O/a 6-2-87

IN THE SUPREME COURT OF FLORIDA

THOMAS B. FERRIS,

Petitioner,

v.

CASE NO. 69,561
Florida Bar No. 293903

RALPH D. TURLINGTON, ETC.,

Respondent.
_____/

BRIEF OF AMICUS CURIAE EDUCATION PRACTICES COMMISSION

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ARGUMENT

THE COURT SHOULD ADOPT A SINGLE STANDARD OF PROOF FOR DISCIPLINARY PROCEEDINGS INVOLVING TEACHING CERTIFICATES.

The Education Practices Commission (Commission) submits this brief as Amicus Curiae in opposition to the standard of proof set forth in Bowling v. Department of Insurance 394 So.2d. 165 (Fla. 1st DCA 1981) and in support of single standard of proof. As the agency whose order was appealed to the First District Court of Appeal in Turlington v. Ferris, 496 So.2d 117 (Fla. 1st DCA 1986) and the body empowered to take final agency action in cases of denial and discipline of teaching certificates, the Education Practices Commission is significantly affected by the issues before this Court. The varying standards of proof employed by the hearing officers and the courts in licensing cases leave the Commission uncertain as to the correct standard to be applied.

In the case before this Court, allegations of sexual battery by a male teacher upon a male minor student gave rise to the teacher's suspension and subsequent dismissal, and an action by Ralph D. Turlington, then Commissioner of Education, against the teacher's certificate. Although a joint hearing was held before the hearing officer and a joint recommended order issued, the two actions sharply diverged after issuance of the recommended order. A panel of the Education Practices Commission adopted the recommended order as its final order on April 18, 1985; the order

was rendered May 9, 1985. In a separate final hearing, the School Board of Hernando County reversed the Hearing Officer in its final order. On appeal to the First and Fifth District Courts of Appeal, respectively, the case continued along separate routes. The first opinion Ferris v. Austin, 487 So.2d 1163 (Fla.5th DCA 1986) issued by the Fifth District on April 24, 1986, found that the School Board had improperly modified the hearing officer's order and accordingly, reversed and remanded for entry of an order consistent with the recommended order. The second opinion, Turlington v. Ferris, (Fla.1st DCA 1981), issued by the First District on October 2, 1986 reversed and remanded the Commission's final order for remand to the hearing officer for another recommended order applying a different interpretation of corroboration of testimony and a different standard of proof. The issues before this Court stem from the last two paragraphs of the First District's opinion:

> The evidence before the hearing officer consisted of conflicting testimony by appellee and the alleged victim regarding two incidents which occurred in the summer and fall of 1983 in appellee's home. The hearing officer did not explicitly reject the minor's testimony, but found that there was insufficient evidence in the record to corroborate his testimony. The hearing officer concluded that 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 vs. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981).

> Although the record contains competent substantial evidence which would support either a finding that appellee committed the sexual battery or a finding that he did not, the hearing officer's recommendation is based upon incorrect interpretation of the law in two respects: that a minor victim's testimony must be corroborated in order to find that a teach engaged in sexual misconduct, and that the standard of proof, under the circumstances of this case, is greater than a preponderance of the evidence.(Emphasis Supplied)

In recognizing the gravity of its authority in licensing cases, the Education Practices Commission submits, for the reasons set forth below, that the standard of proof employed in the Bowling case, sometimes referred to as the sliding scale standard of proof, has become confusing, if not unworkable, and submits that a single standard, whether clear and convincing or preponderance, should be adopted. The Commission submits that a higher standard of proof is preferable to the sliding one established by Bowling.

The Bowling case arose from an action by the Department of Insurance against a licensed insurance agent charged, inter alia, with misappropriation of funds. In overturning the agency's final order, the First District maintained that:

> In a proceeding under a penal statute for suspension or revocation of a valuable business or professional license, the term "substantial competent evidence" takes on vigorous implications that are not so clearly present on other occasions for agency action under Chapter 120. Although all questions of fact as distinguished from policy are determinable under

> the Administrative Procedure Act by substantial competent evidence, Section 120.68(10), we differentiate between evidence which "substantially" supports conventional forms of regulatory action and evidence which is required to support "substantially" a retrospective characterization of of conduct requiring suspension or revocation of the actor's license. Evidence which is "substantial" for one purpose may be less so on another, graver occasion. One takes a stranger's name at his word upon a chance meeting, but wants better proof to cash his check.

394 So.2d at 171

Overthrowing the clear and convincing standard embraced by a pre-APA Second District Court in Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla.2d DCA 1966), the Bowling Court differentiated between the levels of standard of proof required in administrative proceedings and held that, "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 which is induitably as substantial as the consequences." (394 So.2d at 172)

Although Bowling has been consistently relied upon, its holding is in danger of being strained beyond logic. The difficulty encountered by agencies attempting to comply with Bowling is that the opinion implies that the severity of the penalty sets the standard of proof. The Education Practices Commission submits that the standard of proof employed in each disciplinary proceeding should remain static; the severity of the penalty should flow from the seriousness of the offense, but

should not alter the standard of proof. The standard of proof, whether clear and convincing, or preponderance of the evidence, should not shift depending upon the penalty sought by the agency. To require such shifting places a near impossible burden on a reviewing agency imposing final action, and erodes the authority granted to it via Section 120.57(1)(b)9, F.S. which provides, that:

> The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

At least one hearing officer has read Bowling to require that an agency, when alleging a higher penalty, catapults into an elevated standard of proof, while, if alleging a lesser penalty, may rely on a lower standard. Allegation of revocation as a potential penalty would require proof of charges by clear and convincing evidence, but where revocation were not alleged the standard of proof would be less than clear and convincing, but not less than preponderance. Department of Professional Regulation, Florida Real Estate Commission v. Peter David Frontiero, 8 FALR 2237 (Fla. Real Estate Commission 1985).

The reading of Bowing given by the hearing officer in Frontiero is not unusual; however, the Education Practices Commission submits that such readings reverse the natural order of things. Rather than having the severity of the penalty dictate the standard of proof, the Commission submits that this Court should adopt a single standard of proof in licensing cases so that the severity of the penalty would instead flow from the allegations proven.

CONCLUSION

This Court should adopt a single standard of proof for disciplinary proceedings involving teaching certificates.

Respectfully submitted,

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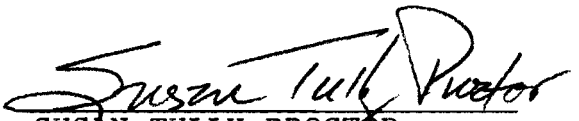

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was forwarded this 9th day of April, 1987 by U.S. Mail to Sydney H. McKenzie III, Esq., Department of Education, Knott Building, Tallahassee, Florida 32301; Pamela L. Cooper, Esq., P. O. Box 1547, Tallahassee, Florida 32302 and Thomas W. Young, III, Esquire, 208 West Pensacola Street, Tallahassee, Florida 32301, and by Federal Express to John J. Chamblee, Jr., Esq., 202 Cardy Street, Tampa, Florida 33606.

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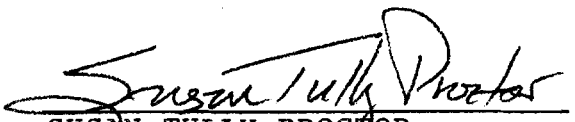

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