STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| JOSEPH ALOYSIOUS MURPHY, IV, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 99-4901 |
| | ) | |
| TOM GALLAGHER, as COMMISSIONER OF EDUCATION, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

## RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on January 31, 2000, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

## APPEARANCES

For Petitioner: Joan Stewart, Esquire
FEA/UNITED
118 North Monroe
Tallahassee, Florida 32399-1700

For Respondent: William R. Scherer III, Esquire
CONRAD & SCHERER
Post Office Box 14723
Fort Lauderdale, Florida 33302

## STATEMENT OF THE ISSUE

Whether Petitioner's application for certification should be denied for the reasons set forth in the Amended Notice of Reasons.

## PRELIMINARY STATEMENT

By letter dated December 28, 1998, the Commissioner of Education (Commissioner) notified Petitioner of the denial of Petitioner's Application for Florida Educator's Certificate for the reasons set forth in the Notice of Reasons that accompanied the letter.

On or about March 17, 1999, Petitioner was provided with an Amended Notice of Reasons, which read as follows:

> JOSEPH ALOYSIOUS MURPHY, 340 Northwest 34th Street Oakland Park, Florida 33309, Department of Education Number 789710 having filed his application for a Florida Educator's certificate before the Department of Education; and the Department of Education having reviewed the application in accordance with Sections 231.17 and 231.262, Florida Statutes, has determined that JOSEPH ALOYSIOUS MURPHY is not entitled to the issuance of a Florida Educator's Certificate, accordingly
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> The Department of Education files and serves upon the applicant, JOSEPH ALOYSIOUS MURPHY, its Amended Notice of Reasons for it denial in accordance with the provisions of Section 120.60, Florida Statutes, and as grounds therefor[], alleges:
>
> 1. On or about August 6, 1994, Applicant solicited sex from an undercover Police Officer posing as a prostitute. Applicant was arrested and charged with Soliciting for Prostitution. On or about October 23, 1995, the case was Nolle Prosequi after Applicant completed a Pre-Trial Intervention Program.
>
> The Department of Education charges:
>
> STATUTE VIOLATIONS
>
> COUNT 1: The applicant is in violation of 231.17(3)(c)6, Florida Statutes, which

> requires that the holder of a Florida Educator's Certificate be of good moral character.
>
> COUNT 2: The applicant is in violation of Section 231.17([10])(a), Florida Statutes, which provides that the Department of Education is authorized to deny an Applicant an educator's certificate if it possesses evidence satisfactory to it that the Applicant has committed an act or acts or that a situation exists for which the Education Practices Commission would be authorized to revoke a teaching certificate.
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> COUNT 3: The Applicant is in violation of Section 231.28(1)(c), Florida Statues, in that he has been guilty of gross immorality or an act involving moral turpitude.
>
> WHEREFORE, the undersigned concludes that Joseph Aloysious Murphy has committed an act or acts or that a situation exists for which the Education Practices Commission would be authorized to revoke an educator's certificate. It is therefore respectfully recommended that the Education Practices Commission affirm the Department of Education's denial of the issuance of a teaching certificate to the Applicant based upon the reasons set forth herein, in accordance with the Explanation of Rights for which is attached to and made a part of this Amended Notice of Reasons.

On or about March 29, 1999, Petitioner submitted an executed Election of Rights form through which he requested (1) an opportunity to attempt to "negotiate a settlement" and (2) if settlement negotiations were unsuccessful, a "formal hearing" on the proposed denial of his application.

No settlement was reached, and on November 22, 1999, the matter was referred to the Division of Administrative Hearings

(Division) for the assignment of an Administrative Law Judge to conduct the hearing Petitioner had requested.

The case was assigned to the undersigned, who scheduled a hearing in the matter for January 31, 2000. On January 27, 2000, the Commissioner filed a Notice of Withdrawal of Count I of [the Amended] Notice of Reasons, in which he stated the following:

> Respondent . . . hereby withdraws Count I of [his Amended] Notice of Reasons which alleges that the Petitioner is in violation of Section 231.17(3)(c)([5]) Florida Statutes which requires that the holder of a Florida Educator's Certificate be of good moral character. Respondent does not withdraw Counts II and III of its Amended Notice of Reasons which remain pending for the final hearing. 1/

As noted above, the hearing was held on January 31, 2000. At the hearing, nine witnesses testified: Joyce Fleming; Deborah Cooper; Howard Greitzer, Esquire; Beverly James; Michael Zarra; Edward Walsh, Esquire; Broward County Court Judge Joseph Aloysious Murphy III; Father Guy Fenger; and Petitioner. In addition to the testimony of these nine witnesses, the parties offered 14 exhibits (Petitioner's Exhibits A through C and Respondent's Exhibits A through K) into evidence. Respondent's Exhibits A and D through K were received into evidence. The undersigned reserved ruling on Petitioner's Exhibits A through C and Respondent's Exhibits B and C 2/ (as well as the testimony related to these exhibits) to give the parties an opportunity to present further argument (in their proposed recommended orders) on the admissibility of this evidence.

At the conclusion of the evidentiary portion of the hearing on January 31, 2000, the undersigned announced on the record that proposed recommended orders had to be filed no later than 30 days from the date of the undersigned's receipt of the transcript of the hearing. The undersigned received the hearing Transcript (which consisted of two volumes) on February 25, 2000. Thereafter, on March 27, 2000, and March 29, 2000, respectively, Petitioner and Respondent filed their Proposed Recommended Orders, which the undersigned has carefully considered.

In his Proposed Recommended Order, Petitioner gave notice that he was withdrawing his offer of Petitioner's Exhibits B and C. Accordingly, the only exhibits about which there remains an unresolved dispute concerning admissibility are Petitioner's Exhibit A (the Final Order of Dismissal issued in Broward County Court Case No. 94-15421MO10A), Respondent's Exhibit B (an executed waiver of Petitioner's right to a speedy trial and a preliminary hearing filed in Broward County Court Case No. 94-15421MO10A), and Respondent's Exhibit C (the Nolle Prosequi entered in Broward County Court Case No. 94-15421MO10A). Having reviewed the respective arguments made by the parties and having otherwise given careful consideration to the matter, the undersigned has determined that, in the interest of fairness and completeness, these exhibits (and the non-expert, fact testimony related to these exhibits 3/ ) should be made a part of the evidentiary record in the instant case, which already contains

evidence, presented by the Commissioner, of Petitioner's arrest on the "soliciting [of] prostitution" charge that was the subject of Broward County Court Case No. 94-15421MO10A. 4/

## FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

1. Petitioner is presently 25 years of age. His date of birth is July 29, 1974.

2. Petitioner had a troubled youth; however, since the August 6, 1994, incident (described below) that is the focus of the instant case, he has matured and gained a reputation of being a responsible adult member of his community.

3. On Saturday, August 6, 1994, shortly after his twentieth birthday, at approximately 5:55 p.m., Petitioner was driving north on Andrews Avenue in downtown Fort Lauderdale. He had just finished running errands for his father in the downtown area and was on his way home. 5/ There were no passengers in his vehicle.

4. As Petitioner approached the intersection of North Andrews Avenue and Second Street, there was a woman standing on the sidewalk on the northeast corner of the intersection, facing south, who attracted his attention.

5. Unbeknownst to Petitioner, the woman, Joyce Fleming was a police officer employed by the Fort Lauderdale Police Department. Officer Fleming was participating in an undercover

operation designed to "combat street level prostitution activity." Her role in the operation was to pose as a street prostitute.

6. When Petitioner stopped for a red light at the intersection of North Andrews Avenue and Second Street, he made eye contact with Officer Fleming, who waved at him and pointed him toward a nearby parking garage, which was underneath an office building.

7. Petitioner pulled into the parking garage and parked his car, head first, facing a concrete wall and beside concrete pilings.

8. Officer Fleming, who was wearing a wire, then walked up to the driver's side of Petitioner's vehicle and started talking to Petitioner. The conversation she had with Petitioner was tape recorded 6/ and monitored by backup officers (who were in the vicinity).

9. Officer Fleming began her conversation with Petitioner by complaining that a certain police officer, who, she told Petitioner, had been across the street from where she had been standing on North Andrews Avenue, was always "bothering" her. It was because of this police officer, she explained to Petitioner, that she had not "want[ed] to get in over there." After being told about the police officer, Petitioner asked Officer Fleming, "Why don't I meet you somewhere else?" To allay Petitioner's concerns, Officer Fleming told him that the police officer was no

longer across the street and that therefore she could "get in" his vehicle. Petitioner, however, indicated to Officer Fleming that he was still "nervous about it," to which Officer Fleming replied, "If you're nervous, you can go on." Petitioner, though, did not "go on." He chose to stay. 7/

10. Officer Fleming then asked Petitioner what he "want[ed] to do." Petitioner answered, "I don't know, what do you want?" Officer Fleming's response was, "Well, I don't care; just tell me what you want to do and I'll tell you how much."

11. Petitioner told Officer Fleming (whom he believed to be a prostitute) that he was interested in a "blow job." 8/ He and Officer Fleming then haggled over the price. Petitioner ultimately agreed to pay Officer Fleming $10.00, 9/ after which the following exchange took place between Petitioner and Officer Fleming:

> Officer Fleming: Okay. We can do that then.
>
> Petitioner: Why don't I meet you somewhere else?
>
> Officer Fleming: You don't want to do it here?
>
> Petitioner: Well, I don't want a cop pulling up.

12. It was at this point in time that back up officers arrived on the scene and arrested Petitioner for "soliciting for prostitution" in violation of Fort Lauderdale Municipal Ordinance 16-1.

13. At no time did Petitioner actually pay Officer Fleming any money; nor was there ever any physical contact, sexual or otherwise, between Petitioner and Officer Fleming. (Petitioner remained in his vehicle, while Officer Fleming stood alongside the vehicle on the driver's side, throughout their conversation in the parking garage.)

14. The charge that Petitioner had violated Fort Lauderdale Municipal Ordinance 16-1 10/ by agreeing to pay Officer Fleming for oral sex was filed in Broward County Court, and it was docketed as Case No. 94-15421MO10A.

15. On March 23, 1995, Petitioner filed a Sworn Motion to Dismiss in Case No. 94-15421MO10A. Appended to the motion was a copy of a transcript that had been prepared of the tape recording of the conversation Petitioner had had with Officer Fleming immediately prior to his arrest. The transcript, however, did not accurately and completely reflect the contents of the tape recording. It omitted Petitioner's affirmative response when he was asked by Officer Fleming, during price negotiations, whether he would be agreeable to paying $10.00 for her services. 11/

16. Pursuant to an agreement with the Municipal Prosecutor, Petitioner entered a Pre-Trial Intervention Program on or about July 5, 1995.

17. Petitioner successfully completed the Pre-Trial Intervention Program. Consequently, on October 23, 1995, prior to any ruling having been made on Petitioner's Sworn Motion to

Dismiss, the Municipal Prosecutor issued a Nolle Prosequi in Case No. 94-15421MO10A announcing that the "City of Fort Lauderdale decline[d] prosecution on all municipal violations against [Petitioner] arising out of [his] arrest on [August 6, 1994]."

18. Petitioner graduated from the University of South Florida in December of 1997 with a B.A. degree in English.

19. On or about February 17, 1998, Petitioner submitted to the Department of Education (Department) an Application for Florida Educator's Certificate seeking an "initial two-year nonrenewable temporary" teaching certificate. On the application, he acknowledged his August 6, 1994, arrest.

20. From August of 1998 to January of 1999, Petitioner was employed as a tenth-grade English teacher at MacArthur High School in Hollywood, Florida (which, at the time, had an enrollment of 2,200 students). The principal of the school was (and still is) Beverly James. In Ms. James' opinion, Petitioner did a "very good job" while at the school, and she "would not hesitate" to rehire him if he received his teaching certification.

21. In addition to his classroom responsibilities at MacArthur High School, Petitioner also served as the assistant coach of the school's wrestling team. The head coach of the team was Michael Zarra. In Mr. Zarra's opinion, Petitioner did a "good job coaching," and he would not "have any hesitation to have [Petitioner] back as an assistant wrestling coach."

22. As evidenced by his job performance at MacArthur High School, by engaging in the conduct for which he was arrested on August 6, 1994, Petitioner has not impaired his ability to be an effective teacher. The incident, which took place when Petitioner was a 20-year old college student, four years before he began teaching at the school, was not widely publicized and it has not adversely affected his reputation in the community.

23. By letter dated December 28, 1998, Petitioner was notified that his Application for Florida Educator's Certificate was being denied for the reasons set forth in the Notice of Reasons that accompanied the letter.

24. Shortly thereafter, Ms. James terminated Petitioner's employment at MacArthur High School. She did so only because she was told she had to inasmuch as Petitioner "would not be certified."

25. On or about March 17, 1999, Petitioner was provided with an Amended Notice of Reasons reflecting that the denial of his application was based solely upon the August 6, 1994, incident involving Officer Fleming.

26. Petitioner subsequently sought to reopen Broward County Court Case No. 94-15421MO10A. His efforts were successful. On June 23, 1999, Broward County Court Judge Joel T. Lazarus issued a Final Order of Dismissal in the case, which provided as follows:

> CAME ON TO BE HEARD on June 21, 1999
> Defendant's Motion to Vacate and Set Aside

> Disposition and Defendant's Sworn Motion to Dismiss and the Court having heard the arguments of counsel and being further advised, it is hereby
>
> ORDERED AND ADJUDGED that Defendant's Motion to Vacate and Set Aside Disposition be and the same is hereby GRANTED.
>
> IT IS FURTHER ORDERED AND ADJUDGED that, as to Defendant's Sworn Motion to Dismiss and the Court's consideration of the matters before it, this Court makes a determination that no material issue of fact that sustains the criminal charges against this Defendant exist[s] and that the Defendant is entitled to dismissal as a matter or law.
>
> IT IS FURTHER ORDERED AND ADJUDGED that Defendant's Sworn Motion to Dismiss be and same is hereby GRANTED and the Defendant is herewith discharged.

CONCLUSIONS OF LAW

27. Petitioner is seeking an "initial two-year nonrenewable temporary" teaching certificate.

28. The certification of teachers is governed by Section 231.17, Florida Statutes, which provides, in pertinent part, as follows:

> 231.17. Official statements of eligibility and certificates granted on application to those meeting prescribed requirements
>
> (1) Application.--Each person seeking certification pursuant to this chapter shall submit a completed application to the Department of Education and remit the fee required pursuant to s. 231.30. . . . Pursuant to s. 120.60, the Department of Education shall issue within 90 calendar days after the stamped receipted date of the completed application an official statement of eligibility for certification or a certificate covering the classification,

level, and area for which the applicant is deemed qualified.

(10) Denial of certificate.--

(a) The Department of Education may deny an applicant a certificate if the department possesses evidence satisfactory to it that the applicant has committed an act or acts, or that a situation exists, for which the Education Practices Commission would be authorized to revoke a teaching certificate.

(b) The decision of the Department of Education is subject to review by the Education Practices Commission upon the filing of a written request from the applicant within 20 days after receipt of the notice of denial.

29. The grounds upon which the Education Practices Commission may take disciplinary action against a certified teacher are set forth in Section 231.28, Florida Statutes, which provides, in pertinent part, as follows:

231.28. Education Practices Commission; authority to discipline

(1) The Education Practices Commission shall have authority to suspend the teaching certificate of any person as defined in s. 228.041(9) or (10) for a period of time not to exceed 3 years, thereby denying that person the right to teach for that period of time, after which the holder may return to teaching as provided in subsection (4); to revoke the teaching certificate of any person, thereby denying that person the right to teach for a period of time not to exceed 10 years, with reinstatement subject to the provisions of subsection (4); to revoke permanently the teaching certificate of any person; to suspend the teaching certificate, upon order of the court, of any person found to have a delinquent child support obligation; or to impose any other penalty

> provided by law, provided it can be shown that such person: . . .
>
> (c) Has been guilty of gross immorality or an act involving moral turpitude;

30. Chapter 231, Florida Statutes, does not define the terms "gross immorality" or "an act involving moral turpitude." See Sherburne v. School Board of Suwannee County, 455 So. 2d 1057, 1061 (Fla. 1st DCA 1984).

31. Rule 6B-4.009, Florida Administrative Code (which deals with dismissal actions initiated by school boards against instructional personnel pursuant to Section 231.36, Florida Statutes), however, provides guidance to those seeking to ascertain the meaning of these terms, as they are used in subsection (1)(c) of Section 231.28, Florida Statutes. See Castor v. Lawless, 1992 WL 880829, 10 (EPC 1992)(Final Order).

32. Rule 6B-4.009(2), Florida Administrative Code, defines "immorality" as follows:

> 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.

"Thus, in order to dismiss a teacher for immoral conduct the factfinder must conclude: a) that the teacher engaged in conduct inconsistent with the standards of public conscience and good morals, and b) that the conduct was sufficiently notorious so as to disgrace the teaching profession and impair the teacher's

service in the community." McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996). The teacher's impairment may be inferred if the immoral conduct occurred in the classroom or in the presence of students, but not if the misconduct was of a "private nature" not involving students. See Walker v. Highlands County School Board, 2000 WL 256154 (Fla. 2d DCA March 8, 2000).

33. "Gross immorality," as the term suggests, is misconduct that is more egregious than mere "immorality." It is "immorality which involves an act of conduct that is serious, rather than minor in nature, and which constitutes a flagrant disregard of proper moral standards." See Castor v. Lawless, 1992 WL 880829, 10 (EPC 1992)(Final Order); Turlington v. Knox, 3 FALR 1373A, 1374A (EPC 1981)(Final Order).

34. Rule 6B-4.009, Florida Administrative Code, also contains a definition of "moral turpitude." This definition is found in subsection (6) of the rule, which provides 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 statute fixes the moral turpitude.

"In contrast to the definition of immorality in Rule 6B-4.009(2), the definition of moral turpitude in Rule 6B-4.009(6) does not require notoriety or impaired ability for service in the

community." Gallagher v. Powell, 1999 WL 1483626, n.16 (Fla. DOAH 1999).

35. In evaluating whether a teacher "[h]as been guilty of gross immorality or an act involving moral turpitude," in violation of Section 231.28(1)(c), Florida Statutes, it must be remembered that "[b]y virtue of their leadership capacity, teachers are traditionally held to a high moral standard in a community." Adams v. Professional Practices Council, 406 So. 2d 1170, 1171 (Fla. 1st DCA 1981).

36. Where, as in the instant case, an applicant for a teaching certificate disputes the announced intention to deny certification on the ground that the applicant "[h]as been guilty of gross immorality or an act involving moral turpitude," as described in Section 231.28(1)(c), Florida Statutes, and the applicant requests that an evidentiary hearing be held in accordance with Section 120.57(1), Florida Statutes, the Commissioner (as the head of the Department) bears the burden of proving (at the requested hearing) by a preponderance of the evidence that the applicant engaged in such alleged misconduct. See Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996); Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974)("'As a general rule the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial

proceeding--that is, A preponderance of the evidence. It is not satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt.").

37. The Commissioner, in the instant case, established by a preponderance of the record evidence that, as alleged in the Amended Notice of Reasons, "[o]n August 6, 1994, [Petitioner] solicited [oral] sex from an undercover Police Officer [Officer Fleming] posing as a prostitute" by agreeing to pay her $10.00 to engage in such activity. In so doing, as further alleged in the Amended Notice of Reasons, Petitioner committed "an act involving moral turpitude," as described in Section 231.28(1)(c), Florida Statutes. See In re the Matter of Robert W. Koch, 890 P.2d 1137, 1139 (Ariz. 1995)(soliciting prostitution deemed to be a crime involving moral turpitude.). (The record evidence, however, is insufficient to establish that this "act involving moral turpitude" also constituted "gross immorality" inasmuch as there has been no showing made that the incident has received any notoriety or that it impaired Petitioner's ability to be an effective teacher. See McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)(although the record evidence demonstrated that "McNeill did in fact touch the undercover officer in a sexually suggestive manner," such inappropriate conduct could not be found to constitute "immorality," as defined in Rule 6B-4.009(2), Florida Administrative Code, because "the School Board failed to meet its

burden of proof with respect to impaired effectiveness, the second element of the offense."); McKinney v. Castor, 667 So. 2d, 387, 389 (Fla. 1st DCA 1995)(proof insufficient to establish McKinney engaged in conduct amounting to "gross immorality," in violation of Section 231.28(1)(c), Florida Statutes, where it did not demonstrate that his conduct "was 'sufficiently notorious' to bring McKinney and the education profession 'into public disgrace or disrespect and impair (McKinney's) service in the community,' or that McKinney's conduct seriously reduced his effectiveness as an employee of the school board"); Gallagher v. Powell, 1999 WL 1483626 (Fla. DOAH 1999)(educator guilty of committing an "act involving moral turpitude, but proof insufficient to establish educator's guilt of "gross immorality" because showing not made that his "conduct was notorious or brought public disgrace or disrespect to [educator] or to the education profession or that [educator's] ability to serve the community was impaired.").)

38. To determine whether Petitioner's August 6, 1994, "act involving moral turpitude" is conduct "for which the Education Practices Commission would be authorized to revoke a teaching certificate," within the meaning of Section 231.17(10)(a), Florida Statutes, or whether it is, rather, less serious conduct warranting disciplinary action not as severe as revocation, it is necessary to consult the Education Practices Commission's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Commission's disciplinary

authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees). The Education Practices Commission's "disciplinary guidelines" are found in Rule 6B-11.007, Florida Administrative Code, and they provide, in pertinent part, as follows:

> 6B-11.007 Disciplinary Guidelines.
>
> (1) When the Education Practices Commission finds that a person has committed any act for which the Commission may impose discipline, the Commission shall impose an appropriate penalty within the ranges set forth for various acts or violations in the following disciplinary guidelines unless, based upon consideration of aggravating and mitigating factors in the individual case which are among those set out in subsection (3), the Commission determines that a penalty outside the range in those guidelines but within statutory limitation is appropriate. In those cases in which the Commission relies on

aggravating or mitigating factors to depart from the ranges in these disciplinary guidelines, such aggravating and mitigating factors shall be stated in the record of the case and in the Final Order imposing the applicable penalty.

(2) The following disciplinary guidelines shall apply to violations of the below listed statutory and rule violations and to the described actions which may be basis for determining violations of particular statutory or rule provisions. Each of the following disciplinary guidelines shall be interpreted to include "probation" with applicable terms thereof as an additional penalty provision. . . .

(h) Sexual misconduct, no students involved, in violation of S. 231.28(1)(c), (f), (i), F.S., Rule 6B-1.006(4)(c), (5)(c), (d), F.A.C.

Probation -- Suspension

(i) Sexual misconduct with any student or any minor in violation of S. 231.28(1)(c), (f), (i), F.S., Rule 6B-1.006(3)(a), (e), (g), (h), (4)(c), F.A.C.

Suspension -- Revocation . . .

(3) Based upon consideration of aggravating and mitigating factors present in an individual case, the Commission may deviate from the penalties recommended in subsection (2). The Commission may consider the following as aggravating or mitigating factors:

(a) The severity of the offense;

(b) The danger to the public;

(c) The number of repetitions of offenses;

(d) The length of time since the violation;

(e) The number of times the educator has been previously disciplined by the Commission;

(f) The length of time the educator has practiced and the contribution as an educator;

(g) The actual damage, physical or otherwise, caused by the violation;

(h) The deterrent effect of the penalty imposed;

(i) The effect of the penalty upon the educator's livelihood;

(j) Any effort of rehabilitation by the educator;

(k) The actual knowledge of the educator pertaining to the violation;

(l) Employment status;

(m) Attempts by the educator to correct or stop the violation or refusal by the licensee to correct or stop the violation;

(n) Related violations against the educator in another state including findings of guilt or innocence, penalties imposed and penalties served;

(o) Actual negligence of the educator pertaining to any violation;

(p) Penalties imposed for related offenses under subsection (2) above;

(q) Pecuniary benefit or self-gain [i]nuring to the educator;

(r) Degree of physical and mental harm to a student or a child;

(s) Present status of physical and/or mental condition contributing to the violation including recovery from addiction;

(t) Any other relevant mitigating or aggravating factors under the circumstances.

39. Petitioner's August 6, 1994 "act involving moral turpitude" constituted "[s]exual misconduct, no students involved," within the meaning of Rule 6B-11.007(2)(h), Florida Administrative Code, an offense that, according to the Education Practices Commission's "disciplinary guidelines," is punishable by no more than a suspension in the absence of aggravating circumstances warranting a harsher penalty. An examination of the record in the instant case reveals that no such aggravating circumstances are present in the instant case. 12 & 13/

40. Accordingly, Petitioner's "sexual misconduct" (which occurred almost six years ago when he was a 20-year old college student) is not conduct "for which the Education Practices Commission would be authorized to revoke a teaching certificate," within the meaning of Section 231.17(10)(a), Florida Statutes, and, therefore, it does not provide a basis upon which Petitioner's Application for Florida Educator's Certificate may be denied.

41. In his Proposed Recommended Order, the Commissioner proposes that Petitioner's Application for Florida Educator's Certificate be granted ("due to mitigating circumstances," not because of any lack of authority to deny the application pursuant to Section 231.17(10)(a), Florida Statutes 14/ ), but he further proposes that the application be granted "with conditions to include one year of probation, a letter of reprimand, and a

three credit college course in ethics." No statutory authority, however, exists for the issuance of such a "conditional" license. An examination of the provisions of Chapter 120, Florida Statutes (including, in particular, Section 120.60, Florida Statutes, which deals specifically with "licensing") and Chapter 231, Florida Statutes, does not reveal any language clearly authorizing the Department to issue a reprimand to an applicant seeking an "initial two-year nonrenewable temporary" teaching certificate or to place such an applicant on probation, with conditions, for pre-application conduct that does not render the applicant unqualified or ineligible for certification or that does not warrant the denial of certification pursuant to Section 231.17(10)(a), Florida Statutes. In the absence of such clear language, Petitioner may neither be reprimanded, placed on probation, nor required to take a three-credit college course in ethics, as the Commissioner proposes. 15/ See City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 495-96 (Fla. 1973)("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service Commission . . . . As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise

thereof, . . . and the further exercise of the power should be arrested."); Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991) ("An administrative agency has only the authority that the legislature has conferred it by statute."); Taylor v. Department of Professional Regulation, Board of Medical Examiners, 534 So. 2d 782, 784 (Fla. 1st DCA 1988)("We discern no clear statement of legislative intent to provide for discipline of a physician for prelicensure misconduct where he has not falsified his application and is adjudged presently fit to practice. We therefore hold that the Board was without jurisdiction to discipline appellant" for his prelicensure conduct.); see also Section 120.52(8), Florida Statutes ("A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing

or interpreting the specific powers and duties conferred by the same statute."). 16/

42. The Commissioner does not dispute that Petitioner is "of good moral character," as required by Section 231.17(3)(c)(5), Florida Statutes, and otherwise meets the qualifications for an "initial two-year nonrenewable temporary" teaching certificate. Furthermore, the Commissioner has not shown that Petitioner has engaged in any conduct warranting the denial, pursuant to Section 231.17(10)(a), Florida Statutes, of Petitioner's application for such a teaching certificate. Under such circumstances, Petitioner must be granted the "initial two-year nonrenewable temporary" teaching certificate he is seeking. See Section 231.17(3)(a), Florida Statutes ("The department shall issue a temporary certificate to any applicant who submits satisfactory evidence of possessing the qualifications for such a certificate . . . .").

## RECOMMENDATION

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

RECOMMENDED that the Education Practices Commission issue a final order reversing the Department of Education's preliminary denial of Petitioner's Application for Florida Educator's Certificate and directing the Department to issue, unconditionally, the "initial two-year nonrenewable temporary" teaching certificate sought by Petitioner.

DONE AND ENTERED this 13th day of April, 2000, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of April, 2000.

## ENDNOTES

1/ At the outset of the final hearing held on January 31, 2000, counsel for Respondent gave the following explanation for the decision to "drop[] the first count" of the Amended Notice of Reasons:

> Quite candidly, I don't think I have any evidence to support that count.

2/ Although marked for purposes of identification as Respondent's exhibits, Respondent's Exhibits B and C were offered into evidence by Petitioner.

3/ Expert testimony is nonadmissible concerning a question of law." Lee County v. Barnett, Banks, Inc., 711 So. 2d 34 (Fla. 2d DCA 1997); see also Edward J. Seibert, A.I.A., Architect and Planner, P.A. v. Bayport Beach and Tennis Club Association, Inc., 573 So. 2d 889, 891 (Fla. 2d DCA 1990)("An expert should not be allowed to testify concerning questions of law."). To the extent that Mr. Greitzer and Petitioner's father (both of whom are members of the Florida Bar) testified concerning "questions of law," such testimony has not been considered by the undersigned.

4/ The undersigned, however, recognizes that the dismissal of the solicitation charge in Broward County Court Case No. 94-15421MO10A does not foreclose a finding in the instant case that Petitioner, during his encounter with Officer Joyce Fleming on August 6, 1994, engaged in conduct constituting "gross immorality or an act involving moral turpitude," within the meaning of

Section 231.28(1)(c), Florida Statutes. See E. C. v. Katz, 731 So. 2d 1268, 1270 (Fla. 1999)("In the present case, it is clear that collateral estoppel does not bar relitigation of the alleged abuse of J .K. C. because the respondents were not parties to the previous proceeding."); Walton v. Turlington, 444 So. 2d 1082 (Fla. 1st DCA 1984)("[W]e agree that it is appellant's conduct, not the criminal charge o[r] conviction nor the records thereof, which forms the basis of the administrative complaint. We are in accord with appellee's contention that the expungement of the records of the criminal prosecution places appellant in the same position as if he had never been charged with the crime. This does not mean, of course, that appellant may not be held responsible for his actions in a non-criminal proceeding, for as the Commission appropriately observes, it is not necessary for a teacher to be charged with or convicted of a crime in order to be subject to revocation of his certificate based upon conduct reflecting gross immorality or moral turpitude.").

5/ Earlier in the day, he had played a round of golf with a friend.

6/ The tape recording of the conversation was received into evidence (as Respondent's Exhibit G) at the final hearing in this case. The undersigned has listened to the tape several times. His findings as to what was said during the conversation are based upon what he heard on the tape.

7/ His decision to remain, like his decision to stop in the first place, was purely voluntarily. He was not, at any time, coerced or forced to do anything by Officer Fleming.
.
8/ The undersigned rejects as unworthy of belief Petitioner's claim that he was joking when he told Officer Fleming he wanted a "blow job" and that he told her this only "because he was intimidated by her, and that was his way of dealing with the intimidating circumstances."

9/ Petitioner's agreement to pay Officer Fleming $10.00 for oral sex was not the product of any coercion or intimidation.

10/ The "violation of a municipal ordinance is not a 'crime,' and it is not a 'noncriminal violation' as defined in Florida Statutes." Thomas v. State, 614 So. 2d 468, 471 (Fla. 1993).

11/ By all appearances, this omission was inadvertent.

12/ That Petitioner, in his testimony at the final hearing in this case, may not have accurately described, in all respects, what happened during his encounter with Officer Fleming on August 6, 1994, is not such an aggravating circumstance which would justify a departure "from the penalties recommended" in

Rule 6B-11.007(2)(h), Florida Administrative Code. See Bernal v. Department of Professional Regulation, Board of Medicine, 517 So. 2d 113 (Fla. 3d DCA 1987), approved, 531 So. 2d 967 (Fla. 1988)(disciplinary action against licensee may not be increased based upon licensee's "alleged lack of candor in his testimony before the hearing officer[,] . . . an offense with which he was not charged"; "one's conduct in defending an action against him may not be the subject of an increased penalty if he is nevertheless found guilty"); see also In re: Davey, 645 So. 2d 398, 405 (Fla. 1994)("[O]nly where lack of candor is formally charged and proven may it be used as a basis for removal or reprimand" of a judge.).

13/ As the Commissioner acknowledges in his Proposed Recommended Order, the following are among the "mitigating circumstances" present in the instant case: Petitioner's "age at the time of the incident, the length of time which has elapsed between the incident and the time of his application, and his rehabilitation since the incident."

14/ The undersigned has rejected the Commissioner's argument that "the Department is authorized to deny [Petitioner's] application" pursuant to Section 231.17(10)(a), Florida Statutes, because the argument ignores the significance of the Education Practices Commission's "disciplinary guidelines."

15/ Contrary to the argument made by the Commissioner in his Proposed Recommended Order, such language is not found in Section 231.262, Florida Statutes, which deals with "[c]omplaints against teachers and administrators" who are already certified, not applicants for an "initial two-year nonrenewable temporary" teaching certificate.

16/ Had the Legislature desired to authorize the issuance of a conditional license, such as that proposed by the Commissioner in the instant case, it could have used, in Chapter 231, Florida Statutes, language similar to that which it used in Section 373.2295, Florida Statutes, which deals with applications for permits for an interdistrict transfer of groundwater and provides for the "approval, denial, or approval with conditions" of such applications, or the language it used in Section 490.009(1)(g), Florida Statutes, which authorizes the "[p]lacement of an applicant [seeking licensure as a psychologist] on probation for a period of time and subject to conditions." See Chapman v. Sheffield, 750 So. 2d 140, 143, n1. (Fla. 1st DCA 2000)("Had the legislature intended to authorize other persons to sign for the defendant in a representative capacity, it could have expressed that intention in the statute [as it did in Section 48.031(1)(a), Florida Statutes]. The absence of such a provision supports our conclusion that the defendant must sign the receipt."); Bishop

Associates Limited Partnership v. Belkin, 521 So. 2d 158, 161 (Fla. 1st DCA 1988)("Had the legislature wanted to qualify developers by lease duration in section 718.301 Florida Statutes, it could have easily inserted the same terms it used in section 718.502(1). But no such language is present.").

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.