STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, AS COMMISSIONER OF EDUCATION,	)	
Petitioner,	)	
vs.	)	Case No. 02-0310PL
TONYA WHYTE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on May 3, 2002, 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: Gonzalo R. Dorta, Esquire
Gonzalo R. Dorta, P.A.
334 Minorca Avenue
Coral Gables, Florida 33134-4304

For Respondent: Mitchell J. Olin, Esquire
Mitchell J. Olin, P.A.
1000 South Andrews Avenue
Fort Lauderdale, Florida 33316

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what disciplinary action should be taken against her.

PRELIMINARY STATEMENT

On or about October 11, 2000, Petitioner's predecessor, the Honorable Tom Gallagher, filed an Administrative Complaint against Respondent, in which he asserted the following:

> Petitioner, Tom Gallagher, as Commissioner of Education, files this Administrative Complaint against Tonya Whyte. The Petitioner seeks the appropriate disciplinary sanction of the Respondent's educator's certificate pursuant to Sections 231.262 and 231.28, Florida Statutes, and pursuant to Rule 6B-1.006, Florida Administrative Code, Principles of Professional Conduct for the Education Profession in Florida, said sanctions specifically set forth in Section 231.262(6) and 231.28(1), Florida Statutes.
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> The Petitioner alleges:
>
> ### JURISDICTION
>
> 1. The Respondent holds Florida Educator's Certificate 801286, covering the area of Mathematics, which is valid through June 30, 2003.
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> 2. At all times pertinent hereto, the Respondent was employed as a Mathematics teacher at Deerfield Beach High School, in the Broward County School District.

MATERIAL ALLEGATIONS

3. On or about January 17, 1999, Respondent engaged in lewd and lascivious acts when she allowed someone to fondle her exposed vaginal area in front of the patrons of an adult club. Respondent was arrested and charged with Lewd and Lascivious Act and Remaining in a Place for the Purpose of Prostitution. On or about July 18, 2000, the charges were dropped by the court. Respondent was suspended from her teaching position and or about January 24, 2000, Respondent resigned from her position with the Broward County school system.

STATUTE VIOLATIONS

COUNT 1: The Respondent is in violation of Section 231.28(1)(c), Florida Statutes, in that Respondent has been guilty of gross immorality or an act involving moral turpitude.

COUNT 2: The Respondent is in violation of Section 231.28(1)(f), Florida Statutes, in that Respondent has been found guilty of personal conduct which seriously reduces her effectiveness as an employee of the school board.

WHEREFORE, the Petitioner recommends that the Education Practices Commission impose an appropriate penalty pursuant to the authority provided in Sections 231.262(6) and 231.28(1), Florida Statutes, which penalty may include a reprimand, probation, restriction of the authorized scope of practice, administrative fine, suspension of the teaching certificate not to exceed three years, permanent revocation of the teaching certificate, or combination thereof, for the reasons set forth herein, and in accordance with the Explanation and Election of Rights forms which are attached hereto and made a part hereof by reference.

Through the submission of a completed Amended Election of Rights form signed by her attorney on or about November 3, 2000, Respondent requested a "formal hearing" on the allegations of wrongdoing made in the Administrative Complaint if settlement negotiations did not result in a settlement agreement. On January 22, 2002, the matter was referred to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct the "formal hearing" Respondent had requested. 1/

The final hearing in this case was initially scheduled for April 3, 2002. On March 13, 2002, Respondent, through her counsel of record, Mitchell J. Olin, Esquire, filed a motion requesting that the final hearing be continued on the ground that her attorney had a scheduling conflict and on the following additional ground:

> Additionally, due to financial hardship in Ms. Whyte having lost her teaching occupation, and due to the severe anguish and distress she has suffered and continues to suffer, all as a result of the underlying incident, Ms. Whyte is not medically fit for this hearing and has moved back to the State of Michigan to be with her family members for support, both financially and emotionally. Currently, Ms. Whyte is receiving Social Security disability payments.

By Order issued April 2, 2002, the motion was granted and the final hearing in this case was rescheduled for May 3, 2002.

On April 25, 2002, Respondent, again through Mr. Olin, filed a second Motion for Continuance, in which she stated the following:

> 1. This cause is scheduled for hearing on Friday, May 3, 2002, at 9:30 p.m.
>
> 2. Undersigned has [a] conflict with said time and date as he has been called to begin a jury trial before the Honorable Estella Moriarity, on April 29-May 5 (special set in case style Glazier v. Connell, case #00-21020 CACE (05), in the Circuit Court in and for Broward County.
>
> 3. Additionally, due to financial hardship in Ms. Whyte having lost her teaching occupation for which she has moved back to the State of Michigan to be with her family members, Ms. Whyte has enrolled in real estate and marketing classes which classes continue past May 3, 2002 and she is genuinely unavailable for trial.
>
> 4. The Department will suffer no prejudice in the granting of this motion, and, should Ms. Whyte successfully complete and receive her real estate license, an agreement can probably be reached with Petitioner.

This second Motion for Continuance was denied by Order issued April 26, 2002.

As noted above, the final hearing in this case was held on May 3, 2002, as scheduled.

At the outset of the hearing, Petitioner's counsel of record, Gonzalo R. Dorta, Esquire, moved, without opposition, to have the style of the instant case changed to reflect that the Honorable Charlie Crist had become the Commissioner of Education

since the Administrative Complaint had been filed against Respondent. The motion was granted.

At the hearing, Respondent appeared through her attorney, Mr. Olin. She did not make a personal appearance. As a preliminary matter, Mr. Olin explained that Respondent was "finishing up final exams and classes in a real estate [course] in the State of Michigan and hence could not be [present at the hearing]," and he then requested that Respondent be allowed to testify "telephonically." Mr. Dorta indicated that he opposed this request, to which Mr. Olin responded as follows:

> Ms. Whyte, as a direct result of the actions here that she finds herself has been financially and adversely affected. She did move back to her family in the State of Michigan. She is undergoing a change in occupational professions into the real estate market. She is enrolled and involved in final exams as a result of that in both marketing and real estate classes culminating today. If she wasn't there to take them today she would not be able to sit again for many months which would severely prejudice her again financially, which is the grounds [that] I raised in my motion to continue this hearing so that she could be present and that we could proceed properly with her.
>
> And again, I would renew that motion at this point if the State has taken the position that they must have her here for this.

The undersigned declined to continue the hearing and deferred, until "after the Petitioner conclude[d] the presentation of his

case," further discussion of the matter of whether Respondent would be testifying and, if so, by what means she would do so.

Another preliminary matter discussed before the taking of evidence concerned the statutory provisions cited in Counts 1 and 2 of the Administrative Complaint. Both parties agreed that these provisions (Subsection (1)(c) of Section 231.28, Florida Statutes, and Subsection (1)(f) of Section 231.28, Florida Statutes) had been renumbered (to Section 231.2615(1)(c), Florida Statutes (2001), and Section 231.2615(1)(f), Florida Statutes (2001), respectively).

Mr. Dorta, on behalf of Petitioner, presented the testimony of one witness, Deputy John Duncan of the Broward County Sheriff's Office. In addition to Deputy Duncan's testimony, Mr. Dorta offered into evidence 15 exhibits (Petitioner's Exhibits 1 through 5, 7 through 10, 12, and 14 through 18), all of which were received.

Mr. Olin, on behalf of Respondent, also called to the stand a single witness, William Markowitz, Respondent's former husband. Mr. Olin did not offer any exhibits into evidence, but he did ask the undersigned to take official recognition, pursuant of Section 120.569(2)(i), Florida Statutes, of the Order on Defendant's Motion to Dismiss issued in State of Florida v. Tammy Schmidt, Palm Beach County Circuit Court Case No. 93-010064MM A02, on October 4, 1993, and the Order and

Opinion Affirming Trial Court issued in State of Florida v. Maryann Silvers and Ray Hall, Broward County Circuit Court Case No. 00-08AC10A, on June 15, 2000. The undersigned indicated that he would grant the request provided that he and Mr. Dorta were provided copies of these court orders, a ruling Mr. Dorta indicated he had "no problem with." 2/

The evidentiary record was closed without Respondent testifying; however, the undersigned stated that he would entertain a motion to reopen the record for the purpose of taking Respondent's testimony, if such a motion was filed within two weeks (by May 17, 2002).

At the close of the evidentiary portion of the hearing on May 3, 2002, the undersigned set the deadline for filing proposed recommended orders at 15 days from the date of the filing with the Division of the transcript of the final hearing. The parties indicated, before leaving the Fort Lauderdale hearing site, that they intended to further explore, prior to the proposed recommended order filing deadline, the possibility of amicably resolving the instant controversy.

Having received neither the transcript of the final hearing, nor any post-hearing pleading from the parties, the undersigned, on August 6, 2002, issued an Order directing the parties "to confer and advise the undersigned, in writing, no later than 15 days from the date of this Order, as to the status

of this matter and whether there still remain[ed] issues in dispute [to be] resolved by the undersigned."

A Transcript of the final hearing (consisting of one volume) was filed with the Division on August 19, 2002.

On August 23, 2002, Mr. Dorta filed a response to the undersigned's August 6, 2002, Order. In his response, Mr. Dorta advised that the parties were unable to amicably resolve the instant controversy.

On September 5, 2002, Mr. Dorta filed a motion requesting an extension of time, until September 15, 2002, to file Petitioner's proposed recommended order in the instant case. A hearing on the motion was held that same day by telephone conference call. During the motion hearing, Mr. Olin requested, without opposition, that the deadline for filing proposed recommended orders be extended beyond September 15, 2002, to September 18, 2002. By Order issued September 6, 2002, the deadline for filing proposed recommended orders was extended to September 18, 2002.

Petitioner's Proposed Recommended Order was filed on September 18, 2002. Respondent's Recommended Order was filed on September 20, 2002. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

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

1. Respondent is now, and has been at all times material to the instant case, a Florida-certified teacher authorized to teach mathematics.

2. She holds Florida Educator's Certificate No. 801286, which covers the five-year period ending June 30, 2003.

3. Respondent was a teacher for more than a decade in Michigan before moving to Florida.

4. She began teaching in Florida in or around September of 1998, when she was hired to teach mathematics at Deerfield Beach High School (DBHS).

5. Respondent taught at DBHS only into the early part of the second semester of the 1998-1999 school year, when she was removed from the classroom following her arrest, during the early morning hours on January 17, 2002, for lewd and lascivious conduct.

6. The arrest occurred at Athena's Forum, a club that Respondent and her then fiancée, William Markowitz, had read about in a magazine article about "swing clubs." The article "peaked [their] interest to go in[to one of these clubs] and see what it was all about."

7. Respondent and Mr. Markowitz entered Athena's Forum at approximately 9:30 p.m. on Saturday, January 16, 1999. Neither she nor Mr. Markowitz had been to the club before.

8. They were stopped in the vestibule and asked to fill out and sign a membership application and to pay a membership fee of $75.00, which they did. They were then allowed to go into the interior of the building.

9. There were signs posted in the vestibule and elsewhere in the club cautioning that those who might be offended by "sexual activity or nudity" should not enter the club.

10. Upon entering the interior of the building, Respondent and Mr. Markowitz went to the bar and ordered drinks. They later went to the buffet area where food was being served to get dinner. They brought their dinner to a table "at the stage level," where they sat down and ate. It was "very dark" there. They spent the rest of the evening sitting at their table (next to each other) listening to music and watching "people coming and going throughout the club." On occasion, they got up to dance.

11. There were at least 50 people in the club that evening, some of whom were in various states of undress, being "fondl[ed]" and "touch[ed]" by others.

12. Respondent and Mr. Markowitz, however, both remained clothed throughout their stay at the club.

13. Among the other people in the club that evening was Deputy John Duncan of the Broward County Sheriff's Office (BCSO). Deputy Duncan was there, along with eight to 12 other law enforcement officers, as part of a BCSO undercover operation.

14. Deputy Duncan had been to the club on a prior occasion to conduct "surveillance."

15. He had gone there at the direction of his supervisor, Sergeant Barbara Stewart. Sergeant Stewart had advised Deputy Duncan and the other participants in the undercover operation that a "tip" had been received that "lewd activity was supposedly going on inside the club" and that they "were going in there to look for" such activity and to see if "any narcotics [were] being sold."

16. During that first visit, the club was "dead." The bartender, however, told Deputy Duncan that there were other times, including "certain nights [designated as] couples nights, that things [did] go on" at the club. Among these "things," according to the bartender, was "sexual activity."

17. Deputy Duncan returned to the club at approximately 10:00 p.m. on January 16, 1999.

18. He gained entry to the interior of the building after showing his "membership number" to a woman "at the front desk,"

giving the woman a "bottle of liquor" he had brought with him, and having his "cover charge" paid (by a fellow undercover officer).

19. Deputy Duncan, along with Sergeant Stewart, who was part of the BCSO undercover operation at the club that evening, proceeded to the "northwest section of the bar," where they sat down.

20. Next to the bar was a "dance floor." There were tables and chairs surrounding the "dance floor."

21. Approximately 30 feet from where he was seated at the bar, in the area of the "dance floor," Deputy Duncan observed a "white female," 3/ standing up, straddling the right leg of a "gentleman" sitting on a chair. The "white female" was wearing a tight-fitting, black spandex dress. Deputy Duncan saw the "gentleman" "lift her dress up" above her vaginal area. It appeared to Deputy Duncan that the "white female" did not "have any underwear on." The "gentleman" then proceeded to fondle the "white female's" vaginal area. This went on for two to five minutes. At no time did the "white female" attempt to pull down her dress or otherwise cover her vaginal area. Neither she, nor the "gentleman," made any effort to hide what they were doing.

22. Although Deputy Duncan considered the "white female's" and the "gentleman's" conduct to be lewd and lascivious, he did

not immediately place them under arrest inasmuch as the undercover operation had not concluded.

23. Before the club was "raided" later that evening and arrests were made, Deputy Duncan observed other instances of people in plain view engaging in activities of a sexual nature.

24. He saw, among other things, "women with other women where they were fondling the breast," "women with men doing dirty dancing," and "men and women in corners."

25. In the "back area" of the club, he saw "hot tubs with several naked individuals inside" and rooms where people were "engaging in open intercourse."

26. There were approximately 38 people arrested as a result of the BCSO undercover operation at Athena's Forum that evening.

27. Respondent and Mr. Markowitz were among those arrested.

28. Respondent's and Markowitz's arrests were for lewd and lascivious conduct. The arrests occurred at 1:30 a.m. on January 17, 1999 (after the club had been "raided").

29. Deputy Duncan was the arresting officer. He believed that Respondent and Mr. Markowitz were the "white female" and "gentleman," respectively (referred to above) whom he had

observed earlier that evening in the area of the "dance floor" engaging in conduct that he considered to be lewd and lascivious.

30. Deputy Duncan, however, was mistaken. Respondent was not the "white female" 4/ and Mr. Markowitz was not the "gentleman" 5/ Deputy Duncan had seen.

31. At no time that evening at the club had Mr. Markowitz pulled Respondent's dress up or fondled Respondent's vaginal area.

32. Respondent's and Mr. Markowitz's arrests were two of the "many" arrests Deputy Duncan made at "swing clubs" in the county.

33. Respondent's arrest was reported in the media.

34. It was common knowledge at DBHS that she had been arrested for lewd and lascivious conduct at a "swing club."

35. The Broward County School Board initiated disciplinary proceedings against Respondent. It removed her from the classroom and reassigned her to a "security guard" position pending the outcome of the disciplinary proceedings.

36. Respondent thereafter submitted a letter of resignation, dated January 24, 2000, to the Broward County School Board. In her letter, she stated, among other things, the following:

Broward County showed me a warm welcome by taking away my civil rights to privacy and making my entire ordeal a Nationwide joke. No one, except my attorney and my future husband knew of my arrest on January 17, 1999, until the School Board . . . gave information to the local and national media.

. . . . The Broward County School Board showed an excellent, motivated and experienced educator that they are more interested in what teachers do after hours than the students' well-being. I was wrongfully arrested on January 17, 1999 in a private club where no children were present. It was not near or on any school grounds and it did not impair my ability to teach. As of this letter, it seems that the criminal charges against me will be dismissed. On February 17, 1999, I was handed a letter that will forever change my life, when I was pulled and submitted to complete ridicule in front of my 4th Period class with only forty minutes to the end of the day. I successfully taught for four weeks and would have continued to successfully teach if the Board had not release[d] my name to the media. After a national debate on the right to privacy my career was destroyed, as well as my life. . . .

In August 1999 I was placed on administrative reassignment with pay. I was informed that I would receive a "meaningful" job that would justify my paycheck while we awaited the Administrative Hearing. Once assigned a position, displayed for the world to see, as a security guard for the main School Board Building, I reported my health issues and repeated harassment from the media, school board employees, teachers, and parents. I was informed by Carmen Rodriguez, attorney for the School Board, that the position I was assigned would involve "little or no participation." I asked for a different position but the

> request was denied. . . . At this point I am unable to return to work due to illness . . . .
>
> Therefore, due to the cost to my personal health, lack of financial resources, lack of union support, the fact that I am only an annual contract teacher, being refused a position change, and being denied a Leave of Absence, and the pride to not submit myself to the degrading way you treated my fellow educator, I must with great hesitation resign as an educator in Broward County. I am giving up the battle in the administrative courts to win the war of public opinion.

37. The criminal charges that had been filed against Respondent following her arrest were "dropped by the court" on or about July 18, 2000.

38. Respondent married Mr. Markowitz, but they were later divorced.

39. They still keep in touch with one another, however.

40. Mr. Markowitz tried to help Respondent make the necessary arrangements to attend the final hearing in the instant case, but due to the expense involved and the fact that Respondent had an examination to take, she was unable to be at either of the hearing sites. 6/

CONCLUSIONS OF LAW

41. Petitioner is requesting that the Education Practices Commission (EPC) take disciplinary action against Respondent

pursuant to Subsections (1)(c) and (f) of Section 231.2615, Florida Statutes (2001), which provide as follows:

> Education Practices Commission; authority to discipline.–
>
> (1) The Education Practices Commission may 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 the person:
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> * * *
>
> (c) Has been guilty of gross immorality or an act involving moral turpitude.
>
> * * *
>
> (f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board.

42. Chapter 231, Florida Statutes (2001), 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).

43. Rule 6B-4.009, Florida Administrative Code (which deals with dismissal actions initiated by district 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 231.2615, Florida Statutes (2001). See Castor v. Lawless, 1992 WL 880829 *10 (EPC 1992)(Final Order).

44. Subsection (2) of Rule 6B-4.009, 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).

45. "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, supra; and Turlington v. Knox, 3 FALR 1373A, 1374A (EPC 1981)(Final Order).

46. 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.

"Not every criminal act involves moral turpitude; only those which are by nature 'base[,] [vile,] or depraved' qualify." In re Berk, 602 A.2d 946, 948 (Vt. 1991). Lewd and lascivious conduct is one such crime. See Duvallon v. State, 404 So. 2d 196, 197 (Fla. 1st DCA 1981). "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 *14 n.16 (Fla. DOAH 1999)(Recommended Order).

47. In evaluating whether a teacher "[h]as been guilty of gross immorality or an act involving moral turpitude," in violation of Subsection (1)(c) of Section 231.2615, Florida Statutes (2001), 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).

48. "Personal conduct" that is not itself in any way wrongful may not form the basis for disciplinary action pursuant to Subsection (1)(f) of Section 231.2615, Florida Statutes (2001), regardless of the negative publicity surrounding the conduct. See Tenbroeck v. Castor, 640 So. 2d 164, 168 (Fla. 1st DCA 1994)("[W]e . . . deem it appropriate to address the issue of whether appellant's effectiveness as a teacher was impaired as the result of his conduct. As already stated, no student or teacher testified that appellant's effectiveness as a school teacher had been seriously reduced as a result of the challenged conduct. The opinion testimony of appellee's expert to that effect was pinned upon the notoriety created in the community by the marriage between appellant and Angela. However, standing alone, the marriage was not unlawful. The attendant publicity surrounding appellant's marriage, which in itself is not a crime or a violation of any rule or statute, cannot be used by the commissioner or the EPC to establish that appellant's

effectiveness as a teacher or administrator has been impaired."); and Baker v. School Board of Marion County, 450 So. 2d 1194, 1195 (Fla. 5th DCA 1984)("The School Board argues that the record establishes that Baker's effectiveness as a teacher has been impaired at the elementary school where he taught and that this alone justifies his dismissal. While it is true that the school principal testified as to the impairment of Baker's teaching effectiveness, we must reject this argument, otherwise whenever a teacher is accused of a crime and is subsequently exonerated with no evidence being presented to tie the teacher to the crime, the school board could, nevertheless, dismiss the teacher because the attendant publicity has impaired the teacher's effectiveness. Such a rule would be improper.").

49. Impaired or reduced effectiveness of a teacher may be established even in the absence of "specific" or "independent" evidence of impairment where the conduct in which the teacher engaged is of such a nature that it "must have impaired" the teacher's ability to discharge his or her job responsibilities. See Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000); and Summers v. School Board of Marion County, 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995).

50. "No revocation [or] suspension . . . of any [Florida teaching certificate] is lawful unless, prior to the entry of a final order, [Petitioner] has served, by personal service or

certified mail, an administrative complaint which affords reasonable notice to the [teacher] of facts or conduct which warrant the intended action and unless the [teacher] has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." Section 120.60(5), Florida Statutes.

51. The teacher must be afforded an evidentiary hearing if, upon receiving such written notice, he or she disputes the alleged facts set forth in the administrative complaint. Sections 120.569(1) and 120.57, Florida Statutes.

52. At the hearing, Petitioner bears the burden of proving that the teacher engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the teacher's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

53. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

54. In determining whether Petitioner has met his burden of proof, it is necessary to evaluate his evidentiary presentation in light of the specific factual allegations made in the administrative complaint. Due process prohibits the EPC from taking disciplinary action against a teacher based upon conduct not specifically alleged in the Petitioner's administrative complaint. See Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731

So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

55. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the teacher. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

56. In the instant case, Petitioner has alleged that Respondent violated Subsections (1)(c) and (1)(f) of Section 231.2615 (formerly 231.28), Florida Statutes (2001), when, "[o]n or about January 17, 1999, [she] engaged in lewd and lascivious acts [by] allow[ing] someone to fondle her exposed vaginal area in front of the patrons of an adult club."

57. Petitioner failed to clearly and convincingly establish at the final hearing that Respondent engaged in such conduct.

58. While Petitioner's lone witness, Deputy Duncan, testified that, during an undercover operation at a "swing club," he had observed a "white female," whom he believed to be Respondent, engage in the conduct described in the Administrative Complaint, it appears to the undersigned, after careful consideration of the entire evidentiary record, that the "white female" about whom Deputy Duncan testified was not Respondent, but rather someone else, and that Deputy Duncan made a mistake, albeit an honest one, in testifying otherwise.

59. In an effort to show that Deputy Duncan had misidentified her as the "white female," Respondent presented the testimony of Mr. Markowitz. Mr. Markowitz testified that he had been with Respondent, his then-fiancée, at the "swing club" on the evening in question and at no time that evening had Respondent done what Deputy Duncan had seen the "white female" do. Mr. Markowitz was clearly in a position to know what Respondent did and did not do that evening, and he testified about the matter with apparent sincerity and candor and in a manner that suggested he had a reasonably clear recollection of the events he described. Furthermore, his testimony that his and Respondent's arrests that evening were cases of mistaken identity is plausible, particularly given the delayed timing of their arrests and the large number of other arrests in which Deputy Duncan was involved. Cf. People v. Gilmore, 48 Cal.Rptr.

449, 454 (Cal. App. 1966)("Especially in cases such as that before us, where the same officer and the same informant were engaged in a long series of purchases, extending over a substantial period, may the informant prove to be a valuable defense witness. As we have said above, these are circumstances under which the possibility of an honest mistake in identification by the officer is well within the realm of possibility--the officer knows each defendant only as one of a large group of sellers, introduced to him by the informant but otherwise unknown to him, seen perhaps only once and often under conditions of difficult observation. It is, therefore, at least possible, for any one defendant, that the informant, if interviewed and called, might testify that the officer was, in this case, mistaken and that the transaction involved was not with this defendant but with some other individual.").

60. Exercising his authority to "assess witness credibility" (see McNeill v. Pinellas County School Board, 678 So. 2d at 478), the undersigned has credited Mr. Markowitz's testimony and, accordingly, finds that Respondent did not engage in the conduct alleged in the Administrative Complaint. 7/

61. In view of this finding, the charges against Respondent should be dismissed. 8/

RECOMMENDATION

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

RECOMMENDED that the EPC issue a final order dismissing the instant Administrative Complaint.

DONE AND ENTERED this 14th day of October, 2002, 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 14th day of October, 2002.

ENDNOTES

1/ It is unclear from the record why it took more than a year for the matter to be referred to the Division.

2/ Copies of these court orders were filed with the Division on September 13, 2002. They were accompanied by a cover letter from Mr. Olin, dated September 11, 2002, reflecting that Mr. Dorta had also been sent copies.

3/ In his testimony, Deputy Duncan did not provide any further details regarding the physical characteristics of this "white female."

4/ Inasmuch as Respondent did not appear at the final hearing, Deputy Duncan did not have the opportunity to make an "in-hearing" identification of Respondent. Compare with Department

of Health, Board of Massage Therapy v. Keys, 2001 WL 1018338 (Fla. DOAH 2001)(Recommended Order)("The factfinder found it striking that the Department made relatively little effort to identify Keys conclusively as the wrongdoer. It would have been a simple matter to have subpoenaed her for the final hearing, so that a definitive identification could be made, or, failing that, to have obtained photographs or videotapes of her during discovery upon which a persuasive in-hearing identification could be based. The Department's failure to take these or similar steps toward meeting its heavy evidential burden--particularly given the paucity of information that it had concerning Keys' appearance, about which nothing unique or distinguishing was elicited--reflected negatively on its entire case.").

5/ Unlike Respondent, Mr. Markowitz was at the final hearing (at the Fort Lauderdale hearing site, from where Deputy Duncan testified). Deputy Duncan, however, was not asked to make an "in-hearing" identification of Mr. Markowitz as the "gentleman" he had seen with the "white female."

6/ Given these circumstances surrounding Respondent's absence from the final hearing, and the fact Respondent had Mr. Markowitz testify on her behalf that she had not engaged in the conduct alleged in the Administrative Complaint, the undersigned has not drawn an adverse inference from Respondent's failure to appear and testify at hearing. See Geiger v. Mather of Lakeland, Inc., 217 So. 2d 897, 898 (Fla. 4th DCA 1968)("The unfavorable inference which may be drawn from the failure of a party to testify is not warranted when there has been a sufficient explanation for such absence or failure to testify."); and Weeks v. Atlantic Coast Line Railroad Company, 132 So. 2d 315, 316 (Fla. 1st DCA 1961)("The weight of authority supports the general rule that the failure of a party to introduce an available witness does not give rise to any inference or presumption that the testimony of the witness, if he had been called, would have been unfavorable to such party, where other qualified witnesses have testified for the party concerning the same matters, and the testimony of the uncalled witnesses would have been merely cumulative or corroborative.").

7/ In making this credibility determination, the undersigned has not overlooked that Mr. Markowitz, while he is divorced from Respondent, apparently is still friendly with her.

8/ It is questionable whether the conduct that Deputy Duncan saw the "white female" engage in and about which he testified,

given the setting in which it occurred, constituted "lewd and lascivious acts" for which a certified teacher in this state may be disciplined by the EPC. Cf. Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991)("Under Florida criminal law the terms 'lewd' and 'lascivious' are synonymous: Both require an intentional act of sexual indulgence or public indecency, when such act causes offense to one or more persons viewing it or otherwise intrudes upon the rights of others. . . . The terms 'lewd' and 'lascivious' thus mean something more than a negligent disregard of accepted standards of decency, or even an intentional but harmlessly discreet unorthodoxy. . . . Acts are neither 'lewd' nor 'lascivious' unless they substantially intrude upon the rights of others."); Florida Board of Bar Examiners Re N.R.S., 403 So. 2d 1315, 1317 (Fla. 1981)("Private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law. This might not be true of commercial or nonconsensual sex or sex involving minors."); and Campbell v. State, 331 So. 2d 289, 289-90 (Fla. 1976)("On the weekend of July 4, 1974, . . . [l]ocal police officers . . . visited bars and lounges frequented by Pensacola area homosexuals. Among these establishments was Robbie's YumYum Tree Lounge, where appellant was employed as a waiter. At approximately 2:00 a.m. on July 6, 1974, two of four undercover agents who had been in the YumYum Tree for some two hours saw appellant fondle one Jeffries, a patron; both Campbell and Jeffries were arrested for violating Section 798.02, Florida Statutes [prohibiting lewd and lascivious conduct]. . . . [T]he evidence in the record does not substantiate behavior which was 'extremely indecent, immoral, and offensive.' The term 'indecent' is difficult enough of precise definition, but the term 'extremely indecent' must certainly refer to an act more outrageous than that perpetrated by the appellant. Additionally, who in the dark and crowded recesses of the YumYum Tree at 2:00 a.m. on July 6, 1974, was 'offended'? This is not to say that such establishments provide sanctuary from enforcement of our criminal laws. Our holding today is that there must be more to constitute 'open and gross lewdness and lascivious behavior' than this record discloses and that a jury of reasonable persons could not reasonably have concluded that appellant's conduct at the time and place and under the circumstances it occurred constituted a violation of Section 798.02, Florida Statutes."); however, since the undersigned has found that the "white female" was someone other than Respondent, it is unnecessary to, and the undersigned will not, decide this issue.

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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.