

O/A 6-2-87

IN THE SUPREME COURT OF FLORIDA

**THOMAS B. FERRIS,**

Petitioner,

vs.

Case Number: 69,561  
Florida Bar No. 0302546

**RALPH D. TURLINGTON, ET AL.,**

Respondent.

FILED

MAR 17 1987

SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

**BRIEF OF AMICUS CURIAE**  
**FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSOCIATION**

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## STATEMENT OF CASE AND FACTS

This case is before the Court for discretionary review pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv), it having been determined that the First District Court of Appeal decision in Turlington v. Ferris, Case Number BH-37 (Oct. 2, 1986), expressly and directly conflicted with the companion case rendered by the Fifth District Court of Appeal in Ferris v. Austin, 487 So.2d 1163 (Fla. 5th DCA 1986), upon an identical administrative recommended order. In addition, the decision below conflicted with decisions of the Second and Third District Court of Appeal on the question of the appropriate standard of proof to be applied at the administrative hearing in license revocation proceedings.

This case arose from the filing of a Notice and Charges statement by the Hernando County School Board against Thomas Ferris charging him with immorality for the alleged sexual abuse of a male student. With the filing of these charges, the School Board suspended Ferris without pay and provided notice of its intent to dismiss Ferris.

The Department of Education thereafter filed an administrative complaint seeking to impose sanctions against Ferris' certificate based upon the allegations of sexual misconduct forming the basis of the School Board's complaint. By stipulation the School Board and license revocation proceedings were consolidated and a joint administrative hearing was conducted by a hearing officer appointed by the Division of

Administrative Hearings pursuant to Section 120.57(1), Florida Statutes (1984).

Upon review of all of the evidence, the Hearing Officer issued two recommended orders. As a threshold finding applicable to both proceedings, the Hearing Officer concluded that the allegations of sexual misconduct were not substantiated by the weight of the evidence and that Ferris had had no sexual conduct with the student as alleged. Based upon these findings, the Hearing Officer first recommended that charges filed by the School Board be dismissed and second that the administrative complaint filed by Commissioner Turlington also be dismissed.

The School Board of Hernando County upon review of this decision declined to accept the recommended order and instead voted to permanently dismiss Ferris as an instructional employee with Hernando County School Board. This final order was timely appealed to the Fifth District Court of Appeal which reversed the final order dismissing Ferris. The District Court concluded that the Hearing Officer properly resolved the issue of credibility in Ferris' favor due to the "clear factual determination" that no sexual conduct occurred and that the standard of proof as applied by the Hearing Officer at the administrative trial was correct.

Taking a different appellate route, the Education Practices Commission adopted and approved the recommended order and dismissed the administrative complaint against Ferris. Thereafter, Commissioner Ralph Turlington appealed the final order of the EPC. The First District Court in reviewing the

identical recommended order, found that the Hearing Officer erred in two respects: first, as to the "requirement of corroboration of the minor's testimony" to support a finding of sexual misconduct by the teacher and second, by imposing an elevated standard of proof within the license revocation proceeding.

On these two issues, clear and direct conflict existed between the First District Court of Appeal and the Fifth District Court of Appeal decisions. Accordingly, Ferris sought review under the Rule Fla.R.App.P. 9.030(a)(2)(A)(iv).

The Amicus, Florida Teaching Profession-National Education Association (FTP-NEA) believes that the First District Court of Appeal has inappropriately applied a minimum standard of proof in this case. By doing so, the Court, without explication, has apparently receded from its prior decisions imposing a "sliding scale" standard of proof in penal type proceedings where the sanction may be the loss of license or livelihood. Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981). The decision to impose a mere preponderance of evidence standard in this license revocation proceeding is inapposite to other district court opinions which have fully recognized the serious implications inherent in an administrative license revocation proceeding by requiring the clear and convincing evidence standard to sustain charges. It is to this aspect of the First District Court of Appeal opinion that this brief is addressed.

### SUMMARY OF THE ARGUMENT

Amicus, FTP-NEA, contends that the appropriate standard of proof in administrative proceedings, where such proceedings might culminate in severe sanctions, is a standard of proof greater than the mere preponderance of evidence. Unlike the most recent pronouncement in this case, the Florida appellate courts in determining the appropriate standard of proof in an administrative penal setting for the most part have recognized the punitive implications in the license revocation or dismissal action and required a different, more compelling standard than the traditional preponderance of evidence test used in most administrative or civil proceedings. Pearl v. Florida Real Estate, 394 So.2d 189 (Fla. 3d DCA 1981); Sneij v. Department of Professional Regulation, 454 So.2d 795 (Fla. 3d DCA 1984); Purvis v. Department of Professional Regulation, 464 So.2d 134 (Fla. 1st DCA 1984); Cohn v. Department of Professional Regulation, 477 So.2d 1039, 1046 (Fla. 3d DCA 1985); and, Robinson v. Florida Board of Denistry, 447 So.2d 930, 932 (Fla. 3d DCA 1984). Whether the standard adopted is a "clear and convincing" test or a "sliding scale" analysis, many courts have rejected the preponderance standard in light of the character, scope and purpose of the penal proceeding and the possibility of grave punitive impact upon the accused. See Bowling. This Court now has the opportunity to put to rest much of the confusion which



has existed following the Bowling decision and provide a definitive statement as to the standard of proof to be used at the hearing level of penal administrative cases.

The FTP-NEA contends that only an intermediate standard of proof which recognizes the substantial interests at stake and which minimizes as much as possible the likelihood of inaccurate findings should be applied in cases such as the one before this Court.

## ARGUMENT AND ISSUE

IN A PROCEEDING UNDER A PENAL STATUTE FOR  
LICENSE REVOCATION, AN ELEVATED STANDARD OF  
PROOF AT THE HEARING LEVEL IS APPROPRIATE.

The sole issue to be addressed by Amicus FTP-NEA is whether in an administrative hearing the proper evidentiary standard of proof is greater than the preponderance of evidence standard. For assistance in determining what standard of proof should govern the administrative penal proceeding, a review of the applicable statutory provisions and the case law construing those provisions is instructive in ascertaining the precise standard of proof to be used.

The Administrative Procedures Act, Chapter 120, provides that the standard for review by an agency of a hearing officer's recommended order and the scope of judicial review of factual determinations by an agency shall be by "substantial competent evidence." In pertinent part, Section 120.57(1)(b)(10), Florida Statutes (1984), authorizes the agency to reject or modify the findings of fact contained in the recommended order only when the agency determines that such "findings of fact were not based upon competent substantial evidence." So, too, Section 120.68(10), Florida Statutes (1984), permits the reviewing court to set aside agency orders that are not supported by record competent substantial evidence. As to the requisite standard of proof governing the administrative hearing itself, the statute is silent.

Because the Legislature failed to prescribe the degree of proof applicable in the penal administrative proceeding the judiciary has traditionally endeavored to resolve the question of the appropriate standard of review. See Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2d DCA 1966); Bowling, supra; Pearl, supra; and Sneij, supra. However, there has been much confusion surrounding the scope of judicial review of agency determinations and the standard of proof applicable in the administrative hearing convened to determine such matters. This confusion stems from the lack of legislative definition of the competent substantial evidence standard and its application in various forms of adjudicatory proceedings and within the various stages of the administrative proceeding in general. See Robinson. While the confusion exist as to the term competent substantial evidence there is no evidence that the Legislature intended to recede from the earlier judicial decisions imposing an intermediate standard of proof in license revocation proceedings.<sup>1</sup>

Historically, the standard of proof applied in license revocation proceedings prior to the enactment of the APA was the clear and convincing test. Reid v. Florida Real Estate

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<sup>1</sup> Amicus FTP-NEA has been unable to discover any evidence of Legislative intent concerning the precise standard of proof to be used in a license revocation proceeding nor has Amicus been able to discern an express intent on the part of the Legislature to recede from the former standard of proof used in license revocation proceedings.

Commission, 188 So.2d 846 (Fla. 2d DCA 1966); Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). In Reid, the Real Estate Commission sought to suspend or revoke a realtors license on charges of dishonest conduct. There, the court determined in light of the severe potential penalty that the dishonesty must be proven by "clear and convincing evidence."

This Court in Rayman recognized that the quantum of proof suggested by a mere "preponderance of the evidence standard" failed to satisfy the requirements of a disciplinary proceeding seeking to sanction a licensee. Because loss of livelihood was a potential penalty, the standard of proof to which the agency was held had to be commensurate with the penalties available to that agency.<sup>2</sup>

The earlier decisions were forever mindful of the potential penalties involved in those cases and of the necessity to balance the penalty with the risk of error. Accordingly, the preponderance of evidence standard used in the typical civil case involving a monetary dispute only was found to be inapplicable to civil cases involving some type of quasi-criminal wrongdoing by a defendant. While the interests of the Defendant in the administrative penal proceeding cannot be elevated to those

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<sup>2</sup> So, too, in Collins Securities Corp. v. Security and Exchange Commission, 562 F.2d 826 (DC Cir. 1977), the court using a similar analysis determined that "the clear and convincing evidence standard serves this function of drawing a realistic correlation between the burden of persuasion and the available remedies." at 826.

interests of the Defendant in a criminal case and thereby requiring the reasonable doubt standard of proof, historically the individual's interests were considered more substantial than the issues found in civil cases. Rayman at 596.

FTP-NEA contends that these decisions, outlining the standard of proof in penal type administrative proceedings, were not invalidated with the promulgation of the Administrative Procedures Act. As stated earlier, because the statute is silent, the prior judicial expressions, unless clearly and unequivocally retracted, remain valid and in many instances are the only statements of the appropriate standard of proof in penal cases.

This case, and indeed all license revocation and disciplinary cases, require an elevated quantum of proof at the trial level. Here, the potential penalty is far more severe than the mere loss of money; it involves the potential deprivation of Ferris' livelihood. The FTP-NEA believes that the ability to revoke a teacher's license should be exercised only upon clear and substantial proof necessary to sustain the charges. To do otherwise implicates the fundamental precepts of fairness inherent in the due process clause, which "guarantees that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness 'generating the feeling, so important to a popular

government, that justice has been done . . .'" Robinson v. Florida Board of Dentistry, DPR, 447 So.2d 930 (Fla. 3d DCA 1984), citing Marshall v. Gerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1630, 64 L.Ed.2d 182, 188 (1980).

Even with the adoption of the Administrative Procedures Act, the district courts have been loathsome to abandon the clear and convincing test as to the standard of evidence required to support a license revocation proceeding at the hearing level. Pearl v. Florida Real Estate, 394 So.2d 189 (Fla. 3d DCA 1981); Snejj v. Department of Professional Regulation, 454 So.2d 795 (Fla. 3d DCA 1984). The Pearl decision, rendered on the heels of Bowling, applied the Reid "clear and convincing" proof standard at the trial level in a license revocation proceeding, stating that penal sanctions could only be imposed upon "clear and convincing proof of the substantial causes justifying the forfeiture." Several years later in Snejj, the Third District continued to uphold the clear and convincing standard in license revocation proceedings. In Snejj, the Court looked to the evidence presented at trial and found it wholly lacking to establish the charges. Recognizing the potential deprivation of livelihood inherent in the case, the Court favorably cited Walker v. State Board of Optometry, 322 So.2d 612 (3d DCA 1975), which required an elevated standard of proof in such cases.

This Court has defined the competent substantial evidence standard as "such evidence as will establish a substantial basis of fact from which the fact and issue can be reasonably inferred"

for such evidence as is "sufficiently relevant and material that a reasonable mind will accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). In applying the competent substantial evidence standard within the penal setting, the First District Court in Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1961), first rejected the Reid clear and convincing test and thus created a species of substantial competent evidence which varied the standard of proof dependent upon the gravity of the sanctions. In Bowling, the court stated:

In a proceeding under a penal statute for a 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 cases for agency action under Chapter 120 . . . . When the proceeding may result in a loss of a valuable business or professional license, the critical matters in issue must be shown by evidence which is indubitably as "substantial" as the consequences.

394 So.2d at 172. Thus, the Bowling court accepted in part the underlying rationale of the earlier Florida cases which imposed a higher standard of review. While Bowling essentially dealt with the judicial standard of review of an agency decision, its applicability to the hearing-level standard of proof has generated much confusion. However, many cases following the Bowling standard have generally interpreted the decision to require an elevated standard of competent substantial evidence at the hearing level. See: Robinson v. Florida Board of Denistry,

447 So.2d 930, 932 (Fla. 3d DCA 1984); Cohn v. Department of Professional Regulation, 477 So.2d 1039, 1046 (Fla. 3d DCA 1985); Purvis v. Department of Professional Regulation, 464 So.2d 134, 137 (Fla. 1st DCA 1984); Smith v. School Board of Leon County, 405 So.2d 183, 185-86 (Fla. 1st DCA 1981).

In Smith, the First District Court of Appeal considered the application of the Bowling standard of proof to the dismissal of a non-instructional employee by the School Board of Leon County. The First District found the analysis in Bowling to be instructive in that the statute in consideration was "penal in nature," School Board of Pinellas County v. Noble, 384 So.2d 205 (Fla. 1st DCA 1980), and the "loss of backpay a substantial penalty." Within the context of a suspension and loss of pay, the elevated standard was considered appropriate.

In adopting the Bowling rationale, the Third District Court of Appeal in Robinson reasoned that the elements of procedural due process inherent in a license revocation action and the doctrine of fundamental fairness require the agency to employ the elevated standard at the trial level. To meet due process standards, the hearing must be meaningful and provide a recognition and observance of the procedural safeguards. Id. at 933.

In this case, the First District remanded the case for a reapplication of the facts under a preponderance of evidence standard as opposed to the more stringent standard set forth in Bowling. By so doing, the First District apparently failed to



recognize the substantial consequences if the charges are sustained under a lower standard of proof. This failure to follow the elevated standard of proof could result in the loss of livelihood without the procedural protections required by the due process. The FTP-NEA submits that such an interpretation is wholly inconsistent with past precedents in this and other Florida courts.

The rationale underlying the clear and convincing standard of proof analysis and the Bowling test can also be seen in federal court precedents. Frequently, the Supreme Court has been called upon to determine the appropriate standard of review in administrative cases. As a general proposition the "preponderance of evidence standard is the appropriate standard for civil and administrative proceedings. Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir. 1980) cert den., 449 U.S. 834, 101 S.Ct. 105, 66 L.Ed.2d 39 (1980); Bender v. Clark, 744 F.2d 1424 (1984). However, where the individuals' interests at stake are "particularly important" and "more substantial than mere loss of money," the intermediate standard of proof, be it called clear and convincing evidence or unequivocal or substantial evidence, has been recognized. Addington v. Texas,

411 U.S. 418, 424, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979).<sup>3</sup> Thus, where it has been necessary to inject fundamental fairness in an administrative proceeding which implicates an individual's liberty interests, the courts have concluded that the primary function of the standard of proof at the trial level is to "minimize the risk of erroneous decisions." Addington citing at 1809, citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

With these precedents in mind, Amicus respectfully suggest that the appropriate standard to apply in a license revocation disciplinary proceeding is an elevated standard of proof or a clear and convincing standard. Amicus readily concedes that there are types of license regulatory proceedings which may not implicate a loss of livelihood where a lesser standard may be applicable. However, in the case before this Court, where a licensed teacher has been charged with sexual misconduct and who was required to participate in an evidentiary hearing on the matter, and where the proceeding is clearly designed to be punitive in nature, an elevated standard is necessary to protect the rights and interests of the accused.

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<sup>3</sup> The Addington decision dealt with the civil commitment of an individual. See also, Santowsky v. Kramer, 455 U.S. 755, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (convincing evidence standard required for the determination of parental rights.) Chaunt v. United States, 364 U.S. 350, 81 S.Ct 147, 5 L.Ed.2d 120 (1960). Clear and convincing standard of proof required in denaturalization cases.

CONCLUSION

Based on the authority and for the reasons cited herein, the Amicus FTP-NEA respectfully requests that this Court reverse the decision of the First District Court of Appeal and find that the appropriate standard of proof at the trial level is an intermediate clear and convincing standard of proof. Accordingly, the Court should reverse the First District Court of Appeal decision and uphold the final order of the Education Practices Commission.

Respectfully submitted,

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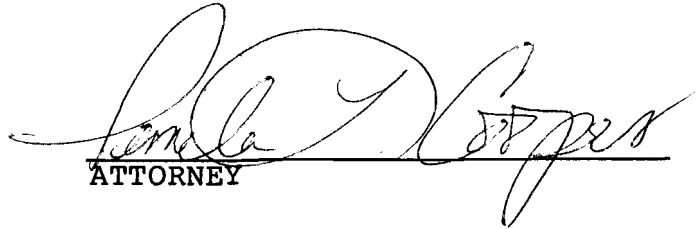
By: 

PAMELA L. COOPER

ATTORNEY FOR AMICUS, FTP-NEA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 16<sup>th</sup> day of March, 1987, to: Thomas W. Young, III, Esquire, 208 West Pensacola Street, Tallahassee, Florida 32301; John Chamblee, Esquire, 202 Cardy Street, Tampa, Florida 33606; and, Sydney H. McKenzie, III, Esquire, Department of Education, the Knott Building, Tallahassee, Florida 32301.

  
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