

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANK T. BROGAN, as)
Commissioner of Education,)
)
Petitioner,)
)
vs.) Case No. 94-6356
)
MARGUERITE SMITH,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was held by the Division of Administrative Hearings, before Administrative Law Judge, Daniel M. Kilbride, in Orlando, Florida, on October 31, 1997. The following appearances were entered:

APPEARANCES

For Petitioner: Barbara J. Staros, Esquire
131 North Gadsden Street
Tallahassee, Florida 32301

For Respondent: Lorene C. Powell, Esquire
FEA/United
118 North Monroe Street
Tallahassee, Florida 32399-1700

STATEMENT OF THE ISSUE

Whether the Education Practices Commission should revoke or suspend Respondent's teaching certificate, or impose any other penalty provided by law, for the reasons cited in the Administrative Complaint filed July 12, 1994.

PRELIMINARY STATEMENT

On July 12, 1994, Petitioner issued an Administrative Complaint alleging that Respondent, a certified teacher, engaged in conduct that was in violation of subsections 231.28(1)(c), (e) and (f), Florida Statutes, and therefore warranted the taking of disciplinary action against her certificate. The Administrative Complaint also charges Respondent with violating Section 231.28(2), Florida Statutes. The Respondent requested a formal hearing on these allegations.

On November 3, 1994, this matter was referred to the Division of Administrative Hearings for adjudication. This matter was first set for final hearing on May 4, 1995, but was continued, for good cause, at the request of the Petitioner. On November 3, 1995, a Joint Motion for Abeyance was filed. An Order of Abatement was issued for good cause on November 13, 1995, and the case remained in abeyance until a Notice of Hearing was issued on March 13, 1997, scheduling the final hearing for June 10, 1997. That hearing was continued for good cause at the request of the Respondent. On September 8, 1997, a Notice of Hearing was issued rescheduling the hearing for October 31, 1997, at 9:00 by video teleconferencing between Tallahassee and Orlando.

Shortly before the hearing was about to commence on October 31, 1997, counsel for Respondent telephoned the Administrative Law Judge, who was already located at the Tallahassee video hearing site, requesting a continuance of the

hearing. Counsel for Respondent called from an Orlando location other than the video hearing room. Counsel for Respondent was advised to report to the Orlando video hearing room to make her motion for continuance on the record and with the presence of opposing counsel. More than one hour after the scheduled start time of the hearing, the Administrative Law Judge commenced the hearing noting that counsel for Respondent had more than adequate time to attend the hearing. Sometime after the hearing commenced, counsel for Respondent arrived at the hearing room. Counsel for Respondent made an ore tenus motion for continuance. Counsel stated that she had excused her client, the Respondent, who was not with her in the hearing room, because her client's only other witness was unavailable to testify that morning. No subpoena had been issued to compel the attendance of said witness. No prior motion for accommodation had been filed on behalf of Respondent or her witness. Counsel proffered that said witness was elderly and was physically unable to travel to the hearing site. The motion for continuance was denied and the hearing proceeded. See Gerald v. State, 674 So. 2d 96 (Fla. 1996); Williams v. State, 438 So. 2d 936 (Fla. 3rd DCA 1983); Cf. Beachum v. State, 547 So. 2d 288 (Fla. 1st DCA 1989).

At the hearing, Petitioner presented one witness, Thomas McIntyre, and offered four exhibits into evidence. Counsel for Respondent did not present any evidence. Counsel for Respondent proffered her witnesses' testimony. The essence of the proffer

was that the Respondent and the other absent witness would have testified to facts and circumstances of the Respondent's two felony convictions. The proffer included references to the absent witness planning to testify that he had given money to the Respondent, not to the partnership; that the money was actually used by the Respondent's partner; that Respondent used the money to open a school and that there was an \$800 discrepancy. Counsel for Respondent also stated that the Respondent's criminal case is on appeal to the Florida Supreme Court.

At the close of the evidentiary hearing, the parties were advised that post-hearing submittals were to be filed no later than 10 days following the filing of the transcript. A transcript of the proceedings was filed on November 25, 1997. A corrected transcript was furnished on December 4, 1997. On December 5, 1997, Petitioner timely filed a Proposed Recommended Order. Respondent has not filed her proposals as of the date of this order.

FINDINGS OF FACT

1. Respondent holds Florida Educator's Certificate No. 182469, covering the areas of business education and vocational education. It is valid through June 30, 1997. Respondent filed an application for the renewal of her certificate.

2. Respondent was formerly employed by the Brevard County School District. She retired from her employment with the school district in March 1994.

3. In the case of United States of America v. Marguerite Y. Smith, Case Number 93-185-CR-Orl-18, the Respondent was charged by the Federal Grand Jury with the following:

Marguerite Y. Smith knowingly and intentionally executed and attempted to execute the scheme and artifice to defraud and to obtain money and funds by means of false pretenses and representations, in that Marguerite Y. Smith, forged the signature of Jerry Bellomy on Check Nos. 001081 and 001071, presented those checks to Southeast Bank, N.A. for payment, and then used the proceeds of those checks for her own purposes.

All in violation of Title 18, United States Code, Section 1344.

4. In the case of United States of America v. Marguerite Y. Smith, Case No. 93-198-CR-Orl-18, the Respondent was charged by the Federal Grand Jury with the following:

On or about September 13, 1993, in Brevard County, Florida, in the Middle District of Florida, Marguerite A. Smith, the defendant herein, in a matter within the jurisdiction of the National Aeronautics and Space Administration of the United States, knowingly and willfully made a false, fictitious and fraudulent material statement and representation, in that the defendant certified that she had not, within a three year period preceding September 13, 1993, been convicted of commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract, or with commission of theft, or with making false statements, whereas, as Marguerite A. Smith then and there well knew, on September 20, 1991, in the case of United States v. Marguerite A. Smith, Case No. 910166-CR-Orl-19, Marguerite A. Smith was convicted of a violation of Title 18, United States Code, Section 665(A) theft from employment and training funds, arising from the submission of a false claim to obtain funds administered by a federal agency pursuant to the Job Training Partnership Act.

All in violation of Title 18, United States Code, Section 1001.

5. Respondent plead not guilty to the charges and following a trial by jury was found guilty of both charges. On April 20, 1994, Respondent was adjudicated guilty of Bank Fraud and making a False Statement to an Agency of the United States. She was sentenced to be imprisoned for a term of fifteen months, followed by supervised release for a term of three years during which Respondent must pay \$22,953.28 in restitution.

6. Respondent was arrested on the above charges at Rockledge High School, where she was employed, during a school day on November 15, 1993. Two FBI agents went to the principal's office and told the principal that they came there to arrest Respondent. The principal went to Respondent's classroom and asked her to come with him to his office, whereupon she was arrested and taken to detention by the FBI agents.

7. The principal was contacted by the local radio station and one of the major news networks sent a television crew to the school for an on-campus interview. There was television and radio coverage of the fact that Respondent was arrested. There was widespread knowledge of her arrest among the students at the school, their parents and the community at large.

8. Respondent's arrest and conviction was the subject of newspaper articles in Florida Today on January 5, 1994, and The Orlando Sentinel on November 16, 1993.

9. Respondent is not eligible for rehire by the Brevard County School District because she had been found guilty of a

felony and that Respondent's effectiveness as a teacher has been damaged.

10. In a prior case, an Administrative Complaint was filed against Respondent on May 12, 1993, alleging that Respondent submitted a fraudulent claim to receive federal funds and that she pled guilty to the charge of Obtaining Federal Funds by Fraud, Betty Castor v. Marguerite Smith, Case No. 93-067-RT, EPC Index No. 93-197-FOI. As a result of that administrative proceeding, Respondent was disciplined by the Education Practices Commission (EPC) in a Final Order issued on December 24, 1993. Respondent was placed on four years probation and was issued a letter of reprimand by the EPC.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569, 120.57(1), and 231.262(5), Florida Statutes.

12. This proceeding involves disciplinary action against Respondent's teaching certificate. Therefore, the burden of proof to establish the facts upon which the Petitioner seeks to discipline Respondent's teaching certificate is on the Petitioner. Balino v. Dept. Of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The charges must be proved by the Petitioner through the introduction of clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292

(Fla. 1987).

13. Section 231.28(1), Florida Statutes, authorizes the Department of Education, Education Practices Commission, to revoke or otherwise penalize a teaching certificate provided it can be shown that the holder of the certificate:

(c) Has been found guilty of gross immorality or an act involving moral turpitude;

(e) Has been convicted of a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation; and

(f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the school board.

14. In the Administrative Complaint filed against Respondent, it has been alleged that she has committed the acts prohibited by the provisions of Section 231.28(1)(c), (e) and (f), Florida Statutes.

15. Rule 6B-4.009, Florida Administrative Code, provides:

(2) "Immorality" is defined as conduct that is inconsistent with the standard of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

16. The term "moral turpitude" is defined in Rule 6B-4.009(6), Florida Administrative Code, as follows:

Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statutes fixes the moral turpitude.

Moral turpitude has also been defined by the Supreme Court of Florida as follows:

Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man or by man to society . . . It has also been defined as anything done contrary to justice, honesty, principle, or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated.

State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 146 So. 660,661 (1933).

17. Section 231.28(2), Florida Statutes, provides that a plea of guilty in any court or the decision of guilty by any court shall be prima facie proof of grounds for revocation of a teaching certificate. "Prima facie evidence is evidence sufficient to establish a fact unless and until rebutted." State v. Kahler, 232 So. 2d 166, 168 (Fla. 1970).

18. Respondent proffered the substance of what her witness would have testified if he was at the hearing. However, it was clear from statements made by counsel for Respondent that this proposed testimony went to the guilt or innocence of the Respondent. The Respondent may not, in this proceeding, attempt to relitigate the issue of her guilt or innocence on any of these criminal charges or convictions. McGraw v. Department of State, Division of Licensing, 491 So. 2d 1193 (Fla. 1st DCA 1986).

19. As to Respondent's assertion that her criminal conviction was on appeal, Petitioner need not wait for the outcome of an appeal of a criminal conviction before seeking

disciplinary action against Respondent's teaching certificate. Rife v. Dep't of Pro. Reg., 638 So. 2d 542, 543 (Fla. 2nd DCA 1994) ("the Board was authorized to revoke Dr. Rife's license, even though there are appellate proceedings pending in Vermont"); Dep't of Pro. Reg. V. Stern, 522 So. 2d 77, 79 (Fla. 3rd DCA 1988) (abuse of discretion to delay state license revocation proceedings pending exhaustion of appellate process.)

20. Petitioner has demonstrated, by clear and convincing evidence, that Respondent has been convicted of a felony in violation of Section 231.28(1)(e), Florida Statutes.

21. Because the crimes of Bank Fraud and False Statement to an Agency of the United States are clearly crimes of moral turpitude, Respondent is also guilty of violating Section 231.28(1)(c), Florida Statutes.

22. By clear and convincing evidence, Petitioner has demonstrated that the arrest and conviction for the crime and the publicity surrounding it were sufficient to bring public disgrace or disrespect to the Respondent herself and to the education community. Respondent is therefore guilty of personal conduct which seriously reduces her effectiveness as an employee of the school board in violation of Section 231.28(1)(f), Florida Statutes.

23. Rule 6B-11.007, Florida Administrative Code, contains the disciplinary guidelines to apply to statutory violations. For committing a felony, paragraph (2)(g) of the rule specifies a

penalty ranging from suspension to revocation of Respondent's license. Paragraph (3) of the rule allows the Commission to consider factors in mitigation or aggravation including the number of times the educator has been disciplined by the Commission.

24. This is Respondent's second time before the Commission. Respondent has offered no evidence in mitigation.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Education Practices Commission issue a Final Order finding Marguerite Smith guilty of violating the provisions of Sections 231.28(1)(c)(e)(f) and (2), Florida Statutes. It is further

RECOMMENDED that a Final Order be issued revoking Respondent's teaching certificate for a period of seven years.

DONE AND ENTERED this 26th day of December, 1997, at
Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of December, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.