STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLAY COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 18-2308

CARRIE WILLIAMS,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 18, 2018, in Green Cove Springs, Florida, before Lawrence P. Stevenson, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eric J. Holshouser, Esquire
Michael Jeffrey Lufkin, Esquire
Buchanan Ingersoll & Rooney, PC
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Jacksonville, Florida 32202

For Respondent: Mark S. Levine, Esquire
Levine & Stivers, LLC
245 East Virginia Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner, Clay County School Board ("School Board"), may terminate Respondent's employment as an non-instructional employee based upon the conduct alleged in the

document titled "Charges and Recommended Action" (the "Charge") issued by the Superintendent of Schools, Addison Davis, to Respondent dated April 17, 2018.

## PRELIMINARY STATEMENT

On or about April 17, 2018, Respondent, Carrie Williams, received a copy of the Charge, which recommended the termination of her employment for just cause, based on a positive result from a random selection drug test to which Ms. Williams submitted on November 28, 2017. The Charge alleged that Ms. Williams failed to comply with the following:

> School Board Policy 6GX-10-2.17, Section A.3.n, "Non-compliance with the regulations and policies of the School Board."
>
> School Board Policy 6GX-10-2.17, Section A.3.k, "Misconduct in office." [and]
>
> School Board Policy 6GX-10-2.17, Section B, "Alcohol and Substance Abuse."

A separate letter, also dated April 17, 2018, informed Ms. Williams of her right to request a formal hearing to contest the charges. On April 30, 2018, Ms. Williams, through counsel, filed a Petition for Formal Hearing, denying the factual allegations, raising procedural objections to the manner in which the drug test was conducted, and challenging the proposed disciplinary action.

On May 3, 2018, the School Board adopted Superintendent Davis's recommendation and terminated Ms. Williams's employment for just cause pending disposition of this action.

On May 8, 2018, the School Board referred this matter to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge and the conduct of a formal hearing. The matter was scheduled for final hearing beginning on September 18, 2018, on which date it was convened and completed.

At the outset of the hearing, the parties stipulated to the admission of Joint Exhibits 1 through 3. At the hearing, the School Board presented the testimony of David Broskie, assistant superintendent of Human Resources for the School Board; Jacqueline Cory, the School Board's director of Support Personnel and Human Resources during the relevant period; Amanda Johns, a collector and phlebotomist who administered the disputed drug test to Williams; and Raymond M. Pomm, M.D., a board-certified psychiatrist, clinician, and addiction specialist. The School Board's Exhibits 1 through 8 and 10 through 14 were admitted into evidence. School Board Exhibit 14 was the deposition transcript for Philip A. Lopez, M.D., and exhibits referenced therein.

Ms. Williams testified on her own behalf and presented the testimony of Superintendent Davis; Betsy Reagor, a service unit

director for the Florida Education Association ("FEA"), assigned to the Clay Education Staff Professional Association Local 7409 ("CESPA"); and Lonnie Roberts, an electronic technician in the School Board's maintenance department and CESPA vice president. Ms. Williams's Exhibits 1 through 8 were admitted into evidence. It is noted that Ms. Williams's Exhibits 3, 4, and 7 are duplicative of Joint Exhibits 1 through 3.

The one-volume Transcript of the hearing was filed at DOAH on October 2, 2018. Two unopposed extensions of the time for filing proposed recommended orders were granted by Orders dated November 15 and December 10, 2018. In compliance with the deadline set by the second extension Order, the parties filed their Proposed Recommended Orders on December 14, 2018.

## FINDINGS OF FACT

1. Article IX, section 4 of the Florida Constitution, establishes that each county constitutes a school district. The School Board is the constitutional entity authorized to operate, control, and supervise the public schools for Clay County. § 1001.42, Fla. Stat.

2. A Collective Bargaining Agreement ("CBA") between the School Board and CESPA governs the relationship between the School Board and its educational support employees.

3. Respondent Carrie Williams was hired by the School Board in 1998. At all material times, Ms. Williams worked for

the School Board as a non-instructional Exceptional Student Education ("ESE") assistant at Bannerman Learning Center, an elementary school within the Clay County school district. Ms. Williams was an "educational support employee" as that term is defined by section 1012.40(1)(a), Florida Statutes (2018). Educational support employees working for the School Board are covered by the CBA.

4. Ms. Williams remained employed by the School Board from 1998 until May 3, 2018, when the School Board terminated her employment for just cause after she tested positive for cocaine and marijuana metabolites on a random drug test.

5. Ms. Williams had been subject to no prior discipline as a School Board employee.

6. As an ESE assistant, Ms. Williams had job responsibilities that included transporting exceptional students in vehicles owned by the School Board. Ms. Williams was required by the School Board to have a valid Florida driver's license and a safe driving record while employed.

7. Because of her student transportation job duties and driving-related job qualifications, Ms. Williams was subject to random drug testing under the School Board's Alcohol and Substance Abuse Policy ("Substance Abuse Policy"), rule 6GX-10-2.17B. Language in Article XII(B) of the CBA reflects the Substance Abuse Policy's random drug testing requirements.

8. The Substance Abuse Policy, in conjunction with the CBA, establishes standards for the School Board's drug testing of support employees. For employees who operate commercial motor vehicles ("CMV") and, as such, perform "safety sensitive functions," as defined by Federal regulations, the Substance Abuse Policy and CBA require random drug testing that complies with the Omnibus Transportation Employee Testing Act of 1991 ("OTETA"). The Federal Department of Transportation ("DOT") requirements for this testing regime are codified at 49 C.F.R. Part 40. The tests are colloquially referred to as "DOT tests."

9. School Board employees such as Ms. Williams, who are not covered by OTETA, but whose job descriptions require a valid driver's license other than a CMV license, are also subject to random drug testing under the Substance Abuse Policy and the CBA. The Substance Abuse Policy states, at 6GX-10-2.17 B.10.a.(2), that the procedures used for testing and review of test results for these non-OTETA employees "shall be the same as those established for CMV operators as specified in [Substance Abuse Policy] 2.17 B.9,d.,e." The cited Substance Abuse Policy specifications provide as follows:

> d. Drug Testing Procedures: With respect to drug testing procedures OTETA requires the use of a "split sample" approach, which provides employees an option for a second screening test following positive findings on the primary sample.[1/] All testing for controlled substances shall be performed on

urine specimens and be accomplished by means of an initial screen (Enzyme Immunoassay or EIA), followed by a confirmation of any positive findings by Gas Chromotography/Mass Spectrometry or GC/MS. All controlled substances testing will be carried out at a laboratory certified by the Department of Health and Human Services (DHHS).

Urine spectrometry shall be screened for amphetamines, cannabinoids, cocaine, phencyclidine, and opiates.

e. Review of Controlled Substance/Alcohol Test Results: All laboratory results generated by the District's drug testing program shall be reviewed by a medical review officer (MRO). The MRO is a licensed physician (medical doctor or doctor of osteopathy) having knowledge of substance abuse disorders and having appropriate medical training to interpret and evaluate an individual's confirmed positive test result, together with his/her medical history and any other relevant biomedical information.

Prior to verifying a "positive" result, the MRO shall make every reasonable effort to contact the employee (confidentially), and afford him/her the opportunity to discuss the test result. If, after making all reasonable efforts and documenting them, the MRO shall contact the District's key contact, who shall direct the employee to contact the MRO as soon as possible (within 24 hours).[2/]

Under split-sample collection procedures, the employee has seventy-two (72) hours following notification of a positive result to request the secondary sample be analyzed. Analysis of the split-sample specimen shall be at the employee's expense and shall be paid in advance with a money order or certified check.[3/]

10. Article XII(B)(2) of the CBA likewise provides that non-OTETA employees who hold a position for which a driver's license is required "shall be subject to random drug testing." It goes on to provide: "The method used to generate the list of randomly selected employees and all other aspect of the drug testing for this group of employees shall be the same as for OTETA covered employees. Specifically, this shall require that Federal standards be met with regard to specimen collection and handling, testing procedures, the use of a Medical Review Officer (MRO) to review all test results, and reporting procedures."

11. At all times relevant to this proceeding, Ms. Williams was aware of the School Board's Substance Abuse Policy and that she could be subjected to random drug testing. She also understood that the School Board could take disciplinary action up to and including termination of her employment as a consequence of a failed drug test.

12. In spite of the clear language of the Substance Abuse Policy providing that non-OTETA employees, such as Ms. Williams, shall be subjected to the same testing procedures as OTETA employees, i.e., the DOT test, the School Board conceded at hearing that its long established practice has been to provide a "non-DOT" drug test to employees in Ms. Williams's position. David Broskie, assistant superintendent for Human Resources,

testified that for as long as he could remember the School Board's practice has been to require employees with commercial driver's licenses ("CDLs") to take the DOT test, and to require employees with regular driver's licenses to take the non-DOT test. Mr. Broskie stated that neither CESPA nor any individual employee has ever filed a grievance or otherwise challenged the School Board's practice.

13. Both the DOT and non-DOT tests are subjected to the same five-panel drug screen set forth in 49 C.F.R. § 40.85, i.e., marijuana metabolites, cocaine metabolites, amphetamines, opiate metabolites, and phencyclidine ("PCP"). Both tests employ the same standardized cutoff levels for the presence of drugs in the urine. Evidence provided at the hearing established that the chief difference is that the DOT test employs the split specimen technique, whereby the urine sample is divided into two specimens at the point of collection. In the non-DOT test, a single urine specimen is sent to the lab, which may then retain a portion of the specimen for potential retesting.

14. On the morning of November 28, 2017, School Board personnel alerted Ms. Williams that she had been selected for a random drug test. She went to the School Board's administrative office and completed the School Board's consent form for a non-DOT drug test. The consent form required her to submit to a

random drug screen at ClayMed of North Florida ("ClayMed"), the School Board's drug screening service provider, no later than 8:30 a.m.

15. ClayMed's facility is less than two minutes from the School Board's administrative office. Ms. Williams arrived there at 8:15 a.m., and recorded her name and arrival time on the patient sign-in sheet.

16. Amanda Johns has been employed by ClayMed as a collector, phlebotomist, and a breath alcohol technician for four years, and has 19 years' experience in the drug screening collection industry. Ms. Johns was on duty at ClayMed on the morning of November 28, 2017. She witnessed Ms. Williams sign in and then assisted her in the sample collection process. Ms. Johns testified, consistent with the sign-in sheet, that Ms. Williams was the first patient to sign in that morning, and that the next patient did not arrive until 8:45 a.m.

17. After Ms. Williams signed in, Ms. Johns took her back to a desk and chair approximately five feet from a bathroom in the rear of ClayMed's office where urine samples are given. Ms. Williams provided Ms. Johns with the School Board's consent form.

18. Ms. Johns verified Ms. Williams's identification and the accuracy of her paperwork, made appropriate notations on it, had Ms. Williams empty her pockets, gave her a cup for the urine

sample collection, and sent her to the nearby bathroom to provide the specimen.

19. Ms. Johns remained at the collection desk directly facing the bathroom for the entire time Ms. Williams was in the bathroom. Ms. Johns was at the desk when Ms. Williams exited with her urine sample.

20. At the hearing, Ms. Williams testified that after she exited the ClayMed bathroom, and was standing with her urine sample at the collection desk, she received a telephone call concerning her mother's medical condition. Ms. Williams testified that she told Ms. Johns that she had an emergency and needed to leave. She testified that she set her urine sample on the corner of the collection desk and left ClayMed before the collection process was completed. She stated that there were other urine samples on the desk at the time she placed her sample there.

21. Ms. Williams's testimony on this point is contradicted by Ms. Johns and by the documentary evidence. Ms. Johns testified that Ms. Williams did not receive a call and did not leave ClayMed before completing the collection process. Ms. Williams turned over her urine sample to Ms. Johns at 8:23 a.m., as indicated on the non-DOT Custody and Control Form that Ms. Johns completed at the time of collection. The Custody and Control Form identified Ms. Williams as the donor, and

connected her to the sample container via matching specimen numbers.

22. After Ms. Williams placed her urine sample on the collection desk, Ms. Johns removed one of the two tamper seal labels from the bottom of the Custody and Control Form, affixed it over the top of the sample bottle, dated the label, and provided it to Ms. Williams for her initials. In fact, Ms. Johns had to go through this process twice in Ms. Williams's presence because she inadvertently dated the first label "11/27." Ms. Johns removed the first label, put on the second of two tamper seal labels from the Custody and Control Form, dated it correctly, and had Ms. Williams initial the sample a second time.

23. Ms. Williams signed the Custody and Control Form, certifying (a) that she provided her urine specimen to the collector, (b) that Ms. Williams had not altered her urine sample in any way, (c) that the specimen bottle used was sealed with a tamper-evident seal in her presence, and (d) that the information provided on the Custody and Control Form and on the corollary label affixed to the specimen bottle was correct.

24. Ms. Johns testified that Ms. Williams left ClayMed immediately after completing the collection process. Ms. Williams departed ClayMed before the next patient arrived and signed in at 8:45 a.m.

25. As to her claim that other urine samples were sitting on the collection desk when she left her sample, Ms. Williams could offer no specific description as to how many there were or whether they were labeled. Ms. Johns unequivocally stated that there were no other urine samples on the collection desk when she took Ms. Williams's sample. Ms. Johns' testimony is supported by the fact that Ms. Williams was the first patient of the day, making it highly unlikely that other samples would be on the desk. Ms. Johns testified that there was no chance that Ms. Williams's urine sample was switched with someone else's.

26. Ms. Johns' version of events on the morning of November 28, 2017, is credited. Chain of custody over Ms. Williams's urine sample was appropriate at all material times.

27. Ms. Williams's urine sample was sent to Laboratory Corporation of America ("LabCorp") in Southaven, Mississippi, for testing. LabCorp received the urine sample on November 29, 2017, with no material deficiencies noted. The lab specifically noted on the Custody and Control Form that the primary specimen bottle seal for Ms. Williams's urine sample was intact on November 29, 2017.

28. On November 30, 2017, LabCorp conducted an initial immunoassay test on Ms. Williams's urine sample that yielded a presumptive result positive for marijuana and cocaine

metabolites. LabCorp then performed a confirmation test using gas chromatography/mass spectrometry ("GC/MS"), which resulted in Ms. Williams's urine sample being confirmed positive for marijuana metabolite and cocaine metabolite. A laboratory report was issued that same day.

29. The positive results were forwarded to First Source Solutions, the School Board's MRO service provider, and were reviewed there by MRO Philip A. Lopez, M.D. On December 1, 2017, Dr. Lopez called Ms. Williams twice, once at 9:28 a.m. and again at 12:57 p.m.,[4/] to discuss the positive results of the tests, but was unable to reach her. At 3:26 p.m. on the same day,[5/] Dr. Lopez's office contacted Jacqueline Cory, the School Board's director of Support Personnel and Human Resources, advising that Dr. Lopez had been unable to reach Ms. Williams. Dr. Lopez's office asked Ms. Cory to call Ms. Williams and give her Dr. Lopez's contact information. Ms. Cory spoke with Ms. Williams on the afternoon of December 1 and told her that she needed to contact Dr. Lopez that day. Ms. Williams did not call Dr. Lopez that day.

30. On December 3, 2017, Dr. Lopez determined that Ms. Williams's drug screen was positive for cocaine and marijuana.

31. On December 4, 2017, at 8:19 a.m., First Source Solutions contacted Ms. Cory to inform her that they were

releasing Ms. Williams's drug test results to the School Board as "no contact, positive for marijuana and cocaine." Shortly thereafter, Ms. Cory accessed the MRO's report with a final verification of positive for cocaine and marijuana and took it to Mr. Broskie. Mr. Broskie instructed Ms. Cory to call Ms. Williams and set up an appointment for them to meet with her the following day.

32. When Ms. Cory called Ms. Williams, she told her that the School Board had received a positive report from her random drug screen and that Mr. Broskie wanted to meet with her about it the following day. Ms. Williams agreed to meet, but stated to Ms. Cory that she could not understand the test result.

33. Also on December 4, 2017, at 2:38 p.m., Ms. Williams phoned Dr. Lopez. Ms. Williams denied that she had used marijuana or cocaine, but admitted to what Dr. Lopez characterized as "passive exposure." Dr. Lopez asked her a series of questions designed to probe whether there was an alternative, medically reasonable explanation for the presence of marijuana and cocaine in Ms. Williams's drug screen. However, Ms. Williams's answers provided no such explanation. Consequently, Dr. Lopez advised Ms. Williams that her drug test result would be set as positive for cocaine and marijuana.

34. A meeting between Ms. Williams, CESPA union representative Betsy Reagor, Ms. Cory, and Mr. Broskie was held

on December 5, 2017. Mr. Broskie explained to Ms. Williams that the School Board had received a drug test report positive for cocaine and marijuana and that, consistent with School Board practice, Ms. Williams was being suspended with pay, pending an investigation. Ms. Williams denied drug use and stated that she did not think it was her urine that was tested. She offered to give another urine sample.

35. Mr. Broskie advised Ms. Williams that School Board policy provided her 72 hours from the time she was notified of the test result to request that the urine sample she gave on November 28, 2017, be retested.[6/] Mr. Broskie further informed Ms. Williams that she would be responsible for the cost of retesting.[7/]

36. On December 6, 2017, Ms. Williams spoke again with Dr. Lopez by telephone. She again denied drug use, but provided Dr. Lopez with no new medical information to justify a change in her positive drug test. Ms. Williams did not contact Dr. Lopez and First Source Solutions to request a retest of her urine sample until the morning of December 8, 2017. This was more than 72 hours after she received notice of her positive drug test result from Ms. Cory and Dr. Lopez on December 4, 2017.

37. A timeline of events provided to the School Board in January 2018 by First Source Solutions indicates that problems with a money order and later a check submitted by Ms. Williams

to pay for the retest prevented it from being done. Ms. Williams first attempted payment in mid-December 2017 and finally gave up on January 4, 2018.

38. In January 2018, the School Board transitioned Ms. Williams from "suspended with pay" to "suspended without pay." Mr. Broskie testified that the School Board normally would move immediately for termination of an employee with a positive drug result. However, the School Board wished to give Ms. Williams the benefit of the doubt because she had denied drug use and had spoken of asking for a retest. The School Board decided to proceed cautiously while it investigated the matter.

39. In mid-January 2018, Ms. Cory communicated with First Source Solutions about obtaining the above-referenced timeline of events. Ms. Cory also confirmed with First Source Solutions that Ms. Williams's urine sample had been available for retesting, as well as the length of time the specimen would remain available and whether the company could conduct a DNA test on Ms. Williams's urine.

40. After receiving the timeline from First Source Solutions, Ms. Cory passed it on to Mr. Broskie as part of the investigatory process. They took special note of the timeline entry in which Dr. Lopez wrote that Ms. Williams had admitted "passive exposure." Ms. Cory testified that she took this to

mean that Ms. Williams acknowledged she had been around marijuana and cocaine.

41. Ms. Cory also obtained information from ClayMed concerning Ms. Williams's drug screen. This included, among other things, obtaining a copy of the non-DOT Custody and Control Form signed by Ms. Williams on November 28, 2017, and ClayMed's Patient Sign-In sheet for that day.

42. On February 7, 2018, Ms. Williams independently submitted to a hair follicle drug test. A single hair was collected from Ms. Williams's head at that time and sent to United States Drug Testing Laboratories, Inc.'s ("USDTL") for testing. USDTL performed a five-panel drug screen on Ms. Williams's hair specimen on February 13, 2018, and reported negative test results for cocaine and cannabinoids. Ms. Williams offered the hair follicle test results to the School Board as evidence that the November 2017 drug screen was erroneous.

43. Both parties presented expert evidence on the efficacy of hair follicle testing generally, and on the particular question of whether a negative hair follicle test on February 7, 2018, could call into question the result of the urine drug test of November 28, 2017. Ms. Williams introduced the deposition testimony of Donald E. Palm, III, Ph.D., an expert in pharmacology with a professional focus in neuropharmacology.

Dr. Palm opined that the hair follicle test was a valid indicator of whether cocaine and marijuana were present in Ms. Williams's system on November 28, 2017. Dr. Palm stated that, because hair is a stable matrix to preserve a drug, samples of drugs can be detected in hair "up to three to even six months" after ingestion. A urine screen is capable of detecting cocaine metabolites for three or four days after ingestion and cannabinoids for perhaps six days. Dr. Palm cited research indicating that an African American's hair is thicker and richer in melanin, factors that provide a "perfect matrix" for preserving drugs in the system. Ms. Williams is African American.

44. The School Board offered testimony and a written expert opinion at the final hearing from Raymond M. Pomm, M.D., a board-certified physician specializing in addiction psychiatry; a certified MRO; and chief medical officer for Gateway Community Services, an addiction treatment facility in Jacksonville. Dr. Pomm has been involved in hair follicle testing and assessing drug screens involving hair follicle specimens for many years. He developed the protocols standardizing the utility of hair follicle testing for the State of Florida's impaired professionals program.

45. Dr. Pomm testified that hair follicle testing has been around for a long time but has limitations. A hair test might

or might not show a positive for three months or longer, depending on circumstances. Excessive washing, hair treatments, or hair straightening can disrupt the bonds of hair follicles and invalidate test results. Dr. Pomm testified that marijuana is not easily taken up into the hair follicle, especially in hair with high melanin content. He agreed with Dr. Palm that African American hair may be optimal for a cocaine test, but noted research indicating that the rate for positive cocaine tests is only 40 percent after a couple of months.

46. Dr. Pomm described urinalysis testing at the GC/MS level as the "gold standard" in the industry. It tests at the molecular level. If the molecule is there, the test detects it. The GC/MS test does not detect something that is not there. Cocaine and marijuana metabolites are detected in a urinalysis only when the drugs have been ingested; "passive exposure" is not enough to generate a positive GC/MS result.

47. Dr. Pomm opined that he could not medically conclude from Ms. Williams's negative hair follicle test that her November 2017 urinalysis was erroneous. In his words, "a negative hair follicle testing has absolutely no relevance to the original test through urinalysis that was positive."

48. In the "Frequently Asked Questions" portion of its public webpage, USDTL has published the following questions and answers:

> Q. Can a hair test be manipulated by the donor?
>
> A. Yes. Bleaching, perming, dyeing and straightening can affect the outcome of a hair test. Commercially treated hair should not be collected.
>
> Q. Can a hair test be used to prove that a previously taken urine test was inaccurate?
>
> A. No. The results of any second collected specimen have absolutely no bearing on the validity of the results of the first collected specimen. Furthermore, each matrix has its own advantages, disadvantages and limits of interpretation.

49. The preponderance of the evidence establishes that Ms. Williams's hair follicle test of February 7, 2018, does not invalidate the results of the random urine drug test that Ms. Williams took on November 28, 2017.

50. Dr. Pomm further opined that nothing in this case suggests that the School Board's deviation from DOT protocols in collecting Ms. Williams's November 2017 urine sample adversely affected the reliability of the test result: "The urine is the urine. Whether it's split or not, it's still the urine." Whether the specimen is split at the collection site or later at the lab makes no clinical difference. The same five-panel drug screen, with the same standard cutoff levels, is used in both DOT and non-DOT drug tests.

51. In a document titled "Fact Finding Memorandum," dated April 16, 2018, Mr. Broskie wrote as follows:

The recommendation to terminate Carrie Williams's employment with the Clay County School District is based on her having submitted to a urinalysis test which came back positive for marijuana and cocaine use. As an ESE Assistant, one of the essential functions of Ms. Williams's job was to transport students in a motor vehicle, and as a result of that, she is considered to be in a safety sensitive position subjecting her to random drug testing under the School Board's Alcohol and Substance Abuse policy. She was randomly selected for such testing on November 28, 2017, and the district received positive test results for her marijuana and cocaine use on or about December 4, 2017 (copy attached). She was placed on unpaid suspension on January 8, 2018.

Under the School Board's Alcohol and Substance Abuse policy, Ms. Williams could have elected within 72 hours to have her split sample retested at her expense,[8/] but she chose not to exercise that right though she delayed for weeks in making a decision. Rather, through her attorney, she has contended that when she gave her urine sample in November 2017, several other patients were at the collection facility and that multiple samples were setting out on a counter unmarked so hers must have been mixed up with someone else's sample. Then, in early February 2018, approximately two and a half months after she was tested, she provided a urine and hair sample for testing at a laboratory she selected, and the results came back negative. Her attorney contends that while the urinalysis test would only detect the presence of illegal drugs recently ingested, the hair sample provides a record of drug use going back 90 days, thus proving the sample taken in November 2017 was not Ms. Williams's. The union and her attorney have also claimed that Ms. Williams does not fit the profile of a drug user and that she has consistently

maintained she never ingested any illegal drugs.

I investigated the above and have determined that Ms. Williams's defense to the positive drug test to be insufficient based on the following:

* Two certified medical review officers ("MRO's"), one of whom is a certified addiction psychiatrist retained to advise the School District on drug testing, have given the District an opinion that a single episode of illegal drug use will not result in a positive hair sample drug test, particularly one more than 60 days after the illicit drug use.

* The collection site and testing laboratory have confirmed they properly followed specimen collection and chain of custody protocols, including properly marking and sealing Ms. Williams's sample. Also, the sign-in sheet at the collection site (copy attached) documents that Ms. Williams was the first to give a sample on November 28, 2017 and that the next patient did not even sign in until more than 20 minutes after she already had donated her sample, directly contradicting her claim that others were there at the same time and that multiple samples were setting on the counter.

* The contemporaneous notes of the MRO who certified the initial drug test result document that Ms. Williams admitted to passive exposure, contrary to her later denial of any ingestion of illegal drugs (see attached).

* The certified addition psychiatrist/MRO disputes that drug use can be determined by profiling individuals.

Given that students' safety is of utmost concern to the District and Superintendent,

> and the risk of a negligent retention claims of employing someone who tested positive to drive children, employment termination is recommended.

52. The Substance Abuse Policy prohibits a School Board employee from reporting to work with illegal drugs in his or her system. The Substance Abuse Policy further prohibits School Board employees' use of illegal drugs off duty and off School Board property because such use "may adversely affect on-the-job performance and the confidence of the public in the School district's ability to meet its responsibilities." Employees who violate the Substance Abuse Policy are subject to discipline, up to and including termination.

53. The School Board's Discipline Policy ("Discipline Policy"), 6GX-10-2.17 and Article X of the CBA provide that the School Board may dismiss any employee for just cause. The Discipline Policy establishes that "[j]ust cause shall include, but is not limited to" a variety of violations, among them "misconduct in office" and "non-compliance with regulations and policies of the School Board, State Board of Education, or the laws of Florida."

54. The Discipline Policy and the Substance Abuse Policy are communicated to School Board employees through the School Board's Employee Handbook. It is undisputed that Ms. Williams

was aware of the School Board's drug testing policy and that she was subject to random drug testing during her employment.

55. The Substance Abuse Policy and CBA do not provide for mandatory termination for employees who fail drug tests, but the School Board's established practice is to terminate employees testing positive for illegal drugs. Superintendent Davis testified that the rationale for the School Board's practice is safety-based. He stated that student safety is the School Board's greatest priority. Employees who transport students and test positive for cocaine and marijuana will face termination "100 percent of the time."

56. Prior to this case, Mr. Broskie had been involved in disciplining five or six other School Board employees who tested positive for illegal drugs. Each case resulted in either termination of employment by the School Board or the employee's voluntary resignation in lieu of termination.

57. When questioned as to why the School Board did not employ progressive discipline in light of Ms. Williams's prior spotless record, Superintendent Davis responded that the School Board's "progressive discipline menu" was in fact consulted and that the appropriate consequence for the circumstance was selected.

58. On April 17, 2018, Superintendent Davis provided Ms. Williams with written notice of his recommendation that the

School Board terminate her employment based on her misconduct in office and violations of School Board policies.

59. On May 3, 2018, the School Board accepted the Superintendent's recommendation and terminated Ms. Williams's employment for just cause effective May 17, 2018.

60. Ms. Williams had the remaining portion of her November 28, 2017, urine sample retested by a Quest Diagnostics Incorporated laboratory between May 10 and May 13, 2018. The retest reconfirmed the presence of cocaine and marijuana metabolites in Ms. Williams's urine sample.

61. On May 15, 2018, Dr. Lopez reviewed the retest of Ms. Williams's urine sample and reconfirmed that it was positive for cocaine and marijuana.

62. Mr. Broskie testified that his opinion that Ms. Williams's employment should be terminated is unchanged by the fact that she was given a non-DOT drug test. Echoing Dr. Pomm, Mr. Broskie stated that the lack of split sampling at the point of collection had no effect on the ultimate test result because the same five-panel drug screen is administered in both DOT and non-DOT drug tests.

63. Ms. Williams counters that the Federal DOT's rules are explicit and detailed, providing for security measures at the test site, procedures for the taking of the urine samples, chain of custody for urine samples, and guarantees of privacy for

employees. 49 C.F.R. pt. 40. For example, urine collectors are required to do all of the following before each collection:

> (1) Secure any water sources or otherwise make them unavailable to employees (e.g., turn off water inlet, tape handles to prevent opening faucets);
>
> (2) Ensure that the water in the toilet is blue;
>
> (3) Ensure that no soap, disinfectants, cleaning agents, or other possible adulterants are present;
>
> (4) Inspect the site to ensure that no foreign or unauthorized substances are present;
>
> (5) Tape or otherwise secure shut any movable toilet tank top, or put bluing in the tank;
>
> (6) Ensure that undetected access (e.g., through a door not in your view) is not possible;
>
> (7) Secure areas and items (e.g., ledges, trash receptacles, paper towel holders, under-sink areas) that appear suitable for concealing contaminants; and
>
> (8) Recheck items in paragraphs (b)(1) through (7) of this section following each collection to ensure the site's continued integrity.

49 C.F.R. § 40.43(b).

64. The evidence produced at the hearing did not establish that these exemplar procedures or the other collector procedures prescribed by 49 C.F.R. Part 40, Subparts D & E were followed by ClayMed. Obviously, the many provisions specific to split

specimen testing were not followed due to the School Board's initial instruction that Ms. Williams be given a non-DOT test.

65. The DOT rules provide that in undertaking the verification process, an MRO must not consider any evidence from tests of urine samples or other body fluids (e.g., blood or hair samples) that are not collected or tested "in accordance with this part." 49 C.F.R. § 40.151(a). The MRO is required to make reasonable efforts to reach the employee to notify him or her of positive test results. "Reasonable efforts include, at a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee" at the numbers the employee has provided. These efforts must be documented, including dates and times, before the MRO may contact the Designated Employer Representative ("DER") and direct that person to contact the employee. 49 C.F.R. § 40.131(c).

66. If the DER becomes the first point of contact, the DER must attempt to contact the employee immediately and inform the employee of the consequences of failing to contact the MRO within the next 72 hours, which are that the MRO may verify the test as positive. 49 C.F.R. § 40.131(d).

67. After verifying a drug test as positive, the MRO is required to inform the employee of his or her right to have the split specimen tested, as follows:

> (b) You must inform the employee that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen.
>
> (c) You must tell the employee how to contact you to make this request. You must provide telephone numbers or other information that will allow the employee to make this request. As the MRO, you must have the ability to receive the employee's calls at all times during the 72 hour period (e.g., by use of an answering machine with a "time stamp" feature when there is no one in your office to answer the phone).
>
> (d) You must tell the employee that if he or she makes this request within 72 hours, the employer must ensure that the test takes place, and that the employee is not required to pay for the test from his or her own funds before the test takes place. You must also tell the employee that the employer may seek reimbursement for the cost of the test (see § 40.173).
>
> (e) You must tell the employee that additional tests of the specimen (e.g., DNA tests) are not authorized.

49 C.F.R. § 40.153.

68. The evidence produced at hearing established multiple failures by the School Board and its MRO to comply with the DOT testing requirements. In even considering the non-DOT test, Dr. Lopez, the MRO, acted in contravention of the DOT requirement that he consider only evidence from tests of urine samples collected in accordance with 49 C.F.R. Part 40. Dr. Lopez made only two attempts in a three-hour period to contact Ms. Williams on December 1, 2017, the first at

9:28 a.m., the second at 12:57 p.m. At 3:26 p.m., Dr. Lopez phoned Ms. Cory (the presumptive DER) to ask her to call Ms. Williams and give her his contact information.

69. Ms. Cory spoke with Ms. Williams that afternoon and told her she needed to contact Dr. Lopez that day. The record is silent as to whether Ms. Cory informed Ms. Williams of the significance of the following 72-hour period. In any event, Dr. Lopez reported the test "no contact, positive for marijuana and cocaine" at 8:19 a.m., on December 4, 2017. This was slightly sooner than 72 hours after Dr. Lopez's first, unsuccessful attempt to phone Ms. Williams and much sooner than 72 hours after Ms. Cory actually contacted Ms. Williams on the afternoon of December 1, 2017.

70. Ms. Williams phoned Dr. Lopez on December 4, 2017, at 2:38 p.m. Dr. Lopez testified as to what he and Ms. Williams discussed but did not state whether he gave her the information required by 49 C.F.R. § 40.153, particularly the notification that she was not required to pay for any retest from her own funds before the test took place.

71. In urging that its failure to follow the DOT testing procedure mandated by its own policy was harmless error, the School Board narrowly focuses on the laboratory test result without considering the myriad procedural and substantive protections denied to Ms. Williams by the failure of the School

Board to use the DOT test protocols. In addition to the initial, fatal flaw of failing to require a split sample, the School Board's MRO failed to make reasonable efforts to contact Ms. Williams about her test result. The MRO also denied Ms. Williams the proper 72-hour notice before her test was verified as "positive, no contact."

72. The School Board denied Ms. Williams a retest because of her inability to pay for it, despite a clear DOT requirement that the School Board pay for the test if she could not. There is every reason to believe that Ms. Williams would have promptly requested a retest had she been told that she was not required to come up with the money immediately. Mr. Broskie's testimony and his "Fact Finding Memorandum" make clear that Ms. Williams's failure to request a retest within 72 hours and her subsequent failure to pay for a retest played a significant role in the recommendation to terminate her employment. Thus, the School Board's errors were not merely procedural. The School Board denied Ms. Williams the substantive right to a timely retest of a split sample specimen, then used the lack of a retest as evidence against her.

73. It is axiomatic that an agency must follow its own rules. The fact that the agency has disregarded a specific provision of its rules for as long as its employees can remember is irrelevant once the illicit practice is challenged. The

School Board's prior failures should not be visited upon Ms. Williams.

74. There is no way of knowing how events would have played out if the School Board had followed its own adopted policy and sent Ms. Williams for a DOT drug test. The School Board's failure to comply with its own Substance Abuse Policy 6GX-10-2.17B.10 and Article XII of the CBA renders the non-DOT drug test administered to Ms. Williams invalid.

## CONCLUSIONS OF LAW

75. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 1012.33(6)(a), Florida Statutes (2018).

76. The School Board has the burden to establish by a preponderance of the evidence the grounds for disciplining Ms. Williams. See, e.g., McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

77. As a non-instructional ESE assistant, Ms. Williams is an "educational support employee," as defined by section

1012.40(1)(a), Florida Statutes. Accordingly, the parties' CBA governs Ms. Williams's termination. § 1012.40(2)(b), Fla. Stat.

78. Article X of the CBA establishes that employees are subject to discipline "only for just cause." The CBA does not define "just cause" in the context of discipline. While the School Board has discretion in setting the standards for employee discipline, "just cause" for discipline "must rationally and logically relate to an employee's conduct in the performance of the employee's job duties" and must be "concerned with inefficiency, delinquency, poor leadership, lack of role modeling or misconduct." Lee Cnty. Sch. Bd. v. Preiss, Case No. 08-4443, RO at 45 (Fla. DOAH Feb. 13, 2009)(citing Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217 (Fla. 2d DCA 1994))(Blue, J., specially concurring); and State ex rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948).

79. Consistent with its rule making authority under section 1012.23(1)(a), the School Board has defined "just cause" in its Discipline Policy, 6GX-10-2.17A.3., as including, among other things, "misconduct in office" and "non-compliance with the regulations and policies of the School Board, State Board of Education, or the laws of Florida."

80. In the instant case, the Charge asserts that "just cause" existed to terminate Ms. Williams's employment because, on December 4, 2017, the School Board received a cocaine and

marijuana-positive result for Ms. Williams's November 28, 2017, random drug screen. The Charge alleges that the failed drug test resulted in violations of: School Board Discipline Policy 6GX-10-2.17A.3.k., "misconduct in office"; School Board Discipline Policy 6GX-10-2.17A.3.n., "non-compliance with the regulations and policies of the School Board"; and the School Board's Substance Abuse Policy, rule 6GX-10-2.17B.

81. An "educational unit" is defined as an "agency" under section 120.52(1)(a). The School Board is subject to the rulemaking provisions of section 120.54, as modified by section 120.81(1). There was no contention in this case that the Substance Abuse Policy, rule 6GX-10-2.17B, was improperly adopted. There was no contention in this case that Substance Abuse Policy, rule 6GX-10-2.17B, is an invalid exercise of delegated legislative authority. It is a valid, existing, enforceable rule of the School Board.

82. There is plentiful case law standing for the proposition that an agency is bound by its own rules. See, e.g., Collier Cnty. Bd. of Cnty. Comm'rs v. Fish & Wildlife Conser. Comm'n, 993 So. 2d 69, 72-73 (Fla. 2d DCA 2008)("of course, an agency is required to follow its own rules"); Fla. Wildlife Fed'n v. Collier Cnty., 819 So. 2d 200, 208 (Fla. 1st DCA 2002)("An agency action which conflicts with the agency's own rules is erroneous."); Cleveland Clinic Fla. Hosp. v. Ag.

for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996)("Without question, an agency must follow its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1085 (Fla. 1st DCA 1989)("Until amended or abrogated, an agency must honor its rules.")

83. Subsection 9 of Substance Abuse Policy, rule 6GX-10-2.17B, provides as follows, in relevant part:

> 9. CMV Operators/Safety Sensitive Function Employees:
>
> a. Employees who operate commercial motor vehicles (CMVs), and who as such perform safety-sensitive functions as defined in Federal Regulations, shall be subject to drug and alcohol testing in accordance with the Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143, hereinafter referred to as OTETA, and local policy as defined herein. This drug and alcohol testing program shall be administered by the Division of Human Resources with a key contact to be assigned by the Superintendent to answer questions about the program.
>
> "Safety-sensitive function" is defined as follows:
>
> 1) All time spent inspecting, servicing, or conditioning any CMV.
>
> 2) All time spent on or in a CMV.
>
> 3) All time loading or unloading a CMV, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded.

4) All time spent performing the driver requirements associated with an accident/incident.

5) All time repairing, obtaining assistance, or remaining in attendance upon a disabled CMV.

* * *

c. Testing Categories: The types of tests required to be performed are pre-employment testing, random testing, reasonable suspicion testing, post-accident testing, post-incident testing, return-to-duty testing, and follow-up testing.

* * *

Random Testing – Random alcohol testing shall be administered at a minimum annual rate of 25 percent of the average number of covered employee positions. For controlled substance testing the minimum annual rate shall be 50 percent of the average number of covered employee positions. All such tests shall be unannounced and spread reasonably throughout the calendar year.

The names for random alcohol and controlled substance abuse testing shall be generated by the agency contracted for such testing and shall be reported to the key contact in a confidential manner. Employees requireing [sic] testing will be notified in writing by an immediate supervisor and shall report immediately to the collection facility for the proper testing. In no instance shall an employee report later than the time necessary to reach the collection facility from the time notification was given. Employees shall be compensated at their normal rate of pay for the time necessary to comply with the requirements for random alcohol and controlled substance testing.

* * *

d. Drug Testing Procedures: With respect to drug testing procedures OTETA requires the use of a "split sample" approach, which provides employees an option for a second screening test following positive findings on the primary sample. All testing for controlled substances shall be performed on urine specimens and be accomplished by means of an initial screen (Enzyme Immunoassay or EIA), followed by a confirmation of any positive findings by Gas Chromatography/Mass Spectrometry or GC/MS. All controlled substances testing will be carried out at a laboratory certified by the Department of Health and Human Services (DHHS).

Urine specimens shall be screened for amphetamines, cannabinoids, cocaine, Phencyclidine, and opiates.

e. Review of Controlled Substance/Alcohol Test Results: All laboratory results generated by the District's drug testing program shall be reviewed by a medical review officer (MRO). The MRO is a licensed physician (medical doctor or doctor of osteopathy) having knowledge of substance abuse disorders and having appropriate medical training to interpret and evaluate an individual's confirmed positive test result, together with his/her medical history and any other relevant biomedical information.

Prior to verifying a "positive" result, the MRO shall make every reasonable effort to contact the employee (confidentially), and afford him/her the opportunity to discuss the test result. If, after making all reasonable efforts and documenting them, the MRO shall contact the District's key contact, who shall direct the employee to contact the MRO as soon as possible (within 24 hours).

Under split-sample collection procedures, the employee has seventy-two (72) hours

following notification of a positive result to request the secondary sample be analyzed. Analysis of the split-sample specimen shall be at the employee's expense and shall be paid in advance with a money order or certified check.

84. Subsection 10 of Substance Abuse Policy, rule 6GX-10-2.17B, the portion of the rule directly applicable to Ms. Williams, provides as follows, in relevant part:

> 10. Operators of District-Owned Vehicles Not Classified as Commercial Motor Vehicles:
>
> a. Employees who, by designation on Board-approved job descriptions, must possess a valid driver's license other than a Commercial driver's license shall be subject to random drug testing.
>
> 1) Random drug testing under this section shall be administered at a minimum annual rate of 50% of the average number of covered employee positions. All such tests shall be unannounced and spread reasonably throughout the calendar year.
>
> The names for random drug testing shall be generated by the agency contracted for such testing and shall be reported to the district key contact in a confidential manner. Employees to be tested will be notified in writing of this requirement and will be directed to report to the approved collection site within a specific time frame. Employees shall be compensated at their normal rate of pay appropriate for the time necessary to comply with this section.
>
> 2) Drug Testing Procedure/Review of Results: Procedures used for testing and review of test results under this section shall be the same as those established for CMV operators as specified in 2.17B.9, d., e . . . . (emphasis added).

85. The underscored language establishes that the School Board requires, through a validly adopted rule, that employees such as Ms. Williams be drug tested under the same procedures as those established for CMV operators, i.e., the OTETA-mandated "split sample" approach as described at 49 C.F.R. Part 40.

86. In spite of the clear language of its own rule, and the similar language in Article XII of the CBA that drug testing for non-OTETA employees holding positions requiring valid driver's licenses "shall be the same as for OTETA covered employees," the School Board has consciously chosen to deviate from these requirements and provide only non-DOT drug testing for non-CMV employees such as Ms. Williams. The School Board's assistant superintendent for Human Resources testified that he could not remember a time when the School Board had complied with the rule. The School Board is mistaken in contending that its longstanding practice of disregarding the rule is an argument in its favor here.

87. In Monroe County School Board v. Barber, Case No. 97-3878 (Fla. DOAH July 30, 1988), Administrative Law Judge ("ALJ") Errol H. Powell decided an issue precisely on point with the instant proceeding: whether a school board employee should be dismissed for testing positive on a random drug test, where regulations called for collection of the DOT-mandated split specimen collection but only a single specimen was collected.

The employee did not request a retest because he was unable to pay for it, being unaware that he was not required to pay for the retest before it was performed. Barber at ¶ 21. ALJ Powell noted:

> According to DOT's Regulations, had Mr. Barber requested a re-analysis, the MRO would have been notified at that point that no split sample was available for a re-analysis, and the MRO would have cancelled the test and reported the testing as being negative, not positive.

Id. at ¶ 28.

88. The Monroe County School Board's view of discipline following a positive drug test was remarkably similar to that of the Clay County School Board in the instant case:

> Even though . . . School Board policies do not provide for mandatory termination from employment for employees who test positive in the School Board's Testing Program, the established practice of the School Board is to terminate such employees. The rationale for the School Board's established practice is that, because the results of a positive DOT drug test does [sic] not indicate precisely when the employee used drugs, the School Board has decided to "err . . . on the side of children" and terminate the employee.

Id. at ¶ 32.

89. Judge Powell's conclusions of law as to the decisive issue were as follows, in relevant part:

> 51. The undersigned is not persuaded by the School Board's position. It was not harmless error to fail to use the split

> sample method. Mr. Barber was denied a fundamental right, a substantive right, provided to him by the federal government, the School Board, and the collective bargaining agreement. Mr. Barber was denied his right to the split sample method and the procedures associated therewith. The test results should not be considered valid.
>
> * * *
>
> 54. Additionally, the School Board was given the option by the federal government to choose which method, the single sample method or the split sample method, to use in the School Board's Testing Program. The School Board, not its employees, chose the split sample method, and, thereby, agreed to be bound by DOT's Regulations pertaining to the split sample method. In the collective bargaining agreement, the School Board agreed that DOT's Regulations would be followed. DOT's regulations provide, among other things, the "minimum precautions" which must be taken. The failure to use the split sample method, as required by the School Board, failed to provide the minimum precautions required by DOT's Regulations and to protect the rights of the donor, Mr. Barber.

90. ALJ Powell's reasoning is entirely persuasive. The drug test administered to Ms. Williams should be voided because it denied her the right, established by School Board policy and the CBA, to the split sample method and the procedural safeguards associated with it. There is no reasonable way to unwind the sequence of events back to the moment Ms. Williams was handed the consent form for a non-DOT test and conclude that the following cascade of errors was "harmless."

91. Once the test results are held invalid and disregarded, there is no just cause for discipline of any kind against Ms. Williams.

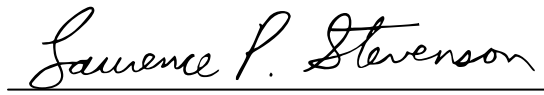
## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Clay County School Board enter a final order:

1. Dismissing the "Charges and Recommended Action" issued by the Superintendent of Schools Addison Davis to Respondent dated April 17, 2018; and

2. Reimbursing Respondent for any pay or benefits that she did not receive as a result of the School Board's actions in this case, plus interest from the date that any such pay or benefit was withheld, as appropriate under applicable law.

DONE AND ENTERED this 12th day of February, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2019.

ENDNOTES

[1/] The "split sampling" or "split specimen" technique is detailed at 49 C.F.R. § 40.71. The collector pours at least 30 mL of urine from the collection container into one specimen bottle to be used as the primary specimen. The collector then pours at least 15mL of urine from the collection container into a second specimen bottle to be used as the secondary specimen. The collector secures the lids on the bottles, seals the bottles with tamper-evident bottle seals, writes the date on the bottle seals, then has the employee initial the bottle seals to certify that the bottle contains the specimens he or she provided.

[2/] This sentence does not state, but clearly means to say, that the MRO has made all reasonable efforts but has failed to contact the employee.

[3/] It is noted that the quoted portion of the Substance Abuse Policy makes no provision for ensuring that the testing of the secondary sample occurs in a timely manner, even if the employee is unable or unwilling to pay for it at the outset. The policy thus contravenes the provisions of 49 C.F.R. § 40.173(b): "[I]f you ask the employee to pay for some or all of the cost of testing the split specimen, and the employee is unwilling or unable to do so, you must ensure that the test takes place in a timely manner, even though this means that you pay for it." The rule goes on to provide that the employer may then seek reimbursement from the employee for the cost of the test. 40 C.F.R. § 40.173(c).

[4/] The specific times are taken from a timeline created by First Source Solutions and later provided to the School Board. See Finding of Fact 37, infra. It is noted that the First Source Solutions timeline actually states that this call was made at "12:57 a.m." The undersigned presumes that this was a typographical error.

[5/] The timeline actually states that the call was made at "15:26 a.m.," an obvious typographical error.

[6/] Mr. Broskie was referencing Substance Abuse Policy 6GX-10-2.17B.9.e., set forth in full at Finding of Fact 9 above. It is

noted that the policy by its terms gives an employee 72 hours to request testing of the secondary sample taken under the split-sampling technique prescribed by the DOT test. Ms. Williams was not afforded the split-sampling test, hence Mr. Broskie's offer to retest the remains of the single sample she provided on November 28, 2017.

[7/] See Endnote 3 above for discussion of the School Board's responsibility to pay for testing of the secondary sample.

[8/] There was no "split sample" because the School Board deviated from its Substance Abuse Policy and directed Ms. Williams to take a non-DOT test.

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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.