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

PETITIONER'S BRIEF ON THE ISSUE OF JURISDICTION

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

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I.
SUMMARY OF ARGUMENT

A. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN FERRIS V. AUSTIN IN THAT THE COURTS' INTERPRETATIONS OF AND DETERMINATIONS AS TO THE VALIDITY OF THE HEARING OFFICER'S RECOMMENDED ORDER BELOW ARE CONTRADICTORY.

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, failed to apply the preponderance of evidence test in concluding that the Department of Education failed to carry its burden of proof in the consolidated administrative proceeding, below. In Ferris v. Austin, 487 So.2d 1163 (Fla. 5th DCA 1986), which is cited in the First District Court's opinion, the Fifth District Court of Appeal, on the other hand, concluded that the hearing officer, in the companion recommendation directed to the School Board, found that the burden of proof had not been met "pursuant to any standard," including the preponderance of evidence standard.

The First District Court of Appeal further held 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," whereas the Fifth District Court of Appeal determined upon review of the same language in the companion recommended order that "we do not read the hearing officer's recommended order as rejecting the minor's testimony solely because is was not corroborated...."

The Fifth District ultimately ordered that the School Board adopt the hearing officer's recommended order, whereas the First District reversed the decision of the Education Practices Commission, which had adopted the companion recommendation, and ordered the matter remanded to the hearing officer.

In each respect the decisions of the First and Fifth District Courts of Appeal are directly and expressly conflicting.

B. THE DECISON OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND AND THIRD DISTRICT COURTS OF APPEAL ON THE ISSUE OF WHETHER THE APPROPRIATE STANDARD OF PROOF IN AN ADMINISTRATIVE PROCEEDING INVOLVING A LICENSE REVOCATION IS BY A "PREPONDERANCE OF THE EVIDENCE" OR A MORE RIGOROUS STANDARD.

The First District Court of Appeal in its opinion below directs that the case be remanded to the hearing officer who is to apply the preponderance of evidence standard to determine whether the Respondent sustained its case seeking to revoke the Petitioner's teaching certificate.

The Second District Court of Appeal has not receded from its decision in Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2nd DCA 1966) where it found that "clear and convincing proof" is the standard of evidence required to sustain a license revocation at the hearing level (as distinguished from the application of the "competent substantial evidence" test which governs administrative and/or judicial review of such hearing level decisions. See §§ 120.57(1)(b)9 and 120.68(10) Fla. Stat. (1984); Florida Real Estate Comm. v. Webb, 367 So.2d 201, 203, n.2 (Fla. 1979)). The Third District Court of Appeal has similarly in at least two cases, approved the application of the Reid "clear and convincing proof" test at the hearing level in license revocation cases. See, eg. Pearl v. Florida Board of Real Estate, 394 So.2d 189, 192 (Fla. 3rd DCA 1981); Sneij v. Department of Professional Regulation, 454 So.2d 795, 796 (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 "competent substantial evidence" test, to replace the Reid standard post-APA, which has been broadly interpreted to require, in license revocation cases, more rigorous proof at the hearing level than mere preponderance of the evidence. Id at 171, 172. See also Purvis v. Department of Professional Regulation, 464 So.2d 134, 137 (Fla. 1st DCA 1984). Bowling has been followed in the Third and Fifth Districts. See, e.g., Cohn v. Department of

Professional Regulation, 477 So.2d 1039, 1046 (Fla. 3rd DCA 1985); Robinson v. Florida Board of Dentistry, 447 So.2d 930, 932 (Fla. 3rd DCA 1984); Cf, Harvey v. Division of Alcoholic Beverages, 451 So.2d 1065 (Fla. 5th DCA 1984).

At a minimum, express and direct conflict exists between the decision reached by the First District Court, below, and the decisions in the Second and Third Districts which have applied either the clear and convincing standard or at least a more rigorous standard than "preponderance of the evidence" in license revocation cases. There also appears to be a conflict between the decision below and those First District Court decisions which have followed the rationale of Bowling and applied the sliding-scale standard to proof required at the hearing level.

II.
STATEMENT OF THE CASE AND THE FACTS

Effective April 16, 1984, the Petitioner was suspended from his duties without pay by the School Board of Hernando County ("School Board"). 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. The 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 reinstatment 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 Respondent. 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 on 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.

On April 18, 1985, the Education Practices Commission 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.

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 with 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 erred in requiring corroboration of the minor's 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 "A". 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).

III.
LEGAL ARGUMENT

A. Express and direct conflict applies to conflicts between decisions; such conflict can be determined from the language of the decisions asserted to be in conflict.

Article V§3(b)(3), Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(A)(iv) provide that the Supreme Court

> May review any decision of a district court of appeal... that expressly or directly conflicts with a decision of another district court of appeal... on the same question of law.

In Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), the Supreme Court held that

> It is the conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari. 231 So.2d 824.

The Supreme Court's constitutional jursidiction to resolve conflicting appellate decisions was addressed in Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981). Specifically, in Ford Motor, the Court considered the meaning of the "expressly" requirement. The district court did not identify a direct conflict between its decision with any other Florida appellate decisions; in its opinion, however, the court discussed the legal principles upon which it relied in reversing the trial court's grant of a directed verdict.

This Court further held that it was not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under Art. V, §3(b)(3) of the Florida Constitution. In Ford Motor, the Court looked at the language in the district court opinion which set forth the standard of review for a trial court's motion granting a new trial. The language reflected that the district court had applied a standard of review that conflicted with the appropriate standard as set out in Supreme Court decisions.

Particularly relevant to this case is Excelsior Insurance Company v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979), where the Supreme Court found it had conflict jurisdiction where two district courts of appeals construed identical language in separate insurance contracts but reached contrary conclusions as to its legal effect.

B. The decision of the First District Court of Appeal expressly and directly conflicts with the decision of the Fifth District Court of Appeal interpreting the same hearing officer's report.

In the instant case, the Fifth and First District Courts of Appeal reviewed the same language in two companion hearing officer's reports, and reached contrary conclusions as to the

legal effect of the hearing officer's findings as described above. The Fifth District, in its Opinion at page 5 (Exhibit B in the Appendix) found that the hearing officer had not rejected the minor's testimony because it was uncorroborated, but found that the charges against the Petitioner were not supported by sufficient evidence, the asbence of corroboration having a bearing on that finding in the face of evidence corroborating the case on defense. The Fifth District further found, at page 5 of its Opinion, that the hearing officer concluded that the evidence failed to support the charges against the Petitioner under any standard, including preponderance of evidence. In contrast, the the First District found that the hearing officer erred in rejecting the minor's testimony because it was uncorroborated, and erred in failing to apply the preponderance of evidence standard which should be applied on remand. Exhibit A, at pages 2 and 3.

Clearly, the instant case falls within the holdings of Gibson and Excelsior, supra. The Fifth and First District Courts of Appeal, based upon the consideration of identical provisions of two companion recommendations by the hearing officer, reached opposing interpretations of the hearing officer's findings and conclusions on issues which, in turn, affected the courts' holdings as to the validity of the companion recommendations.

As contemplated within Article V, §3(b)(3) and Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., the two district courts of appeal considered issues based upon the same hearing officer's report and reached conflicting decisions.

C. The First District Court of Appeal's decision conflicts with those of the Second and Third District Courts of Appeal as to the burden of proof required in license revocation proceedings.

The Second District Court of Appeal in Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2nd DCA 1966) determined that "clear and convincing proof" is the standard of evidence required to sustain a license revocation at the hearing level. Reid was decided prior to the adoption of the Administrative

Procedures Act which specifies that the standard for review by an agency of a hearing officer's decision and for review by a court of the agency decision, shall be on the basis of "substantial competent evidence." See §§ 120.57(1)(b)9 and 120.68(10) Fla. Stat. (1984). This Court, in Florida Real Estate Comm. v. Webb, 367 So.2d 201, 203, n.2 (Fla. 1979)), determined that the Reid clear and convincing standard no longer (post-APA) governs the scope of review of administrative decisions, but otherwise did not address the hearing-level standard of proof issue.

In Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 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 Reid test need not be "resurrected" and instead adopted a test keyed to the term "substantial" in the phase "substantial competent evidence" which varies the standard of proof depending on the severity of the consequences...

> 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.

In Bowling as well as subsequent cases citing its language, it has more often than not been difficult or impossible to determine whether the Bowling analysis is being applied to describe the hearing-level proof standard or the standard for review. In at least several cases, however, including cases arising in the First District, the sliding-scale test has been applied at the hearing level to require a more rigorous burden than preponderance of the evidence in license revocation cases.

See, e.g., Purvis v. Department of Professional Regulation, 464 So.2d 134, 137 (Fla. 1st DCA 1984); Cohn v. Department of Professional Regulation, 477 So.2d 1039, 1046 (Fla. 3rd DCA 1985); Robinson v. Florida Board of Dentistry, 447 So.2d 930, 932 (Fla. 3rd DCA 1984); Cf, Harvey v. Division of Alcoholic Beverages, 451 So.2d 1065 (Fla. 5th DCA 1984).

The Third District Court of appeal has applied the Reid "clear and convincing proof" test in license revocation cases; see, eg. Pearl v. Florida Board of Real Estate, 394 So.2d 189 (Fla. 3rd DCA 1981); Sneij v. Department of Professional Regulation, 454 So.2d 795 (Fla. 3rd DCA 1984). On other occasions it has applied the Bowling sliding scale standard to require more rigorous proof in revocation cases. Robinson, supra; Cohn supra.

The Fourth District also appears to have adopted the sliding-scale standard of proof in license revocation proceedings; see, South Florida Water Management District v. Caluwe, 459 So.2d 390 (4th DCA 1984) at 459 So.2d 394, note 4.

In the instant case, the First District remanded to the hearing officer for reconsideration, applying a preponderance of the evidence standard as opposed to the stricter standard first set forth in Bowling, supra., and followed in a line of cases, including Purvis, supra and Barker v. Board of Medical Examiners, 428 So.2d 720 (1st DCA 1983). The First District's decision in the instant case signifies at least a partial retreat from its holding in Bowling, et al, and the interjection of even more confusion into an already clouded issue. The retreat from Bowling in this case leaves the Second and Third Districts, probably the Fourth District, and perhaps the Fifth, along with varying panels of the First District, applying a higher standard of proof than preponderance of the evidence in license revocation proceedings such as that involved in the instant case. It is at least clear that a conflict exists between the decisions of the Second and Third District Courts of Appeal and the First District Court of Appeal. The Supreme Court should assert jurisdiction over this

case to bring order to the increasing confusion surrounding the hearing-level burden of proof issue in license revocation cases.

IV.
CONCLUSION

Based upon the foregoing, the Court is urged to accept discretionary jurisdiction on the basis of direct, express conflict as provided by Fla. R. App. P. 9.030(a)(2)(A)(iv). Acceptance of jurisdiction will enable the Court to resolve a significant split among and confusion within the District Courts of Appeal on the issue of the hearing-level standard of proof in license revocation cases.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served by First Class United States mail upon Judith A. Brechner, Esq., General Counsel, State Board of Education, Knott Building, Tallahassee, Florida 32301, this 10th day of November, 1986.