

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOM GALLAGHER, as Commissioner)
of Education,)
)
Petitioner,)
)
vs.) Case No. 99-2533
)
MARIA DUPREE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on December 1, 1999, in Miami, Florida.

APPEARANCES

For Petitioner: Bruce P. Taylor, Esquire
Post Office Box 131
St. Petersburg, Florida 33731-0131

For Respondent: Maria Dupree, pro se
1511 Mahaffey Circle
Lakeland, Florida 33811

STATEMENT OF THE ISSUES

At issue in this proceeding is whether Respondent committed the offenses set forth in the Administrative Complaint, as amended, and, if so, what disciplinary action should be taken against her.

PRELIMINARY STATEMENT

On December 22, 1998, Petitioner filed an Administrative Complaint against Respondent which, as amended, alleged that:

1. Respondent, Maria Dupree, held Florida educator's certificate [number] 631483, covering the areas of health education and physical education, which was valid for a period from 1994 through June 30, 1999, at which time it expired and was not renewed.

2. At all times pertinent hereto, the Respondent was employed as a Physical Education substitute teacher, in the Dade County School District. . . .

3. On or before February 2, 1996, Respondent deposited stolen checks into her own checking account worth \$5,525.00. Respondent, and her accomplice [Ileana DePhillips], had agreed to split the money evenly and kept a hand written log to record the stolen amounts. Respondent was arrested on February 2, 1996, and charged on or about February 23, 1996, with five counts of 3rd Degree Grand Theft. The cases were Nolle Prosequi by the state after the Respondent completed the conditions of a Pre-Trial Intervention program.

Based on such allegations, Petitioner charged that Respondent violated Section 231.28(1)(c), Florida Statutes, "in that Respondent has been guilty of gross immorality or an act involving moral turpitude" (Count I); violated Section 231.28(1)(f), Florida Statutes, "in that Respondent, upon investigation, has been found guilty of personal conduct which seriously reduces [. . . her] effectiveness as an employee of the school board" (Count II), and violated Section 231.28(1)(j), Florida Statutes, "in that Respondent has otherwise violated the

provisions of law, the penalty for which is the revocation of the teaching certificate" (Count III).

Respondent filed an election-of-rights which disputed the allegations of fact contained in the Administrative Complaint and requested a formal hearing. Consistent with such request, Petitioner referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Section 120.569 and 120.57(1), Florida Statutes.

At hearing, Petitioner called Sharon Jackson, Raquel Saavedra, Ileana DePhillips, and Maria Dupree as witnesses, and Petitioner's Exhibits 1-7 were received into evidence. Respondent testified on her own behalf, and Respondent's Exhibit 1 was received into evidence.

The hearing transcript was filed January 14, 2000, and the parties were accorded 10 days from that date to file proposed recommended orders. Petitioner elected to file such a proposal and it has been duly-considered.

FINDINGS OF FACT

Background

1. Respondent, Maria Illescas-Dupree, held Florida educator's certificate number 631483, covering the areas of health education and physical education, which was valid for a period extending from 1994 through June 30, 1999, at which time it expired and was not renewed.

2. From 1988 to 1992, Respondent was employed by the School Board of Dade County, Florida (School Board) as a physical education instructor and assigned to Citrus Grove Elementary School. Among those who knew of her, Respondent was regarded as an extremely competent and professional educator, who was dedicated to her students, who maintained an exceptional rapport with faculty and staff, and who evidenced good moral character. (Respondent's Exhibit 1)

3. In 1992, Respondent took maternal leave from her employment with the School Board for the birth of her first child, Maggie (now 7 years of age). That leave was subsequently extended by the arrival of Respondent's second child, Caitlin (now 6 years of age) and thereafter by the arrival of Respondent's third child, Lauren (now 4 years of age). Given the size of her family, as well as the expiration of her maternal leave, 1/ Respondent resigned her employment with the School Board (presumably in 1995) with the expectation that she would continue in the role of homemaker and that her husband would continue to support the family. However, Respondent's expectations were short-lived, and by early September 1995, with his abusive behavior escalating (with threats of physical violence), Respondent was compelled to have her husband removed from their home.

4. With her husband absent from the home, Respondent was left without a source of income, with de minimus funds to support

the family, 2/ and without any permanent means of transportation. However, Respondent's neighbor, Ileana DePhillips, immediately offered her assistance.

5. Over the ensuing days Mrs. DePhillips provided groceries for Respondent and her children, drove Respondent to the office of the Department of Health and Rehabilitative Services (H.R.S.) to apply for food stamps and to W.I.C. "to get. . . milk and cereal, and basic things for the children since they were under five-years-old." Mrs. DePhillips also accompanied Respondent to court so she could obtain a restraining order against her husband.

6. While apparently successful in obtaining a restraining order, and notwithstanding his abusive character, Respondent nevertheless allowed her husband to return to the family home before the end of September 1995. 3/ At the time, Respondent was hopeful for a reconciliation; however, by January 1996 she was convinced otherwise, left the family home, and filed for divorce. Today, Respondent is divorced, resides in Lakeland, Florida, with her three daughters, and hopes to resume her teaching career.

The claim of misconduct

7. Petitioner's claim of misconduct is premised on the banking activities of Respondent and Mrs. DePhillips in October 1995 (shortly after Respondent's husband returned to the marital home). It is Petitioner's contention that "Respondent deposited

stolen checks into her own checking account worth \$5,525.00 . . . [and that she] and her accomplice [Ileana DePhillips] had agreed to split the money." Respondent denies any wrongdoing and avers she was not aware the checks were stolen when they were deposited or when she wrote checks against the account, and that she immediately ceased writing checks when she learned from the bank that the checks (Mrs. DePhillips had asked her to deposit) were returned unpaid and her own checks were being dishonored. According to Respondent, she only allowed Mrs. DePhillips to deposit the subject checks into her account as an accommodation, and is of the opinion that Mrs. DePhillips deceived her.

The transactions at issue

8. The first questionable transaction occurred on or about October 11, 1995, when Mrs. DePhillips asked Respondent to deposit her paycheck (from Angel Norberto Diaz, Petitioner's Exhibit 2) in Respondent's bank account so she might clear and access the funds. Apparently, Respondent, who felt a sense of obligation for Mrs. DePhillips' recent acts of kindness, harbored no reason to distrust her and had previously accommodated such requests from Mrs. DePhillips (who did not have a bank account). Again, Respondent agreed and deposited the check to her account on October 11, 1995. Unknown to Respondent, as well as Mrs. DePhillips' employer, Mrs. DePhillips had made the check for \$500.00, as opposed to the \$175.00 that was due her.

9. At or about the same time she was in the process of defrauding her employer, Mrs. DePhillips stole a book of checks from her sister-in-law, Raquel Saavedra. 4/ Subsequently, Mrs. DePhillips would write five checks to the order of "cash," and prevail on Respondent to deposit the checks to her account (as she had previously done with Mr. Diaz' checks). When Respondent accommodated Mrs. DePhillips by depositing the checks, and subsequently wrote checks against the deposits, she did so unwittingly, without knowledge of Mrs. DePhillips' unlawful conduct. 5/

10. The checks Mrs. DePhillips stole and forged on Mrs. Saavedra's account, and prevailed on Respondent to allow her to deposit to her (Respondent's) bank account, totaled \$5,025.00, were dated between October 12, 1995, and October 22, 1995, and were deposited between October 13, 1995, and October 23, 1995. The transactions were as follows:

A. Check number 300, dated October 12, 1995, was drawn in the amount of \$425.00 and deposited on October 13, 1995.

B. Check number 248, dated October 20, 1995, was drawn in the amount of \$500.00, and deposited on October 20, 1995 (as part of a larger deposit of \$1,050.00).

C. Check number 226, drawn in the amount of \$2,025.00, and check number 232, drawn in the amount of \$875.00, were both dated October 20, 1995, and were deposited on October 23, 1995 (as part of a larger deposit of \$2,975.00).

D. Check number 234, dated October 22, 1995, was drawn in the amount of \$1,200.00, and deposited on October 23, 1995.

11. Against these deposits, as well as the deposit of the Diaz check, Respondent wrote (with Mrs. DePhillips' permission or at her request) numerous checks during the month of October 1995 before she received notice from her bank that the checks were being returned unpaid and her own checks dishonored. The checks she wrote totaled \$5,312.73, with \$2,021.25 being written for Respondent's or her family's benefit, \$1,257.77 being written for Mrs. DePhillips' or her family's benefit, and the balance representing mixed purchases that benefited both families (i.e., a joint shopping trip to the grocery store). 6/ Facially, given the size of her family (two adults and three children), as well as the nature of the purchases or character of the store visited, the purchases appear to represent routine living expenses, as opposed to extravagances.

12. Given the proof, it must be resolved that Petitioner has failed to demonstrate clearly and convincingly, that, as alleged in the Administrative Complaint, "Respondent deposited stolen checks into her own checking account worth \$5,525.00 . . . [and that she] and her accomplice [Ileana DePhillips] had agreed to split the money" or otherwise engaged in any unlawful or improper conduct with regard to her banking activities. 7/

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

14. Where, as here, an agency proposes to take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes, and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). That standard requires that "the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Solomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

15. Regardless of the disciplinary action sought to be taken, it may be based only upon the offenses specifically alleged in the Administrative Complaint. See Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and

Hunter v. Department of Professional Regulation, 458 So. 2d 844 (Fla. 2d DCA 1984). Moreover, in determining whether Respondent violated the provisions of Section 231.28(1), as alleged in the Administrative Complaint, one "must bear in mind that it is, in effect, a penal statute. . . . This being true, the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it."

Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

16. Pertinent to this case, Section 231.28(1), Florida Statutes, provides that the Education Practices Commission may discipline a licensee if it can be shown that such person:

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

* * *

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

* * *

(j) Has otherwise violated the provisions of law, the penalty for which is the revocation of the teaching certificate. . . .

17. Rule 6B-4.009, Florida Administrative Code, defines "immorality" and "moral turpitude" as follows:

(2) Immorality is defined as conduct that is inconsistent with the standards 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.

* * *

(6) 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 statute fixes the moral turpitude.

Finally, the term "gross" in conjunction with "immorality" has heretofore been found to mean "immorality which involves an act of misconduct that is serious, rather than minor in nature, and which constitutes a flagrant disregard for proper moral standards." Education Practices Commission v. Knox, 3 FALR 1373-A (DOE 1981). Accord State ex rel. Tulledge v. Hollingsworth, 146 So. 660, 661 (Fla. 1933), wherein the court observed:

Moral turpitude [or synonymously, "gross immorality" as that term is also used in the subject statute] involves the idea of inherent baseness or depravity in the private and social relations or duties owed by man to 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.

18. Here, for reasons appearing more fully in the Findings of Fact, it cannot be resolved, clearly and convincingly, that Respondent engaged in any misconduct with regard to her banking practices. Consequently, Petitioner has failed to demonstrate that Respondent violated the provisions of Section

231.28(1)(c)(f), and (j), Florida Statutes, as alleged in the Administrative Complaint.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the a final order be entered dismissing the Administrative Complaint.

DONE AND ENTERED this 11th day of February, 2000, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of February, 2000.

ENDNOTES

- 1/ The School Board limits maternal leave to a three-year period.
- 2/ Respondent's bank statement (Petitioner's Exhibit 5) reflects a balance of \$92.97 as of September 12, 1995.
- 3/ According to Respondent, her husband was only out of the home for approximately two weeks.
- 4/ According to Mrs. DePhillips, Respondent drove her to Mrs. Saavedra's house on the day she stole the checks and then she filled out the checks at issue (Petitioner's Exhibit 1) while riding in the back seat of the car Respondent was driving.

According to Respondent, both she and Mrs. DePhillips were passengers in car driven by a neighbor and she had no knowledge of the stolen checks. Considering the proof, it is more likely, as Respondent avers, that they rode with a neighbor. Moreover, given that Mrs. DePhillips would subsequently prevail on Respondent to deposit the checks to her account (without informing her that the checks were stolen), and the checks bore various dates and were deposited over time, it is improbable that Mrs. DePhillips filled the checks out in Respondent's presence and her testimony that she did so is rejected.

5/ In reaching such conclusion, Mrs. DePhillips' testimony (that she informed Respondent that the checks were stolen) has not been overlooked. However, her testimony regarding such disclosure was conflicting and inconsistent with the objective proof and, consequently, not persuasive. Notably, Mrs. DePhillips initially offered the following explanation:

Q. Now, a moment ago, you said something about--at some point, telling Maria you had got the checks from your sister-in-law.

A. Yes.

Q. Were you all still writing checks?

A. No, no. It was stopped. It was stopped.

Q. To your knowledge, did Maria ever write any checks on that money after you told her you got it from Raquel?

A. No, it was stopped. Her personal checks you mean? Maria's personal checks? I don't remember when was the last check drawn. I cannot tell you that. Maybe the bank knows it, but I don't. (Transcript, page 40.

Mrs. DePhillips subsequently testified that, although she could not recall the date, she knows she informed Respondent in October 1995, that the checks were stolen. (Transcript, page 47) Later, Mrs. DePhillips testified that she informed Respondent that the checks were stolen before the second deposit or by October 15, 1995. (Transcript, pages 49 and 56) Mrs. DePhillips also contradicted herself when she subsequently testified (despite her earlier testimony that "I don't remember when was the last check drawn.") that Respondent's check writing continued during October, November, and December 1995. (Transcript, page 46) Contrasted with Mrs. DePhillips' testimony, Respondent testified

that she was not aware the checks were stolen when they were deposited or when she wrote checks against the deposits, and that she ceased writing checks against the account when she learned from the bank (presumably on receipt of her November 8, 1995, bank statement, Petitioner's Exhibit 6) that the checks (Mrs. DePhillips had asked her to deposit) were returned unpaid and her own checks were being dishonored.

Clearly, Mrs. DePhillips testimony on these key matters was contradictory. It is also improbable, given her pattern of deception, that Mrs. DePhillips would suddenly inform Respondent of her duplicity and expect her continued cooperation. Moreover, the objective proof demonstrates Respondent ceased writing checks (at or about the end of October 1995) when she received notice of a problem from the bank. In this regard, Petitioner's Exhibit 4, a list of the checks written against the account (which list was prepared by the Respondent after she received notice from the bank to allocate between them responsibility for their purchases), clearly reflects that the bank was reimbursed \$1,670.00 on November 15, 1995, and \$1,355.00 on November 20, 1995. It is unlikely that any reimbursement would be made while check writing continued. Finally, there is no objective proof of record that Respondent wrote any checks after October 1995.

Given the conflicts in Mrs. DePhillips' testimony, as well as the inconsistencies with the objective proof, her testimony (that Respondent was aware the checks she deposited for Mrs. DePhillips were stolen when she wrote checks against them) must be rejected as unreliable and otherwise unworthy of belief. Consequently, there is no reason to reject or dismiss Respondent's testimony that she had no knowledge of any impropriety until after she received notice from her bank.

6/ Petitioner's Exhibit 7 contains copies of some of the checks Respondent wrote during the relevant time frame (October 1995). However, the exhibit also contains copies of checks Respondent wrote in September 1995 which are not relevant to this case.

7/ In so concluding, it has not been overlooked that Petitioner harbors a different view, and is of the opinion that there is direct, as well as circumstantial evidence, that would compel a different conclusion. (See Petitioner's Proposed Recommended Order, Supporting Argument.) As for the direct evidence, Petitioner observes that:

The evidence that Respondent knowingly wrote checks based on stolen/forged checks deposited into her account is overwhelming. Her co-defendant clearly said Respondent was told of the nature of the deposits, and

continued to write checks based on those deposits. Furthermore, any rational person would certainly be on notice that the checks were stolen. Respondent knew Ms. DePhillips was not working regularly. Ms. DePhillips began forging the checks while seated in the back of a car Respondent was driving. Respondent was obviously sharing in the proceeds of the stolen and forged checks. . . .

Notably, to accept Petitioner's view that there is direct evidence to support the idea that Respondent "knowingly wrote checks based on stolen/forged checks deposited to her account" requires acceptance of Mrs. DePhillips' testimony that she "told [Respondent] of the nature of the deposits, and [she] continued to write checks based on those deposits." For reasons noted supra, Ms. DePhillips' testimony in this regard has not been credited, nor has her testimony that she "began forging the checks while seated in the back of a car Respondent was driving" been credited.

Without credible testimony from Mrs. DePhillips, all that remains to suggest Respondent "knowingly wrote checks based on stolen checks deposited to her account" is circumstantial evidence and inferences Petitioner suggests should be drawn based on that proof. With regard to these matters, Petitioner observes that:

. . . By her own admission she wrote over \$2,000.00 worth of checks that were for the exclusive benefit of herself and her children. She offers no credible explanation to justify such an act. She did offer two totally incredible explanations. First, she said she was somehow paying Ms. DePhillips back. It is obvious that writing checks for her own expenditures is not paying back Ms. DePhillips. Second, she says she thought her husband was covering, or would cover the checks. However, she also testified that she was in fear for her life based on threats made by her husband, that he threatened to kill her and take the children, and that she sought police protection from him. Under such circumstances, it is totally incredible that she would have any reasonable expectation that her husband would cover thousands of dollars in checks. The only explanation that fits the evidence, is that Respondent and Ms. DePhillips were partners

in crime. Ms. DePhillips stole and forged the checks, and with Respondent's knowledge and consent, deposited them in Respondent's account. They then each shared in the proceeds. . . .

While such is the conclusion Petitioner suggests should be drawn from the proof, other explanations for Respondent's conduct are also reasonable. First, while Respondent knew Mrs. DePhillips was not working regularly, that offers no reason that, given their past experiences together, she should suspect Mrs. DePhillips of criminal conduct. Second, while she clearly wrote checks for her own benefit against the proceeds, she did so with Mrs. DePhillips permission (Transcript, page 43). Finally, it was not unreasonable for Respondent to assume, with regard to the checks written to benefit her family, that her husband, who had recently returned to the family home and was its sole source of income, would cover or repay those funds. Clearly, on balance, the proof is also consistent with conduct that could not be characterized as criminal or improper. Consequently, the circumstantial evidence, and the inferences Petitioner suggests should be drawn from it, do not and cannot (clearly and convincingly) support a conclusion that Respondent engaged in any criminal or improper conduct.

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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.