OA 6-2-87

047

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 AMENDED REPLY 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

In his Answer Brief, the Respondent addresses four areas of disagreement with the Statement of the Case and Facts contained within the Petitioner's initial brief. Not surprisingly, the Petitioner takes exception to each of those points.

First, as to point 1, the Respondent argues that the term "penalty" should not be applied to the characterization of disciplinary action, in a proceeding such as the one initiated by the Respondent below, which seeks to revoke a teacher's certificate to teach. Ironically, the Respondent later in the same brief, in his discussion of the appropriate standard of proof, repeatedly refers to the assessment of the "penalty," in "license disciplinary cases," as the appropriate point at which the substantiality of the evidence should be considered. See pp. 17 and 19 of the Respondent's brief. Moreover, the proceedings under which the action below was initiated by the Respondent, §231.28, Fla. Stat., expressly describes the potential action against the teaching certificate as a "penalty". See, §231.28(1)("The Education Practices Commission shall have the authority to suspend... (4); to revoke permanently the teaching certificate of any person; or to impose any other penalty provided by law...."); see also §231.262(6), Fla. Stat. also referring to "other appropriate penalties" including "revocation or suspension of a certificate"). Finally, the First District Court of Appeal, from which this appeal is taken, has described proceedings initiated to revoke teaching certificates as involving the assessment of a penalty or as being penal in nature. See, e.g. School Board of Pinellas County v. Noble, 384 So.2d 205 (Fla. 1st DCA 1980), on remand from 372 So.2d 1111 (Fla. 1979); Jenkins v. State Board of Education, 399 So.2d 103, 105

(Fla. 1st DCA 1981); Cf., Bowling v. Department of Insurance, 394 So.2d 165, 171; Bach v. Florida State Board of Dentistry, 378 So.2d 34, 36 (Fla. 1st DCA 1980); Anson v. Florida State Board of Architecture etc., 354 So.2d 386, 387 (Fla. 1st DCA 1977). The Respondent's attempt to euphemize the terminology betrays the basic flaw in his argument on the burden of proof issue; a proceeding seeking revocation of a teaching certificate as a potential penalty carries the same import, i.e., loss of professional livelihood, as does disciplinary action against an attorney which may result in disbarment, for which this Court has said that the standard of proof to be applied is "clear and convincing evidence". The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978) (citing The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970)).

Secondly, the Respondent objects to the Petitioner's statement that the Hearing Officer concluded that the allegations of misconduct were not supported by the weight of the evidence and that the Petitioner had no sexual contact with the alleged victim. The sole basis for that objection is the Hearing Officer's reference, at paragraph 16 of his recommended order, to the allegations made against the Petitioner. Although the Respondent's point is vague at best, it appears that this is an extension of the argument that because the Hearing Officer referred to the existence of the allegations brought against the the Petitioner in his Findings of Fact, those allegations should be deemed accepted as either true or unresolved, even though the Hearing Officer expressly states in his recommended order that he credited the contradictory evidence submitted by the Petitioner. The Petititioner, in the same fashion as both the EPC and the Fifth District Court of Appeal, finds that this analysis ignores both the facial language of the Hearing Officer's report and

every reasonable construction that could be applied to its interpretation.

The Respondent's third area of disagreement with the Petitioner's Statement of the Case and Facts relates to the Respondent's Exceptions to Recommended Order filed by his attorney with the Education Practices Commission, which was considered and rejected by the Commission on April 18, 1985. See, the Record on Appeal filed in this Court (hereinafter referred to as "R.") at pages 17 - 53. The first exception, (R. 18-22), is couched in the following terms by the Respondent:

> ...the Hearing Officer concluded that the case against the Respondent should be dismissed for failure of the Petitioner to present sufficient corroborative evidence of the minor's testimony. R. 18.

The Respondent then proceeded in his Exceptions to examine the evidence presented which he considered corroborative of the charges, arguing that the Hearing Officer overlooked it or ignored it. In point II of his Exceptions, the Respondent states:

> ...it is the Petitioner's [the Commissioner's] position based upon the foregoing legal authorities that the minor's testimony standing alone is sufficient to establish the allegations of misconduct set forth in the Administrative Complaint. R. 23.
>
> *******
>
> Using this Hearing Officer's standard of proof, any case brought upon this set of facts would be dismissed for lack of corroboration of the student's testimony. R. 24

The Respondent, in contesting the Petitioner's Statement of the Case and Facts filed here, now claims his exceptions did not argue that the Hearing Officer erred as a matter of law in requiring corroboration of the minor's testimony. That statement appears to be clearly contradicted by the Record. However, assuming that claim to be true, it appears then, that the

Respondent now concedes that prior to the presentation of its issues on appeal to the First District Court of Appeal, it did not argue in the form of an exception that the hearing officer had required corroboration of the minor's testimony, and presumably drew the same conclusions from the face of the Hearing Officer's report as did the Fifth District Court of Appeal in Ferris v. Austin, 487 So.2d 1163, 1166, i.e. that the hearing officer found insufficient evidence to support the Respondent's case and did not assert that corroboration was necessary as a matter of law in such cases.

Had that been clear below, the Petitioner would have argued that the issue was waived by the Respondent in that it was not asserted before the EPC by way of exception and preserved for appeal, and, or in the alternative, that the post-final-order shift of the Respondent's position on the interpretation of the hearing officer's report indicated the tenuousnees of that point on appeal. See §120.57(1)(b)4. In either case, the Respondent appears to be pulling himself up by his bootstraps.

The same argument also applies to the second element of the Respondent's third area of disagreement as to the Petitioner's Statement of the Case and Facts; i.e., that it is now claimed that issues were asserted before the First District Court which were not addressed in Exceptions before the EPC. It appears, again, that the Respondent's attempt to distinguish between its argument to the EPC as contained in its Exceptions and the issues address on appeal in the First District Court falls flat. The Respondent, in its Exceptions at point "II" states:

> The burden of proof in administrative proceedings, like civil proceedings, is by a preponderance of the evidence.

The Respondent then argued that the hearing officer failed to properly consider the evidence supporting the charges against the

Petitioner under that standard of proof in that the Hearing Officer considered numbers of witnesses as opposed to the quality of their testimony. The EPC considered the exception and rejected it. An element of that question necessarily was whether the Hearing Officer's recommended order stated that the case was not sustained even applying the Respondent's preponderance standard.

The fourth area of the Respondent's disagreement with the Petitioner's Statement of the Case and Facts is his reference to a "Negotiation Memorandum." It is not clear from the remaining text of the Answer Brief how this comment is relevant to the argument of the points on appeal. In fact, it does not appear to be mentioned again in any part of the Respondent's brief. The fact is that the acceptance of the convenience plea did not adjudicate nor affect the issues to be submitted to the EPC; the fact of its existence was addressed by the Respondent in the evidentiary hearing, for what it was worth, which was primarily its prejudicial value. It is referenced by the Hearing Officer in his recommended order at page 3 immediately prior to his assessment of the facts as presented in the administrative hearing and his ultimate finding that the facts did not sustain the charges against the Petitioner. It bears no further discussion nor consideration in this appeal.

II
SUMMARY OF ARGUMENT

A. THE HEARING OFFICER IN HIS REPORT DID NOT REQUIRE THAT CORROBORATIVE TESTIMONY BE PRESENTED NOR APPLY AN INCORRECT STANDARD OF PROOF AND SUCH CONSTRUCTION OF THE REPORT INVOLVED AN ISSUE OF FACT OR JUDGMENT THAT WAS IMPROPERLY REDETERMINED BY THE DISTRICT COURT.

The EPC's resolution of the Respondent's Exceptions below required a consideration of the facial language of the Hearing Officer's recommended order. Its rejection of the exceptions,

which later became the basis of the points on appeal, was essentially a determination of fact or an exercise of judgment which the District Court could not disturb without showing absence of substantial competent evidence or that the EPC's decision was clearly erroneous.

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 Court can determine from the face of the Hearing Officer's recommended order that he did not conclude that the minor's testimony required corroboration.

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 Court can determine from the face of the Hearing Officer's recommended order that he found that the charges against the Petitioner were not sustained under any standard of proof, including preponderance of the evidence.

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."

Where, in an administrative case, the charged party may suffer loss of a professional or business license, in this case a teaching certificate, the standard of proof to be applied is "clear and convincing evidence," or the Bowling standard, and not preponderance of the evidence.

III
ARGUMENT

A. THE HEARING OFFICER IN HIS REPORT DID NOT REQUIRE THAT CORROBORATIVE TESTIMONY BE PRESENTED NOR APPLY AN INCORRECT STANDARD OF PROOF AND SUCH CONSTRUCTION OF THE REPORT INVOLVED AN ISSUE OF FACT OR JUDGMENT THAT WAS IMPROPERLY REDETERMINED BY THE DISTRICT COURT.

The Repondent misstates and, consistently, misunderstands the Petitioner's first argument in his initial Brief. The Respondent suggests that the trust of that argument is that the court below improperly substituted its findings of fact and judgment "for that of the hearing officer" when it is the finding and judgment of the EPC that was the subject of concern.

Stated succinctly, in order for the two issues to be argued that are the of subject of the First District's order of remand, it was first necessary to create a factual foundation for the contentions. This was done by the Respondent in asserting that the Hearing Officer's recommended order states, either directly or by inference (1) that corroboration of a victim's testimony is necessary in a sexual battery case litigated in the context of an administrative proceeding; and (2) that the Hearing Officer failed to consider the evidence below under the proper standard of proof. Thus, the threshhold question was essentially one of fact: what did the Hearing Officer state in his recommended order? If the report contained neither of the two offensive assertions, there is simply nothing to argue about; i.e., they are "straw men".

The Petitioner in his initial brief points out that the two straw men referenced above were first presented to the EPC in the form of exceptions. Those exceptions were expressly rejected by the EPC where a fair reading of the Hearing Officer's report showed that the claimed errors never existed. It was not necessary for the EPC to undertake a legal analysis, only to read within the four corners of the recommended order and apply common meaning to common language. It is further argued that, therefore,

in order for the reviewing court to reverse, it must do so on a basis that establishes the impropriety of the agency's factual determination, in a manner analogous to an appellate court's review of a trial court's construction of the language of a written contract, which is essentially a "substantial competent evidence" or clearly erroneous test. See, 3 Fla. Jur. Appellate Review §346. Certainly, if an agency or an individual were entitled to a de novo consideration by the reviewing court of the agency's interpetation of the hearing officer's report, every agency order would be suject to such review where a question of interpetation could be proposed.

The Fifth District Court of Appeal had no difficulty seeing through the smoke in reviewing the determination of the School Board in the companion case which had rejected the Hearing Officer's report, stating that the hearing officer found the evidence to support the minor's testimony to be insufficient, and further finding from reading the recommended order that the hearing officer found the case against the Petitioner to be unsupported under any proof standard.

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 Respondent, at point II of his Answer Brief continues to pursue phantoms created for the purpose of review. It simply unnecessary for this Court to consider whether corrobroation of an alleged victim's testimony is necessary to sustain an administrative claim. Indeed, to put this issue to rest for the purpose of this appeal, the Petitioner agrees that uncorroborated credible testimony of a victim may be sufficient to sustain administrative charges, notwithstanding the conflicting language

in Robinson v. Florida Board of Dentistry, 447 So.2d 930 (Fla. 3rd DCA 1984).

The fact is, in this case the Hearing Officer clearly did not dismiss the charges merely because the minor's testimony was not corroborated. The Hearing Officer carefully laid out in his findings and conclusions the evidence which he found persuasive notwithstanding those claims. The fact that the charges were not supported by convincing corroborative evidence certainly affected his weighing of the evidence in light of the evidence favoring the Petitioner. Of course, that was the Hearing Officer's obligation and responsiblility; there certainly is no requirement that he accept an alleged victim's testimony at face value, even if it had been corroborated.

The Respondent's continued insistence that the Hearing Officer failed to expressly reject the minor's testimony as false has never been addressed, except in summary fashion, by the Respondent. The Respondent has never explained how it is that this concern remains debateable in the face of findings, conclusions, and a recommendation which uniformly state that the allegations were not sustained. The Respondent appears to insist, without explaining his rationale, that it is critical that the Hearing Officer state on the record that the complaining student was a liar in this proceeding when his recommended order makes that result clear without the need to afix that label. The Petitioner certainly at this point has no malice toward the complaining student so as to demand that he be publicly branded a liar for the purpose of clarifying an already adequate recommendation and 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 Respondent, in his brief at point III, argues that the Hearing Officer applied a higher standard of proof in assessing the claims below than preponderance of the evidence. As asserted in his initial brief, the Petitioner contends that a review of the Hearing Officer's recommended order supports the view, adopted by the Fifth District in this matter, that he found that the case against the Petitioner was not sustained under any standard of proof, including preponderance of the evidence. See, paragraphs 13 and 17 of the Findings of Fact in his Recommended Order. The First District, in its opinion, below, wholly fails to address these statements in the Hearing Officer's recommended order and states, without more, simply that the Hearing Officer concluded that the clear and convincing or Bowling test should be applied. This Court, by review the face of the recommended order, can determine, as did the Fifth District, that the Hearing Officer found no creditable evidence to sustain the charges under any standard of proof.

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 the Respondent's argument at point III, several assertions are made which bear close scrutiny.

The first is the analysis of Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981) which appears at page 17-18 of the Answer Brief. The Respondence makes reference there to a difference between "conduct not defined by statute" and "conventional administrative cases", stating that Bowling attaches differing standards of conduct where incipient policy is

created in the context of adjudicatory decision-making. Id. at 171, n. 9. While the point is an interesting one and reflects the First District's recognition of one a number of issues that affects the substantiality of evidence required to sustain adverse agency action, the court by no means concluded that the "sliding scale" standard applied only to "incipent policy" cases, particularly where it stated that the standard to be applied in "licenseediscipline proceedings" is elevated in cases which "may result in the loss of a valuable business license." Id. at p. 172. See Sherburne v. School Board of Suwannee County, 455 So.2d 1057, 1066 (Fla. 1st DCA 1984) (a case also involving claims against a teacher based upon charges of "immorality").

Notwithstanding the Respondent's claim to the contrary, the opinion of the court below adds nothing to this analysis. Without further explanation, the court states merely that the "preponderance of the evidence" test applies "under the circumstances of this case." There is nothing in the opinion which seeks to distinguish the case from Sherburne, for example, on the "incipient policy" issue.

The Respondent's point that the Bowling test refers to "type of proof" also adds little of significance to the discussion. The court in Bowling in the oft-cited language at page 172, expressly comments that the weight of the evidence shifts on the sliding-scale in concert with the severity of the penalty.

The Petitioner agrees, however, with the Respondent's assertion that the Bowling test would treat consistently licensee disciplinary cases where the ultimate result may be loss of the business or professional license; they would all be considered under an elevated standard regardless of the prospect that one might result in a reprimand, for example, another in suspension, and yet another in the supreme penalty of permanent revocation.

Thus, there is no quarrel between the parties, it appears, that one standard should apply in cases in which the result may be license revocation regardless of the penalty finally assessed.

In this regard, the principle is the equivalent of the application of the criminal standard of proof; reasonable doubt applies regardless of the fact that following conviction where the proof adduced at trial was less than overwhelming, the court at sentencing may be inclined to impose a moderate sentence within the confines of the guidelines imposed by statute. The analogy extends to those administrative cases where a penal statue is applied which may result in the loss of a professional license; thus, the EPC now has the authority to impose a penalty following a finding of guilt, as it determines to be appropriate on a case-by-case basis, within the options specified within §231.262 and .28. The finding of guilt as to a specific charge, however, as the jury might be instructed in a criminal case, is made independently of considerations of sympathy or mitigating circumstances relevant only to sentencing. At the fact finding stage, the application of an elevated standard in license discipline cases serves the same essential purpose as the application of the reasonable doubt standard in criminal case, to recognize the more profound significance of proceedings which may result in the loss of critical interests, such liberty and the right to pursue one's profession.

Moving to the consideration of the "clear and convincing" standard, the Petitioner disagrees that it was negated in any way by the adoption and later amendment of the APA. In the context of quasi-judicial proceedings, the APA clarified procedures, but, as stated in the Petitioner's initial Brief, did not address substantive law affecting license revocation proceedings nor the applicable standard of proof. Section 120.57 and 120.68(10), Fla.

Stat. address the standard of review only, not the standard of proof applicable at the hearing level.

The clear and convincing standard has continuously been applied in cases which cannot be rationally distinguished from the matter below. In The Florida Bar v. McCain, supra, this Court citing The Florida Bar v. Rayman, supra, stated:

> The evidence presented by the Bar [in a disciplinary action against an attorney] must be clear and convincing before we may find that the code of conduct governing lawyers has been breached.

Id at 706. After having applied that standard, the Court considered the penalty and rejected the recommendation for public reprimand and a one year suspension and entered an order of disbarment. It is not contested that that proceeding was conducted under the Integration Rule, however nothing in the APA supports the view that a contrary result would be required or expected under an APA proceeding affecting equivalent interests. Nor can it be argued effectively that the right to continue in one's profession as a lawyer is greater than the interest of a teacher in continuing to teach. On the other hand, it would be equally difficult to argue that society's competing interest in seeking to remove offending attorneys from the Bar is less significant than its interest in removing teachers from the teaching profession.

Turning to the decisions of other states, the Petitioner notes initially that many decisions are decided on the basis of a a statutory provision which dictates the standard of proof to be applied. Also, courts in other states have decided cases where it is argued that due process considerations require application of a clear and convincing standard in license revocation cases. See, In re Polk License Revocation, 449 A.2d 7 (N.J. 1982) (cited by the Petitioner at length). Not surprisingly, the decisions are

varied. The contrary view to Polk is stated in Board of Education v. State Board of Education, 497 N.E. 2d. 984 (Ill. 1986) where the court distinguished between contract or tenure dismissal cases, where the result does not necessarily prevent the teacher from teaching, from cases involving the loss of the license to teach, which is analogous to disbarment - the ultimate punishment of an attorney for the which the applicable standard is clear and convincing evidence. And, in Fallon v. Wyoming State Board of Medical Examiners, 441 P.2d 322 (Wyo. 1968), the court held that in a disciplinary proceeding involving a physician...

> ...(t)he burden was upon the complainants to present their case in a proper way and to state rather precisely and to prove the charges of the use of "false and fraudulent statements" by clear and convincing evidence.

See also Story v. Wyoming State Board of Medical Examiners, 721 P.2d 1013 (Wyo. 1986).

Whether due process requires the application of the "clear and convincing standard" as in Addington v. Texas, 99 S.Ct. 1804 (1979) need not be resolved here for two reasons. First, the courts may, as in Rayman and Reid, adopt such a standard in the absence of the constitutional requirement, and secondly, even under the Respondent's reading of the recommended order, the Hearing Officer found that the case was not sustained against the Petitioner under the less stringent Bowling test.

In short, the case law of this state supports the application of a higher standard than preponderance of the evidence in cases which may result in the loss of a professional license. Even assuming the Hearing Officer based his conclusions upon this perception of the law, he was not in error.

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 Cecilia Bradley, Esq., Deputy General Counsel, Knott Building, Tallahassee, Florida 32399; 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 5th day of May, 1987.

JOHN J. CHAMBLEE, JR.

Amended Reply Brief, modified to comply with Fla. R. App. P. Rule 9.210(a)(5), served on May 7, 1987.