STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 17-6388PL

ELIJAH RICHARDSON,

Respondent.
_____/

RECOMMENDED ORDER

On February 16, 2018, a final hearing was held by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
300 Southeast 13th Street
Fort Lauderdale, Florida 33316

For Respondent: Emily Moore, Esquire
Florida Education Association
213 South Adams Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated section 1012.795(1)(j), Florida Statutes, and administrative rules or section 1012.795(1)(a),[1/] as alleged in the

Administrative Complaint; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On or about April 10, 2015, Pam Stewart, as Commissioner of the Department of Education (Petitioner or Commissioner), filed an Administrative Complaint against Mr. Elijah Mark Richardson (Respondent or Mr. Richardson), alleging violations of section 1012.795(1)(a) and (j) and administrative rules. Respondent filed an Election of Rights form, disputing allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On November 21, 2017, the case was referred to the Division of Administrative Hearings (DOAH), where it was scheduled for final hearing on January 24, 2018.

After continuance upon joint motion of the parties, the final hearing was held as rescheduled on February 16, 2018. Through Joint Prehearing Stipulation, the parties stipulated to certain facts, which were accepted and, where relevant, are included among the findings of fact below.

Petitioner offered the testimony of five witnesses: Ms. Kristen Rodriguez, a media specialist at West Hollywood Elementary School (WHE) in Broward County during the 2012-2013 school year; Student A.C., in the fourth grade at WHE during the 2012-2013 school year; Student R.W., a fifth grader that school

year; Student J.G., a fourth grader then; and Ms. Marian Lambeth, chief of the Office of Professional Practices of the Department of Education. Petitioner offered 11 exhibits, all which were admitted, with the caveat that several were hearsay and so could only be used to supplement or explain other competent evidence and were not sufficient in themselves to support findings of fact. Petitioner's Exhibit P-10 was a deposition of Mr. Richardson, admitted under the party admission exception to the hearsay rule.

Respondent testified on his own behalf and presented the testimony of three other witnesses, all teachers at WHE during the 2012-2013 school year: Ms. Kalima Carson; Ms. Deborah Khadaran; and Ms. Diane Velasco-Ortiz. Respondent offered five exhibits, all of which were admitted, and requested official recognition of two items. Recognition of the Florida District Court case was granted. Recognition of an article that had been published on an online professional education journal, The Hechinger Report, offering reasons why African-American teachers become frustrated with their profession, was denied as not relevant.

The one-volume Transcript of the proceeding was filed with DOAH on March 9, 2018. After an Order granting an extension of time until April 9, 2018, both parties timely submitted proposed recommended orders, which were considered.

FINDINGS OF FACT

1. The Commissioner is responsible for investigating and prosecuting allegations of misconduct against individuals holding educator's certificates.

2. Mr. Richardson holds Florida Educator's Certificate 696450, covering the areas of Elementary Education and English for Speakers of Other Languages (ESOL), which is valid through June 30, 2019.

3. At all pertinent times, Mr. Richardson was employed as a fourth and fifth-grade reading teacher at WHE.

4. As Ms. Kristen Rodriguez later testified, during the 2012-2013 school year, she encountered several students who asked her to let them remain with her in the media center at WHE rather than return to their scheduled class with Mr. Richardson. Based upon their accounts of Mr. Richardson's behavior in the classroom, she took the students to the school office and asked them to talk to the principal. The Broward County School District (District) subsequently conducted an investigation.

5. Student A.C. credibly testified at hearing that during the 2012-2013 school year, when she was a fourth-grade student in his class, Mr. Richardson would sometimes scream at students who were not behaving, but did not scream at the well-behaved

students. She testified that on a loudness scale of 1 to 10, he was a "7," while she rated other teachers at "5."

6. Student A.C.'s testimony was supplemented and explained by the written statements of other students in that class: Student G.R. wrote that Mr. Richardson screamed at him close to his face; Student H.T. wrote that Mr. Richardson would scream if he was mad; Student J.G. wrote that when Mr. Richardson yelled at some students, he put his face within inches of the students' faces; Student T.W. wrote that he would yell in students' faces; and Student M.D. wrote that Mr. Richardson would yell in students' faces from inches away.

7. The evidence was clear and convincing that when students were misbehaving, Mr. Richardson would sometimes yell or scream at them, placing his face close to theirs.

8. Student J.G. credibly testified that if a student "wouldn't do like the work or behaved bad, he [Mr. Richardson] would grab them by their shoulders and yell at them and shake them." Student J.G. went on to clarify, "I mean not that bad, but like to get ahold."

9. Student J.G.'s testimony was supplemented and explained by the written statements of other students: Student G.R. reported that Mr. Richardson "grabbed this kid and shook him"; and Student A.C. wrote that Mr. Richardson would shake students who were being bad, writing that "[w]hen he shaked

[sic] kids he would shake them by the shoulders, on a scale from 0 to 5 he would shake kids like about a 2."

10. The Department of Education (DOE) was notified of the allegations against Mr. Richardson. On or about April 5, 2013, Mr. Richardson received notice from Chief Marian Lambeth that the Office of Professional Practices of DOE had opened a case for purposes of investigating Mr. Richardson's alleged inappropriate conduct; and, if founded, the allegations could lead to disciplinary action against Mr. Richardson's Florida Educator's Certificate.

11. On April 18, 2013, Mr. Richardson's attorney sent written notice to Chief Lambeth informing the DOE of her representation of Mr. Richardson in their investigation and requesting a copy of their investigative report upon its completion. Mr. Richardson was copied on the correspondence.

12. As documented by letter later sent to Mr. Richardson, the Professional Standards Committee of the Broward County Public Schools met on May 8, 2013, and determined that there was no probable cause to support a charge of battery. However, the letter stated, "[l]et this correspondence serve as reprimand that any future violation of the Code of Ethics and Principles of Professional Conduct of the Education Profession will result in a recommendation for further disciplinary action up to and including termination."[2/]

13. Mr. Richardson successfully filed a grievance regarding the letter of reprimand imposed by the District. By letter dated March 26, 2014, Mr. Lerenzo Calhoun, employee and labor relations specialist of the District, advised the Broward Teachers Union, "[I]t has been determined that the written reprimand issued to the grievant be rescinded."

14. On April 16, 2014, Mr. Richardson completed a "GC-10R Renewal Application Form rev 06/10 Legal Disclosure 1 - District Version" to initiate renewal of his Florida Educator Certificate, which was due to expire on June 30, 2014. Instructions on the bottom of the form direct the applicant to provide additional detailed information on a Legal Disclosure Supplement if any of the preceding 21 questions on the page are answered affirmatively. Mr. Richardson, having correctly answered "no" to 20 of these questions that deal with sealed records, criminal records, and license sanctions, but "yes" to the single question that asks if there is a "current investigative action" pending, turned to the supplementary page, "GC10R Application Form rev 06/10 Legal Disclosure 2 - District Version."

15. Other than the applicant's name, however, the supplementary form solicited information about only three topics, each in its own section: "Sealed or Expunged Records"; "Criminal Offense Records"; and "Professional License or

Certificate Sanctions." Mr. Richardson had no sealed or expunged records and so could not provide any supplementary information in response to the questions in that section. He had no criminal offense records and thus similarly could not provide responses to the questions in that section. He had no professional license or certificate sanctions and so could not answer those questions either. There were no questions pertaining to ongoing investigations. He logically left the supplementary page blank, and submitted the renewal application to the District's office, which was authorized to reissue the certificate. On the application, he made full disclosure of the pending investigation, complete with a handwritten notation indicating that there was no decision as of yet and including the investigation case number for easy reference (he volunteered this, for remarkably there is no question or blank space to include this information anywhere on the forms).

16. The renewal application was reviewed on behalf of the District by Ms. Sheila Gipson, a certification specialist for the District. Ms. Gipson, dutifully implementing the policy reflected in the form's directions to complete the supplemental disclosure, refused to process the renewal application, deeming it incomplete. On April 23, 2014, Ms. Gipson sent an e-mail to Mr. Richardson illogically repeating the instruction on the form that if any question on page 4 was answered in the affirmative,

that page 5 (the supplement) must be completed, and directed him to do so.

17. If Mr. Richardson—eager to have his license renewed—was baffled by Ms. Gipson's e-mail and nonplussed at the impossible guidance it contained, his bewilderment might be excused. As previously noted, he had already provided complete details about the ongoing investigation to the District and could provide absolutely no information responsive to any of the supplemental questions.

18. In any event, it is clear that strict enforcement of this "catch-22"[3/] has the practical effect of preventing anyone under investigation but awaiting determination from completing an application at all. It is not clear if this structure results from accident or disingenuous design.

19. Mr. Richardson testified that he telephoned Ms. Gipson and explained his dilemma. According to Mr. Richardson, Ms. Gipson concluded that he should not have said "yes" to the investigation question if no sanctions had been imposed, again explaining to him that any "yes" response meant that the application could not be processed without sanctions information. He testified that she directed him to change his answer on page 4 and resubmit the application so it could be considered complete. Mr. Richardson's testimony as to what Ms. Gipson told him was unrefuted. Ms. Gipson's instruction to

Mr. Richardson did not make sense, any more than the form itself did.

20. Mr. Richardson did as Ms. Gipson had instructed and filled out a second application form, which he dated April 26, 2014, indicating no "current investigative action pending" as he was told to do. He executed the Affidavit, which in bold print states: "Giving false information in order to obtain or renew a Florida Educator's Certificate is a criminal offense under Florida law. Anyone giving false information on this affidavit is subject to criminal prosecution, as well as disciplinary action by the Education Practices Commission."[4/]

21. On or about April 23, 2014, notice had been sent to both Mr. Richardson and his attorney that the DOE's preliminary investigation was completed and available for review. An Informal Conference was scheduled for May 22, 2014. Both Mr. Richardson and his attorney acknowledged receipt of the notice on April 28, 2014.

22. After some delays, reflected in e-mail communications, Mr. Richardson hand-delivered the second application to Ms. Gipson, who received it on May 2, 2014.

23. The Commissioner has failed to show that Mr. Richardson gave false information with the intent to deceive or defraud the District or DOE. Mr. Richardson's alternative explanation of his intent is plausible given the irrational

structure of the application form and the fact that he had already fully disclosed the existence of the investigation to the District in the earlier application dated April 16, 2014. His insistence that his only intent was to break the bureaucratic logjam and allow his application to be considered complete, as the District's certification specialist, Ms. Gipson, advised him to do, is plausible.

24. Mr. Richardson's testimony that Ms. Gipson advised him to fill out the second application as he did was not a new assertion: he had said so nearly two years prior to the hearing in his deposition. The Commissioner did not list Ms. Gipson as a witness, and she did not testify. Mr. Richardson's testimony regarding the April 26, 2014, application was unrefuted. The Commissioner failed to prove fraudulent intent.

25. There was no competent evidence presented at hearing that Mr. Richardson ever used profanity in the classroom.

26. Although there was considerable testimony at hearing about a clinic pass associated with an injury to Student N.M. on an occasion when Mr. Richardson's class was engaged in "indoor P.E.," it was not shown that Mr. Richardson in any way caused that injury, and he was not charged with doing so in the Administrative Complaint. There was no competent evidence that Mr. Richardson or any other person ever threw a book at Student N.M., as was charged.

27. Mr. Richardson has been employed by the District for almost 21 years. He has never before had any discipline imposed against his license. He has taught successfully at Challenger Elementary School for almost five years after the 2012-2013 school year, without incident.

28. Ms. Kalima Carson testified that she co-taught with Mr. Richardson. As she testified, he was a good classroom manager. Ms. Carson also credibly testified that he was a good teacher and that his students showed tremendous academic gains. As Ms. Diane Velasco-Ortiz credibly testified, Mr. Richardson was good at motivating his students, and he did well with students who faced challenges at home.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the parties and subject matter of this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).

30. Petitioner is responsible for filing complaints and prosecuting allegations of misconduct against instructional personnel. § 1012.796(6), Fla. Stat.

31. Petitioner seeks to take action against Respondent's educator certificate as provided in section 1012.795. A proceeding to impose discipline against a professional license is penal in nature, and Petitioner bears the burden 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).

32. The Florida Supreme Court has stated that the clear and convincing standard requires that:

> [T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

33. Before considering the individual counts against Respondent, preliminary issues related to the wording of the Administrative Complaint are addressed. First, the Administrative Complaint alleged that Respondent grabbed and shook "fifth grade" students, disciplined his "fifth grade" students by yelling in their faces, and threw a book at a "fifth grade" student, N.M., striking her. However, evidence at hearing indicated that Student N.M. was actually in Respondent's fourth-grade class during the 2012-2013 school year, and the evidence introduced to show these other alleged facts similarly involved fourth graders.[5/] While Student R.W.—who testified

that Respondent was yelling while perched atop a desk in her class—was a fifth grader during the 2012-2013 school year, it was not clear how her testimony related to any of the allegations of the Administrative Complaint.

34. However, Petitioner's failure to show that the students were fifth graders does not mean that none of these charges in the Administrative Complaint were clearly proved. While including the school grade of the students might help identify the students involved, it was not an essential element of any of the charged offenses. Even in criminal cases, failure to prove specific facts alleged in a charging document is permitted so long as those facts are not essential elements. Mitchell v. State, 888 So. 2d 665, 668 (Fla. 1st DCA 2004)(conviction affirmed because language identifying a specific means by which a victim was put in fear was not an essential element, so that proof of fear by another means was sufficient); Ingleton v. State, 700 So. 2d 735 (Fla. 5th DCA 1997)(conviction was affirmed although the language charged that defendant had been murdered "by strangling" when evidence showed that murder was actually committed through a cocaine overdose, because the method by which the murder was committed was surplusage); In the Interest of W.M., 491 So. 2d 1263 (Fla. 4th DCA 1986)(conviction for aggravated assault was affirmed on proof that the defendant used a BB gun, despite the charge of

using a handgun, because the type of weapon used was not an essential element). An administrative hearing does not require more. The grade level of the students alleged in the Administrative Complaint was unnecessary surplusage. It was not necessary for Petitioner to prove the students' grade level.

35. Respondent notes that contrary to the wording of the allegations in the Administrative Complaint, it is uncontroverted that: (1) Respondent did not submit his renewal application to DOE, but instead to the District (which was purportedly authorized to renew applications on behalf of the State of Florida); and (2) the renewal application at issue was in fact submitted on April 26, 2014, not April 26, 2013.

36. Again, however, these errors in the Administrative Complaint reflect careless preparation and drafting rather than legitimate failures of proof at hearing. It is well-settled that an administrative complaint need not be cast with that degree of "technical nicety" required in a criminal prosecution. Libby Investigations v. Dep't of State, 685 So. 2d 69 (Fla. 1st DCA 996). An administrative complaint need only set out the acts complained of with sufficient specificity to allow a respondent a fair chance to prepare a defense. Davis v. Dep't of Prof'l Reg., 457 So. 2d 1074 (Fla. 1st DCA 1984). It was not suggested at hearing, and it is not found, that Respondent was in any way surprised by Petitioner's evidence.

The parties agreed on both the fact that the renewal application had been filed with the District and the actual date on which it had been filed in their Joint Prehearing Stipulation; there was no objection at hearing to the evidence offered on either of these points; and Respondent proceeded with a full understanding of the nature and substance of the charges against him. Respondent was not prejudiced in his defense by these discrepancies in the Administrative Complaint.

Count 1

37. Petitioner alleges in Count 1 that Respondent is in violation of section 1012.795(1)(a), which in April 2014 provided that the Education Practices Commission could impose penalties if a person obtained, or attempted to obtain, an educator certificate by fraudulent means.

38. The Administrative Complaint alleges that Petitioner's April 26, 2014, application was fraudulent because he gave a false answer to the question, "Do you have any current investigative action pending in this state or in any other state against a professional license or certificate or against an application for a professional license or certificate?" While Petitioner proved that a false answer was given, this does not end the analysis.

39. "Fraudulent" is not defined by the statute or by rule. The parties did not cite, and research did not reveal, any cases interpreting the term in this context. The dictionary definition of "fraudulent" is "done to trick someone for the purpose of getting something valuable." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/fraudulent.

40. A fraudulent act requires deliberative intent. As stated in Ocean Bank of Miami v. Inv-Uni Investment Corporation, 599 So. 2d 694, 697 (Fla. 3d DCA 1992):

> To prove fraud a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation which was designed to cause detrimental reliance.

41. It is not at all clear that Respondent's misrepresentation was designed to trick the District into giving him his license by concealing the ongoing investigation. Respondent's unrefuted testimony was that he was only complying with instructions from Ms. Gipson, the certification specialist employed by the District, in order to have the application processed. This version of events is plausible given that it is clear from the evidence that he had already fully disclosed the fact of the investigation to the District ten days earlier in the application dated April 16, 2013. There was also no evidence to suggest that Respondent had any reason to believe

that simply being under investigation was grounds for denial of a renewal application.

42. Respondent's contention that it was Ms. Gipson who told him to fill out the second application as he did was not a new assertion at hearing. He had given this version of events in his deposition taken nearly two years before the hearing. Petitioner did not list Ms. Gipson as a witness or call her to testify at hearing.

43. Contrary to Petitioner's assertion in her Proposed Recommended Order, Respondent's testimony as to what Ms. Gipson told him was not hearsay. It was not offered to prove the truth of the content of Ms. Gipson's admittedly unsound communications to Respondent. Rather, it was offered only to show that the statement was made, as evidence of Respondent's intent in subsequently making a false statement on his second application, a critical issue in this case. See, e.g., King v. State, 684 So. 2d 1388, 1389-90 (Fla. 1st DCA 1996)(an out-of-court statement offered for a purpose other than proving the truth of its contents is not hearsay and is admissible when otherwise relevant to a material issue in the case). Even if it had been hearsay, it would have come under the exception for party admissions under section 90.803(18)(d), Florida Statutes.

44. Petitioner did not show that Respondent had any intent other than to overcome the bureaucratic impasse preventing the

legitimate processing of his application. Petitioner failed to prove by clear and convincing evidence that Respondent attempted to obtain a renewed educator certificate by fraudulent means, in violation of section 1012.795(1)(a).

Count 2

45. Count 2 alleges that Respondent is in violation of section 1012.795(1)(j), in that he has violated the Principles of Professional Conduct for the Education Profession. Counts 3 through 6 go on to allege specific violations of these principles. Count 2 does not constitute a distinct disciplinary violation.

Count 3

46. Count 3 alleges that Respondent violated Florida Administrative Code Rule 6B-1.006(3)(a),[6/] which from August to December of 2012 provided that an educator:

> 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.

47. Petitioner showed that Respondent yelled at misbehaving students, with his face in close proximity to theirs, and that he grabbed them by the shoulders and shook them. In these actions, Respondent failed to make reasonable effort to protect his students from conditions harmful to their mental health.

48. Petitioner proved by clear and convincing evidence that Respondent violated rule 6B-1.006(3)(a).

Count 4

49. Count 4 alleges that Respondent violated rule 6B-1.006(3)(e), which from August to December 2012 provided that an educator shall not intentionally expose a student to unnecessary embarrassment or disparagement.

50. While Respondent has authority for the control and discipline of students, his specific actions were somewhat excessive and intentionally exposed students to unnecessary embarrassment and disparagement.

51. Petitioner proved by clear and convincing evidence that Respondent violated rule 6B-1.006(3)(e).

Count 5

52. Petitioner alleges in Count 5 that Respondent violated Florida Administrative Code Rule 6A-10.081(5)(a), which in April 2014 provided that an individual shall maintain honesty in all professional dealings.

53. Dishonesty is defined as: (1) "lack of honesty or integrity: disposition to defraud or deceive"; (2) "a dishonest act: fraud." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/dishonesty.

54. It is quite clear that filing for renewal is within the scope of an applicant's professional dealings and that under

most circumstances, making a false statement on the application constitutes dishonesty.

55. Here, however, while it was stipulated that Respondent falsely answered "No" on his April 26, 2014, application, viewing this second application in isolation, out of the context of its submission, would be simplistic and unfair. The first application had already provided full disclosure of the investigation. Respondent's action, and the "complicity" of Ms. Gipson, was not to deceive the District to obtain some undeserved benefit,[7/] but only to obtain the review of the application to which Respondent was entitled. Under the unique circumstances here, it cannot be said that Respondent's representations, when considered as a whole, were dishonest or intended to deceive.

56. Petitioner failed to prove by clear and convincing evidence that Respondent violated rule 6A-10.081(5)(a).

Count 6

57. Count 6 alleges that Respondent violated rule 6A-10.081(5)(h), which on April 26, 2014, provided that an individual:

> Shall not submit fraudulent information on any document in connection with professional activities.

58. As discussed above, there was no proof that Respondent's submission was fraudulent. It was never alleged or

shown that the District could decline to process a renewal application solely because an investigation had been initiated or that Respondent submitted the information to cause any detrimental reliance by the District. The clear evidence instead showed that the District's representative was fully informed that an investigation was pending. Respondent's testimony that Ms. Gipson instructed him to fill out the application as he did in an attempt to further the appropriate processing of the application, given that no sanctions had been imposed, was unrefuted.

59. Petitioner failed to prove by clear and convincing evidence that Respondent violated rule 6A-10.081(5)(h).

Penalty

60. The Education Practices Commission adopted disciplinary guidelines for the imposition of penalties authorized by section 1012.795 in Florida Administrative Code Rule 6B-11.007.

61. Rule 6B-11.007(2)(i)16. provided that probation to revocation was the appropriate range of penalty for "[f]ailure to protect or supervise students in violation of paragraph 6B-1.006(3)(a), F.A.C."

62. Rule 6B-11.007(2)(i)22. provided that probation to revocation was the appropriate range of penalty for other violations of the Principles of Professional Conduct.

63. Rule 6B-11.007(2) provided that in addition to penalties listed in the disciplinary guidelines, each should be interpreted to include "probation," "Recovery Network Program," "letter of reprimand," "restrict scope of practice," "fine," and "administrative fees and/or costs" as additional penalty provisions.

64. Rule 6B-11.007(3) provided:

> (3) Based upon consideration of aggravating and mitigating factors present in an individual case, the Commission may deviate from the penalties recommended in subsection (2). The Commission may consider the following as aggravating or mitigating factors:
>
> (a) The severity of the offense;
>
> (b) The danger to the public;
>
> (c) The number of repetitions of offenses;
>
> (d) The length of time since the violation;
>
> (e) The number of times the educator has been previously disciplined by the Commission;
>
> (f) The length of time the educator has practiced and the contribution as an educator;
>
> (g) The actual damage, physical or otherwise, caused by the violation;
>
> (h) The deterrent effect of the penalty imposed;
>
> (i) The effect of the penalty upon the educator's livelihood;

(j) Any effort of rehabilitation by the educator;

(k) The actual knowledge of the educator pertaining to the violation;

(l) Employment status;

(m) Attempts by the educator to correct or stop the violation or refusal by the educator to correct or stop the violation;

(n) Related violations against the educator in another state including findings of guilt or innocence, penalties imposed and penalties served;

(o) Actual negligence of the educator pertaining to any violation;

(p) Penalties imposed for related offenses under subsection (2) above;

(q) Pecuniary benefit or self-gain inuring to the educator;

(r) Degree of physical and mental harm to a student or a child;

(s) Present status of physical and/or mental condition contributing to the violation including recovery from addiction;

(t) Any other relevant mitigating or aggravating factors under the circumstances.

65. Without minimizing any mental harm to a student, there are significant factors in this case that dictate that the penalty be set at the low end of the range established by the guidelines. The events took place four and one-half years ago. Respondent engaged in inappropriate, but nevertheless relatively moderate behaviors in order to discipline misbehaving students

and had an excellent record of improving the performance of even the most challenged students. There is no evidence that Respondent caused, or intended to cause, physical harm to any student. Further, the District returned Respondent to the classroom, and his subsequent performance at Challenger Elementary School has been effective. There is no indication of other discipline over a period of nearly 21 years, either before or after these events. There is no evidence of a long pattern of discipline that might otherwise justify sanctions uniquely available to the Education Practices Commission in fulfilling its statewide responsibilities under section 1012.795, such as suspension or revocation of Respondent's teaching certificate.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Education Practices Commission enter a final order finding Mr. Elijah Mark Richardson in violation of section 1012.795(1)(j), Florida Statutes, through his violation of Florida Administrative Code Rules 6B-1.006(3)(a) and 6B-1.006(3)(e); issuing him a letter of reprimand; and placing him on probation for a period of one employment year.

DONE AND ENTERED this 16th day of April, 2018, in Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of April, 2018.

ENDNOTES

[1/] All references to Florida Statutes or administrative rules are to the versions in effect during the 2012-2013 school year, except as otherwise indicated.

[2/] Though not directly implicated in this case, it should be noted that the wording of the letter, signed by the Chief of Police, is somewhat confusing, seeming to indicate at one point that it represents the Professional Standards Committee's recommendation to the Superintendent and at another point that it is itself a letter of reprimand. It is not clear from the record whether procedures set forth in Broward County School Board Policy 4.9 were followed, or other procedures.

[3/] A catch-22 is a paradoxical situation from which an individual cannot escape because of contradictory rules. The term was coined by Joseph Heller in his 1961 novel of the same name.

[4/] This warning on the form is an oversimplification of the law, as explored further in the Conclusions of Law.

[5/] Some confusion as to the students' grade in school may stem from the fact that several written statements taken by the DOE

investigator were dated in November 2013 and indicate that the students are in the fifth grade. However, the statements themselves show that the events they were recounting had taken place during the preceding academic year, when they were in the fourth grade.

[6/] Petitioner actually cited Florida Administrative Code Rule 6A-10.081(3)(a), yet again failing to correctly identify the rule number in effect at the time of alleged misconduct. The rule was not renumbered until January 11, 2013; the testimony referred to events which allegedly took place prior to December 17, 2012. However, the text of the rule was set out in the Administrative Complaint, and Respondent was not prejudiced by this error.

[7/] Cf., Gootee v. Sch. Bd., 201 So. 3d 115, 118 (Fla. 3d DCA 2015)(submission of falsified time records to obtain unearned pay was a dishonest professional act notwithstanding that supervisor approved and condoned it).

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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.