

8/a 6-2-87

FILED
JUN 2 1987
CLERK OF COURT
JPL

IN THE SUPREME COURT OF FLORIDA

THOMAS B. FERRIS ,
Petitioner,
v.
RALPH D. TURLINGTON, ETC.,
Respondent.

CASE NO. 69,561
Florida Bar No. 130216

BRIEF OF AMICUS CURIAE
FLORIDA EDUCATION ASSOCIATION/UNITED, AFT, AFL-CIO

THOMAS W. YOUNG III, ESQ.
General Counsel, FEA/United
208 West Pensacola Street
Tallahassee, Florida 32301
904/224-1161

TABLE OF CONTENTS

	<u>Page</u>
CITATION OF AUTHORITIES	i
ARGUMENT	1
THE STANDARD OF PROOF REQUIRED TO SUPPORT THE REVOCATION OF A LICENSE IS GREATER THAN THE PREPONDERANCE OF THE EVIDENCE.	
CONCLUSION	7
CERTIFICATE OF SERVICE	8

CITATION OF AUTHORITIES

	<u>Page</u>
STATUTES:	
Section 231.28, Florida Statutes	3, 4, 5
CASES:	
<u>Bowling v. Department of Insurance</u> , 394 So.2d 165 (Fla. 1st DCA 1981)	2, 3, 5, 6
<u>Ferris v. Austin</u> , 487 So.2d 1163 (Fla. 5th DCA 1986)	2, 6
<u>Smith v. School Board of Leon County</u> , 405 So.2d 183 (Fla. 1st DCA 1981)	5
<u>Texton v. Hancock</u> , 359 So.2d 895 (Fla. 1st DCA 1978)	5
<u>Turlington v. Ferris</u> , 496 So.2d 177 (Fla. 1st DCA 1986)	2

ARGUMENT

THE STANDARD OF PROOF REQUIRED TO SUPPORT THE
REVOCATION OF A LICENSE IS GREATER THAN THE
PREPONDERANCE OF THE EVIDENCE.

The Florida Education Association/United, AFT, AFL-CIO (FEA/United) submits this brief as Amicus Curiae in support of position advanced by Petitioner Thomas D. Ferris in this case. FEA/United represents approximately 60,000 Florida school teachers and school-related personnel. In its capacity as representative of these employees, FEA/United frequently appears on their behalf before the Education Practices Commission in proceedings regarding anything from a reprimand and probation to suspension and revocation of the teacher's certificate. Suspension or revocation of the teacher's certificate effectively denies the teacher the opportunity to earn a living in his or her chosen profession. The issue presented to this Court is therefore of significant interest to FEA/United and the teachers it represents.

The case giving rise to this issue is somewhat convoluted because of the consolidation of two hearings. One hearing was initiated by the Hernando County School Board which sought to dismiss Ferris based on charges of immorality. The Hernando County School Board rejected the Hearing Officer's Recommended Order, finding that the Hearing Officer incorrectly

applied a clear and convincing evidence standard. The School Board's order permanently dismissing Ferris as a teacher was reversed in Ferris v. Austin, 487 So.2d 1163 (Fla. 5th DCA 1986).

The other hearing was initiated by the Commissioner of Education who filed an administrative complaint alleging sexual misconduct on the part of Ferris. In that case, the Education Practices Commission adopted the Hearing Officer's Recommended Order in which he concluded that the charges to support the revocation of a license had to be proven by either clear and convincing evidence or by evidence as substantial as the consequences, relying upon Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981). The Commissioner of Education asserted inter alia that the Hearing Officer applied an incorrect standard of proof. The Hearing Officer concluded in that case that the standard of proof "is greater than a preponderance of the evidence." The court below held that the Hearing Officer's recommendation was based upon an incorrect interpretation of the law in that respect. Turlington v. Ferris, 496 So.2d 177, 178 (Fla. 1st DCA 1986).

The court in Ferris v. Austin stated in pertinent part:

There is confusion since the Bowling decision, in that it is not clear whether the clear and convincing evidence standard was adopted, or whether some higher or lesser standard was intended. Nevertheless, Bowling does state that "in a proceeding under a

penal statute for suspension or revocation of a valuable business or professional license, the term competent substantial evidence takes on vigorous implications that are not clearly present on other occasions for agency action under Chapter 120. When the proceeding may result in the loss of a valuable business or professional license, the critical matters in issue must be shown by evidence that is indubitably as substantial as the consequences.

487 So.2d at 1165. (emphasis added) There can be no dispute that the proceedings initiated by the filing of the administrative complaint by the Commissioner of Education in the instant case began proceedings which were pursuant to a statute the effect of which was clearly penal in nature. The intent of the Commissioner was to deprive Ferris of his teaching certificate--i.e. his professional license--if the Commissioner was able to sustain his burden of proof concerning the allegations in the administrative complaint. Section 231.28, Florida Statutes, specifically provides that the Education Practices Commission has the authority to suspend or revoke a teaching certificate.

The analysis of the court in Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981) is most pertinent to the issue before this Court. The court in Bowling required an elevated standard of competent substantial evidence stating:

When the standards of conduct to be enforced are not explicitly fixed by a statute or by rule, but depend upon debatable expressions...; when the conduct to be assessed is passed, beyond the actor's power to

conformance to agency standards announced prospectively; and when the proceeding may result in the loss of a valuable business or professional license, the critical matters at issue must be shown by evidence which is indubitably as substantial as the consequences.

394 So.2d at 172.

The statute in question in the instant case, Section 231.28, Florida Statutes, provides for the suspension or revocation of a teaching certificate provided it can be shown that the individual in question:

- a) Obtained the teaching certificate by fraudulent means;
- b) Has proved to be incompetent to teach or to perform duties as an employee of the public school system or to teach in or to operate a private school;
- c) Has been guilty of gross immorality or an act involving moral turpitude;
- d) Has had a teaching certificate revoked in another state;
- e) Has been convicted of a misdemeanor, felony, or any other criminal charge, other than minor traffic violation;
- f) Upon investigation has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the school board;
- g) Has breached a contract, as provided in Section 231.36(2); or
- h) Has otherwise violated the provisions of law or rules of the State Board of Education, the penalty for which is the revocation of a teaching certificate.

It should not be here debated that Section 231.28 is based upon the interpretation and application of "debatable expressions" concerning past conduct beyond the actor's power to conform to agency standards resulting in the loss of his or her professional license.

Thomas Ferris, having acquired a teaching certificate and a continuing contract, had therefore acquired a valuable property right in his expectation of continued employment. Texton v. Hancock, 359 So.2d 895 (Fla. 1st DCA 1978). Although Florida Statutes, Section 231.28, permit the Education Practices Commission to take away that valuable property right, as indicated above, the standards of conduct to be enforced are not explicitly fixed by a statute but depend upon debatable expressions. This Court should consider that the due process required in the removal of this valuable property right should be established by evidence as substantial as the consequences.

The case of Smith v. School Board of Leon County, 405 So.2d 183 (Fla. 1st DCA 1981) is also instructive in this regard. Although that case dealt with Section 231.36(4)(b), Florida Statutes, and the issue involved was the loss of back pay, the court there properly concluded that the statute in question was penal in nature, and that any action taken pursuant to this section was required to be supported by an elevated standard of competent substantial evidence, relying upon Bowling

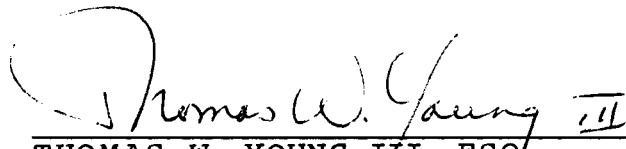
v. Department of Insurance to support this proposition. 405 So.2d 183, 185-186. Thus, the First District Court of Appeal, like the Fifth District Court of Appeal, has considered it appropriate to apply an elevated standard to competent substantial evidence required in situations involving a penal statute such as is the case before this Court.

Whether it is a "clear and convincing standard," or whether the critical matters in issue must be shown by evidence which is indubitably as substantial as the consequences," it is appropriate for this Court to conclude, as did the court in Ferris v. Austin, 487 So.2d 1163, 1165 (Fla. 1st DCA 1986) that Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981) does apply in a proceeding under a penal statute for suspension revocation of a valuable business professional license, and that the term competent substantial evidence takes on vigorous implications that are not so clearly present on other occasions for agency action under Chapter 120.

It is respectfully urged that this Court conclude that an elevated standard was appropriately applied to Petitioner Ferris, and that the appropriate standard is one of clear and convincing evidence when a penal statute is involved, the consequence of which is suspension or revocation of a teaching certificate.

CONCLUSION

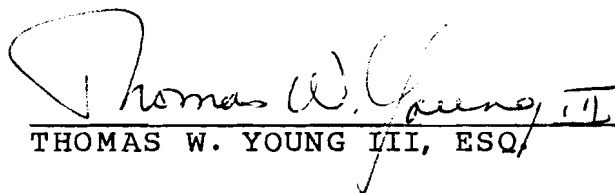
A clear and convincing standard of proof is appropriately applied to Petitioner Ferris, and to all teachers who are party to proceedings the result of which is intended to be the suspension or revocation of their teaching certificate. Failure to elevate the standard would result in the deprivation of a valuable property right without adequate due process of law. This Court should reverse the decision of the court below, and affirm the decision of the Education Practices Commission adopting the Hearing Officer's Recommended Order.



THOMAS W. YOUNG III, ESQ.
General Counsel, FEA/United
208 West Pensacola Street
Tallahassee, Florida 32301
904/224-1161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 13th day of March, 1987 to Sydney H. McKenzie III, Esq., Department of Education, Knott Building, Tallahassee, Florida 32301; John J. Chamblee, Jr., Esq., 202 Cardy Street, Tampa, Florida 33606; and Pamela L. Cooper, Esq., P. O. Box 1547, Tallahassee, Florida 32302.


THOMAS W. YOUNG III, ESQ.