

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD CORCORAN, AS COMMISSIONER
OF EDUCATION,

Petitioner,

Case No. 20-2510PL

vs.

CHRISTINE A. HUTTON,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing by Zoom conference on October 22, 2020.

APPEARANCES

For Petitioner: Ron Weaver, Esquire
Post Office Box 770088
Ocala, Florida 34477-0088

For Respondent: Tobe M. Lev, Esquire
Egan, Lev, Lindstrom & Siwica, P.A.
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STATEMENT OF THE ISSUES

Whether Respondent, Christine A. Hutton ("Respondent"), violated section 1012.795(1)(j), Florida Statutes (2018), and Florida Administrative Code Rule 6A-10.081(2)(a)1., as alleged in the Administrative Complaint; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On November 5, 2019, Richard Corcoran, as Commissioner of Education ("Petitioner"), filed an Administrative Complaint against Respondent, alleging violations of section 1012.795(1)(j) and rule 6A-10.081(2)(a)1. On December 4, 2019, Respondent filed an Election of Rights and request for a hearing involving disputed issues of material fact to contest the allegations. On June 1, 2020, the Education Practices Commission ("EPC") referred the matter to DOAH to assign an Administrative Law Judge to conduct the final hearing.

The final hearing was initially set for August 13, 2020, but was continued to September 17, 2020, at the request of the parties. On September 3, 2020, Petitioner filed an unopposed motion for continuance. That same date, the undersigned granted the motion and reset the final hearing for October 22, 2020.

The final hearing was conducted as scheduled on October 22, 2020. At the outset of the hearing, Petitioner moved ore tenus to amend paragraph three of the Administrative Complaint to replace the date of September 4, 2018, with August 30, 2018. Respondent did not oppose the motion. Accordingly, the undersigned granted the motion.

At the hearing, Petitioner presented the testimony of Vericcia A. McCreary, Frank Sisto, and Aaron R. Clements. Petitioner's Exhibits 1 through 14 were received into evidence. Respondent testified on her own behalf. Respondent's Exhibits 2, 4 through 14, 16, 20 and 21 were received into evidence.

The one-volume final hearing Transcript was filed at DOAH on November 19, 2020. The parties timely filed proposed recommended orders,

which were considered in the preparation of this Recommended Order. On October 5, 2020, the parties filed their Amended Joint Pre-Hearing Statement, in which they stipulated to certain facts. These facts have been incorporated into this Recommended Order as indicated below.

Unless otherwise indicated, all statutory and rule references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. Petitioner is responsible for investigating and prosecuting complaints against individuals who hold educator certificates and are alleged to have violated section 1012.795 and related administrative rules.

2. Respondent holds Florida Educator's Certificate No. 987944, covering the areas of Elementary Education, Mathematics and Middle Grades Integrated Curriculum, which is valid through June 30, 2023.

3. At the time of the allegations in the Administrative Complaint, Respondent was employed as a mathematics teacher at Northport K-8 School ("Northport") in the St. Lucie County School District ("SLCSD"). Respondent began teaching at Northport in 2006.

4. On August 10, 2018, the SLCSD initiated an investigation into alleged misconduct by Respondent regarding an incident which occurred during open house at Northport. School Board Policy 6.301 states that "the Superintendent is authorized to place employees on administrative assignment and/or leave as necessary during an investigation."

5. Respondent was initially placed on Temporary Duty Assignment ("TDA") at the school district's publications center pending the results of the investigation. On August 15, 2018, Respondent was placed on TDA at her home. The investigation was not completed until September 17, 2018. Respondent remained on TDA at her home from August 15, 2018, until she was terminated by the SLCSD on October 9, 2018.

6. While Respondent was on TDA, she remained on pay status. On August 10 and 15, 2018, Respondent received a Notice of Investigation and TDA specifically directing her "not to enter any St. Lucie County Public Schools property other than the location you have been assigned to without the written permission of Aaron Clements, Director of Employee Relations or his designee until this matter is resolved." Respondent was also directed "not to discuss your TDA assignment or the reason you are on TDA with anyone other than your representative or a Human Resources administrator" and "not [to] engage witnesses or potential witnesses." Respondent was warned that failure to follow these directives will be considered insubordination and may result in disciplinary action up to and including termination.

7. While on TDA at home, Respondent did not have any job duties other than the requirement to check-in with Mr. Clements's office each weekday morning by telephone between 7:30 a.m. and 8:00 a.m.

8. On August 30, 2018, Mr. Clements contacted Respondent and directed that she come to the school district's human resources office ("HR") to sign a meeting notice for September 4, 2018.

9. At the time, the HR office was located at the school district's annex building located off University Drive in Port St. Lucie. There were various school district offices in the annex building, including HR, Office of Professional Practices, Risk Management, Finance, and Student Assignment.

10. On the morning of August 30, 2018, Respondent left her home with her daughter, whom she dropped off at a community college. Respondent then drove to the HR office. Respondent was unable to find a parking spot near the entrance to the building so she had to park far away at the back of the parking lot. Respondent had to walk a substantial distance from her vehicle to HR, which caused her to be in extreme physical pain due to her underlying medical issues.

11. Upon arriving at HR, Respondent first encountered Christine Paratore, an application clerk. Ms. Paratore observed that

Respondent "appeared to be very disoriented," and "was staggering and unable to sit erect in the chair." Ms. Paratore noted that Respondent "almost fell out of the chair several times." At hearing, Respondent testified that the pain in her body made it difficult for her to sit, and that when she sat, she stretched her whole body in an effort to alleviate the pain.

12. Ms. Paratore contacted Ms. McCreary, who was Mr. Clements's assistant, to let her know Respondent had arrived. Ms. McCreary went to greet Respondent and let her know that Mr. Clements was on the telephone and that he would be with her in a minute. Ms. McCreary returned to her desk and, shortly thereafter, Respondent, on her own, entered Mr. Clements's office. Ms. McCreary explained to Respondent that Mr. Clements was still on the telephone, that she needed to go back out and wait, and that he would be with her in a minute.

13. Shortly thereafter, Ms. McCreary and Mr. Clements met with Respondent. Ms. McCreary observed that Respondent appeared to be very unstable, confused, had difficulty walking, and almost fell out of her chair. Mr. Clements observed that Respondent was very confused, paranoid, stumbling, and swaying side to side when she walked. Based on their observations, Ms. McCreary and Mr. Clements believed Respondent was "under the influence of something."

14. While at HR, Mr. Clements told Respondent he "felt she was under the influence of something," to which Respondent replied, "Yeah, I am." Respondent stated she was taking multiple medications such as morphine and Xanax. Respondent had a prescription for opioids. Respondent attempted to remove all of the medications from her purse to show Mr. Clements, but was instructed by him not to do so.

15. Mr. Clements provided Respondent with the school district's policy on reasonable suspicion testing, and informed her he was sending her to an alcohol/drug testing facility for a reasonable suspicion alcohol/drug test. Mr. Clements contacted a school district security officer/sworn law

enforcement officer, Officer Sisto, to come to the HR office to transport Respondent for the reasonable suspicion alcohol/drug test.

16. Officer Sisto arrived at HR on the morning of August 30, 2018. He approached Respondent wearing a tac vest, an exposed gun, and a badge. He testified that Respondent "seemed a little agitated" and "upset," which was "normal in these circumstances." Officer Sisto explained to Respondent she was not in police custody, that he was not acting as a law enforcement officer, and that he was there simply as an employee of the school district to transport Respondent to the testing facility.

17. While en-route to the testing facility, Respondent stated she had not been drinking, but advised that she does take prescription medications. Based on his experience and observation of Respondent, Officer Sisto also believed Respondent was under the influence of "something."

18. Officer Sisto transported Respondent to a facility where an alcohol/drug test was performed. After the test, Officer Sisto drove Respondent to her home because, in her condition, he thought she would be a danger to herself or others if allowed to drive home.

19. On September 6, 2018, Mr. Clements received the results of Respondent's alcohol/drug test. Respondent tested negative for alcohol, but tested positive for marijuana and morphine.

20. The sole purported factual basis for Petitioner's claim against Respondent is set forth in paragraph three of the Administrative Complaint. Specifically, Petitioner alleged that on August 30, 2018, when Respondent was on TDA at home "and subject to being called to work in the classroom, she responded to Human Resources while under the influence of drugs." Petitioner further alleged: "Had Respondent been asked to return to the classroom, she would have jeopardized the health, safety, and welfare of students."

21. In its Proposed Recommended Order, Petitioner does not contend that Respondent was under the influence of opioids when she went to the school

district annex and while on duty on August 30, 2018, which is understandable given that Respondent had a prescription for opioids. Rather, Petitioner argues that it "proved by clear and convincing evidence that Respondent was under the influence of marijuana at the time she went to the school district annex and while on duty on August 30, 2018." *Pet. Proposed Recommended Order*, ¶ 28. According to Petitioner, "[t]his finding is supported by the testimony of Petitioner's witnesses, who all testified about Respondent's appearance, her unusual behavior, and statements. There is sufficient evidence without the urinalysis test results to support the conclusion that she was under the influence of marijuana." *Id.*

22. At hearing, Respondent acknowledged she smoked marijuana during the evening of August 29, 2018, and that she did not have a prescription for the marijuana. Respondent does not dispute that she knowingly ingested marijuana while on TDA at home and does not dispute the accuracy of the test results showing that she had done so.

23. Although Respondent smoked marijuana during the evening of August 29, 2018, and while on TDA at home, that does not necessarily mean she was under the influence of marijuana when she reported to HR on the morning of August 30, 2018, and while on TDA on August 30, 2018, as alleged in the Administrative Complaint.

24. At hearing, Respondent testified that while she was at HR on the morning of August 30, 2018, she was anxious and in significant pain due to her underlying medical conditions. Since 2005, Respondent suffered from medical problems that caused pain in her back and legs. Respondent was also anxious about her continued employment.

25. No expert testimony was presented at hearing to demonstrate, clearly and convincingly, that Respondent was, in fact, under the influence of marijuana when she reported to HR on the morning of August 30, 2018, or while on TDA on August 30, 2018. The drug test results do not even show the level or amount of marijuana in Respondent's system at the time of the test.

Although Petitioner's appearance and behavior may have been unusual when she was observed at the HR annex on August 30, 2018, this does not necessarily mean that Respondent was, in fact, under the influence of marijuana at that time or while on TDA on August 30, 2018. Respondent may have been under the influence of "something" as testified to by Petitioner's witnesses, and/or she may have been exhibiting physical manifestations of extreme pain. Respondent had underlying medical conditions which made walking very painful. In sum, Petitioner failed to present clear and convincing evidence at hearing that Respondent was, in fact, under the influence of marijuana when she reported to HR on August 30, 2018, and while on TDA on August 30, 2018, as alleged in the Administrative Complaint.

26. Even if Respondent was under the influence of marijuana on August 30, 2018, however, Petitioner's allegations are premised on Respondent being called to work in the classroom. Respondent was not called to work in the classroom, there were no student classes at the school district's annex building, and Respondent did not encounter any students on August 30, 2018. In fact, Respondent was taken out of the classroom pending the school district's investigation precisely so that she would have no contact with students. Respondent was on TDA assignment in her own home from August 15 until October 12, 2018, and was expressly forbidden from coming to the school campus while on TDA without prior written permission from Mr. Clements.

27. Had Respondent been suddenly summoned to a classroom on August 30, 2018, she would have interacted with children. However, she was not summoned to a classroom and was, in fact, prohibited from doing so. Instead, Respondent was summoned to HR to pick up a meeting notice at a school building annex that did not contain any classrooms. There was no evidence that any school children encountered or spoke to Respondent on the

morning of August 30, 2018, and Respondent denied seeing or encountering any students.

28. Because Respondent did not encounter any students on August 30, 2018, Petitioner did not establish that Respondent failed to protect students from conditions harmful to learning or to their mental or physical health and/or safety. In sum, under the particular facts of this case, Petitioner failed to demonstrate by clear and convincing evidence that Respondent is guilty of conduct in violation of section 1012.795(1)(j) and rule 6A-10.081(2)(a)1., by failing to make reasonable effort to protect students from conditions harmful to learning and/or to any student's mental and/or physical health and/or safety.¹

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.

30. Petitioner seeks to take action against Respondent's educator's 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).

31. The clear and convincing evidence standard requires "that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of

¹ To the extent Petitioner suggests that Respondent was under the influence of marijuana on August 30, 2018, and as such, violated rule 6A-10.081(2)(a)1. by endangering her own children at home and other children along her driving route to HR on August 30, 2018, such contentions are beyond the scope of the Administrative Complaint, and in any event, not proven by clear and convincing evidence.

fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

32. Whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985); *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995).

33. Charges in a disciplinary proceeding must be strictly construed, with any ambiguity construed in favor of the licensee. *Munch v. Dep't of Prof'l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992). In addition, the allegations set forth in the Administrative Complaint are those upon which this proceeding is predicated. *Cottrill v. Department of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits Petitioner from taking disciplinary action against a licensee based on conduct not specially alleged in the Administrative Complaint. *Id.*; see also *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

34. Turning to the instant case, Count I of the Administrative Complaint alleged that Respondent violated section 1012.795(1)(j), in that she violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules. Section 1012.795 provides, in pertinent part, that:

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

capacity requiring direct contact with students for up to 10 years, with reinstatement subject to subsection (4); may permanently revoke the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend a person's educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:

* * *

(j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

35. Count I cannot constitute an independent violation, but rather is dependent upon a corresponding violation of the rules constituting the Principles of Professional Conduct.

36. Count II of the Administrative Complaint alleged that Respondent violated rule 6A-10.081(2)(a)1., by failing to make reasonable effort to protect students from conditions harmful to learning and/or to the student's mental health and/or physical health and/or safety. Section 1001.02(1), Florida Statutes, grants the State Board of Education authority to adopt rules pursuant to sections 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

37. Consistent with this rulemaking authority, the State Board of Education promulgated rule 6A-10.081, Principles of Professional Conduct for the Education Profession in Florida. Rule 6A-10.081(2)(a)1., provides, in pertinent part:

(a) Obligation to the student requires that the individual:

1. 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.

38. Turning to the present case, Petitioner failed to prove by clear and convincing evidence that Respondent is guilty of conduct in violation of section 1012.795(1)(j), and rule 6A-10.081(2)(a)1. As detailed above, Petitioner failed to prove by clear and convincing evidence that Respondent was under the influence of marijuana on August 30, 2018, when she reported to HR at the school district's building annex and while on TDA on August 30, 2018, as alleged in the Administrative Complaint.

39. Even if Respondent had been under the influence of marijuana on August 30, 2018, when she reported to HR and on TDA, however, she did not encounter any students on August 30, 2018. Accordingly, Petitioner failed to prove by clear and convincing evidence that Respondent is guilty of violating section 1012.795(1)(j), and rule 6A-10.081(2)(a)1., by failing to make reasonable effort to protect students from conditions harmful to learning and/or to students' mental health and/or physical health and/or safety.²

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order dismissing the Administrative Complaint.

² In its Proposed Recommended Order, Petitioner acknowledges that this is a case of first impression and an attempt to extend the application of rule 6A-10.081(2)(a)1. beyond a situation where a teacher is alleged to have violated rule 6A-10.081(2)(a)1. while in the presence of students at school. Such an extension of rule 6A-10.081(2)(a)1. is not warranted under the particular facts of this case and a plain reading of rule 6A-10.081(2)(a)1. Moreover, the case of *Gerald Robinson, as Commissioner of Education v. Aydelott*, Case No. 12-0621PL (Fla. DOAH Aug. 29, 2012; Fla. EPC Dec. 19, 2012), upon which Petitioner relies to justify an extended application of the rule, is factually distinguishable from the instant case. In *Aydelott*, a teacher communicated directly with a 14-year-old female student in his class by

DONE AND ENTERED this 8th day of December, 2020, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
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Filed with the Clerk of the
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sending her hundreds of inappropriate text messages, which the Administrative Law Judge found violated rule 6A-10.081(2)(a)1.

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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.