O/A 6-2-87

IN THE SUPREME COURT OF THE STATE OF FLORIDA

THOMAS B. FERRIS Respondent, Petitioner, v. RALPH D. TURLINGTON, as the Commissioner of Education, Petitoner, Respondent.	Case No. 69,561 1st DCA Case No. BH-37 Attorney # 179504

PETITIONER'S INITIAL BRIEF

ON APPEAL FROM
THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

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I

STATEMENT OF THE CASE AND THE FACTS

Effective April 16, 1984, the Petitioner, THOMAS B. FERRIS, hereinafter referred to as the Petitioner, was suspended from his duties without pay by the School Board of Hernando County ("School Board"). The Petitioner was notified of such action by letter dated April 19, 1984, and, by letter dated April 30, 1984, he requested that a formal hearing be conducted upon the charges brought against him. On or about May 25, 1984, the School Board issued a pleading entitled "Notices and Charges", seeking to terminate the Petitioner from his employment based upon allegations of sexual battery involving a minor student.

On or about June 2, 1984, the Petitioner filed a "Demand For Hearing, Response To Charge, Demand For Statement of Particulars And Request For Appointment Of Hearing Officer", in which Petitioner denied the allegations set forth in the School Board complaint. Futhermore, Petitioner demanded, in accordance with §231.36, Fla. Stat., the payment of full back pay and benefits as well as reinstatement to his employment with the School Board of Hernando County on continuing contract.

The Respondent, RALPH D. TURLINGTON, Commissioner of Education, hereinafter referred to as the Respondent, filed an Administrative Complaint on July 5, 1984. The Complaint was based upon the same instances of alleged sexual misconduct which formed the basis for the School Board charges. The Respondent

sought to take disciplinary action, including revocation of the Petitioner's teaching certificate, as a penalty for such alleged misconduct.

The Petitioner filed a responsive pleading to such complaint in which he denied the operative assertions of the complaint and raised affirmative defenses.

The issues in the then pending matters were referred to a hearing officer appointed by the Division of Administrative Hearings, who scheduled a hearing to be conducted pursuant to the provisions of §120.57(1), Fla. Stat. A stipulation for consolidation of the two proceedings before the Division of Administrative Hearings was filed in which the Hearing Officer was requested to issue two orders: one directed to the issues addressed in the charging instrument filed by the School Board and another directed to the issues addressed in the complaint filed by the Commissioner of Education. An administrative hearing concerning the consolidated cases was conducted on November 28th and 29th, and on December 21, 1984, where one record and body of evidence was established for both matters.

On January 30, 1985, the Hearing Officer issued his Findings of Fact, Conclusions of Law, and Recommended Order. He concluded, inter alia, that based of the evidence of record, the allegations of misconduct against the Petitioner were not supported by the weight of the evidence, and that the Petitioner had no sexual contact with the alleged victim. He, accordingly, issued two recommended Orders, one recommending that the charges filed by

the School Board be dismissed and the other recommending that the charges filed by the Respondent be dismissed.

The Commissioner of Education filed exceptions to the Recommended Order on the basis, inter alia, that the Hearing Officer had required corroboration of the student's testimony regarding the claimed sexual assault and on the basis that he had misapplied the standard of proof. On April 18, 1985, the Education Practices Commission considered such exceptions, expressly rejected them at page 1 of the Order, and voted to adopt and approve the report and recommended order of the Hearing Officer and by Order dated May 7, 1985, accordingly dismissed the Administrative Complaint against the Petitioner as filed by the Respondent. See Appendix, Exhibit A, page 1.

On April 30, 1985, the School Board elected to reverse the decision of the Hearing Officer, rejected his recommendation and permanently dismissed the Appellant from his employment with the school system of Hernando County, issuing a final order to that effect.

On April 24, 1986, the Fifth District Court of Appeal for the State of Florida issued an Opinion in which the decision of the School Board was reversed. A true and correct copy of that decision is included within the Appendix filed herewith and labeled Exhibit "B". The Fifth District Court of Appeal expressly concluded that the Hearing Officer in his report had properly resolved issues of credibility and had properly applied the burden of proof, both as to quantity of evidence and

corroboration of testimony, rejecting claims on appeal that the report should be construed otherwise.

On October 2, 1986, the First District Court of Appeal, which had by then received and expressly acknowledged the prior Opinion of the Fifth District Court of Appeal, issued an Opinion finding that the Hearing Officer had failed to properly apply the burden of proof test as to quantity of evidence to sustain a license revocation and as to the corroboration of testimony. A true and correct copy of the Opinion of the District Court of Appeal for the First District is included within the Appendix filed herewith and labeled Exhibit "C". It is from this Opinion and order that this appeal is taken.

On October, 31, 1986, the Petitioner filed a Notice to Invoke Discretionary Jurisdiction in the District Court of Appeal for the First District, stating that this Court jurisdiction lies in this Court under Fla. R. App. P. 9.030(a)(2)(A)(iv).

II
SUMMARY OF ARGUMENT

A. THE FIRST DISTRICT COURT OF APPEAL IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE EDUCATION PRACTICES COMMISSION AS TO THE MEANING AND EFFECT OF THE RECOMMENDATION OF THE HEARING OFFICER.

In the Opinion issued by the First District Court of Appeal from which this appeal is taken, the court determined that the hearing officer, below, was in error in that his recommendation was based upon two incorrect interpretations of the law:

> that a minor victim's testimony must be corroborated in order to find that a teacher engaged in sexual misconduct, and that the standard of proof, under the circumstances of

this case, is greater than preponderance of the evidence.

In reaching this conclusion, the District Court wholly ignored the fact that this same issue, that is whether the hearing officer's recommendation should be interpreted in such a way as to presume these claimed errors, was raised and resolved by the agency which was responsible for reviewing and approving the hearing officer's recommended order, the Education Practices Commission, which adopted the order upon a determination that these objections were without merit. In ignoring the function and decision of the Education Practices Commission on what was essentially a question of fact and not of law, the District Court erroneously substituted its judgment for that of the agency and violated its obligations on review.

B. IT IS CLEAR FROM THE FACE OF THE HEARING OFFICER'S RECOMMENDED ORDER, ADOPTED BY THE EDUCATION PRACTICES COMMISSION, THAT HE DID NOT BASE HIS FINDINGS, CONCLUSIONS OR RECOMMENDATION UPON A VIEW THAT A MINOR VICTIM'S TESTIMONY MUST BE CORROBORATED IN ORDER TO SUSTAIN A FINDING OF SEXUAL MISCONDUCT.

The First District Court of Appeal found that the Hearing Officer had erred in requiring that the testimony of the minor in the case "must be corroborated in order to find that a teacher had engaged in sexual misconduct." The Hearing Officer's recommended order does not contain such a statement nor does such a defect appear expressly or by implication from a fair reading of the recommended order.

C. THE HEARING OFFICER'S RECOMMENDED ORDER, AS ADOPTED BY THE EDUCATION PRACTICES COMMISSION, STATES THAT THE CASE AGAINST THE PETITIONER WAS NOT SUSTAINED UNDER ANY STANDARD OF PROOF, AS ADOPTED BY THE COURTS.

The First District Court of Appeal, in its opinion below, directs that the case be remanded to the Hearing Officer who, it claimed, failed to apply the preponderance of evidence standard to determine whether the Respondent sustained its case in seeking to revoke the Petitioner's teaching certificate. The Hearing Officer clearly stated in his recommended order that the case against the Petitioner was not sustained by the evidence, regardless of which standard of proof was employed, whether it be the "clear and convincing" evidence standard, the First District Court's own Bowling standard, or the preponderance of evidence standard.

D. THE APPROPRIATE STANDARD OF PROOF IN A LICENSE REVOCATION CASE, THE POTENTIAL RESULT OF WHICH IS TO EXTINGUISH THE PROFESSIONAL CAREER OF A PUBLIC SCHOOL TEACHER, IS THE BOWLING OR THE "CLEAR AND CONVINCING" STANDARD, AND NOT "PREPONDERANCE OF THE EVIDENCE."

1. From the legislative history of the Administrative Procedures Act, it is clear that there is nothing which suggests that the courts should recede from the "clear and convincing" evidence test which was the pre-Act standard of proof in license revocation cases at the hearing level, as expressed by the Second District Court of Appeal in Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2nd DCA 1966).

The Second District has not receded from that decision and the Third District Court of appeal has similarly applied the Reid clear and convincing proof test in licensing revocation cases.

Accord, Pearl v. Florida Board of Real Estate, 394 So.2d 189 (Fla. 3rd DCA 1981); Cf, Sneij v. Department of Professional Regulation, 454 So.2d 795 (Fla. 3rd DCA 1984).

The First District Court of Appeal in Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981), adopted a sliding scale standard attaching to the term "substantial" in the substantial competent evidence test, to replace the Reid standard post-APA, which has been broadly interpeted to require, in license revocation cases, more rigorous proof than preponderance of the evidence. Id at 171, 172; Purvis v. Department of Professional Regulation, 464 So.2d 134, 137 (Fla. 1st DCA 1984); Cf, Harvey v. Division of Alcoholic Beverages, 451 So.2d 1065 (Fla. 5th DCA 1984).

2. The standard of proof that applies in arbitration of cases involving teacher discharge, which may arise out of the same facts as are the subject of an administrative proceeding, is generally the "clear and convincing" evidence test.

III
ARGUMENT

A. THE FIRST DISTRICT COURT OF APPEAL IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE EDUCATION PRACTICES COMMISSION AS TO THE MEANING AND EFFECT OF THE RECOMMENDATION OF THE HEARING OFFICER.

The Hearing Officer concluded in his recommended order that, based on the evidence of record, the allegations of misconduct brought against Petitioner were not supported by the weight of the evidence, and that Petitioner had no sexual contact with the student as alleged during either August or October, 1983, or at any other time. (Par. 13 of the Hearing Officer's Findings of

Fact). Based on these conclusions, the Hearing Officer recommended that the Administrative Complaint filed by the Education Pratices Commission should be dismissed. The Hearing Officer's Recommended Order was adopted in its entirety by the Education Practices Commission after express consideration of the very issues which were later stated by the District Court as the basis for remanding the E.P.C.'s decision.

Fla. Stat. §120.57(1)(b)(9) provides as follows:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent and substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept or reduce the recommended penalty in the recommended order, but may not increase it without a review of the complete record.

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The Hearing Officer clearly enumerated his finding of facts in paragraphs 1 through 13 of his recommended order. In Florida, the law is well-established that findings of fact made by a Hearing Officer cannot be modified or set aside by the agency responsible for final action unless such findings were not based upon competent, substantial evidence or the proceeding on which the findings were based did not comply with the essential requirements of law. Likewise, this Court is precluded from re-weighing the evidence or substituting its judgment for that

the agency whose order is under review. Fla. Stat. §120.68 (10) provides as follows:

> If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57 of the act, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.

Under §120.68(9), the court may set aside, modify or remand an agency order if it finds that the agency "has erroneously interpreted a provision of law..." Under subsection (12), the court shall remand the case if it finds the agency's exercise of discretion to be:

> (a) Outside the range of discretion delegated to the agency by law;
> (b) Inconsistent with an agency rule;
> (c) Inconsistent with an officially stated agency policy or prior agency practice, if deviation therefrom is not explained by the agency; or
> (d) Otherwise in violation of a constitutional or statutory provision;
>
> but the court shall not substitute its judgment for that of the agency on an issue of discretion.

In the opinion issued by the First District, below, it is acknowledged that the E.P.C. adopted the recommended order of the Hearing Officer, but in accepting the assertion on appeal by the Commissioner of Education that the Hearing Officer's report contained the claimed defects, no consideration whatever was given by the court to the fact that the same exceptions had been raised before the E.P.C. and rejected.

For the purpose of the District Court's review of the E.P.C. order, it was required to give effect to its determinations of fact and judgments unless clearly not supported by the record or the law. See, City of Lake Wales v. PERC, 402 So.2d 1224 (Fla. 2nd DCA 1981) (the district court is not permitted to change the outcome of agency action unless it is not supported by substantial competent evidence or is legally insufficient); Manatee County v. PERC, 387 So.2d 446, 451 (Fla. 1st DCA 1980) (the district court cannot substitute its judgment for that of the agency). Insofar as the E.P.C. satisfied itself from a review of the Hearing Officer's recommended order that it could not be interpeted so as to assume the errors suggested by the Commissioner in its exceptions, that decision should not have been disturbed by the District Court.

Indeed, the issue resolved by the E.P.C. as to the content of the Hearing Officer's recommended order was essentially one of fact. An analogy of this principle can be found in the case of McDonald vs. Department of Banking and Finance, 346 So. 2d 569 (1 D.C.A. 1975). Petitioners were denied authority from the Department of Banking and Finance, Division of Banking, to organize and operate a bank even though the Hearing Officer, conducting an evidentiary hearing pursuant to Fla. Stat. §120.57(1)(b)(9), made detailed findings of fact tending to show that the petitioners satisfied the statutory requirements for the granting of such banking authority.

Much of the decision discusses the apparent inconsistent standard of review mandated by Fla. Stat. §120.57, which

required the Department to honor the Hearing Officer's findings of fact unless "not based upon competent substantial evidence", and Fla. Stat. 120.68(10), which required the reviewing court to sustain the Department's findings of fact if supported by substantial, competent evidence. The Court adopted the standard of review approved in NLRB vs. Universal Camera, 179 F.2d 749 (2nd Cir. 1950), and held that finding "substantial evidence" must be done by considering the whole record, including the Hearing Officer's findings.

In Leapley v. Board of Regents, Fla. State Univ. Sys., 423 So.2d 431 (1st D.C.A. 1982), the First District Court of Appeal was again faced with the question of whether or not the agency had properly substituted its own findings of fact for those of the Hearing Officer. A university employee brought an unfair labor practice charge against the university. She pursued a grievance, but was advised she could not use that procedure because she was not deemed to be a member of the relevant bargaining unit, the United Faculty of Florida ("UFF"). She disagreed and an evidentiary hearing was conducted pursuant to Fla. Stat. §120.57. The Hearing Officer concluded she was within the UFF's bargaining unit; however, the agency, PERC, disagreed and dismissed her unfair labor pratice charge against the university. Relying on McDonald, supra, the Court reversed, concluding that the issue of whether Leapley was a member of one bargaining unit or another was "essentially a factual determination based upon the circumstances of the case". 423 So. 2d 432. The Hearing Officer's finding should control to the

extent that issue was "simply the weight or credibility of testimony by witnesses", or was determinable "by ordinary methods of proof," or was in a factual realm concerning which "the agency may not rightfully claim special insight." On the other hand, the agency's determination is conclusive where the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility. Id.

In this case, the issue on which the District Court's decision ultimately turned, was the construction of the Hearing Officer's report itself. Surely, whether it appeared to contain a reference to the erroneous matters as claimed by the Commissioner in his exceptions (as distinguished from deciding the merits of the legal quandries created if the claimed errors were found) could be resolved by the E.P.C. in its review of the face of the recommended order. Thus, it was argued before the Education Practices Commission, which had the report before it, that the Hearing Officer erroneously determined that corroboration of a student's testimony was necessary in a claim of sexual assault and that he had also applied an unduly stringent standard of proof. The agency, the E.P.C., whose role it was to review under the standards stated above the Hearing Officer's recommendation, considered the order and found those claims to be without merit and expressly rejected them. Whether viewed as a finding of fact or a matter of judgment, the decision of the E.P.C. that the Hearing Officer's report should not be read so as to presume the errors claimed by the Commissioner of Education is not clearly

erroneous, incorrect as a matter of law, or without support on the record, i.e., from the face of the recommended order itself.

B. IT IS CLEAR FROM THE FACE OF THE HEARING OFFICER'S RECOMMENDED ORDER, ADOPTED BY THE EDUCATION PRACTICES COMMISSION, THAT HE DID NOT BASE HIS FINDINGS, CONCLUSIONS, OR RECOMMENDATION UPON A VIEW THAT A MINOR VICTIM'S TESTIMONY MUST BE CORROBORATED IN ORDER TO SUSTAIN A FINDING OF SEXUAL MISCONDUCT.

The District Court opinion asserts that the Hearing Officer concluded that corroboration was necessary as a matter of law in order to prove the charges against the Petitioner. Apparently, this argument is based soley on the statement by the Hearing Officer in paragraph 16 of the findings of fact:

> In order to make the findings of fact set forth in paragraphs 1-13 above, it is not essential that this testimony of the minor be rejected as false. There simply is not sufficient evidence in this record to corroborate the minor's testimony.

The Hearing Officer did not thereby state that corroboration is necessary as a matter of law in order to find that the allegations of sexual battery are true. Rather, "in this record" there was insufficient evidence, including the absence of corroboration, in order to make a factual finding that the minor's testimony was true. Nowhere does the Hearing Officer purport to set out such a sweeping standard which would require direct eye witness corroboration in every case in which there is only one witness to alleged sexual misconduct. Rather, the Recommended Order was based on a weighing of the evidence and on determining the credibility of the witnesses. The Hearing Officer states on paragraph 17 of the findings of fact that

"(b)ased upon the failure of the weight of the evidence to support a factual finding that these allegations (of misconduct) are true, this testimony is not relevant."

Surely, if the Hearing Officer had concluded that the absence of corroborating evidence precluded a finding adverse to Petitioner as a matter of law, there would have been no need to weigh the evidence. Nor would there have been a need to judge the appearance, credibility, and demeanor of Petitioner and the minor. Yet, the Hearing Officer did judge the appearance, demeanor, and credibility of Petitioner and the minor in making his findings of fact. Immediately preceding the section entitled "Findings Of Fact", the Hearing Officer states that "(b)ased upon the testimony and exhibits in evidence, and the observed candor and demeanor of the witnesses, the following are found as the relevant facts: * * ." (Emphasis added). Therefore, as a matter of law he considered the credibility of the minor prior to rendering his decision.

The fact that the Hearing Officer did not necessarily have to reject the minor's testimony as false in order to make his findings of fact in paragraphs 1 thorugh 13 of the recommended order does not mean that as a matter of law he in fact did not reject his testimony in the end. Indeed, paragraphs 1 through 13 of the Recommended Order make clear that he, in fact, did ultimately reject his testimony. Nowhere does the Hearing Officer say that he could ultimately accept the minor's testimony as credible but still make the findings of fact in paragraphs 1 through 13, as suggested by the Respondent.

Rather, witness credibility must be determined not only by his or her appearance and demeanor, but also by the plausibility of his or her testimony, and all evidence, both direct and circumstantial which tends to prove as well as disprove the testimony. In other words, a witness may appear credible, but the quantity and quality of other evidence of record may so detract from the testimony that a Hearing Officer may properly make findings of fact contrary to such testimony.

Put another way, all evidence of record was necessarily considered by the Hearing Officer in determining the ultimate issue below--whether the allegations of sexual misconduct asserted against Petitioner were true. Obviously, since the only direct evidence of the alleged misconduct was provided by the testimony of the minor, the credibility of the minor (i.e. whether he appeared to testify truthfully) was an important factor to be considered by the Hearing Officer. However, this ultimate issue had to be determined by considering all evidence of record, not just testimony elicited from the minor. Thus, it can be seen that a Hearing Officer may, as in the instant case, reject the testimony of a witness, irrespective of any <u>initial</u> credibility determination made concerning such witness's testimony.

It is not disputed that several criminal cases stand for the proposition that a conviction for sexual battery may be established solely on the basis of the victim's testimony, without the necessity for any independent corroborating evidence of the defendant's guilt. As explained above, the Hearing

Officer did not reject this principle in resolving the case sub judice.

Interestingly however, in the context of administrative disciplinary proceedings, as opposed to criminal prosecutions, the state of the law indicates that the "non-corroboration" rule in fact may not apply. Consider the case of Robinson v. Florida Board of Dentistry, 447 So.2d 930 (3rd D.C.A. 1984), in which appeal was brought of the suspension by the Board of Dentistry of the appellant's license to practice medicine after the Hearing Officer, in a §120.57 proceeding, found that the appellant's treatment of a patient failed to meet the minimum standard of performance in diagnosis and treatment. At the evidentiary hearing, the Board presented the testimony of the complainant and a successor attending dentist.

The Court reversed, and noted that "(i)t should be absolutely self-evident that suspending a professional license solely on the basis of one interested witness does not even begin to approach the level of "competent substantial evidence" as required by section 120.57." Interestingly, the Court recognized that in reality there were two interested witnesses "since the complainant testified against (Appellant)". In the instant case, the Petitioner had only one interested witness with direct knowledge of the alleged misconduct.

Substantial circumstantial evidence of record supports the

finding by the Hearing Officer that no sexual misconduct occurred.[1] As observed by the Hearing Officer:

> There is no evidence of any previous sexual misconduct on the part of the Respondent in the twelve years he has been teaching physical education. There is no evidence of any sexual misconduct with the subject minor throughout their years of close relationship, except the two incidents described, even though better opportunites for such misconduct existed frequently. Even on the night of the concert in Lakeland, there were opportunities to abuse the minor in a parking lot or along the road during the trip, instead of in the Respondent's house only a wall away from the eyes and ears of his lightly sleeping wife. The guidance counselor at Spring Hill Elementary School who receives complaints of sexual molestation received none concerning the Respondent. Neither the principal of Spring Hill Elementary School nor the assistant superintendent of the Hernando County School Board received any such complaints concerning the Respondent. The evidence discloses that the Respondent has a reputation for being a law abiding citizen in both his local community and his teaching community. In summary, the evidence, apart from the allegations in this case, is that the Respondent has never made any sexual contact with any minor.

1/ Findings made in Paragraph 8 of the Hearing Officer's findings of fact are supported by evidence found reflected in the final transcript at pages 291; 521-523; and 570-572. Findings made in Paragraph 9 are supported by evidence found reflected in the final transcript at pages 308, 512-514; 522-524; 525; 531; and 571-573. Findings made in Paragraph 10 are supported by evidence found reflected in the final transcript at pages 293-294; 472; 525-526; and 575-576. Findings made in Paragraph 11-13 are supported by evidence found reflected in the final transcript at pages 527-530; and 577-579.

C. THE HEARING OFFICER'S RECOMMENDED ORDER, AS ADOPTED BY THE EDUCATION PRACTICES COMMISSION, STATES THAT THE CASE AGAINST THE PETITIONER WAS NOT SUSTAINED UNDER ANY STANDARD OF PROOF AS APPLIED BY THE COURTS.

The Fifth District Court of Appeals, in its opinion attached hereto as Exhibit B, found that the Hearing Officer applied the correct standard of evidence in making his recommended order that Ferris be reinstated. Opinion, p. 5. The District Court found that the Hearing Officer had not rejected the minor's testimony because it was uncorroborated, but because it was supported by insufficient evidence. Id. Further, the District Court found that the Hearing Officer had concluded that the evidence, pursuant to any standard, supported the Petitioner and not the School Board.

The First District Court of Appeal, in its opinion below, found that the Hearing Officer applied an incorrect standard of evidence. Appendix, Exhibit C, p. 3. The District Court found that the Hearing Officer had rejected the minor's testimony as uncorroborated and had applied a standard of proof greater than a preponderance of the evidence in reaching his decision supporting the Petitioner. Id.

A review of the Hearing Officer's recommended order supports the view of the Fifth District in this matter. In paragraph 17 of the Findings of Fact in his Recommended Order, the Hearing Officer specifically found that the allegations of misconduct against the Respondent were not supported by the "weight of the evidence." In the context of "burden of proof," the "weight of the evidence" is synonomous with the "preponderance of the evidence". At page 11 of his recommended order, he acknowledged

the existence of a split in the Districts on the standard of proof issue, but went on to state that, whichever standard he applied, the evidence did not support a finding against the Petitioner. A critical finding of fact in this regard appears at page 7, paragraph 13, where the Hearing Officer finds as fact that the Petitioner did not engage in any sexual contact with the student at any time, removing any basis at all for a determination in support of revocation of his teaching certificate. Without going to the length of branding this student a "liar" in a public order by making an issue out of the credibility resolution, the Hearing Officer clearly, by his findings, determined that the Petitioner's version of the facts was sustained, and not the Commissioner's, therefore rejecting the student's testimony. At this point, the issue of standard of proof, whether measured by quantity, quality, preponderance, or substantiality, was academic; the charges were not supported by the facts in the record.

D. THE APPROPRIATE STANDARD OF PROOF IN A LICENSE REVOCATION CASE, THE POTENTIAL RESULT OF WHICH IS TO EXTINGUISH THE PROFESSIONAL CAREER OF A PUBLIC SCHOOL TEACHER, IS THE BOWLING, OR THE "CLEAR AND CONVINCING" STANDARD, AND NOT "PREPONDERANCE OF THE EVIDENCE."

In its Opinion below, the District Court states, without further enlightenment, that "under the circumstances of this case, (the standard of proof) is greater than a preponderance of the evidence." In addition to being obviously cryptic as to how this standard may be argued to apply, or not, to any other case, it appears to be incapable of justification in light of the First

District's other pronouncements on the issue and the general case law relating to license revocation proceedings.

In Bowling v. Department of Insurance, 394 So.2d 165 (1st DCA 1981), the First District held 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. ...we differentiate between evidence which "substantially" supports conventional forms of regulatory action and evidence which is required to support "substantially" a retrospective characterization of conduct requiring suspension or revocation of the actor's license. ... we glean a requirement for more substantial evidence from the very nature of licensee disciplinary proceedings...
>
> 394 So.2d 171-172.

At least two commentators have reported that Bowling states the First District's view of the standard of proof in administrative hearings affecting professional license revocation. See, D&S Publishers, Inc., Florida Administrative Law Practice Manual §14.03(c) at n.12c. Similarly, in Florida Administrative Practice, §4.16 (The Florida Bar, 2nd Ed.): the following comment appears:

> The standard of proof in administrative hearings generally is preponderance of the evidence. Fitzpatrick v. City of Miami Beach, 328 So.2d 578 (Fla. 3rd DCA 1976). When an agency is seeking to revoke an occupational license, a case which is penal in nature, the District Court of Appeal, Second District, has held that the standard is clear and convincing evidence. Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2nd DCA 1966). The District Court of Appeal,

> Third District, has recently held, however, that the standard in license revocation proceedings is preponderance of the evidence. Gans v. State, Department of Professional Regulation, 390 So.2d 107 (Fla. 3rd DCA 1980). The District Court of Appeal, First District, has held that the standard may vary depending on the gravity of the issues. Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981).

Since that text was authored, the Bowling standard in license revocation proceedings has been adopted in the Third District. Robinson v. Florida Board of Dentistry, Department of Professional Responsibility, 447 So.2d 930, 932 (3rd DCA 1984) (suspension of dentistry license); Cohn v. Department of Professional Regulation, 477 So.2d 1039, 1046 (3rd DCA 1986) (revocation of pharmacist's license). (The Third District appears to interchange or equate the Bowling standard in revocation cases with the clear and convincing standard; Pearl v. Florida Board of Real Estate, 394 So.2d 189 (Fla. 3rd DCA 1981); see also, Sneij v. Department of Professional Regulation, 454 So.2d 795 (Fla. 3rd DCA 1984). The Fifth District Court of Appeal has also expressly approved the Bowling standard. Harvey v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, 451 So. 2d 1065 (5th D.C.A. 1984).

Indeed, preceding the date of the Opinion in this case, the First District appeared to follow its own precedent faithfully. See, Purvis v. Department of Professional Regulation, 461 So.2d 134 (1st DCA 1984) and Barker v. Board of Medical Examiners, 428 So.2d 720 (1st DCA 1983).

Thus, with the possible exception of the Fourth District, it appears to be the general view that, in license revocation

cases, either the Bowling flexible, but nonetheless elevated, standard applies, or the "clear and convincing" standard applies. Reid v. Florida Real Estate Commission, 188 So.2d 846 (2nd D.C.A. 1966); accord, Pearl v. Florida Board of Real Estate, 394 So.2d 189 (Fla. 3rd DCA 1981); see also, Sneij v. Department of Professional Regulation, 454 So.2d 795 (Fla. 3rd DCA 1984). Compare, South Florida Water Management District v. Caluwe, 459 So.2d 390 394, note 4. (4th DCA 1984), with Lewis v. Planned Financial Services, 340 So.2d 941 (Fla. 4th DCA 1976).

It is also clear that the elevated standard of proof applies across-the-board in license revocation cases which are penal in nature, there being no evidence that that any court has adopted a position that whether the standard applies to a particular case should depend on its particular circumstances. See, e.g., Reid, 447 So.2d at 447; Guest v. Department of Professional Regulation, Board of Medical Examiners, 429 So.2d 1225 (1st D.C.A. 1983); Robinson v. Florida Board of Dentistry, Department of Professional Responsibility, 447 So.2d 930 (3rd. D.C.A. 1984); and, Harvey v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, 451 So.2d 1065 (5th D.C.A.1984).

In Sherburne v. School Board of Suwannee County, 455 So.2d 1057 (1st D.C.A. 1984), for example, a teacher appealed from an order of the Suwannee County School Board terminating her employment on the grounds that she lacked good moral character. The alleged statutory basis for such action was identical to that relied upon in the instant case, specifically Fla. Stat.

§230.36(6) which allows discharge for "good cause". Ms. Sherburne, like the Petitioner herein, was discharged on the finding that she was guilty of "immorality". The First District Court found no trouble in finding the Bowling burden of proof applicable.

> In proceedings such as this, involving the loss of a valuable professional position and dependent upon the application of such broad general terms as "immorality", this Court has held that the critical matters in issue must be shown by evidence which is indubitably as substantial as the consequences. (Emphasis added).
> 455 So.2d 1061

Smith v. School Board of Leon County, 405 So.2d 183, 185-186 (1st D.C.A. 1981), also rejects a narrow interpretation of Bowling. (The Bowling burden of proof applies to any asserted disciplinary action to be taken under statute such as Section 231.36 which is penal in nature and would impose a serious penalty such as loss of back pay). Indeed, in Smith, back pay was the only penalty at stake - in the instant case, the loss of the teaching certificate, which would also necessarily result in the loss of employment as a teacher under the School Code, is at stake. It would be hard to imagine a case in which the penalty imposed would better justify the use of the Bowling standard.

An analysis of the legislative history of the Administrative Procedures Act reveals no discussion at all concerning the standard of proof at the hearing level in the course of the enactment of §120.57. See, e.g., the Reporters Comments on Proposed Administrative Procedures Act for the State of Florida, March 9, 1974, at 0120.6, published in D&S

Publications, Inc., Florida Administrative Law Practice Manual. This suggests that there was no legislative intent to modify the existing law as stated in Reid, supra, in which the Second District Court of Appeal had adopted the clear and convincing evidence test. See also, Mancusi-Ungaro, Rulemaking and Adjudication Under the Florida Administrative Procedures Act, 28 Fla. L. Rev. 755, 768 (1975) ("Procedures for due process during formal hearings are essentially the same as were provided in hearings under the 1961 act.").

It is also significant that the Florida courts have established that an administrative proceeding in which the issue is whether to revoke a license to engage in a business or profession is "penal in nature". Wilson v. Pest Control Commission of Florida, 199 S.2d 777, 779 (4th D.C.A. 1976); Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973). Accordingly, the courts have found that because of the nature of such proceedings and the fact that substantial rights are at risk, greater safeguards should obtain in such proceedings. Thus, the Fourth Amendment exclusionary rule has been previously applied in a license revocation proceeding before the State Board of Education. Adams v. State of Florida Professional Pratices Counsel, 406 S.2d 1170 (1 D.C.A. 1981). Likewise, the right against self incrimination guaranteed under both the Florida and United States Constitutions dictates application of the exclusionary rule in a quasi-criminal administrative proceeding such as is presented by the instant case. Where the potential outcome of a hearing is so severe as to

result in the loss of livlihood, such as in the circumstance where a professional license is subject to revocation, the court's have been quick to find that an elevated standard of proof is required. Cf. Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), in which the Justices unamimously declared:

> The function of the standard of proof, as that concept is embodied in the Due Process Clause and in the realm of facti-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

In a setting striking close to home, in cases involving discipline of attorneys, the "clear and convincing" standard has been applied. See, e.g., In re Adriaans, 28 U.S. App. D.C. 515, 524 (1907); In re Fisher, 179 F.2d 361, 369-70 (7th Cir. 1950)., cert denied sub nom. Kerner v. Fisher, 340 U.S. 825, 71 S.Ct. 59, 95 L.Ed. 606 (1950); In re Ryder, 263 F.Supp. 360, 361 (E.D. Va. 1967), aff'd, 381 F.2d 713 (4th Cir. 1967); Dorsey v. Kingsland, 84 U.S. App. D.C. 264, 265-66, 173 F.2d 405, 406-407, rev'd on other grounds, 338 U.S. 318, 70 S.Ct. 341, 94 L.Ed. 579 (1949).

Finally, it is noteworthy that where a collective bargaining agreement exists which provides that a teacher may not be discharged without just cause, a common circumstance in the state, the fired teacher may elect to pursue his or her claim through the grievance procedure, up to an including binding arbitration. See, §447.401, Fla. Stat.; PERC v. District School Board of DeSoto County, 374 So.2d 1005 (Fla. 2nd DCA 1979). Generally, arbitrators in discharge cases will apply a higher degree of proof than preponderance of evidence (up to and in some

cases including "reasonable doubt") where the allegations against the employee involve violations that would be recognized as criminal violations or involve moral turpitude. Elkouri and Elkouri, How Arbitration Works, 622-623 (3rd Ed. 1979).

In sum, the the elevated standard of proof should apply for the following reasons: 1) the "clear and convincing" standard applied before the current Act was enacted and there is nothing in its legislative history which implies an intention to modify that standard in license revocation proceedings; 2) every district court, with the possible exception of the Fourth District, has adopted either the "clear and convincing" standard or the Bowling standard; 3) the gravity of the conseqeunces of a license revocation proceeding are so profound as to require a greater standard of proof than would apply in a negligence case where the parties battle on equal footing and imparts the requisite "degree of confidence" society should place on the adjudication of a person's right to engage in his or her profession; and 4) where the standard of proof in collateral proceedings involving the same essential facts, such as arbitration proceedings, is an elevated standard, such standard should apply a fortiori where the professional license, the livelihood, is at stake.

V
CONCLUSION

The Opinion of the First District Court of Appeal should be reversed and the Final Order of the Education Practices Commission should be affirmed in all respects.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been served by First Class United States mail upon the State Board of Education, c/o Barbara Staros Harmon, Deputy General Counsel, Knott Building, Tallahassee, Florida 32301; Pamela Cooper, Esq., Meyer, Brooks & Cooper, P.A., 911 E. Park Ave., Tallahassee, Florida, 32301; and Thomas Young, Florida Education Association, Tallahassee, Florida, 32301, this 16th day of March, 1987.

JOHN J. CHAMBLEE, JR.