



upon which it based its probable cause determination; (2) that the Commission lacks jurisdiction to pursue disciplinary action against the Petitioner because it failed to comply with certain statutory timing requirements; (3) that the Commission is not authorized to sanction the Petitioner's certificate based on an alleged violation of a local school district rule; (4) that the undisputed facts do not support a finding that the Petitioner violated Standard 2 of the Code of Ethics for Educators by having inappropriate contact with a student; and (5) that Standard 2 is void for vagueness under the Georgia and United States Constitutions.

The Commission's Counter Motion seeks summary determination on the grounds that the undisputed facts establish violations of the following four standards of the Code of Ethics for Educators: Standard 2, Conduct with Students; Standard 4, Honesty; Standard 9, Required Reports; and Standard 10, Professional Conduct.

After consideration of the parties' arguments and submissions, and for the reasons stated below, the Petitioner's Motion is **GRANTED** as to the fourth ground and **DENIED** as to all other grounds. The Commission's Counter Motion is **DENIED** in its entirety.

## **II. APPLICABLE LEGAL STANDARDS**

Both parties in this case have styled their pleadings as motions for summary determination, a characterization that is correct as to the Respondent's Counter Motion and the first two grounds for the Petitioner's Motion. However, with respect to the third, fourth, and fifth grounds, the Petitioner's Motion is more accurately titled a motion to dismiss. Accordingly, the Court applies the legal standards for both summary determination and dismissal in ruling on the parties' motions.

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(1).<sup>2</sup> On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party “is entitled to a judgment as a matter of law on the facts established.” Pirkle v. Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at \*6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2206) (noting that a summary determination is “similar to a summary judgment” and elaborating that an administrative law judge “is not required to hold a hearing” on issues properly resolved by summary determination.) Further, pursuant to OSAH Rule 15:

When a motion for summary determination is supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(3). See Lockhart v. Dir., Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at \*3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

Motions to dismiss are authorized by O.C.G.A. § 50-13-13(a)(6), which provides that “[t]he agency, the hearing officer, or any representative of the agency authorized to hold a hearing shall have authority to . . . dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground . . . .” See also O.C.G.A. § 9-11-12(b);

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<sup>2</sup> To the extent the Respondent’s Counter Motion relies upon the Petitioner’s Answer rather than affidavits or other probative evidence, it might also be styled as a motion for judgment on the pleadings. See Novare Group v. Sarif, 290 Ga. 186, 191 (2011). However, because motions for judgment on the pleadings are not specifically authorized by either the Administrative Procedure Act, O.C.G.A. § 50-13-1, et seq., or OSAH rules, it will be treated here as a motion for summary determination.

Ga. Comp. R. & Regs. r. 616-1-2-.02(3). Here, a ruling on the third, fourth, and fifth grounds for the Petitioner's Motion does not require consideration of affidavits or other evidence outside the pleadings. Therefore, as to these issues, the Petitioner's Motion will be treated as a motion to dismiss for lack of subject matter jurisdiction and/or failure to state a claim upon which relief may be granted. See Seaboard C.L.R. Co. v. Dockery, 135 Ga. App. 540, 543-44 (1975); Cox v. Turner, 268 Ga. App. 305 (2004). A motion to dismiss may be granted only if "the averments in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim." Cox, 268 Ga. App. at 305 (citations omitted).

### **III. THE PETITIONER'S MOTION**

#### **A. Issues Presented For Dismissal**

The Petitioner's Motion presents three grounds upon which she contends dismissal is warranted. In the third ground for her Motion, the Petitioner argues that the Commission lacks jurisdiction to sanction her certificate based on a violation of a local school district rule. In the fourth ground, the Petitioner contends that even if all allegations of the Statement of Matters Asserted are taken as true, they do not support a finding that she violated Standard 2 of the Code of Ethics for Educators. In the fifth ground, she argues that Standard 2 is unconstitutionally vague. For the reasons stated below, the Petitioner's Motion is denied as to the third ground and granted as to the fourth ground. Additionally, because the Petitioner's Motion is granted as to the fourth ground, it is unnecessary to decide the fifth ground.

## 1. Allegations of the Statement of Matters Asserted

For the purpose of considering the third, fourth, and fifth grounds for the Petitioner's Motion under the standard applicable to motions to dismiss, all allegations of the Statement of Matters Asserted are assumed to be true. The relevant allegations are summarized as follows:

On October 3, 2012, the Petitioner received a phone call from L.B., a former student, who reported that her father had kicked her out of their home, leaving her with nowhere to go. L.B. stated that she could not contact her mother until her father was asleep or left the home. (Statement of Matters Asserted ¶ 5.) The Petitioner picked up L.B. and ultimately allowed her to stay at the Petitioner's home overnight. (Statement of Matters Asserted ¶ 6.)

The Petitioner reported the incident to school administrators the next day, and her principal directed her to file a report with the Division of Family and Children Services ("DFCS") immediately. (Statement of Matters Asserted ¶¶ 7-8.) However, the Petitioner failed to file a DFCS report until October 15, 2012, more than ten days later. (Statement of Matters Asserted ¶ 12.) At the time of the incident, local school board policy required the Petitioner to report suspected abuse directly to DFCS, rather than to a designated reporter or administrator. (Statement of Matters Asserted ¶ 3.)

Based on these allegations, the Commission contends that the Petitioner violated Standards 2, 4, 9, and 10 of the Code of Ethics for Educators.

## 2. The Commission May Pursue Sanctions Based on Ethical Violations.

The Petitioner argues that the Commission impermissibly seeks to sanction her certificate based on her violation of a local school board policy that required her to report directly to DFCS, and that she complied with state law when she reported the suspected abuse of L.B. to her principal. See O.C.G.A. § 19-7-5(c)(2). However, the Statement of Matters Asserted explicitly states that the proposed disciplinary action is premised on alleged violations of the Code of Ethics for Educators, not on alleged violations of local policies. Whether or not the Petitioner's alleged failure to comply with a local policy amounts to a violation of the Code of Ethics for

Educators is an issue that will be decided at the hearing. Therefore, the Petitioner is not entitled to dismissal of this allegation.

3. The Facts Alleged in the Statement of Matters Asserted Do Not Support a Finding That the Petitioner Violated Standard 2.

Dismissal is warranted, however, as to the fourth ground of the Petitioner's Motion. The Statement of Matters Asserted alleges that the Petitioner violated Standard 2 of the Code of Ethics for Educators, entitled "Conduct with Students," which provides:

An educator shall always maintain a professional relationship with all students, both in and outside the classroom. Unethical conduct includes but is not limited to:

1. committing any act of child abuse, including physical and verbal abuse;
2. committing any act of cruelty to children or any act of child endangerment;
3. committing any sexual act with a student or soliciting such from a student;
4. engaging in or permitting harassment of or misconduct toward a student that would violate a state or federal law;
5. soliciting, encouraging, or consummating an inappropriate written, verbal, electronic, or physical relationship with a student;
6. furnishing tobacco, alcohol, or illegal/unauthorized drugs to any student; or
7. failing to prevent the use of alcohol or illegal or unauthorized drugs by students who are under the educator's supervision (including but not limited to at the educator's residence or any other private setting).

Ga. Comp. R. & Regs. 505-6-01(3)(b). The Commission concedes that the Petitioner did not violate any of the seven specifically enumerated examples of unethical conduct with students. Instead, the Commission evidently relies upon the catch-all provision of Standard 2, which

requires teachers to maintain “professional relationship[s]” with their students and to refrain from “unethical conduct.” The Commission’s reliance on this provision is misplaced. According to the Commission, “[t]he undisputed facts . . . point towards unprofessional conduct” and “[i]t is unprofessional for a teacher to allow a student to spend the night at her house without the parents’ knowledge or permission.” See Commission’s Response to Petitioner’s Motion for Summary Determination (“Commission’s Response”) at 14. Standard 2, however, does not authorize the Commission to sanction teachers for conduct that “points toward” unprofessionalism, and it does not prohibit the Petitioner’s conduct here.

Given the broad meaning of the terms “professional relationship” and “unethical conduct,” the catch-all provision of Standard 2 must be interpreted under the rule of *ejusdem generis*. *Ejusdem generis* is a rule of construction that states, “[W]hen a statute . . . enumerates . . . several particular things, and concludes with a general term of enlargement, this latter term is to be construed as being [of the same kind or class] with the things specifically named, unless . . . there is something to show that a wider sense was intended.” Dep’t of Transp. v. Montgomery Tank Lines, 276 Ga. 105, 107 n.5 (2003) (citing Mulkey v. State, 252 Ga. 201, 203 (1984)). “Under the rule of *ejusdem generis*, the words ‘including but not limited to’ ordinarily should be construed as referring to [items] of the same kind as those specially named.” Record Town, Inc. v. Sugarloaf Mills L.P., 301 Ga. App. 367, 371 (2009).

Applying the rule here, the Court observes that the examples of unethical conduct itemized in Standard 2 are indisputably inappropriate – involving, among other things, child abuse, endangerment, and drugs and alcohol – and in most cases illegal. Unlike the enumerated examples, however, the Petitioner’s actions were not illegal, and she did not abuse or endanger a student. In fact, the Petitioner’s behavior may have protected the student. This is a difference in

kind, not merely in degree, which renders Standard 2 inapplicable to this case. Accordingly, the Petitioner is entitled to dismissal of the allegation that she violated Standard 2.

#### 4. The Petitioner's Constitutional Challenge to Standard 2

Petitioner further asserts that Standard 2 is void for vagueness as prohibited by Article I, Section I, Paragraph I of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution. This contention is moot, however, in light of the foregoing conclusion that the Statement of Matters Asserted fails to allege a violation of Standard 2. Moreover, although the Petitioner is required to raise constitutional issues at the administrative level, an administrative law judge is "powerless to declare [statutes] unconstitutional." Flint River Mills v. Henry, 234 Ga. 385, 386 (1975).

### **B. Issues Presented For Summary Determination**

The Petitioner contends that the Commission lacks jurisdiction to sanction her teaching certificate for two reasons, set forth in the first and second grounds for her Motion. First, the Petitioner argues that the Commission was divested of jurisdiction because it failed to comply with the statutory time frame for completion of its preliminary investigation. Second, she asserts that the Commission found probable cause for violations of only two of the four relevant ethical standards, and that its disciplinary action is therefore limited to those two standards. The Petitioner's Motion is denied as to both grounds.

#### 1. Findings of Undisputed Material Fact

Viewing the evidence in the light most favorable to the Commission, the following facts relevant to the issues presented for summary determination are undisputed:



1.

On December 13, 2012, the Commission formally reviewed a complaint from the Cobb County School System and recommended an investigation.<sup>3</sup> (Exhibits R-1, R-2, R-3 at 5.)

2.

On February 14, 2013, the Commission granted a thirty-day investigative extension to allow its investigator more time to complete the investigation. In the Investigative Petition for Extension, the investigator wrote, "This investigator finds it impractical to present a summary of the investigative findings by the expiration date . . . ." (Exhibits P-F at 7, R-4.)

3.

On March 13, 2013, the Commission granted a second thirty-day investigative extension. The investigator's extension request used the same language as the February extension. (Exhibits P-G at 6, R-5.)

4.

On April 11, 2013, the Commission granted a third thirty-day investigative extension. The investigator's extension request used the same language as the February and March extensions. (Exhibits P-H at 6, R-6.)

5.

At its meeting on May 9, 2013, the Commission reviewed the investigative report and found probable cause that Petitioner violated the following standards of the Code of Ethics for Educators: Standard 2, Conduct with Students; Standard 4, Honesty; Standard 9, Required Reports; and Standard 10, Professional Conduct. At that time, the Commission recommended a one-year suspension of Petitioner's teaching certificate. (Exhibits P-C, R-7 at 4.)

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<sup>3</sup> The minutes of the Commission's December meeting reveal that the Petitioner's case was also listed as having been approved for a preliminary investigative extension. However, this notation was in error. (Exhibits P-D, R-2, R-3 at 5.)

6.

By letter dated May 9, 2013, the Commission notified the Petitioner of its probable cause determination and proposed sanction. (Exhibit P-C.)

2. The Commission Substantially Complied With its Governing Statutes.

In this case, the Petitioner argues that the Commission lacked jurisdiction to make a probable cause finding and recommend disciplinary action against the Petitioner because it failed to comply with statutory directives regarding the time frame for completion of its preliminary investigation. Specifically, the Petitioner contends that (1) the Commission failed to render a decision or extend with preliminary investigation within sixty days; (2) the Commission improperly extended its preliminary investigation three times, whereas the statute permits no more than two extensions; and (3) the extensions were improper because they did not include a statement of “unusual or compelling circumstances.” Notwithstanding these procedural irregularities, the Commission’s failure to adhere precisely to the statute does not void its decision to pursue disciplinary action against the Petitioner.

Georgia law establishes a specific time frame for the investigation of complaints received by the Commission. When the Commission receives a complaint, it decides within thirty days whether to conduct a preliminary investigation. O.C.G.A. § 20-2-984.3(b). The preliminary investigation is conducted by a Commission investigator, who is expected to complete the investigation within sixty days. O.C.G.A. § 20-2-984.4(e). The Commission then reviews its investigator’s report and determines whether to recommend disciplinary action against an educator based on a finding of probable cause. O.C.G.A. §§ 20-2-984.5(a), (c). The Commission’s recommendation is made “no later than the [C]ommission’s regularly scheduled meeting next occurring after [sixty] days from receipt of the findings of the preliminary

investigation.” O.C.G.A. § 20-2-984.5(a). However, prior to the expiration of this sixty-day period, the Commission may extend the review period for an additional thirty days “if unusual and compelling circumstances render it impracticable for the [C]ommission to complete its review within such period.” O.C.G.A. § 20-2-984.5(b). Further, “[a]ny such order shall state with particularity the circumstances which render it impracticable” for the review to be completed. *Id.* The Commission may, before the extended review period ends, enter a further extension for an additional thirty-day period. *Id.*

Nonetheless, because the Commission substantially complied with its governing statutes, it has not lost jurisdiction to pursue disciplinary action against the Petitioner. Under Georgia law, “substantial compliance with any statutory requirement, especially on the part of public officers, shall be . . . sufficient, and no proceeding shall be declared void for want of such compliance . . . .” O.C.G.A. § 1-3-1(c). Consistent with this provision, Georgia courts have determined that statutes requiring public officials to act within specific time periods are directory, not mandatory, in the absence of a penalty for noncompliance. Charles H. Wesley Ed. Found. v. State Election Bd., 282 Ga. 707, 709 (2007) (thirty-day period for board to grant or deny a petition was directory, not mandatory); Thebaut v. Ga. Bd. of Dentistry, 235 Ga. App. 194, 195 (Ct. App. 1998) (board’s delay in issuing a written decision to sanction a dentist was not void for jurisdiction because “no harm is shown nor authority withdrawn”).<sup>4</sup> Even where the statute uses the word “shall,” it is considered “simple futurity rather than a command.” Hardison v. Fayssoux, 168 Ga. App. 398, 400 (1983).

In this case, although the Commission did not comply precisely with the time frames established in its governing statutes, its substantial compliance was sufficient given the absence

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<sup>4</sup> The Petitioner’s reliance on Walker v. Dep’t of Transp., 279 Ga. App. 287 (2006) is misplaced because that statute, unlike the provision at issue here, provides a penalty for non-compliance.

of a penalty for noncompliance. In addition, the Commission substantially complied with the statutory requirement that an extension of time for the preliminary investigation must be based on circumstances that are “unusual or compelling.” The Commission therefore retains jurisdiction to pursue sanctions against the Petitioner’s teaching certificate.

3. The Commission Found Probable Cause for Violations of Four Ethical Standards.

The Petitioner further contends that the Commission’s probable cause determination was based on just two ethical standards, rather than the four standards identified in the Statement of Matters Asserted, and that the subject of this proceeding is limited to those two standards. However, assuming *arguendo* that the Commission’s probable cause finding restricts the issues presented for determination at the evidentiary hearing,<sup>5</sup> the Commission here notified the Petitioner that it had found probable cause of a violation of all four ethical standards.

The Commission’s May 2013 letter to the Petitioner states, in the second paragraph, that the factual allegations investigated included “inappropriate conduct with a student and failure to make a required report.” (Exhibit P-C.) From this, the Petitioner argues that the Commission found probable cause only as to Standards 2 and 9. See O.C.G.A. § 20-2-984.4(c). However, the Petitioner fails to mention the first paragraph of the letter, which advised the Petitioner that “[t]he grounds for disciplinary action by the Commission include Standard 2 (Conduct with Students), Standard 4 (Honesty), Standard 9 (Failure to Report), and Standard 10 (Professional Conduct).” (Exhibit P-C.) Similarly, the minutes of the Commission’s May 2013 meeting confirm that the Commission found probable cause regarding Standards 2, 4, 9, and 10. (Exhibit R-7 at 4.) Under these circumstances, the Petitioner’s argument is without merit.

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<sup>5</sup> It is unnecessary to address this argument in light of the Court’s finding that the Commission notified the Petitioner of each ethical standard upon which its proposed disciplinary action is based.

#### IV. THE COMMISSION'S COUNTER MOTION

The Commission's Counter Motion was filed on September 24, 2013, eighteen days past the deadline for filing a motion for summary determination established in the Prehearing Order entered on August 19, 2013.<sup>6</sup> The Commission did not seek leave to file its Counter Motion and did not request an amendment of the Scheduling Order entered on September 9, 2013. Accordingly, the Commission's Counter Motion is denied as untimely.

Moreover, even if the substance of the Commission's Counter Motion were considered, genuine issues of material fact remain for determination regarding the Petitioner's alleged conduct. In addition, to the extent certain facts are undisputed, the Commission has not demonstrated that these undisputed facts support a legal conclusion that the Petitioner violated the particular ethical standards at issue or that the proposed sanction is warranted.

#### V. DECISION

For the reasons set forth above, the Petitioner's Motion is **GRANTED** as to the fourth ground and **DENIED** as to all other grounds. The allegation that the Petitioner violated Standard 2 of the Code of Ethics for Educators is **DISMISSED**. The Commission's Counter Motion is **DENIED** in its entirety.

SO ORDERED, this 6<sup>th</sup> day of November, 2013.



KRISTIN L. MILLER  
Administrative Law Judge

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<sup>6</sup> Pursuant to the Prehearing Order, dispositive motions were due at least thirty days prior to the originally scheduled hearing date, or on or before September 6, 2013. The Scheduling Order did not modify this deadline and did not otherwise authorize the filing of a dispositive motion by the Commission.