STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 17-0128PL

KEARY RYLAND, a/k/a KEARY WHITE,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard on April 21, 2017, by video teleconference at locations in Tallahassee and Pensacola, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Keary Page White, pro se
121 San Carlos Avenue
Gulf Breeze, Florida 32561

STATEMENT OF THE ISSUES

Whether Respondent violated sections 1012.795(1)(f), (1)(g), and (1)(j), Florida Statutes, and Florida Administrative Code Rule 6A-10.081(3)(a), as alleged in the Amended Administrative Complaint; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On September 26, 2016, the Commissioner of Education executed an Amended Administrative Complaint against Respondent which alleged that, on several occasions, Respondent was involved in alcohol-related incidents either involving or in the presence of students, which incidents warranted discipline.

On October 24, 2016, Respondent timely filed an election of rights by which she requested a formal hearing. The matter was referred to the Division of Administrative Hearings for an evidentiary hearing.

The hearing was scheduled for March 20, 2017. Upon motion filed by Petitioner, and for good cause shown, the hearing was continued until April 21, 2017.

On April 17, 2017, the parties filed their Joint Prehearing Stipulation, wherein the parties stipulated to paragraphs 1 and 3, and a portion of paragraph 5 of the Amended Administrative Complaint, each of which is adopted and incorporated herein.

The final hearing was convened on April 21, 2017, as scheduled. At the final hearing, Petitioner presented the testimony of Santa Rosa County Deputy Sheriff Christina Ann Reaves; Gulf Breeze Police Officer Jermel Kidd; Lacey Barrett; Jon Hartley; Joshua Hartley, a student at Gulf Breeze High School; Mary Klisart, a student at Gulf Breeze High School;

Amy Parker, a teacher at Gulf Breeze High School; Ashley Turner, a guidance counselor at Gulf Breeze High School; Jon Watts, an assistant principal at Gulf Breeze High School; Jason Weeks, who was, at all times relevant to this proceeding, the principal of Gulf Breeze High School; and Conni Carnley, who was, at all times relevant to this proceeding, the director of Employee Evaluations and Accountability for the Santa Rosa County School District. Petitioner's Exhibits 1 through 7, 9 through 12, 14 through 16, 19 through 21, 23, 24, 26, and 27 were received in evidence. Petitioner's Exhibit 26 is the transcript of the deposition of Jordan Brayton, who was, at all times relevant to this proceeding, a student at Gulf Breeze High School. Petitioner's Exhibit 27 is the transcript of the deposition of Amelia Smith, who was, at all times relevant to this proceeding, a student at Gulf Breeze High School. During the hearing, it was established that both depositions were properly noticed, though Respondent attended neither. Based on the sworn testimony of the deponents, it is found that both Mr. Brayton and Ms. Smith reside more than 100 miles from the Pensacola and Tallahassee hearing locations, and both are out of the state of Florida. Therefore, the use of their depositions is allowed pursuant to Florida Rule of Civil Procedure 1.330(a)(3), as adopted by Florida Administrative Code Rule 28-106.206. The deposition transcripts have been accepted in lieu of live

testimony, and have been given the evidentiary weight as if the deponents offered their testimony at the final hearing.

In her case in chief, Respondent testified on her own behalf. Respondent's Exhibits 1 and 2 were received in evidence.[1/]

A one-volume Transcript of the proceedings was filed on May 8, 2017.

Respondent submitted a Proposed [Recommended] Order (PRO) on April 28, 2017. To the extent that PRO contains information outside of the record of this proceeding, that information has not been considered. The PRO was otherwise considered. Petitioner timely filed a Proposed Recommended Order which has been considered in the preparation of this Recommended Order.

The relevant and material actions that form the basis for the Administrative Complaint occurred between January 2015, and May 26, 2015. This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Accordingly, all statutory and regulatory references are to their 2015 version, unless otherwise specified.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses and other evidence presented at the final hearing and on the

entire record of this proceeding, the following Findings of Fact are made:

1. The Florida Education Practices Commission is the state agency charged with the duty and responsibility to revoke or suspend, or take other appropriate action with regard to teaching certificates as provided in sections 1012.795 and 1012.796, Florida Statutes (2016). § 1012.79(7), Fla. Stat.

2. Petitioner, as Commissioner of Education, is charged with the duty to file and prosecute administrative complaints against individuals who hold Florida teaching certificates and who are alleged to have violated standards of teacher conduct. § 1012.796(6), Fla. Stat.

3. Respondent holds Florida Educator's Certificate 1128573, covering the areas of Elementary Education, English, English for Speakers of Other Languages (ESOL) and Middle Grades Integrated Curriculum, which is valid through June 30, 2021. During the 2013-2014 school year, until her voluntary resignation effective June 3, 2015, Respondent was employed as a language arts teacher at Gulf Breeze High School. Since that time, Respondent has been employed as a third-grade teacher at a private Christian academy in Pensacola, Florida.

Material Allegations

4. The material allegations upon which the alleged violations are predicated are, in their entirety, as follows:

> 3. On or about July 19, 2008, Respondent illegally operated a boat while under the influence of alcohol. As a result of conduct, she was arrested and charged with Boating Under the Influence. On or about February 18, 2009, Respondent was adjudicated guilty of Boating Under the Influence.
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> 4. In or around January 2015 through March 2015, Respondent provided a forum where underage students illegally consumed alcohol and/or consumed alcohol in the presence of students. This conduct includes, but is not limited to, instances:
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> (a) in or around February 2015, wherein Respondent provided alcohol to underage students; and
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> (b) on or about March 20, 2015, when Respondent drove to J.H.'s, a student's, home, while under the influence of alcohol, and thereafter, attempted to drive J.H. while so inebriated.
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> 5. On or about April 24, 2015, Respondent illegally operated a motor vehicle while under the influence of alcohol. On or about May 26, 2015, as a result of the aforementioned conduct, Respondent was arrested and charged with DUI-Second Conviction More Than Five (5) Years After Prior Conviction. On or about April 7, 2016, Respondent pled nolo contendere to an amended charge of Reckless Driving; adjudication was withheld.

Count 1

5. Count 1 alleged a violation based upon Respondent having "been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic

violation." The Count was based on the two incidents described in paragraphs 3 and 5 of the Amended Administrative Complaint as follows:

Boating Under the Influence -- 2008

6. On or about July 19, 2008, Respondent was maneuvering a boat onto a trailer at the Navarre Beach boat ramp. Her husband was driving their vehicle, and had backed their trailer into the water. As a result of actions at that time, Respondent was placed under arrest for Boating Under the Influence (BUI), a misdemeanor (her husband was arrested for Driving Under the Influence). Respondent entered a plea of no contest to the BUI offense and, on February 18, 2008, was adjudicated guilty. Subsequent to the final hearing, counsel for Petitioner researched the issue and discovered that the incident occurred prior to Respondent's initial certification as a teacher. As a result, Petitioner correctly concluded and stipulated "that no disciplinary action should be taken as a result of this conviction."

Driving Under the Influence -- 2015

7. On April 24, 2015, Respondent and a friend drove, in the friend's car, to Pensacola Beach for drinks. Respondent left her car in a Publix parking lot. Upon their return, Respondent correctly perceived that she was not fit to drive home. Her phone was dead, so she got into her car and started

it in order to charge the phone. She called her son and asked that he come pick her up. At some point after calling her son, Respondent called her soon-to-be ex-husband, from whom she was in the process of a bitter divorce, and engaged in a heated and animated discussion with him. A complaint was called in, and Officer Kidd was dispatched to the scene.

8. Upon his arrival, Officer Kidd observed Respondent in her car, with the engine running, "yelling at someone on the phone." He noticed a bottle of Crown Royal in the center console. Respondent refused to perform field sobriety tasks. Office Kidd's observations of Respondent while she was in the car and upon her exiting the car led him to believe that she was impaired. Respondent had been in the car, with the engine running, and was clearly in control of the vehicle regardless of her intent to drive. Although Respondent's son arrived on the scene to take her home, Respondent was arrested and transported to jail.[2/]

9. Respondent was charged with DUI. The charges were reduced, and she entered a nolo plea to reckless driving. The trial judge withheld adjudication.

Count 2

10. Count 2 alleged a violation based upon Respondent having "been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the

district school board." The Count was based on the incidents described in paragraph 4 of the Amended Administrative Complaint.

March 20, 2015 -- The Garage

11. On or about March 20, 2015, over spring break, Joshua Hartley was at Pensacola Beach with friends, including Respondent's son. He had his father's car. Apparently, Joshua's father, Jon Hartley had been trying for some time to reach Joshua and have him return the car. Joshua and his group of friends had plans to stay at the beach into the evening. Respondent's son suggested that Respondent, who he knew to be at the beach, could follow Joshua home, and then return him to his friends at the beach. Respondent was called, and she followed Joshua from the beach to his house, a drive of perhaps 15 minutes.

12. When Joshua and Respondent arrived at the house, Mr. Hartley, Ms. Barrett, and a third man were sitting and drinking in the open garage. Other than agreement that Respondent and Joshua showed up at the house at the same time, the description of the events by Joshua Hartley, Mr. Hartley, and Ms. Barrett were so divergent that the three might well have been in different places.

13. Ms. Barnett described the incident as occurring between 8:00 and 8:30 p.m., when it was dark. She testified

that Joshua and Respondent pulled up in separate vehicles, and that Mr. Hartley initially approved of Joshua returning to the beach with Respondent as a good deed, since Joshua purportedly indicated that "she's really drunk." She indicated that Joshua got into the passenger seat of Respondent's vehicle, whereupon Respondent put the vehicle in gear, and lurched forward, almost hitting Mr. Hartley's vehicle. At that time, Ms. Barrett indicated that Mr. Hartley ran down, startled by the driving error, told Joshua that he could not go with her, and offered to let Respondent stay with them until she sobered up. Ms. Barrett further described Respondent as essentially falling out of her bathing suit, barefoot, staggering, with slurred and vulgar speech, and highly intoxicated. After about an hour, and as Respondent was preparing to leave, Ms. Barnett testified that Joshua, who had remained with the adults in the garage since his arrival, went to his room. Ms. Barnett testified that Respondent then excused herself to use the restroom. Ms. Barnett testified that after 15 minutes or so, she went inside, and found Respondent "exiting Joshua's bedroom." Her description of the event is not accepted, and her veiled insinuation that something improper occurred -- for which no evidence exists -- did not go unnoticed.

14. Mr. Hartley described the incident as occurring between 6:00 and 7:00 p.m. He testified that Joshua and

Respondent arrived at the house in Respondent's car with Joshua as the passenger. He was "positive" that Joshua was not driving because he was 15 years old and did not have a driver's license. When they pulled into the driveway, Mr. Hartley testified that he walked down to the vehicle and that Joshua got out of the car. Mr. Hartley was unsure if Joshua stayed in the garage at all, but at most went to his room after a matter of minutes. Respondent joined the adults in the garage. Mr. Hartley indicated that Respondent "looked like she had been at the beach" and, though her speech was not slurred, he could tell she had been drinking because he could smell alcohol and by "the way she was speaking." His description of Respondent was far from the florid state of intoxication as described by Ms. Barnett. Mr. Hartley offered no description of Respondent's vehicle lurching forward, Respondent staggering, or of Joshua asserting that Respondent was really drunk. Finally, his concern that "the grown, intoxicated woman [as described by counsel in his question] was in your 15 year old son's bedroom" was based solely on Ms. Barnett's description of what she claimed to have seen.

15. Joshua testified that he drove to his house in his father's black Lincoln Aviator, and that Respondent followed in her white Ford Expedition. It was daylight, around 4:00 in the afternoon. Upon their arrival, Respondent pulled onto the grass

next to the driveway. Mr. Hartley was mad, possibly about Joshua having the car, would not let him return to the beach, and sent him to his room within a minute of his arrival. Joshua testified that Respondent was in typical beach attire. He had no complaint as to Respondent's actions either at the beach or at his house, and did not see her drinking. He did, however, indicate that "they" told him that "she might have been drunk or something." He testified that after Respondent spent some time with the adults in the garage, she then went inside to use the restroom. Joshua's door was open, and Respondent stood at the door and apologized if she had gotten him into trouble. She then left.

16. Given the dramatic divergence in the stories of the witnesses, the evidence is not clear and convincing that anything untoward occurred when Respondent agreed to give Joshua a ride to his house to return his father's car, and offered to return him to his friends at the beach. Though credible evidence suggests that Respondent had alcohol on her breath, there was no evidence that she was "under the influence of alcohol," that she was not able to lawfully drive a vehicle, or that Joshua suspected that she had been drinking. Ms. Barrett's more dramatic testimony that Respondent was drunk and

staggering, falling out of her clothes, with her speech slurred and profane, and the intimation that she was in Joshua's bedroom in that condition, is not accepted.

17. The evidence adduced at the hearing was not clear and convincing that, on March 20, 2017, Respondent engaged in personal conduct that seriously reduced her effectiveness as an employee of the district school board.

February 15, 2015 -- Mardi Gras

18. There was a good bit of evidence and testimony taken that Petitioner was seen drunk and staggering down the street at the 2015 Pensacola Mardi Gras, and was seen and assisted by students in that condition. However, the basis for the Amended Administrative Complaint was not that Respondent was publically intoxicated, but that she "provided alcohol to underage students."

19. Pensacola has a Mardi Gras event with a parade and floats. In 2015, "Fat Tuesday" was on February 17. The big 2015 Mardi Gras parade was on Sunday, February 15.

20. Respondent had a group of friends that were in a Mardi Gras Krewe and she had been helping them with the float. She apparently drank a good bit. By the time her friends were ready to join the parade, around noon to 1:00 p.m., Respondent determined that she was drunk enough that she should go to the

hotel room the group had rented. Unlike the evidence for the "Garage" incident, the evidence was convincing that Respondent was very intoxicated.

21. Ms. Smith testified that Respondent joined a group of alumni and students at a Subway parking lot where they had gathered to watch the parade. The evidence is persuasive that Respondent came upon the scene by happenstance, and that the parking lot was not her destination. While there, Respondent very likely consumed one or more "Jello-shots." However, the suggestion that Respondent was in any condition to have brought the Jello-shots with her to the parking lot is rejected. Rather, the evidence supports that the shots were there, and that she partook. It would not have been out of character for Respondent to have taken them and handed them around. Furthermore, the testimony that Respondent was distributing beers to students is, for the same reason, simply not plausible.

22. After a while, Ms. Smith, followed but not assisted by Mr. Brayton, assisted Respondent to her hotel. Respondent was, by this time, in a state colloquially known as "falling-down drunk." She could not walk unassisted, and at one point laid down on a picnic table. It was at this time that Respondent and Ms. Smith were photographed, a picture that received some circulation.

23. Ms. Smith finally delivered Respondent to her hotel, where Respondent's son saw them and relieved Ms. Smith of any further duties. Mr. Brayton's testimony that he thereafter entered Respondent's hotel room was not supported by Ms. Smith or others. His testimony regarding Respondent's son and his friends at the hotel was not clear and convincing.

January 2015 -- The House Party

24. Amelia Smith testified to an alleged incident in the fall of 2014 in which she was at Respondent's house and students were having a party in the garage at which students were drinking. There was no allegation in the Amended Administrative Complaint as to any event in the fall of 2014.

25. Ms. Klisart testified to an incident involving students drinking at Respondent's house around the Martin Luther King holiday, which in 2015 was on January 19. That corresponds to Petitioner's statement that she returned to her house after an evening celebrating her birthday,[3/] to find her son and his friends having a party in the garage at which students were drinking. The allegation in the Amended Administrative Complaint that Respondent provided a forum where underage students illegally consumed alcohol in January 2015 was adequately pled.

26. The evidence supports a finding that Respondent had been drinking when she arrived at her house. The evidence is not clear and convincing that she joined the students in the garage, but she clearly knew the party was ongoing, that it involved high school students, that the students were drinking, and that she made no effort to put a halt to the party.

Notoriety of the Incidents

27. The evidence is clear and convincing that the incidents described herein were widely known by students at Gulf Breeze High School, by other teachers, and by the school administration.

Counts 3 and 4

28. Count 3 alleges that "Respondent has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules." Count 4 alleges "that Respondent has failed to make reasonable effort to protect the student from conditions harmful to learning and/or to student's mental health and/or physical health and/or safety."

29. Rule 6A-10.081(3)(a) "does not require evidence that Respondent actually harmed [a student's] health or safety. Rather, it requires a showing that Respondent failed to make reasonable efforts to protect the student from such harm." Gerard Robinson, as Comm'r of Educ. v. William Randall Aydelott, Case No. 12-0621PL, RO at 76 (Fla. DOAH Aug. 29, 2012; EPC

Dec. 19, 2012). Under the circumstances described herein, Petitioner proved that Respondent, by allowing, if not condoning, student drinking at her home in January 2015, failed to make reasonable effort to protect students from harm.

CONCLUSIONS OF LAW

A. Jurisdiction

30. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

B. Standards

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

> (1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby

> denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:
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> * * *
>
> (f) Has been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation.
>
> (g) Upon investigation, has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board.
>
> * * *
>
> (j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

32. Rule 6A-10.081(3)(a) provides that:

> 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.

C. Burden and Standard of Proof

33. Petitioner bears the burden of proving the specific allegations of wrongdoing that support the charges alleged in

the Administrative Complaint by clear and convincing evidence before disciplinary action may be taken against the professional license of a teacher. Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); § 120.57(1)(j), Fla. Stat.; see also Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

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

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

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

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

36. The allegations set forth in the Administrative Complaint are those upon which this proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); see also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits the imposition of disciplinary sanctions based on matters not specifically alleged in the notice of charges. See Pilla v. Sch. Bd. of Dade

Cnty., 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); Texton v. Hancock, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978); see also Sternberg v. Dep't of Prof'l Reg., 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985) ("For the hearing officer and the Board to have then found Dr. Sternberg guilty of an offense with which he was not charged was to deny him due process."). Thus, the scope of this proceeding is properly restricted to those issues of fact and law as framed by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

D. Count 1 -- Section 1012.795(1)(f)

37. Count 1 of the Administrative Complaint charged Respondent with violating section 1012.795(1)(f) by having "been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation."

38. Count 1 is based on two incidents -- a 2008 adjudication of guilt on a misdemeanor charge of Boating Under the Influence, and a 2015 plea of nolo contendere to a misdemeanor charge of reckless driving, for which adjudication was withheld.

Boating Under the Influence -- 2008

39. The BUI offense was withdrawn, based on the determination that it could not form the basis for a

disciplinary action. See, e.g., Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Based on Petitioner's statement in the Proposed Recommended Order, Taylor is dispositive, and the pre-licensure 2008 BUI cannot form the basis for post-licensure discipline.

Reckless Driving -- 2015

40. Although Respondent was initially charged with driving under the influence (DUI), the charge was reduced to reckless driving. Adjudication was withheld.

41. The Commissioner has determined that reckless driving is more than a minor traffic violation. Dr. Eric J. Smith, as Comm'r of Educ. v. Tina Adams, Case No. 09-5392PL (Fla. DOAH Feb. 18, 2010; Fla. EPC June 24, 2010).

42. In order to sustain a violation based on a criminal incident, there must have been a conviction or finding of guilt, or a plea of guilty, none of which exist with regard to the 2015 incident.

43. The lesser plea of nolo contendere when adjudication is withheld is not sufficient to support a violation of section 1012.795(1)(f), a conclusion that finds support in the reporting requirements in section 1012.795(5), which requires that:

> Each district school superintendent and the governing authority of each university lab school, state-supported school, or private school shall report to the department the name of any person certified pursuant to

> this chapter or employed and qualified pursuant to s. 1012.39:
> (a) Who has been convicted of, or who has pled nolo contendere to, a misdemeanor, felony, or any other criminal charge, other than a minor traffic infraction. (Emphasis added).

44. That the Legislature required reporting of a plea of nolo contendere for a person holding a certificate, but did not make such a nolo contendere plea a criteria for discipline under a different subsection of the same statutory section is clear evidence that the Legislature did not intend for a plea of nolo contendere, without adjudication, to be a sufficient basis for discipline. "When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, [the court] will not imply it where it has been excluded." Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995); see also J.S. v. C.M., 135 So. 3d 312, 317 (Fla. 1st DCA 2012); Beshore v. Dep't of Fin. Servs., 928 So. 2d 411, 412 (Fla. 1st DCA 2006).

45. Respondent entered a nolo plea to the amended reckless driving charge, and the trial judge withheld adjudication. Therefore, since Respondent was not "convicted or found guilty of, or entered a plea of guilty" to the 2015 charge of reckless driving, the reckless driving incident is not a ground for discipline.

46. Petitioner has not proven a violation of section 1012.795(1)(f) as alleged in Count 1 by clear and convincing evidence.

E. Count 2 -- Section 1012.795(1)(g)

47. Count 2 of the Administrative Complaint charged Respondent with violating section 1012.795(1)(f) by exhibiting "personal conduct that seriously reduces [her] effectiveness as an employee of the district school board."

48. As to the January 2015 "house party," Petitioner proved that, by her not shutting down the party and by allowing high school students to use her house as a venue for a party at which alcohol was openly consumed, the respect that is owed by students to Respondent was compromised, which reduced her effectiveness as a teacher.

49. As to the February 15, 2015, "Mardi Gras incident," Petitioner proved that Respondent appeared in public in a grossly intoxicated state, joined students in publicly consuming alcoholic beverages, and relied on a student to assist her in walking to her hotel. Respondent was photographed in that state of intoxication, which became widely known. Thus, Respondent engaged in conduct that reduced her effectiveness as a teacher.

50. As to the March 20, 2015, "garage incident," the evidence was not clear and convincing that Respondent engaged in any activity that was illegal or inappropriate. Thus,

Petitioner has failed to prove that Respondent engaged in conduct that reduced her effectiveness as a teacher.

51. Petitioner proved a violation of section 1012.795(1)(g) as alleged in Count 2 as to the house party and Mardi Gras incidents by clear and convincing evidence.

F. Counts 3 and 4 -- Section 1012.795(1)(j) and Rule 6A-10.081(3)(a)

52. Count 3 of the Administrative Complaint charged Respondent with violating section 1012.795(1)(j) by having violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education Rules. Thus, Count 3 does not constitute an independent violation, but rather is dependent upon a corresponding violation of the rules constituting the Principles of Professional Conduct.

53. Count 4 of the Administrative Complaint charged Respondent with violating rule 6A-10.081(3)(a) by failing to make reasonable effort to protect her students from conditions harmful to learning, to their mental or physical health, or to their safety.

54. The evidence in this case demonstrates that Respondent, either expressly or tacitly, provided students with a place to drink and party as a result of the January 2015 house party incident. As such, Respondent failed to make reasonable

effort to protect students from conditions that would be reasonably expected to expose them to risk to their health and safety.

55. Petitioner proved a violation of section 1012.795(1)(j) and rule 6A-10.081(3)(a) as alleged in Counts 3 and 4 as to the house party by clear and convincing evidence.

G. Penalty

56. Florida Administrative Code Rule 6B-11.007(2) establishes the range of penalties for violations of various statutory and regulatory provisions as follows:

> (2) The following disciplinary guidelines shall apply to violations of the below listed statutory and rule violations and to the described actions which may be basis for determining violations of particular statutory or rule provisions. Each of the following disciplinary guidelines shall be interpreted to include "probation," "Recovery Network Program," "letter of reprimand," "restrict scope of practice," "fine," and "administrative fees and/or costs" with applicable terms thereof as additional penalty provisions. The terms "suspension" and "revocation" shall mean any length of suspension or revocation, including permanent revocation, permitted by statute, and shall include a comparable period of denial of an application for an educator's certificate.

57. The recommended penalty for a violation of section 1012.795(1)(g) for engaging in personal conduct which seriously

reduces effectiveness as a district school board employee is "Probation - Revocation." Fla. Admin. Code Rule 6B-11.007(2)(f).

58. Section 1012.795(1)(j) is not one of the specific statutory provisions listed in the penalty guidelines. Rather, it is incorporated in rule 6B-11.007(2)(j), as among the "[o]ther violations of Section 1012.795, F.S.," with a guideline penalty of "Probation – Revocation or such penalty as is required by statute."

59. Rule 6B-11.007(2)(i)16. lists a guideline penalty of "Probation – Revocation" for "[f]ailure to protect or supervise students" in violation of rule 6A-10.081(3)(a).[4/]

60. Rule 6B-11.007(3) establishes aggravating and mitigating factors to be applied to penalties calculated under the guidelines. The facts of this case demonstrate that there are no aggravating or listed mitigating factors to warrant deviation from the recommended penalty ranges.

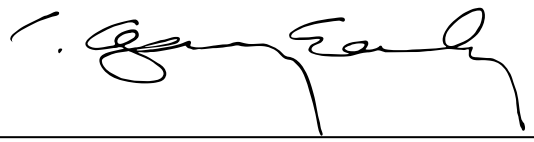
61. As to the recommended penalty, and recognizing the authority of the Education Practices Commission to establish the appropriate penalty for a proven offense, the undersigned notes the following: Several of the allegations in the Amended Administrative Complaint were not proven. Those that were, i.e., the house party and the Mardi Gras incident, occurred during a period of time in which Respondent was in the throes of

a difficult and bitter divorce. As recognized by Ms. Smith, Respondent was "lonely and sad." While providing no excuse, it places her actions, exclusively fueled by alcohol, in some context. Respondent has, since the last alleged incident on April 24, 2015, completed a rehabilitation program. She has, for the past two years, taught without incident at a private Christian elementary school in Pensacola. It is this type of person for whom the Department of Education's Recovery Network Program would seem to have been designed. The recommendation made herein is predicated on those factors.

RECOMMENDATION

Upon consideration of the Findings of Fact and Conclusions of Law reached herein, it is RECOMMENDED that the Education Practices Commission enter a final order finding that Respondent violated sections 1012.795(1)(g) and (1)(j), and rule 6A-10.081(3)(a). It is further recommended that Respondent be placed on probation for a period of five years, and be required to obtain treatment through the Recovery Network Program at a frequency and for a duration deemed appropriate by the Education Practices Commission.

DONE AND ENTERED this 7th day of June, 2017, in Tallahassee, Leon County, Florida.



E. GARY EARLY
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2017.

ENDNOTES

[1/] Petitioner objected to the introduction of Respondent's Exhibit 2 on the basis that it was not identified in Respondent's prefiled exhibit list, and due to Respondent's failure to properly authenticate the document. Respondent's Exhibit 2 was originally prefiled with the undersigned as Petitioner's Exhibit 8, though it was not introduced during Petitioner's case in chief. Thus, the undersigned found that there was no surprise or prejudice to Petitioner from Respondent's use of the exhibit. As to the issue of authenticity, counsel for Petitioner admitted that he would not have provided a non-authentic document with Petitioner's exhibits. Furthermore, the admission and consideration of the evidence is within the discretion of the undersigned pursuant to the evidentiary standard set forth in section 120.569(2)(g), Florida Statutes. See Fla. Indus. Power Users Gp. v. Graham, 209 So. 3d 1142 (Fla. 2017)("We find that the Commission has discretion on whether to apply the Florida Evidence Code . . . to its proceedings.").

[2/] The police report noted that Respondent's car was over the parking space line and was in contact with another vehicle. Though it is not unreasonable to believe that Respondent put her

car into gear at some point, there was insufficient non-hearsay evidence to determine that she hit the other car and not vice versa.

[3/] According to the police reports in evidence, Respondent's birthday is January 12. The "matters asserted" in the police report being unrelated to the date of Respondent's birthday, the report is not hearsay as to that information.

[4/] Rule 6A-10.081 was transferred from Florida Administrative Code Rule 6B-1.006 on January 11, 2013. The penalty guidelines continue to cite to rule 6B-1.006 in setting penalty ranges. Rule 6A-10.081(3)(a) is substantively identical to the last iteration of rule 6B-1.006(3)(a). Since the facts alleged and the text of the rule allegedly violated were clear for Count 4, and since there is no evidence that Respondent was misled or harmed by the citation in the penalty guidelines to a rule that is no longer in effect as numbered, the penalty guideline in rule 6B-11.007(2)(i)16. shall be applied to the violation of rule 6A-10.081(3)(a).

COPIES FURNISHED:

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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.