STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, as Commissioner of Education,

Petitioner,

vs.

ORINGEN E. COLEBROOK,

Respondent.

Case No. 01-3786

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 18, 2001, in Fort Pierce, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert E. Sickles, Esquire
Kelly Holbrook, Esquire
Broad and Cassel
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Tampa, Florida 33602-3310

For Respondent: Oringen E. Colebrook, pro se
3709 Avenue O
Fort Pierce, Florida 34954

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Administrative Complaint issued by the Petitioner and dated March 28, 2001, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated March 28, 2001, Charlie Crist, as the Florida Commissioner of Education ("Commissioner"), charged Oringen E. Colebrook with having violated certain of the statutory and rule provisions governing the conduct of teachers in Florida's public schools. In Count I, the Commissioner charged Mr. Colebrook with having violated Section 231.2615(1)(c), Florida Statutes, alleging that "Respondent is guilty of gross immorality or an act involving moral turpitude"; in Count II, the Commissioner charged Mr. Colebrook with having violated Section 231.2615(1)(f), Florida Statutes, alleging that "Respondent has engaged in conduct which has seriously reduces [sic] his effectiveness as an employee of the district school board"; in Count III, the Commissioner charged Mr. Colebrook with having violated Section 231.2615(1)(i), Florida Statutes, alleging that "Respondent has violated the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education Rules"; in Count IV, the Commissioner charged Mr. Colebrook with having violated Rule 6B-1.006(3)(a), Florida Administrative Code, alleging that "Respondent has failed to take reasonable efforts to protect his students from conditions harmful to their learning and/or the students' mental and/or

physical health and/or safety"; and in Count VI,[1] the Commissioner charged Mr. Colebrook with having violated Rule 6B-1.006(3)(e), Florida Administrative Code, alleging that "Respondent has intentionally exposed a student to unnecessary embarrassment or disparagement."

The charges against Mr. Colebrook were derived from the following factual allegations in the complaint:

> 3. In 1989, Respondent received a letter of reprimand from his Principal for allegedly using profane language outside of the high school's cafeteria. The profane language was directed toward an Assistant Principal, and could be overheard by students.
>
> 4. On or about March 22, 1990, Respondent received a letter of reprimand while employed at Fort Pierce Central High School, for allegedly using profane and inappropriate language in class with his students. It was recommended that Respondent be suspended without pay for five days and transferred to another school. The suspension was reduced from five days to three days and Respondent was transferred to Woodland[s] Academy, in the St. Lucie County School District.
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> 5. On multiple occasions while employed at Woodland[s] Academy, Respondent made inappropriate contact with a student in a violent and threatening manner, and continued to use profane and inappropriate language in front of his students. On May 8, 2000, Respondent threatened a minor student, T.S., pursued the student out of his classroom, and into the office of the Dean of Students at Woodland[s] Academy. In front of Lee Haines [sic], the Dean of Students at Woodland[s] Academy, and Deputy Joe Hover, the School Resource Officer,

> Respondent physically assaulted the minor student, T.S., by grabbing the student and throwing the student over two chairs, and onto the floor. Respondent then commented to Deputy Hover "This may cost me my job, but no student is going to call me drunk." Respondent was arrested and charged with battery as a result of the incident.

Mr. Colebrook timely disputed the factual allegations in the Administrative Complaint and requested 45 days in which to attempt to negotiate a settlement with the Office of Professional Practices. No settlement was reached, and the Commissioner forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was conducted on December 18, 2001.

At the hearing, the Commissioner presented the testimony of Lee Haynes, Joseph Hover, Earl Wayne Gent, Robert Hiple, James H. Sullivan, and Johnny Thornton. Petitioner's Exhibits 3 through 9 and 14 were offered and received into evidence. Counsel for the Commissioner also placed on the record the Commissioner's objection to the ruling of Administrative Law Judge Larry Sartin in the Order on Second Motion to Compel and Motion for Sanctions he entered on December 12, 2001. Finally, Mr. Colebrook testified in his own behalf but offered no exhibits into evidence.

During her opening statement, counsel for the Commissioner stated: "The only real question to be decided today is whether the conduct on May 8, 2000 [sic] occurred and, if so, what is the proper sanction. Based on the progression of Mr. Colebrook's behavior and severity of the assault on the student, suspension is the appropriate sanction here." This statement, as well as the focus in paragraphs 3 and 4 of the Administrative Complaint on the letters of reprimand issued to Mr. Colebrook in 1989 and 1990, caused the undersigned to question counsel for the Commissioner about the purpose of including paragraphs 3 and 4 in the Administrative Complaint, whether they were included to allege factual bases for substantive violations or to establish a basis for an enhanced penalty should the Commissioner satisfy his burden of proving the allegations in paragraph 5.

As requested, the Commissioner filed on February 7, 2002, a memorandum of law in which he clarified that he intended to allege in paragraphs 3 and 4 factual bases for the substantive violations identified in the five counts of the Administrative Complaint. The Commissioner also argued in the memorandum that the allegations in paragraphs 3 and 4 of the Administrative Complaint were sufficient to apprise Mr. Colebrook that he was being prosecuted for the 1989 and 1990 incidents that were the subjects of the reprimand letters. The sufficiency of the

allegations to support a substantive violation is addressed below, as appropriate.

The transcript of the proceedings was filed with the Division of Administrative Hearings on January 28, 2002, and the Commissioner timely filed Petitioner's Proposed Recommended Order; Mr. Colebrook did not file a post-hearing proposal. The proposed findings of fact and conclusions of law in the Commissioner's submittal have been carefully considered during the preparation of this Recommended Order.

Finally, in order to facilitate an understanding of the findings of fact in this Recommended Order, it is noted that, at the commencement of the final hearing, the parties were advised of the limitation on the use of hearsay evidence in administrative proceedings set forth in Section 120.57(1)(c), Florida Statutes (2001)("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."). Even so, much of the evidence presented by the Commissioner, both in documents and in testimony, was hearsay. Because Mr. Colebrook was appearing pro se, he did not object to the admissibility of the evidence as hearsay, and the evidence was admitted into evidence. The sufficiency of this evidence to support findings of fact has been addressed below.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Education is the state agency responsible for investigating and prosecuting complaints against teachers holding Florida educator's certificates for violations of Section 231.2615, Florida Statutes. Section 231.262, Florida Statutes. Pursuant to Section 231.2615(1), Florida Statutes, the Educational Practices Commission is the entity responsible for imposing discipline for any of the violations set forth in Section 231.2615(1), Florida Statutes.

2. Mr. Colebrook holds Florida Educator's Certificate No. 296141. At the times material to these proceedings, Mr. Colebrook was employed as a teacher by the St. Lucie County public school system.

Incident of December 21, 1988, and January 6, 1989, letter of reprimand.

3. During the 1988-1989 school year, Mr. Colebrook was employed as a coach and physical education teacher at Fort Pierce Central High School. In a letter of reprimand dated January 6, 1989, then-principal James Sullivan admonished Mr. Colebrook for using profane language in a conversation with an assistant principal, Wayne Gent, outside the school

cafeteria, and he noted in the letter that this conduct was a violation of school board policy. Mr. Sullivan did not personally observe the incident involving Mr. Colebrook and Mr. Gent, and his account of the incident was based on information provided to him by Mr. Gent.[2]

4. Mr. Sullivan stated in the letter that the December 21, 1988, incident was "not the first time [Mr. Colebrook] had used profane language in the workplace,"[3] and, in his testimony at the hearing, Mr. Sullivan inferred from this statement that "there would have been other instances where that had occurred."[4] Mr. Sullivan could not, however, recall during his testimony any specific incidents in which Mr. Colebrook had used profanity or any discussions he might have had with Mr. Colebrook regarding such an incident.

5. The incident referred to in the letter of reprimand occurred on December 21, 1988, when Mr. Colebrook engaged Mr. Gent in a conversation about the athletic budget. Mr. Colebrook was upset about the budget, and he may have used profanity during the conversation,[5] which lasted a couple of minutes. In his testimony, Mr. Gent declined to describe Mr. Colebrook as "irate" during the encounter. The conversation took place in the corridor outside the school cafeteria during a time when students were changing class, so that there could have been students in the area when the conversation took place.

6. As noted above, the Commissioner charged Mr. Colebrook in paragraph 3 of the Administrative Complaint as follows: "In 1989, Respondent received a letter of reprimand from his Principal for allegedly using profane language outside of the high school's cafeteria. The profane language was directed toward an Assistant Principal and could be overheard by students." It is uncontroverted that Mr. Colebrook received a written reprimand that was placed in his personnel file.

7. The factual allegations in paragraph 3 of the Administrative Complaint, liberally construed, are sufficient to allege not only that Mr. Colebrook received a written reprimand but also that he committed the acts attributed to him in the letter. However, the evidence submitted by the Commissioner is not sufficient to establish clearly and convincingly that Mr. Colebrook actually used profanity or was irate during the conversation with Mr. Gent in December 1988. Mr. Sullivan's knowledge of the incident was second-hand, based solely on information received from Mr. Gent,[6] and Mr. Gent's recollection at the hearing that Mr. Colebrook "may have" used profanity during the conversation does not rise to the level of clear and convincing proof. Furthermore, Mr. Gent's testimony describing Mr. Colebrook as "upset" during the conversation contradicts the description in the letter that he was "irate."

Incident of March 14, 1990, and March 22, 1990, letter of reprimand.

8. During the 1989-1990 school year, Mr. Colebrook was employed as a coach and physical education teacher at Fort Pierce Central High School. In a letter of reprimand dated March 22, 1990, then-principal James Sullivan notified Mr. Colebrook that an investigation had been conducted by Robert Hiple, an assistant principal at Fort Pierce Central High School, into events that allegedly occurred in Mr. Colebrook's classroom on March 14, 1990. In the letter, Mr. Sullivan reported the results of Mr. Hiple's investigation and relied on Mr. Hiple's conclusion, based exclusively on interviews with students, that Mr. Colebrook had used "profane language in [his] second period class on March 14, 1990."[7] According to Mr. Sullivan, Mr. Hiple reported that "a consensus of the students" said that Mr. Colebrook said "'I'm not going to put up with this fucking shit, I'll beat your Mother-fucking ass.'"[8] Mr. Sullivan also referred in the letter to information provided by Mr. Hiple that one of the students in Mr. Colebrook's class told Mr. Hiple that she was afraid to admit to Mr. Colebrook that she had accidentally flipped an object in class "after seeing [his] reaction and hearing [his] comments."[9]

9. The investigation to which Mr. Sullivan referred in his March 22, 1990, letter was initiated on March 15, 1990, when

Mr. Hiple reported to Mr. Sullivan that a parent had complained that Mr. Colebrook had used profanity and threatened a student in the classroom. Mr. Sullivan asked Mr. Hiple to investigate the incident, and Mr. Hiple began by asking Mr. Colebrook for his version of the incident. Mr. Colebrook admitted that there had been an incident but denied using profanity or threatening a student or students, although he admitted that he may have said that "he was going to kick somebody's butt and he challenged a student and yelled at them."[10]

10. Mr. Hiple proceeded to gather information about the incident by interviewing students who had been in Mr. Colebrook's classroom at the time of the incident, and his testimony at the hearing was consistent with the information attributed to him by Mr. Sullivan in the letter of reprimand. Mr. Hiple did not testify from his personal knowledge of the incident.

11. On or about March 16, 1990, Mr. Colebrook approached Mr. Hiple and asked about the investigation. Mr. Hiple advised him that Mr. Sullivan would discuss the results of the investigation with him. Mr. Colebrook became "a little loud and aggressive" during this encounter and stated that he did not want to discuss the matter with Mr. Sullivan.[11] Mr. Colebrook did not "threaten [Mr. Hiple] physically or even verbally, but

he was obviously upset and became loud in an open environment where students could hear."[12]

12. In the March 22, 1990, letter, Mr. Sullivan referred to the written reprimand issued to Mr. Colebrook in January 1989 for the use of profanity in the workplace, and he advised Mr. Colebrook that he was recommending to the school superintendent that he be suspended without pay for five working days and administratively transferred to another school for the 1990-91 school year. Mr. Sullivan based the recommendation that Mr. Colebrook be transferred to another school on Mr. Colebrook's comment to Mr. Hiple that Mr. Colebrook did not want to talk with Mr. Sullivan about the results of Mr. Hiple's investigation into the March 14, 1990, incident. In Mr. Sullivan's view, "it creates a difficult working relationship if a principal has a staff person who refuses to sit down and talk with him."[13]

13. Mr. Colebrook was suspended without pay for three days, but it was not clear from the record whether he was transferred for the 1990-1991 school year, as requested by Mr. Sullivan.

14. As noted above in the Preliminary Statement, the Commissioner charged Mr. Colebrook in paragraph 4 of the Administrative Complaint as follows:

> On or about March 22, 1990, Respondent received a letter of reprimand while employed at Fort Pierce Central High School, for allegedly using profane and inappropriate language in class with his students. It was recommended that Respondent be suspended without pay for five days and transferred to another school. The suspension was reduced from five days to three days and Respondent was transferred to Woodland[s] Academy, in the St. Lucie County School District.

It is uncontroverted that Mr. Colebrook received a written reprimand based on the conduct alleged in the March 22, 1990, letter from Mr. Sullivan and that Mr. Sullivan recommended in the letter that Mr. Colebrook be suspended without pay and transferred to another school.

15. Giving the allegations in paragraph 4 of the Administrative Complaint the most expansive construction possible, they are sufficient to allege that Mr. Colebrook used "profane language in [his] second period class on March 14, 1990," as recited in the March 22, 1990, letter. However, the evidence presented by the Commissioner is not sufficient to establish clearly and convincingly that Mr. Colebrook actually used profane language as related by Mr. Hiple in his testimony and by Mr. Sullivan in the letter of reprimand. Not only was Mr. Sullivan's knowledge of the incident second-hand, based solely on information received from Mr. Hiple, Mr. Hiple's knowledge of the incident was also second-hand, based solely on

information provided to Mr. Hiple during interviews with some of the students in Mr. Colebrook's classroom on the day in question.[14]

16. The evidence presented by the Commissioner is, however, sufficient to support a finding that Mr. Colebrook used inappropriate language in front of the students of his second-period class on March 14, 1990, when he said "he was going to kick somebody's butt" and yelled at the students in his class.[15] Mr. Colebrook's use of this language in front of students, while inappropriate, did not constitute gross immorality or involve moral turpitude, but it can be inferred from this conduct that Mr. Colebrook's effectiveness as a teacher was seriously reduced in 1990, when the incident took place, at least with respect to his effectiveness in teaching the students in the classroom at the time of his outburst. Because the Commissioner presented no evidence to establish that Mr. Colebrook directed his comment or his yelling to any particular student, the Commissioner has failed to establish that Mr. Colebrook embarrassed or disparaged any student during the incident of March 14, 1990. The evidence is, however, sufficient to establish that Mr. Colebrook's statement to his students that he was going to "kick somebody's butt" and his yelling at the students created a condition in the classroom harmful to the students' learning.

Incident of May 8, 2000, Mr. Colebrook's use of profanity, and September 25, 2000, letter of reprimand.

17. Mr. Colebrook was transferred to Woodlands Academy from Fort Pierce Central High School in either 1990 or 1991. During the 1999-2000 school year, Mr. Colebrook taught physical education at Woodlands Academy.

18. In the afternoon of May 8, 2000, Mr. Colebrook was teaching a combined special education class and eighth grade class consisting of approximately 50 students. Toward the end of the class period, a student in the classroom spoke up and said to Mr. Colebrook: "You're a drunk son of a bitch."[16] Mr. Colebrook thought it was the student T.S., and he told him to come to the front of the classroom, where Mr. Colebrook apparently intended to discipline him. T.S. did not obey Mr. Colebrook but, rather, slipped out of the classroom door. Mr. Colebrook did not leave the classroom to go after T.S., but he sent a student into the hall to bring him back into the classroom; the student reported that T.S. was not in the hall.

19. About five or six minutes before the end of the class period, T.S. showed up in the office of Lee Haynes, Dean of Students at Woodlands Academy. T.S. told Mr. Haynes that Mr. Colebrook had sent him to the office. Since classes would change in a few minutes, Mr. Haynes decided to keep T.S. in his

office until the bell rang, when he would send T.S. to his next class.

20. Mr. Haynes and T.S. sat at Mr. Haynes' desk and talked.[17] Just before time for the bell to ring, Mr. Colebrook walked into Mr. Haynes office. When T.S. saw Mr. Colebrook, he stood up and started moving away from him, around Mr. Haynes' desk. Mr. Colebrook moved toward T.S., placed his right hand on T.S.'s shoulder, asked why T.S. had called him a drunk in class, and gave T.S. a shove with the hand on T.S.'s shoulder. The shove was not hard enough to knock T.S. off balance, but, as a result of the shove and of T.S.'s simultaneous movement away from Mr. Colebrook, T.S. "tangled his feet"[18] and fell down.[19] Mr. Haynes noticed that there were two chairs in the area where T.S. fell, and he assumed that the chairs may have "aided [T.S.'s] fall."[20]

21. As Mr. Haynes helped T.S. get back on his feet, Mr. Colebrook made a motion toward T.S., and Mr. Haynes stood between Mr. Colebrook and T.S. Mr. Haynes then took T.S. to the principal's office, where Johnny Thornton, the principal of Woodlands Academy at the time, talked with T.S. T.S. was not injured as a result of the fall, but Mr. Thornton described him as "visibly upset, crying."[21]

22. Joseph Hover, a deputy with the St. Lucie County Sheriff's Office who was serving as a school resource officer at

Woodlands Academy in May 2000, was a witness to the incident, and he arrested Mr. Colebrook on the afternoon of the incident for misdemeanor battery.[22] The criminal case against Mr. Colebrook was concluded on August 21, 2000, when an entry was recorded on the court's progress docket that no information would be filed with respect to the charges against Mr. Colebrook.

23. Several local newspapers printed stories about the incident and about Mr. Colebrook's arrest. Both students and teachers at Woodlands Academy had access to these newspapers, and some of the students at Woodlands Academy were observed actually reading the articles about Mr. Colebrook. In Mr. Thornton's estimation, other teachers at Woodlands Academy were aware of the incident, although Mr. Thornton tried to avoid discussing the incident with either the teachers or the students at Woodlands Academy.

24. In a letter dated May 10, 2000, Mr. Colebrook was advised that an investigation into the May 8, 2000, incident would be conducted by the school system and that he was suspended with pay pending the outcome of the investigation. The final investigative report, dated September 7, 2000, was apparently submitted to the superintendent of schools for St. Lucie County, William Vogel, who prepared a formal letter of reprimand dated September 25, 2000.[23]

25. In the letter, Mr. Vogel identified two bases for the reprimand: "The act of pushing or throwing a student to the floor" and "[t]he use of profanity in the presence of students." Mr. Vogel did not identify the source of the information on which he based these charges, although it is inferred that the charges are derived from the investigative report. Mr. Vogel advised Mr. Colebrook in the letter that he would be suspended without pay for five days, that he would be required to complete "coursework in classroom management, stress control or other similar formal training/workshop," and that the complaint would be sent to the state Department of Education.[24]

26. After the May 8, 2000, incident, Mr. Colebrook was given an alternate assignment, and he returned to teach at Woodlands Academy in August or early September 2000 for the 2000-01 school year. Mr. Thornton was concerned when Mr. Colebrook returned to Woodlands Academy that some of his effectiveness as a teacher would be undermined by the students' knowledge of the May 8, 2000, incident, but there was no direct evidence that this was indeed the case.

27. As noted above in the Preliminary Statement, the Commissioner charged Mr. Colebrook in paragraph 5 of the Administrative Complaint as follows:

> On multiple occasions while employed at Woodland[s] Academy, Respondent made inappropriate contact with a student in a

> violent and threatening manner, and continued to use profane and inappropriate language in front of his students. On May 8, 2000, Respondent threatened a minor student, T.S., pursued the student out of his classroom, and into the office of the Dean of Students at Woodland[s] Academy. In front of Lee Haines [sic], the Dean of Students at Woodland[s] Academy, and Deputy Joe Hover, the School Resource Officer, Respondent physically assaulted the minor student, T.S., by grabbing the student and throwing the student over two chairs, and onto the floor. Respondent then commented to Deputy Hover "This may cost me my job, but no student is going to call me drunk." Respondent was arrested and charged with battery as a result of the incident.

The Commissioner has failed to present sufficient evidence to establish the allegations in paragraph 5 of the Administrative Complaint.[25] Rather, the evidence presented by the Commissioner is sufficient only to establish clearly and convincingly (1) that, on May 8, 2000, Mr. Colebrook put his hand on T.S.'s shoulder and shoved him and that, as a result of this shove and of T.S.'s movement away from Mr. Colebrook, T.S. fell over two metal chairs in Mr. Haynes' office and (2) that Mr. Colebrook was arrested and charged with battery as a result of the incident.

28. The evidence presented by the Commissioner is not sufficient to demonstrate that Mr. Colebrook's approaching T.S., placing his hand on T.S.'s shoulder, shoving T.S., and, at least in part, causing T.S. to stumble and fall over two chairs

constituted gross immorality or involved moral turpitude. However, Mr. Colebrook's actions were harmful to T.S.'s mental health and safety even though T.S. suffered no physical injury. In addition, because he was upset and crying, Mr. Colebrook's actions exposed T.S. to embarrassment in front of Mr. Colebrook, Mr. Haynes, Deputy Hover, and Mr. Thornton. Accordingly, the evidence presented by the Commissioner is sufficient to establish that Mr. Colebrook violated two provisions of the Principles of Professional Conduct for the Education Profession in Florida.

29. Finally, the appearance of news stories about Mr. Colebrook's arrest in the local press can reasonably support the inference that the students and teachers and the community in general were aware of the accusations against Mr. Colebrook with respect to the incident involving T.S. and of Mr. Colebrook's arrest. The Commissioner did not, however, present any direct evidence to establish that Mr. Colebrook's effectiveness as an employee of the St. Lucie County School Board was seriously reduced as a result of the publicity, and such an inference cannot reasonably be drawn, especially since no information was filed against Mr. Colebrook. Mr. Colebrook's shoving T.S., though inexcusable, was not such egregious conduct that it would, of itself, give rise to an inference that his effectiveness as an employee of the St. Lucie County School

Board was seriously reduced. In addition, in light of the fact that the Superintendent of Schools for St. Lucie County did not think it appropriate to remove Mr. Colebrook from the classroom, the Commissioner has failed to establish clearly and convincingly that Mr. Colebrook's effectiveness as an employee of the St. Lucie County School Board was seriously reduced as a result of the May 8, 2000, incident.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2001).

31. In its Administrative Complaint, the Commissioner seeks, among other penalties, the revocation or suspension of Mr. Colebrook's teaching certificate. Therefore, the Commissioner has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

32. Clear and convincing evidence, as defined by the court in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983),

> 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.

33. Based on the findings of fact herein, the Commissioner has proven by clear and convincing evidence that Mr. Colebrook was reprimanded in writing by Mr. Sullivan in January 1989 and in March 1990; that, in March 1990, Mr. Colebrook threatened to "kick somebody's butt" and that he yelled at his students in the classroom; and that Mr. Colebrook approached T.S. in Mr. Haynes office on May 8, 2000, placed his hand on T.S.'s shoulder, shoved T.S., and, at least in part, caused T.S. to stumble and fall over two chairs.

34. Section 231.2615(1), Florida Statutes (2000), gives the Education Practices Commission the power to suspend or revoke the teaching certificate of any person, either for a set period of time or permanently, or to impose any penalty provided by law, and the statute sets out the bases for the imposition of such penalties.

35. Based on the factual allegations in the Administrative Complaint, the Commissioner charged Mr. Colebrook in Count I with violating Section 231.2615(1)(c), Florida Statutes, which provides that a teacher may be disciplined if he or she "[h]as

been guilty of gross immorality or an act involving moral turpitude."

36. Section 231.2651 does not contain a definition of gross immorality or of moral turpitude. "Gross immorality" has, however, been defined as follows:

> [t]he 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 of proper moral standards." Education Practices Commission v. Knox, 3 FALR 1373-A (Department of Education 1981).

Frank T. Brogan v. Eston Mansfield, DOAH Case No. 96-0286 (EPC Sept. 27, 1996).

37. The court in State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (1933), observed that moral turpitude

> involves the idea of inherent baseness or depravity in the private 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.

38. In Adams v. Professional Practices Council, 406 So. 2d 1170 (Fla. 1st DCA 1975), the court concluded that teachers "charged by sections 231.09 and 231.28(1) with providing leadership and maintaining effectiveness as teachers . . . are traditionally held to a high moral standard in the community."

39. Even holding Mr. Colebrook to the high moral standard applicable to teachers, based on the findings of fact herein, the Commissioner failed to carry his burden of proving by clear and convincing evidence that either Mr. Colebrook's telling the students in his class in March 1990 that he was going to "kick somebody's butt" and yelling at them or his shoving T.S. in Mr. Haynes' office on May 8, 2000, constituted acts of gross immorality or of moral turpitude. Neither of these acts exhibited a "flagrant disregard of proper moral standards" or an "inherent baseness or depravity" sufficient to support such a violation.

40. Based on the factual allegations in the Administrative Complaint, the Commissioner charged Mr. Colebrook in Count II with violating Section 231.2615(1)(f), Florida Statutes, which provides that a teacher may be disciplined if he or she "[u]pon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the school board." As noted in paragraph 33, based on the findings of fact herein, the Commissioner has carried his burden of proving by clear and convincing evidence that Mr. Colebrook told the students in his class in March 1990 that he was going to "kick somebody's butt" and yelled at them. Such conduct, occurring as it did in the classroom and directed at students, gives rise to the inference that Mr. Colebrook's effectiveness

as a teacher at Fort Pierce Central High School in 1990 was seriously reduced, at least among the students in the class at the time of the outburst and those other students who learned about the incident. Cf. Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000)(Misconduct of Purvis, who "lied under oath and resisted arrest" rose to a "level of misconduct which would support the inference that Purvis' effectiveness as a teacher had been impaired."). The Commissioner has not, however, established that, as a result of the incident in the classroom on March 14, 1990, Mr. Colebrook's current effectiveness as an employee of the St. Lucie County School Board has been seriously reduced, and a penalty cannot properly be imposed on Mr. Colebrook for a violation of Section 231.2651(1)(f), Florida Statutes, that occurred in 1990.

41. As noted in paragraph 33, based on the findings of fact herein, the Commissioner has carried his burden of proving by clear and convincing evidence that Mr. Colebrook shoved T.S. in Mr. Haynes' office on May 8, 2000, and that this shove contributed to T.S.'s falling over two chairs. However, the Commissioner presented no evidence to establish that Mr. Colebrook's conduct in fact seriously reduced his effectiveness as an employee of the St. Lucie County School Board, nor can this be inferred simply because the allegations against Mr. Colebrook and his arrest were the subject of

articles in the local newspapers and were thus known generally in the community and among the students and teachers at Woodlands Academy. Finally, Mr. Colebrook's conduct was not so egregious that a serious reduction in his effectiveness as an employee of the school board can be inferred from the nature of the conduct itself. Indeed, the most persuasive evidence that the incident of May 8, 2000, and the publicity it generated did not seriously reduce Mr. Colebrook's effectiveness as an employee of the St. Lucie County School Board is the decision of the St. Lucie County Superintendent of Schools, based on allegations of conduct which exceeded in seriousness that supported by the evidence presented herein, that the appropriate discipline for Mr. Colebrook was a five-day suspension, together with formal training in classroom management or stress control.

42. Based on the factual allegations in the Administrative Complaint, the Commissioner charged Mr. Colebrook in Count III with violating Section 231.2615(1)(i), Florida Statutes, which provides that a teacher may be disciplined if he or she "[h]as violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules." The Commissioner did not identify in Count III any specific rules that Mr. Colebrook allegedly violated, but he charged in Counts IV and IV[26] of the Administrative Complaint that Mr. Colebrook had violated two of the Principles of

Professional Conduct for the Education Profession in Florida, those found in Rule 6B-1.006(3)(a) and (e), Florida Administrative Code, which, if proven, would constitute a violation of Section 231.2615(1)(i), Florida Statutes.

43. Rule 6B-1.006(3)(a), Florida Administrative Code, provides that a teacher has the obligation to the student to "make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety." Based on the findings of fact herein, the Commissioner carried his burden of proving by clear and convincing evidence that Mr. Colebrook's actions in March 1990 violated this rule. By yelling at students and threatening to "kick somebody's butt," Mr. Colebrook created conditions in his classroom harmful to learning rather than protecting his students from such conditions. Likewise, on the basis of the findings of fact herein, the Commissioner carried his burden of proving by clear and convincing evidence that Mr. Colebrook's shoving T.S. in Mr. Haynes' office on May 8, 2000, violated Rule 6B-1.006(3), Florida Administrative Code. Mr. Colebrook's conduct toward T.S. created a condition potentially harmful to T.S.'s mental health and potentially harmful to T.S.'s physical health.

44. Rule 6B-1.006(3)(e), Florida Administrative Code, provides that a teacher has the obligation to the student to

"not intentionally expose a student to unnecessary embarrassment or disparagement." Based on the findings of fact herein, the Commissioner failed to carry his burden of proving by clear and convincing evidence that Mr. Colebrook's threatening to "kick somebody's butt" and yelling at his students in March 1990 violated this rule. Mr. Colebrook's remarks and conduct were not directed to any particular student and so could not reasonably embarrass or disparage a student. However, based on the findings of fact herein, the Commissioner has carried his burden of proving by clear and convincing evidence that Mr. Colebrook's shoving T.S. in Mr. Haynes' office on May 8, 2000, exposed T.S. to embarrassment. Mr. Colebrook's action caused T.S. to fall in front of Mr. Colebrook, Mr. Haynes, and Deputy Hover and caused him to be upset and to cry in Mr. Thornton's office.

45. Based on the findings of fact herein and on Mr. Colebrook's violations of Rule 6B-1.006(3)(a) and (e), Florida Administrative Code, the Commissioner has proven by clear and convincing evidence that Mr. Colebrook violated Section 231.2651(1)(i), Florida Statutes.

46. Pertinent to the consideration of the penalty that should be imposed in this case, it is uncontroverted that Mr. Colebrook received written reprimands in 1989 and 1990 based on allegations that he used profanity in an area where students

were present and that he directed profanity at the students in his classroom. The fact that Mr. Colebrook was subject to disciplinary action by his principal in 1989 and 1990 is not sufficient to enhance the penalty imposed on Mr. Colebrook as a result of the one statutory and two rule violations proven by the Commissioner. These two letters of reprimand relate to incidents that are remote in time from the incident involving T.S. and are based on allegations, unproven at this hearing, that Mr. Colebrook used profanity in front of students.

47. After careful consideration, it is determined that, based on the findings of fact and conclusions of law herein, Mr. Colebrook should be placed on probation for a period of three years, subject to reasonable conditions to be determined by the Education Practices Commission; such conditions might include a requirement that Mr. Colebrook receive training in anger management.[27]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order finding Oringen E. Colebrook guilty of violating Rule 6B-1.006(3)(a) and (e), Florida Administrative Code, and Section 231.2651(1)(i), Florida Statutes; dismissing Count I of the Administrative Complaint; and, placing Mr. Colebrook on probation for a period of three years, subject

to such reasonable conditions as the Education Practices Commission deems appropriate.

DONE AND ENTERED this 1st day of March, 2002, in Tallahassee, Leon County, Florida.

____

PATRICIA HART MALONO
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March, 2002.

ENDNOTES

[1]/ The Administrative Complaint does not include a "Count V."

[2]/ Transcript at 66-67.

[3]/ Petitioner's Exhibit 4.

[4]/ Transcript at 67.

[5]/ The only person with direct knowledge of the events of December 21, 1988, who testified at the final hearing was Wayne Gent. Mr. Gent testified about the incident as follows:

> Q. I'm going to ask you about specific incidents. Do you recall an event that happened on December 21 of 1988?
>
> A. Yes.
>
> Q. And what happened then?

A. It was in regards to the athletic budget and coach was upset about the budget and came to see me and I believe it was according to the letter [of reprimand dated January 6, 1989] outside the cafeteria and he was very upset and had some words there and probably lasted just a couple of minutes.

Q. Now, in this conversation did Mr. Colebrook use profanity?

A. I believe so. I believe it was cussing. I couldn't tell you exactly what he was saying. It's a long time ago but the letter kind of refreshed it, but I couldn't tell you specific language.

Q. Did he become irate in the conversation?

A. He was upset.

[6]/ The description of the incident in the letter of reprimand is hearsay and is not "sufficient in itself to support a finding" that Mr. Colebrook used profanity and was irate in his conversation with Mr. Gent unless the letter would be admissible in a civil proceeding as an exception to the hearsay rule. See Section 120.57(1)(c), Florida Statutes.

It is questionable whether, on this record, the Commissioner established the foundation for admission of the letter as a business record since the regularly conducted business activity of a school is the education of students not the disciplining of teachers. However, even assuming that the Commissioner had established in the record that the letter was admissible as an exception to the hearsay rule under Section 90.803(6), Florida Statutes, as a document "kept in the course of a regularly conducted business activity" where it is "the regular practice of that business activity to make such" a record, Mr. Sullivan's summary of the incident of December 21, 1988, is not a precise and explicit description of the event and is, therefore, not given great weight when balanced against the testimony of Mr. Gent. Mr. Gent's memory of the December 21, 1988, encounter with Mr. Colebrook was sufficiently refreshed by the contents of the letter to allow him to testify of his personal knowledge, and this testimony cannot be bolstered by

Mr. Sullivan's description of the incident in the January 6, 1989, letter.

[7]/ Petitioner's Exhibit 5.

[8]/ Id.

[9]/ Id.

[10]/ Transcript at 49.

[11]/ Transcript at 50-51.

[12]/ Id.

[13]/ Transcript at 76-77.

[14]/ The description of the March 14, 1990, incident in Mr. Sullivan's March 22, 1990, letter of reprimand is hearsay and is not "sufficient in itself to support a finding" that Mr. Colebrook committed the acts recited in the letter unless the letter would be admissible in a civil proceeding as an exception to the hearsay rule. See Section 120.57(1)(c), Florida Statutes. For the reasons stated above in footnote 6, it is questionable whether the letter of reprimand is a business record admissible into evidence pursuant to Section 90.803(6), Florida Statutes. (Regrettably, the undersigned indicated to counsel for the Commissioner at the hearing that she had established that the March 22, 1990, letter was admissible as a business record. See transcript at 73. This assurance may have been in error.)

Even if the letter were admissible under the business record exception to the hearsay rule, Mr. Sullivan's summary of the incident was based on information contained in Mr. Hiple's investigative report, which information was obtained by Mr. Hiple from third party witnesses during interviews he conducted as part of his investigation. Therefore, Mr. Sullivan's assertion that Mr. Colebrook used profane and inappropriate language in the classroom is based on hearsay contained within a business record and must be either independently proven by a person with knowledge of the incident or admissible under another exception to the hearsay rule in order to support a finding of fact in this Recommended Order. See Section 90.805, Florida Statutes; Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 809 (Fla. 1st DCA

1986)(Assuming that the investigator's report was a business record, "the fact remains that the relevant information contained in the report is itself hearsay. . . . The investigator indicated in his report that his findings were based on his discussions with various persons associated with the appellant's arrest and conviction. Such information is hearsay and does not fall under any hearsay exception. (Footnote omitted.) Thus, the material contained in the investigator's report could not be relied upon by the Commission to support it's [sic] findings."(citing to Section 120.58(1), Florida Statutes, now Section 120.57(1)(c), Florida Statutes))

None of the witnesses to the March 14, 1990, incident appeared as witnesses at the hearing. And, it does not appear from the record that the statements of the third party witnesses would be admissible under any of the exceptions to the hearsay rule set out in Section 90.803(6), Florida Statutes. Consequently, the account of the March 14, 1990, incident in the March 22, 1990, letter of reprimand cannot support a finding that Mr. Colebrook committed the acts alleged in the letter.

[15]/ Mr. Hiple's testimony that Mr. Colebrook admitted using such language can support a finding of fact to that effect because Mr. Colebrook's statement is a party admission pursuant to Section 90.803(18), Florida Statutes, and is, therefore, admissible over objection in a civil proceeding. See Section 120.57(1)(c), Florida Statutes.

[16]/ Transcript at 108.

[17]/ There is no indication in the record that T.S. advised Mr. Haynes of the incident in Mr. Colebrook's classroom.

[18]/ Transcript at 19.

[19]/ Counsel for the Petitioner questioned Mr. Haynes about a prior statement he had purportedly made to the effect that Mr. Colebrook had pushed T.S. to the ground, which is inconsistent with Mr. Haynes' testimony that T.S. fell to the ground. Mr. Haynes recalled making the statement to persons investigating the incident for the school system, who incorporated it into a written report on the incident, which report was received into evidence as Petitioner's Exhibit 6. Because there is no indication in the report that Mr. Haynes' prior statement was made under oath, the statement is hearsay, see Section 90.801(2)(a), Florida Statutes, and cannot be used

to support a finding of fact since, on this record, it would not be admissible over objection in a civil proceeding. See Section 120.57(1)(c), Florida Statutes. Even if the statement were admissible as an exception to the hearsay rule, its persuasive value is substantially diminished because Mr. Haynes also told the investigators that T.S. "might have tripped," but this statement was not included in the investigation report. Transcript at 22.

[20]/ Transcript at 20.

[21]/ Transcript at 89.

[22]/ Deputy Hover testified at the hearing that Mr. Colebrook "grabbed hold of [T.S.] and threw him across two chairs"; that "he [T.S.] traveled about five to seven feet"; and that, when T.S. fell over, "[w]e caught him . . . and put the student in the foyer of the office outside the door." Transcript at 28-29. This testimony is inconsistent with the testimony of Mr. Haynes that the push was not of sufficient force to make T.S. lose his balance and that the shove, combined with T.S.'s movement away from Mr. Colebrook, caused T.S. to tangle his feet and fall into the chairs.

In addition, Deputy Hover's testimony at the hearing is inconsistent with the statement he included in the sworn arrest affidavit he prepared about two hours after the incident. In the affidavit, Deputy Hover stated that Mr. Colebrook "grabbed [T.S.] by the upper shoulder and neck area and pushed him, causing [T.S.] to travel approximately 3 feet and fall over (2) chairs to the floor" and that "Dean Lee Haynes assisted him [T.S.] up and took him to the principal's office." This account, recorded by Deputy Hover shortly after the incident, is consistent in most particulars with Mr. Haynes' account.

Having considered and weighed the competent evidence of record and the demeanor of the witnesses, Mr. Haynes' testimony at the hearing has been found more persuasive than that of Deputy Hover. Mr. Haynes was in the room with T.S. and Mr. Colebrook and observed the entire incident, while, according to Mr. Haynes, Deputy Hover was standing in the doorway to Mr. Haynes' office when Mr. Haynes picked T.S. up from the floor. Transcript at 19. Accordingly, Mr. Haynes' account of the incident is accepted over that of Deputy Hover.

T.S. was not called to testify at the hearing, but the document identified by Mr. Thornton as the statement given by T.S. regarding the incident was admitted into evidence as Petitioner's Exhibit 14. This statement is hearsay, and its contents cannot be used to support a finding of fact as to the truth of the matters stated by T.S. because nothing in the record establishes that the statement would have been admissible over objection in a civil proceeding. See Section 120.57(1)(c), Florida Statutes. Even if the statement were admissible as an exception to the hearsay rule, it is apparent that the statement includes a self-serving description of T.S.'s behavior in the classroom and has little persuasive value for this reason. In addition, to the extent that T.S.'s description of Mr. Colebrook's conduct in Mr. Haynes' office differs from that of Mr. Haynes, Mr. Haynes' version of events is given accepted as the more credible.

[23]/ The investigative report was admitted into evidence as Petitioner's Exhibit 6. Even if the Commissioner had laid the foundation for the admission of the report as a business record pursuant to Section 90.803(6), Florida Statutes, the report is, with the exception of Mr. Colebrook's account of the incident, composed of a summary of information obtained from third parties, and the conclusions are based on this second-hand information, as well. Therefore, except for Mr. Colebrook's admissions, see Section 90.806(18), Florida Statutes, the contents of the report may not be used as the basis for a finding of fact in this Recommended Order for the reasons set forth in footnote 14 above. See Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 809 (Fla. 1st DCA 1986)

[24]/ Petitioner's Exhibit 8.

[25]/ The only evidence to support the allegations that Mr. Colebrook, on multiple occasions, made inappropriate contact with students, threatened students, or used profane or inappropriate language in front of the students was the following testimony of Mr. Thornton, the principal of Woodlands Academy from 1994 through June 2001:

1. At some point during his time as principal at Woodlands Academy, a student told Mr. Thornton that Mr. Colebrook had directed profanity at her, although Mr. Thornton never personally witnessed Mr. Colebrook using inappropriate language with a student. Mr. Thornton spoke with Mr. Colebrook about the student's accusation, and Mr. Colebrook told him that it didn’t

occur. This testimony is not competent to establish that Mr. Colebrook used profanity or inappropriate language with a student because it is based exclusively on hearsay.

2. Mr. Thornton heard Mr. Colebrook tell a female student something like "you can get your meal from Mr. Thornton. You're going on a diet today," Transcript at 85, which Mr. Thornton interpreted to mean that Mr. Colebrook was going to withhold the student's meal. Although Mr. Colebrook told Mr. Thornton he was only teasing the student, Mr. Thornton told Mr. Colebrook "at that particular time just watch what you say to students because sometimes it can be misconstrued or what have you and that's about it. I never -- just only a verbal reprimand. I never had to put anything in writing." Transcript at 85. (Mr. Thornton gave this answer in response to this question by counsel for the Commissioner: "Had you in your position as principal, have you ever given Mr. Colebrook verbal warning for his use of profanity?"). This evidence is not sufficient to establish that Mr. Colebrook used profanity or inappropriate language with a student.

3. Mr. Thornton was contacted by a parent who told him that Mr. Colebrook had "grabbed her son by the arm and left some blue marks." Transcript at 86. Mr. Thornton spoke with the student and with Mr. Colebrook. Mr. Thornton related in his testimony at the hearing that Mr. Colebrook told him that he grabbed the student by the arm but only to pull him away from the water fountain because the student was washing his face in the fountain. Mr. Thornton instructed Mr. Colebrook to avoid putting his hands on a student.

The only evidence presented by the Commissioner to establish that the student had red marks on his arm was the hearsay statement of a parent; in the absence of direct evidence that such marks were present on the student's arm, the Commissioner did not prove clearly and convincingly that Mr. Colebrook's physical contact with the student was violent. The Commissioner presented no evidence to establish that the contact was threatening or that Mr. Colebrook used profane or inappropriate language during this incident. It cannot be inferred from Mr. Colebrook's description of the event, as related by Mr. Thornton, that his contact with the student was inappropriate under the circumstances, and, because the Commissioner did not present any evidence establishing the standard by which a teacher's physical contact with a student is judged appropriate, he has failed to establish clearly and

convincingly that Mr. Colebrook's act of grabbing the student by the arm and pulling him away from the water fountain constituted inappropriate contact.

[26]/ The Administrative Complaint did not contain a "Count V."

[27]/ One observation must be made with respect to the suggestion in the Proposed Recommended Order that the appropriate penalty in this case should include a requirement that Mr. Colebrook submit to a mental health and substance abuse evaluation by the Recovery Network Program ("RNP") and to any treatment determined necessary by the RNP. There is, however, absolutely nothing in this record that even hints that Mr. Colebrook has a mental condition or a substance abuse problem.

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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.