STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD CORCORAN, AS COMMISSIONER
OF EDUCATION,

Petitioner,

vs. Case No. 20-2987PL

RUTH S. GAILLARD LEGER,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard by Robert L. Kilbride, Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on November 30 and December 1, 2020, by Zoom conference.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
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Fort Lauderdale, Florida 33316

For Respondent: Mark S. Wilensky, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner proved by clear and convincing evidence that Respondent left a kindergarten student, K.M., alone in her classroom on April 2, 2018, as alleged in Petitioner's Administrative Complaint.

PRELIMINARY STATEMENT

On July 1, 2020, Petitioner filed an Administrative Complaint against Respondent. The Administrative Complaint alleged violations of section 1012.795, Florida Statutes, and Florida Administrative Code Rule 6A-10.081. Respondent requested an administrative hearing to contest the charges.

As a result, Petitioner forwarded this matter to DOAH for the assignment of an Administrative Law Judge to conduct the hearing. A hearing was initially scheduled for September 14 and 15, 2020.

After an Agreed Motion to Reset Hearing was filed by the parties and granted, a formal evidentiary hearing was conducted on November 30 and December 1, 2020.

At the hearing, Petitioner called the following witnesses to testify by Zoom conference: Samiyeh Nasser, Steven Bynes, Jr., Nikia Ragin, and Sharonda Bailey. Petitioner offered the following exhibits, which were admitted in evidence: Exhibits 1 through 3 and 5 through 7. Respondent testified on her own behalf and called the following witnesses: William Miller, Shirelle M., and K.M. (a student). Respondent's Exhibits 1, 3, 8, 12a, 12b, and 13b were admitted into evidence.

The Transcript of the proceedings was filed with DOAH on January 4, 2021. After an agreed extension was requested by both parties and granted, the parties timely submitted proposed recommended orders. Both were reviewed and considered by the undersigned in the preparation of this Recommended Order.

References to the Florida Statutes are to the versions in effect at the time of the incident, act, or omission, unless otherwise stated.

FINDINGS OF FACT

Based on the record and evidence presented at the hearing, the undersigned makes the following findings of relevant and material fact:

Stipulated Facts

1. Respondent holds Educator Certificate 1168653, covering the areas of Elementary Education, English for Speakers of Foreign Languages, and Exceptional Student Education ("ESE"), valid through June 30, 2021.

2. At all relevant times, Respondent was employed as a kindergarten teacher at Sunland Park Academy, in the school district of Broward County, Florida.

Evidence Presented at the Hearing

Samiyeh Nasser

3. During the 2017-2018 school year, Samiyeh Nasser ("Nasser") was employed as a Teacher's Assistant at Sunland Park Academy in the Broward County School district. She worked with the kindergarten classes.

4. Nasser "pulled out" students, removing them from a teacher's class and bringing them to her own room to provide extra help with reading, spelling, and word pronunciation.

5. She regularly went to Leger's classroom during first period each day, at approximately 9:00 a.m., and would take four or five students to her own classroom. She would then bring them back to their regular class to attend "specials," which are elective classes.

6. On April 2, 2018, when Nasser returned children to Leger's classroom, at 10:05 a.m. that day, she noticed that the other students had already left the room, but that there was one student, K.M., there alone.

7. When Nasser found her, K.M. was crying. When Nasser asked her why she was alone, K.M. said that her classmates had gone to physical education class ("P.E."), and that she had been told by her teacher, Respondent, to stay in the classroom.

8. Based on other credible evidence, K.M.'s comment to Nasser regarding having to "stay in the classroom" referred to a counseling conversation which Leger had with K.M. earlier in the morning, prior to the class leaving for P.E.

9. She did not mention anything to Nasser about Steven Bynes ("Bynes"), a pool substitute who had assumed responsibility for the class in Respondent's absence.

10. Nasser opened the back door to the classroom, saw the other students at P.E., and instructed the small group of students she brought back to the classroom to join them outside.

11. She did not see either Leger or Bynes with the students at P.E. when she found K.M.

12. Nasser remained with K.M. briefly, hugged her to calm her down, and then left her in the room as she went on to assume her other duties.

13. She was in Leger's classroom a total of approximately five to seven minutes.

Steven Bynes, Jr.

14. Steven Bynes, Jr., was employed as a pool substitute at Sunland Park Academy during the 2017-2018 school year. He provided coverage when teachers were absent or out, and no outside substitute was hired for the day.

15. On April 2, 2018, he was instructed to cover Leger's class while Leger attended a meeting.[1]

16. Bynes was in Respondent's classroom for approximately 20 minutes.

17. Leger returned to the classroom while Bynes was still there and advised him that the class had "specials."

18. Bynes claimed that he advised Leger that it was two minutes before the class was to go to P.E., and advised her that she "still had time" to take them there.

[1] This was a meeting between Leger, the guidance counselor, and a parent mentioned later in this Recommended Order, paragraph 60 *infra.*

19. He claimed that Leger did not say anything to him, and he left the classroom to return to the front office.

20. After the fact, Bynes was told that a student had been left in the classroom, but he denied knowledge of it and denied responsibility for leaving K.M. in the classroom. He claimed he left the class with Leger. He also denied having any conversation with K.M. in the classroom.

21. Bynes denied taking the class to P.E. and stated that when he left the classroom, he left the students with Leger.[2]

Nikia Ragin

22. Nikia Ragin ("Ragin") was the Assistant Principal at Sunland Park Academy during the 2017-2018 school year.

23. She was told by the Principal that Nasser had reported an incident concerning a student, K.M. After speaking to Nasser, she spoke to K.M.

24. Ragin spoke to K.M. approximately two hours after the event took place, and then reported to the Principal.

25. Ragin was also present when Leger explained to the Principal that Bynes, not she, had taken the students to P.E.

26. Other than Leger's statement, Ragin found no other evidence to conclude that Bynes had taken the students to P.E.

27. Ragin's conclusion regarding the evidence, at that point, was misguided and affected because the school surveillance cameras that would likely show who took the students to P.E. were not operating properly.[3]

28. Leger elaborated and explained to Ragin that she was in a meeting with the guidance counselor when the students went to specials.

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[2] Notably, Bynes said he didn't really remember what Leger said or did after he advised her that she still had time to take the class to specials. Curiously, after he said this, he testified that he simply "walked out of the classroom." This description by Bynes was significantly at odds with Leger's testimony and recollection of the same discussion. Bynes seemed vague and uncertain at times regarding the incident. Leger's description of her encounter and discussion with Bynes when she returned, is more persuasive and credible, and is adopted.

[3] The camera tapes had been reviewed by Ragin because of Leger's claim about not taking the students to P.E.

29. Had the surveillance cameras been working, there would have been clear images of the kindergarten hallways and other relevant areas.

30. There were also other inoperative cameras, that if working properly, would have shown relevant views of the hallway leading to and from the office of the guidance counselor.

Sharonda Bailey

31. Sunland Park Academy Principal, Sharonda Bailey ("Bailey"), received a report from Nasser about a student in Leger's class.

32. She referred the matter to Ragin, and saw her speaking with Nasser and also with K.M.

33. Bailey recalled that Bynes had been in the classroom that day to cover the class. She asked him if anything had occurred when he was in the classroom.

34. Bynes told Bailey that Leger had returned to the classroom and said something about the students being late for specials.

35. Bynes recounted to Bailey that he explained to Leger that they weren't that late, that she should take them herself, and that he then walked out the front door.

36. When she spoke with Respondent, Leger stated to her that she did not leave a student in the classroom and that Bynes was the person who took the students to P.E.

37. Bailey also attempted to verify who took the students to P.E. through the school's security cameras. However, because the camera system was antiquated, it had not captured or recorded what she needed to see.

38. The security cameras glitched and froze, and the time stamp was off. In short, the cameras were not capable of adequately displaying Respondent's location or movement in the hallways because its quality was so poor.[4]

[4] The security videos of the kindergarten hallway and the area outside the office of the guidance counselor were requested by Leger during discovery. However, they were not provided to her and were not used or shown at the final hearing.

39. Bailey contacted K.M.'s mother and told her that her child was left alone in the classroom while the rest of the class was taken to specials. She explained that she would investigate the incident.

40. Because Bailey was not able to find anyone during the investigation to validate Respondent's position that she did not leave the student behind, she issued a written reprimand to Leger.

41. Bailey did not speak at length with K.M. about the incident, but merely asked if she was okay.

Private Investigator William Miller

42. William Miller ("Miller") was retained by Leger's counsel to attempt to locate K.M. He ultimately located her in Gulfport, Mississippi.

43. He telephoned K.M.'s mother, Shirelle M. He reached her in her car on her way to pick up K.M. from school.

44. Later that day, Miller was also able to speak directly to K.M.[5]

45. Miller asked K.M. if she remembered the incident. K.M. explained that Respondent went to a meeting, and that the class had been turned over to a substitute teacher by the name of Mr. Bynes. She told him Bynes took the class to P.E. outside the classroom.

46. K.M. related to Miller that she told Bynes she had been bad, and that Respondent had told her she could not go outside for P.E.

47. K.M. stated that Bynes then told her to "wait in the classroom" and he took the rest of the class to P.E.

48. Miller testified that neither he nor K.M.'s mother provided her with any background, mentioned Bynes, or in any way suggested what information they wanted from her.

49. Miller had work experience interviewing juvenile witnesses and testified that he "assiduously avoided" leading K.M., because they are so prone to being improperly led when questioned.

[5] Shirelle M. had called back about 30 minutes later and Miller spoke to K.M. on her mother's speaker phone while they were in the car together.

50. Miller recounted that K.M.'s mother expressed surprise that K.M. recalled the name of Bynes, and assured Miller that she had not coached K.M. in any way.[6]

51. Based on his interviews over the phone, affidavits were prepared for K.M. and her mother, which documented the verbal information they had provided to Miller.

52. The affidavits were given to K.M.'s mother. Miller explained to her that the affidavits should be their testimony, and not the testimony of either Miller or the attorney in the case. He also explained that if there were any changes that needed to be made, she should make the changes, send the affidavit back to him, and that the affidavits could be redone, if necessary.

53. Miller asked the mother to read and go over the affidavit that K.M. was being asked to sign.

54. Miller arranged to have a notary go to their apartment in Mississippi to have the mother and the child execute the affidavits.

55. Before this occurred, he was able to reach Shirelle M. by telephone. She apologized and told him that the delay in executing the affidavit stemmed from the fact that she had changed jobs, and that the Gulf Coast had experienced three separate hurricanes since he had last spoken to her.

56. Miller explained to her that he did not want it to be inconvenient and that he would make the arrangements necessary to get a notary to her to be able to notarize the affidavits.

57. The notary was given specific instructions to tell Shirelle M. and K.M. that they did not have to sign the affidavits, and could make any changes to them that they wanted.

58. Despite the delay in securing her signature, Miller still felt that the mother did not have any hesitation signing her affidavit.

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[6] K.M.'s mother had been told of the incident, but had not been told about Bynes at the time of the incident.

Ruth Galliard Leger

59. Respondent was K.M.'s kindergarten teacher at Sunland Park Academy during the 2017-2018 school year. She recalled that K.M. was a good student and they got along well.

60. Sometime during the morning of April 2, 2018, Respondent requested an emergency meeting with the school's guidance counselor and the parent of a male student.

61. The male student had come in late to class that day. He became disruptive, knocking teaching items, like posters and magnets, to the floor.[7]

62. The meeting was scheduled by the guidance counselor. Respondent left for the meeting when Bynes arrived at her classroom to provide coverage.

63. Earlier that morning, K.M. had also been disruptive. Respondent counseled her and told her that if she did it again, Respondent would take some time from her P.E., consistent with the class rules, and that she would have to stay behind in the classroom with Respondent for a few minutes of her P.E. time.[8]

64. On the day of the incident, the class had P.E. scheduled at 10:10 a.m. When Respondent left for her meeting, the class had not yet gone to P.E.

65. During the meeting with the guidance counselor, Respondent excused herself and returned briefly to her classroom to retrieve a form that needed to be signed by those in attendance at the conference. Resp. Ex. 1.

66. When she entered the room to get the form, Bynes was there with her students. Respondent explained to Bynes that she forgot the form, and that her meeting with the counselor and parent was not over.

67. Respondent asked Bynes what time it was and when he told her that it was approximately 10:15 a.m., she reminded him that the class had specials at 10:10 a.m.

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[7] This was out character for him, prompting Respondent to request the emergency meeting.

[8] Four other students had also been counseled that morning about their conduct and the consequences before Respondent went to her meeting with the counselor.

68. Bynes said that they had only missed five minutes, and the class could still go to P.E.

69. Respondent retrieved the form she needed, went out the front door into the kindergarten hallway, and back to her meeting.

70. The class was in the room with Bynes when Respondent departed to go back to the meeting. However, she did not see Bynes take the students to P.E.

71. After the meeting with the counselor and the parent, Respondent left the counselor's office. Respondent and the student's parent stood in the first-grade hallway talking for several minutes.[9]

72. Respondent then walked the mother to the front door of the school, where there are more cameras, and parted company with her. Leger then proceeded down the hallway back to her classroom.

73. When she got back, she was shocked to find K.M. standing in the room by herself. When she asked K.M. why she was in the room, K.M. explained that she had remembered that Leger previously told her that she owed time from P.E. for misbehaving. As a result, she decided to stay behind in the room when the others went to P.E.

74. Respondent did not recall telling K.M. to "stay back" from P.E. Leger told K.M. that she did not have to remain behind, that she wasn't upset with her, and that she should have gone to P.E. with the rest of the kids.

75. Since there were five minutes left in the P.E. class, Respondent took K.M. out to P.E.

76. When Respondent picked up her students from P.E. five minutes later, K.M. was fine and the class went to lunch.

77. The next day, at the end of school, Principal Bailey handed Respondent a letter advising her that she was under investigation for leaving a child unattended.

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[9] This hallway was covered by the same faulty security cameras previously mentioned.

78. At her disciplinary meeting, Respondent told Bailey that she did not leave K.M. in the classroom, and that she was at a meeting with the guidance counselor and a parent at the time.

79. To support her defense, Respondent asked Bailey for the school videos which would show her in different hallways, entering the counselor's office, and speaking with and walking the mother to the front door when her students went to P.E.

80. Leger later asked her first lawyer on two separate occasions to obtain the relevant videos from the Broward County School District through a Freedom of Information Act request. Resp. Exs. 12a and 12b.

81. She wanted the security videos to be subpoenaed for this case.[10]

82. K.M. remained in Respondent's class for the balance of the year and Respondent had a good year with her.

83. Leger never spoke to K.M. or her mother about the incident.

Shirelle M.

84. Shirelle M. is the mother of K.M. She recalled Miller calling and speaking to her and K.M. on the speaker phone.

85. She heard K.M. tell Miller that it was Bynes that had left her in the classroom.

86. She heard K.M.'s entire conversation with Miller.

87. The affidavit that K.M. signed was an accurate recitation of the phone conversation she heard between Miller and her daughter in the car.

88. She also signed her own affidavit that accurately set forth her conversation with Miller. Resp. Ex. 8.

89. She knew that she could make any changes to her affidavit before signing it.

[10] The undersigned took administrative notice of the DOAH file, which included Respondent's subpoena to the Broward County School District seeking the videos, the District's response, and Respondent's Motion to Compel seeking access to the videos.

90. Shirelle M. was there when K.M. signed her affidavit, and read it with her beforehand. She testified that no person forced her daughter to sign the affidavit.

91. She explained the long period of time that elapsed between the time that she got the affidavit and the time that she signed. The delay was due to her work schedule, which involved four or five jobs, since the COVID-19 pandemic.

92. She testified that she had no hesitation executing her affidavit, and did so freely and voluntarily, since it was accurate and correct.

93. Concerning the day of the classroom incident, she saw her daughter before speaking with the Principal when she picked K.M. up from aftercare.

94. She did not get much detail from the Principal, who said that the matter was still under investigation. The Principal never told her that it was Respondent who left K.M. in the room.

95. She never overheard K.M. tell anyone that Respondent had left her in the classroom.

K.M.

96. Before beginning her testimony, eight-year-old K.M. was questioned by the undersigned. She was polite, alert, and calm. She understood the oath and the importance of telling the truth.

97. She remembered when she lived in Florida. She also recalled Respondent as her kindergarten teacher and the incident of being left in the classroom.

98. K.M. testified that it was Bynes who left her in the classroom when Respondent was at a meeting. [11]

99. She recalled that when Bynes arrived at the classroom, Respondent then left for a meeting.

[11] The Transcript mistakenly phonetically wrote Barnes. It should have been Bynes.

100. K.M. stayed behind when the rest of the class went to P.E. She did so because Respondent had told her earlier that morning to stay behind because of minor discipline issues with her.

101. More specifically, as the class left to go to P.E., K.M. told Bynes that she was supposed to remain in the classroom, and Bynes said "okay" and took the remainder of the class to P.E.

102. K.M. remained in the classroom while the class was at P.E., until Respondent returned from her meeting. When asked by Leger why she was there alone, K.M. reminded Respondent that she had previously told her to stay in the class.

103. K.M. executed an affidavit that she read and that her mother read to her. It accurately reflected what happened. Resp. Ex. 13b.

104. K.M. recalled speaking to a man on the phone (Investigator Miller), and told him the same thing as what she testified to in court.

105. K.M. unequivocally stated twice during the hearing that she never told anyone that Respondent, Leger, had left her in the classroom.

106. Nobody told K.M. what to say in the hearing, and she remembered on her own that to which she testified.

107. K.M. liked Respondent and stated that she was "a pretty good teacher."

CONCLUSIONS OF LAW

108. DOAH has jurisdiction of the subject matter of this proceeding and the parties, pursuant to sections 120.569 and 120.57(1), Florida Statutes.

109. The Education Practices Commission is the state agency charged with the certification and regulation of Florida educators under chapter 1012, Florida Statutes.

110. This is a proceeding in which Petitioner seeks to sanction Respondent's Educator's Certificate. Because sanction proceedings are considered penal in nature, Petitioner is required 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).

111. The "clear and convincing" standard of proof is described by the Florida Supreme Court in *In re Davey*, 645 So. 2d 398 (Fla. 1994). There, the Court held:

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

Id. 645 So. 2d at 404 (quoting with approval, *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

112. Here, the material allegations of the Administrative Complaint are straightforward and clear--Respondent left K.M. unsupervised and alone in her classroom while she took the other students to P.E. That allegation must be proven by clear and convincing evidence. *Osborne Stern & Co.,* 670 So. 2d at 934.

113. In considering whether the proof offered to establish the allegations was clear and convincing, this tribunal is cognizant of the limitations on the use of hearsay evidence in administrative proceedings set forth in section 120.57(1)(c). Section 120.57(1)(c) states:

> (c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

114. Hearsay was offered and, in some instances, conditionally admitted into evidence during the hearing. The hearsay admitted during the hearing was carefully re-evaluated and used as evidence when permitted by law.

115. In this case, for example, an out-of-court statement was made by K.M. to Nasser. These statements by K.M. fall within one or more exceptions to the hearsay rule, and were admitted and considered. They also supplemented or explained K.M.'s testimony.

116. Significantly, K.M.'s statement to Nasser when she found her alone in the classroom, reasonably interpreted, did *not* directly implicate Respondent as the person who actually left her in the classroom when the class went to P.E.

117. Rather, K.M. told Nasser only that her classmates "went to P.E." and she had "to stay in class" because Respondent had told her to stay in the classroom.[12]

118. The undersigned finds that this comment by K.M. referred to Leger's comments to K.M. *earlier* in the morning before Bynes arrived.

119. The undersigned concludes that the statement by K.M. to Nasser, when she found her crying alone in the classroom, did not clearly or convincingly prove that it was Respondent who actually left her in the classroom.

120. Further, the statements made by K.M. to Nasser in the classroom are consistent with a conclusion that K.M. obediently concluded that she was required to remain behind when Bynes left for P.E with the other students.

121. The undersigned further concludes that Respondent was absent when this occurred, having already left the classroom with the form she had retrieved, to return to her meeting with the guidance counselor.

[12] K.M. did *not* clarify when Leger told her this--only that it was said.

122. Not surprisingly, the statements made by K.M. to Nasser were repeated and interpreted by others who heard it--not from K.M., but from Nasser. The information relayed by Nasser to others and the variants of her statements to, or by, others, were hearsay. Those out-of-court statements were not persuasive or convincing and were not given weight by the undersigned.

123. Statements by K.M. to Miller and Shirelle M. in the car were considered for the purpose of supplementing or explaining the testimony both gave at the hearing.

124. Other evidence proffered by Petitioner is worth mentioning as well. In considering whether allegations have been proven by clear and convincing evidence, this tribunal considered the use of evidence in administrative proceedings outlined in section 120.57(1)(d). That statute concerns the admission of collateral matters not necessarily raised by the pleadings. Section 120.57(1)(d) states, in pertinent part:

> ... [S]imilar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity ....

125. It is undisputed that a notice of intent to use similar fact evidence was not filed in this case by Petitioner.

126. Similarly, Petitioner sought to introduce and have the undersigned consider matters that referenced alleged prior failures to supervise students, and other alleged misdeeds of Respondent. Those allegations did not provide any clear or persuasive evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in this case.

127. The undersigned concludes that this evidence was proffered for the purpose of showing Respondent's bad character or propensity. As a result, the evidence was inadmissible. §120.57(1)(d), Fla. Stat.

128. Petitioner also suggests that the evidence of these "uncharged offenses" should be considered because "EPC Rules" do not permit its own consideration of matters for penalty purposes which are not contained in the hearing record. Respondent objected. [13]

129. That argument is unpersuasive and fails for several reasons. This case was referred to DOAH. The case is subject to the DOAH rules, policies, and statutes which govern its proceedings. To layer in or apply rules or policies of other entities, without notice or authority, is inconsistent with the tenets of due process.

130. Moreover, in light of the ultimate Findings of Fact and Conclusions of Law set forth herein, the issue as framed by Petitioner is moot, as no penalty is recommended.

131. Finally, discipline or sanctions may be imposed only on grounds specifically alleged in the Administrative Complaint. *See Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); *Kinney v. Dep't of State*, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); *Hunter v. Dep't Prof'l Reg.,* 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

132. Likewise, only those facts and charges outlined in the Administrative Complaint may be considered during the hearing. *See Christian v. Dep't of Health, Bd. of Chiropractic Med.,* 161 So. 3d 416 (Fla. 2nd DCA 2014), and

[13] Despite being aware of this disputed issue and Respondent's objection, Petitioner cited to no authority, rule, or law to supports its position in its Proposed Recommended Order.

cases cited therein. The past offenses were not outlined or plead in the Administrative Complaint, and will not be considered by the undersigned.

Other Applicable Law

133. In a DOAH hearing, the case is considered de novo by the Administrative Law Judge ("ALJ"), based on the facts and evidence presented at the hearing. This means that the evidence is heard and considered again. There is no "presumption of correctness" that attaches to the preliminary decision of the agency. *Fla. Dep't of Transp. v. J.W.C. Co., Inc.,* 396 So. 2d 778 (Fla. 1st DCA 1981); and *Boca Raton Artificial Kidney Ctr., Inc. v. Fla. Dep't of HRS*, 475 So. 2d 260 (Fla. 1st DCA 1985).

134. Factual findings in a recommended order are within the province of the ALJ, based on the broad discretion afforded to him or her. *Goin v. Comm'n on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995). *See also Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Bevs. & Tobacco* 475 So. 2d 1277 (Fla. 1st DCA 1985).

135. More specifically, the ALJ has the best vantage point to resolve conflicts, determine the credibility of witnesses, draw permissible and reasonable inferences from the evidence, and reach ultimate findings of fact, based on the competent and substantial evidence presented. *Goin,* 658 So. 2d at 1138; *Dep't of Bus. and Prof'l Reg. v. McCarthy,* 638 So. 2d 574 (Fla. 1st DCA 1994).

136. Whether Respondent committed the charged offense(s) is a question of ultimate fact to be decided by the trier-of-fact in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

137. An agency may not substitute its own facts for that of the ALJ so long as there is adequate evidence in the record to support the ALJ's factual findings. *Lantz v. Smith,* 106 So. 3d 518 (Fla. 1st DCA 2013). *See also Resnick v. Flagler Cty. Sch. Bd.*, 46 So. 3d 1110, 1112 (Fla. 5th DCA 2010)("In a fact-driven case such as this, where an employee's conduct is at issue, great

weight is given to the findings of the [ALJ], who has the opportunity to hear the witnesses' testimony and evaluate their credibility.").

Ultimate Findings of Fact

138. After considering the evidence presented at the hearing, and the record as a whole, the undersigned finds the testimony of K.M. and Respondent more persuasive and credible than other witnesses presented by Petitioner, including Bynes.[14]

139. In short, in this case, Petitioner simply failed to carry it's burden by clear and convincing evidence that it was Respondent who left K.M. in the classroom on April 2, 2018, when the other students went to P.E.

140. School officials developed versions of K.M.'s statement through inadmissible and unreliable hearsay which differed and strayed from what K.M. actually told Nasser. Whether they misunderstood Nasser or reached conclusions based on their own assumptions, Petitioner's version of the incident is not supported by the evidence, and falls short of proving the allegations by clear and convincing evidence.

141. Bynes denied that he took the students to P.E., and claimed he left Respondent with her class before K. M. was left alone. The undersigned found this testimony to be directly refuted by other more persuasive evidence from K.M. and Respondent.

142. Regardless, the undersigned concludes that the quality and quantum of evidence produced by Petitioner was simply insufficient to produce in the mind of the undersigned a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established against the Respondent. *See, In re Davey,* 645 So. 2d at 404.

143. In short, Petitioner's proof was neither clear nor convincing that Respondent left K.M. alone in the classroom on April 2, 2018, and the

[14] Regrettably, Petitioner was either unable or unwilling to present or use video surveillance that may have bolstered its allegations and supported its burden of proving the case by clear and convincing evidence.

allegations outlined in the Petitioner's Administrative Complaint were not sufficiently proven.

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 and the charges contained therein.

DONE AND ENTERED this 10th day of February, 2021, in Tallahassee, Leon County, Florida.

ROBERT L. KILBRIDE
Administrative Law Judge
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of February, 2021.

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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.