upon paragraphs 5-9 as separate violations, Petitioner would need to seek to further amend the complaint.

Petitioner then sought leave to further amend the Amended Administrative Complaint, both to address the issue discussed in the July 22 Order, but also to add charges based upon additional allegations related to Ms. Walker's application for renewal of her teaching certificate. Respondent did not respond to the motion, and on August 18, 2014, the motion was granted.

On August 19, 2014, the parties filed a Joint Motion for Continuance and Joinder. In the motion, the parties indicated that Respondent Walker needed more time to prepare for the additional allegations in the Second Amended Administrative Complaint, 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 Tunisia Hairston. 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 those students. 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 holds Florida Educator's Certificate number 948631, covering the areas of elementary education and English for speakers of other languages, which is valid through June 30, 2019.

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

3. In April of 2011, Respondent was teaching fifth grade. Her daughter, Tunisia Hairston, taught fifth grade in the classroom adjacent to hers. Respondent worked as a substitute teacher for approximately 14 years and as a full time teacher for 10 years. She currently teaches second grade in 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 his district 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: 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. Five students from Ms. Walker's class testified at hearing with respect to the 2011 science FCAT examination. Of those five, one student's testimony could be construed as supporting the allegations in the Administrative Complaint.

25. D.M. testified that Ms. Walker just walked around the classroom. She "wasn't giving nobody answers. . . . She just tell you that maybe you should redo that one." She testified that Ms. Walker told her to "relook" at a question, but also testified that she did not think Ms. Walker actually said anything, but rather pointed to the test booklet. D.M. admitted that her memory was not very clear, stating, "it was so long ago."

26. Students S.B., J.J., A.M., and E.S. also testified. S.B. said she "kind of" remembered the test, but that nothing about the test really stood out. She believed that in response to a question she had about the test, Ms. Walker may have given a general answer, such as, check over the page again. She did not remember Ms. Walker giving any hints to the class. S.B.'s

testimony is vague and general at best, and does not support a finding of inappropriate assistance.

27. J.J. testified that she was focused on the test, and was not paying attention to what others were doing. She stated that Ms. Walker did not go around the room giving hints to students during the test, and she did not recall Ms. Walker putting her finger on anyone's test in a "hinting manner."

28. Similarly, A.M. testified that she did not remember Ms. Walker going around giving hints about how students should answer questions. Ms. Walker did not give any hints to A.M. and A.M. did not hear Ms. Walker give any hints to anyone else. A.M. stated that it was really quiet in the room, and while it is hard to remember that far back, if a teacher was giving hints on the FCAT, she would remember it.

29. E.S. also testified that it was pretty quiet during the FCAT. She was not paying attention, but did not think that Ms. Walker went around the room giving hints about answers. She admitted that she did not remember much about the test, and could not separate out what happened in the science part of the test as opposed to the rest of the FCAT, but thinks it would have stood out if something inappropriate happened. She was focused on the test but aware of what was going on in the classroom, and Ms. Walker never pointed to anything on her test booklet, and

thinks she would have heard something if Ms. Walker said anything inappropriate.

30. Valorie Sanders was the proctor assigned to Ms. Walker's class.^{5/} She does not recall exactly what Ms. Walker said during the test, but believed it was for the students to focus. She did not see Ms. Walker do anything that would violate testing protocols, for which she had received training; did not recall Ms. Walker giving hints to any students; did not recall any instance where Ms. Walker implied a student should change an answer from wrong to right; and did not see Ms. Walker point to an answer on a student's test.

31. Finally, Ms. Walker denied that she gave any inappropriate assistance to students during the test. She stated that she made statements such as "pay attention," "focus," "go back over your tests if you finish early," and "make sure you have an answer for every question," but did not make any comments about specific questions on the test. Ms. Walker testified that she remained seated during most of the testing because it is painful for her to walk. She did walk around once when she saw Mr. Chandler in Ms. Hairston's class next to hers, and if she saw students staring off into space she would touch the student's desk to get them back on task, but did not point to specific questions. Ms. Walker testified that she had been giving tests to students for 20 years and had never been accused of any impropriety. She,

like her daughter, welcomed the decision not to proctor any more FCAT tests.

32. After careful review of the evidence presented, it is found that Ms. Walker 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.

33. 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. Walker 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 the testimony is undisputed that Ms. Walker had a difficult time walking^{6/} and only walked around the one time she saw Mr. Chandler. The explanation that she would point to the

desk in order to gain a child's attention and get them to focus is reasonable.

34. It is not clear from the record at hearing when the Department of Education began or ended the investigation with respect to Respondent's license. The Administrative Complaint was signed by the Commissioner on September 18, 2013.

35. Ms. Walker testified that she did not remember receiving the Administrative Complaint, although she knew that there was an Administrative Complaint regarding the FCAT. She received a lot of paperwork during this time period, but did not read it all. She hired Mr. Caldwell to represent her during the investigative stage.

36. On October 3, 2013, an Election of Rights form was filed on Ms. Walker's behalf requesting time to negotiate a settlement with the Office of Professional Practices, and if an agreement was not reached during that time, electing a formal hearing. The Election of Rights form is signed by counsel, and not by Ms. Walker.

37. On March 13, 2014, Ms. Walker completed an application for renewal form for renewal of her educator's certificate. The form has a variety of questions, all of which Ms. Walker answered "no." The questions listed included the following:

Have you ever been convicted of a criminal offense?

Have you ever been found guilty of a criminal offense?

* * *

Are there currently charges pending against you for any criminal offense?

Have you ever had a professional license or certificate sanctioned or disciplined in this state or any other state?

* * *

Do you have any current disciplinary action pending in this state or any other state against a professional license or certificate or against an application for a professional license or certificate?

38. Following the questions was a box that stated the following:

Florida Law requires you to provide a YES or NO answer to the questions within the Legal Disclosure section of your application, even if previously submitted. If you answered YES to any question in the Legal Disclosure section on the application form, you must provide detailed complete information for each affirmative response within the corresponding section in this Legal Disclosure Supplement.

* * *

Having a criminal history or administrative sanction against a professional license does not automatically disqualify a person from receiving a Florida Educator's Certificate, but such incidents will prompt a review by the Office of Professional Practices Services.

39. For the section labeled "Professional License or Certificate Sanction(s)," the form required the applicant to identify the state, year, and issuing agency, as well as the license or certificate affected and the "Sanction and Reason."

40. Above the signature line, the form states: "I do hereby affirm by my signature that all information provided in this application is true, correct, and complete."

41. At the time Ms. Walker filled out the application, no discipline against her certificate had been imposed. There was, however, a proceeding in which Petitioner sought to impose discipline against her certificate. However, at that time, there would have been no year, sanction, or reason for her to list in the disclosure supplement.

42. Applications for renewal are completed at the school district and forwarded to the Department of Education for processing. Ms. Walker testified that she went to the district office at the end of the day and was in a hurry when she filled out the application. At first she skipped the question about "current disciplinary action pending" because she did not understand the question. She bubbled it "no" because she was in a hurry.

43. Veronica White of the Department of Education Bureau of Educator Certification explained the process for renewing educator certificates. She has been employed by the bureau since

1998. Ms. White was asked about the meaning of the term "pending disciplinary action" on the application form:

Q. Ms. White, you referred to a question, referred to the application, the renew application of Ms. Walker. Let me ask you about a question on that application. When the Education Practices Commission, I will call it EPC. When EPC has ordered discipline, but it has not yet gone into effect; is that pending discipline?

A. You are asking me questions that I can't answer. I don't work in Professional Practices Services.

Q. Okay.

A. I can only answer from the certification side. I am sorry.

Q. Okay. Can I ask you about the meaning of pending discipline on the application form; is that something you feel you have expertise in, the meaning of pending discipline?

A. No.

Q. You can't? Okay. All right. So you do not know the meaning of pending discipline on that application form?

A. No, I really don't.

44. At the time Ms. Walker completed her renewal application, there was no final order imposing discipline against her license. There were disciplinary proceedings seeking to impose discipline that had not yet been resolved. It was not unreasonable, given the structure of the application, for her to answer "no" to the question as phrased, especially in light of

the information sought in the legal disclosure supplement. She did not seek to obtain the renewal of her teaching certificate by fraudulent means.

45. Some of Ms. Walker's evaluations were admitted into evidence. A review of Respondent's Exhibit 3 reveals that there are multiple copies of some of the evaluations, and the evaluation for 2010-2011 lacks a signature page. With respect to those evaluations that are complete, Ms. Walker was rated "outstanding" and "effective."

CONCLUSIONS OF LAW

46. 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).

47. 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).

48. 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).

49. 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.

50. 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.

11. On or about January 19, 2013, Respondent received a letter by certified mail from the Office of Professional Practices Services

(PPS) in the Florida Department of Education, informing Respondent that PPS "has now concluded its preliminary investigation and is prepared to provide [Respondent] an opportunity to review the materials and respond to the allegations." The letter stated, in part, ". . . if founded these allegations could result in sanctions against your Florida Educator's Certificate." On or about September 18, 2013, the Commissioner of Education found Probable Cause to justify sanctions against Respondent's Florida Educator's Certificate.

12. On or about March 13, 2014, Respondent submitted an application to renew her Florida Educator Certificate. The application, under the "Professional License or Certificate Sanction(s)" section, asked the following question: "Do you have any current disciplinary action pending in this state or any other state against a professional license or certificate or against an application for a professional license or certificate? Respondent falsely answered "no," and swore that her application was "true, accurate, and complete."

51. Based upon these factual allegations, Petitioner charged Respondent with violating section 1012.795(1)(a), (d), (j), and (k), and rule 6A-10.081(3)(a), (5)(a), (g), and (h). 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:

(a) Obtained or attempted to obtain an educator certificate by fraudulent means.

* * *

(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.

52. 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. Pertinent sections in subsections (3) and (5) 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.

* * *

(g) Shall not misrepresent one's own professional qualifications.

(h) Shall not submit fraudulent information on any document in connection with professional activities.

53. 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 sections 1012.795(1)(d), (j), or (k), or Florida Administrative Code Rule 6A-10.081(3)(a) and (5)(a), as alleged in Counts 2-6 of the Second Amended Administrative Complaint.

54. With respect to allegations that Respondent violated section 1012.795(1)(a), and rule 6A-10.081(5)(g) and (h) (Counts 1, 7, and 8), the evidence must be examined in light of the specific language of both the renewal application and the language of the charged violations. The question that Petitioner alleges that Respondent answered falsely, asks about "pending disciplinary action." It does not, as the corresponding question regarding criminal proceedings does, ask whether there are "charges" pending. More telling, the person who has processed these applications for over fifteen years could not explain what was meant by the question, and the description contained in the form for supplemental disclosure is open to the interpretation that only information regarding discipline that has been decided in

some form, but may, for example, be pending issuance of a final order or pending the results of an appeal, is being sought. Under these circumstances, it is understandable that Respondent was confused about the question, and answered it "no" because she knew of no existing discipline at that time.

55. Moreover, 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). Black's Law Dictionary defines the term "fraud" by saying:

Fraud consists of some deceitful practice or willful device, resorted to within intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional.

www.thelawdictionary.org/fraud. Under this definition, the evidence does not support a finding that Ms. Walker acted in an intentional or willful manner with the intent to deceive anyone with respect to her license, especially where, as here, the action originated from DOE. Similarly, the term "fraudulent misrepresentation" means an "intentional disregard of false or possibly false information."

www.thelawdictionary.org/fruadulent-misrepresentation. Given these definitions, a violation of section 1012.795(1)(a) and rule 10.081(5)(g) and (h) has not been demonstrated by clear and convincing 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 dismissing the Second Amended Administrative Complaint in its entirety.

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



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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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/} Petitioner asserts that Ms. Sanders was not in the room for both days of science testing, in large part because for one day, she signed the security log "Valorie Sanders" and on the other day, she signed the log "V. Sanders." Ms. Sanders could not explain the difference. However, on the first log, Ms. Sanders was not the first person to sign the log. The first person signing in was Ms. Walker, who had used her first initial and last name. Ms. Sanders simply followed suit. On the second page, Ms. Sanders' was the first signature, and she used both her first and last name. The difference in form does not support an inference that Ms. Sanders was not actually present.

^{6/} Ms. Walker testified that she had trouble with her knees, making it painful for her to walk. Mr. Chandler also testified that he would go pick up Ms. Walker's test booklets because of her problems walking.

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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.