STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, AS COMMISSIONER OF EDUCATION,	)	
Petitioner,	)	
vs.	)	Case No. 02-1371PL
ELLEN G. GOLDBERG,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on August 29, 2002, in Miami, Florida.

APPEARANCES

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For Respondent: O. Frank Valladares, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated the Principles of Professional Conduct for the Education Profession, specifically Rules 6B-1.006(3)(a), (e), (f), (g), (i), and 6B-1.006(4)(a), Florida Administrative Code, and, if so, what

disciplinary action should be taken against her pursuant to Section 231.2615(1)(i), Florida Statutes.

PRELIMINARY STATEMENT

By Administrative Complaint dated July 26, 2001, Petitioner Charlie Crist, as Commissioner of Education (the "Commissioner"), charged Respondent Ellen Goldberg, the holder of a valid Florida Educator's Certificate, with having violated the ethical rules governing teachers based on the allegation that she had asked her students how their parents had voted in the 2000 presidential election and had singled out supporters of the Republican candidate for unfavorable treatment. Goldberg disputed the factual allegations and timely requested a formal hearing. On March 29, 2002, the Commissioner referred this matter to the Division of Administrative Hearings for a formal hearing.

The administrative law judge to whom the case initially was assigned scheduled a final hearing for June 24, 2002. The final hearing was continued twice on Respondent's motions and took place on August 29, 2002. Before the final hearing, the Commissioner requested and was granted leave to file an Amended Administrative Complaint, which he did on August 6, 2002.

At the final hearing, the Commissioner called 2 witnesses: Carmen Trimas, a parent; and Lourdes Delgado, the Principal of Shenandoah Middle School. He also introduced the depositions of students Matthew Fletcher and Silvia Echevarria in lieu of their

personal appearances. Finally, the Commissioner offered seven exhibits, numbered 1-5, 7, and 8——which latter is the deposition of Respondent Ellen Goldberg——and these were received in evidence.

Respondent testified on her own behalf and called Ellyn Biggs, a friend and former colleague; Maritza Aragon, the Principal of Youth Co-op Charter School; and Yaslen Jimenez, a student. Additionally, Respondent moved exhibits lettered A-H and J into evidence.

The transcript of the final hearing was filed on October 8, 2002. Each party timely submitted a Proposed Recommended Order, both of which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent Ellen Goldberg ("Goldberg") holds a Florida Educator's Certificate that is currently valid. For the past 20 years, more or less, she has been employed as a public school teacher in the Dade County School District. In the 2000-2001 school year, Goldberg taught reading and language arts to seventh graders at Shenandoah Middle School.

2. On November 8, 2000, many of Goldberg's students were interested in discussing the presidential election, which had not yet produced a president-elect, though the polls had closed the night before.[1] Believing this topic would be a good subject for an academic debate, Goldberg asked her students if they knew

whom their parents had voted for——Governor George W. Bush of Texas or Vice President Al Gore——and why. A majority of those who responded expressed support for Gore.[2]

3. Because they were in the minority, Goldberg put the onus on the Bush backers to recite factual grounds for their choice, ostensibly to persuade the Gore supporters that Bush was the superior candidate. Those students who, in Goldberg's judgment, gave thoughtful answers were given extra credit. Those who failed adequately to articulate reasons for choosing Bush (or elected not to participate in the discussion) received no extra credit but were not penalized. Participation in the discussion was voluntary.

4. There is conflicting evidence as to whether Goldberg called upon Gore supporters likewise to defend their man. It is determined that some students, looking for extra credit, did volunteer to speak on Gore's behalf.

5. During this discussion, Goldberg revealed to her students that she had voted for Gore. She also argued that Bush wanted to take away a woman's right to an abortion. The undersigned is convinced that Goldberg made it clear to her class where she stood in this electoral contest.

6. At least a couple of students were upset that their teacher had asked how their parents had voted and also seemed to be advocating partisan political views that they did not share.

One student's mother, after being told about this classroom debate, wrote a letter to the school's principal complaining about the incident. This parent requested that her son be removed from Goldberg's class, and he was.[3]

7. In due course, the school initiated an internal disciplinary proceeding against Goldberg that culminated, on December 14, 2000, with the principal issuing the teacher a letter of reprimand. In this letter, Goldberg was directed "to immediately refrain from imparting [her] personal views and beliefs and sharing one-sided views with [her] students" and "to refrain from using inappropriate procedures in the performance of [her] assigned duties."

The Charges

8. In his Amended Administrative Complaint against Goldberg, which was served on August 6, 2002, the Commissioner made the following pertinent factual allegations:

> On or about November 9, 2000, [Goldberg] asked her students how their parents voted in the presidential election. However, only those students who said their parents had voted for Bush had to explain their answers. Some students reported that it made them feel nervous and uncomfortable to talk about their parents' decisions in this way. Additionally, [Goldberg] told her students who she voted for and made negative comments about the other candidate. On or about December 14, 2000, [Goldberg] was issued a letter of reprimand by her principal.

On these allegations, the Commissioner accused Goldberg of having violated subsections (3)(a), (3)(e), (3)(f), (3)(g), (3)(i), and (4)(a) of Rule 6B-1.006, Florida Administrative Code, which are part of the Principles of Professional Conduct for the Education Profession in Florida. If proved by clear and convincing evidence, the alleged rule violations would be grounds for discipline under Section 231.2615(1)(i), Florida Statutes.

Ultimate Factual Determinations

9. While the undersigned agrees with the Commissioner that Goldberg exercised poor judgment in her classroom on November 8, 2000,[4] he is not convinced that she intended to disparage, embarrass, discriminate against, or infringe upon the rights of, any of her students. Rather, Goldberg's explanation that she believed the political debate served the legitimate pedagogic purpose of honing the students' critical thinking skills, which would be useful on a standardized test such as the Florida Comprehensive Assessment Test, is accepted. This is not to suggest that no student was offended or embarrassed in Goldberg's class that day or to discount the feelings of those who were, but only to find that it was not Goldberg's conscious object to cause such discomfiture.

10. The undersigned is not convinced that Goldberg unreasonably created conditions in her classroom that were

harmful to learning or harmful to her students. To be sure, the undersigned is of the opinion that Goldberg's questioning her seventh-grade students about how their parents had voted, even as part of a voluntary exercise for extra credit, was ill advised, as was expressing her personal political views. The undersigned reasonably infers, however, that on the day after an extraordinary presidential election that was too close to call, some discussion of the current political events was probably unavoidable. Therefore, given the context in which Goldberg's conduct occurred, it would be unfair and inaccurate to characterize the conditions in her classroom as harmful.

11. Goldberg did not fail to keep in confidence "personally identifiable information." The information she solicited (how parents had voted) would not, by itself, permit the personal identification of any student. Moreover, in any event, there is no evidence——and hence can be no finding——that Goldberg disclosed this information outside the classroom, wherein its use, Goldberg believed, served a professional purpose.

12. The undersigned is not convinced that Goldberg attributed her personal views to the school or any other organization with which she was affiliated. The problem in this case is not that Goldberg failed reasonably to distinguish between her personal views and those of the school (or another

organization), but rather that she expressed personal views which prudence dictates she should have kept to herself.

13. The undersigned is not convinced that Goldberg's effectiveness as a teacher has been impaired in any way as a result of the incident that occurred on November 8, 2000.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

15. Upon a finding of probable cause to believe that grounds exist to revoke or suspend a teaching certificate, or to impose any other appropriate penalty against a teacher, the Commissioner is responsible for prosecuting the formal administrative complaint. Section 231.262(6), Florida Statutes (2001).[5]

16. If the Commissioner proves any of the grounds for discipline enumerated in Section 231.2615, Florida Statutes, then the Education Practices Commission (the "Commission") is empowered to punish the certificate holder by imposing penalties that may include one or more of the following: permanent certificate revocation; certificate revocation, with reinstatement following a period of not more than ten years; certificate suspension for a period of time not to exceed three years; imposition of an administrative fine not to exceed $2,000

for each count or separate offense; restriction of the authorized scope of practice; issuance of a written reprimand; and placement of the teacher on probation for a period of time and subject to such conditions as the Commission may specify. Sections 231.261(7)(b), 231.2615, and 231.262(7), Florida Statutes.

17. Section 231.2615(1)(i), Florida Statutes, authorizes the Commission to take disciplinary action against a teacher who has "violated the Principles of Professional Conduct for the Education Profession in Florida prescribed by State Board of Education rules."

18. Rule 6B-1.006, Florida Administrative Code, provides in pertinent part:

> (1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
> (2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.
> (3) Obligation to the student requires that the individual:
> (a) Shall 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.
>
> * * *
>
> (e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student's legal rights.

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

* * *

(i) Shall keep in confidence personally identifiable information obtained in the course of professional service, unless disclosure serves professional purposes or is required by law.

* * *

(4) Obligation to the public requires that the individual:

(a) Shall take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated.

19. The foregoing statutory and rule provisions are penal in nature and must be strictly construed, with ambiguities being resolved in favor of the licensee. Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977). Whether Goldberg violated these rules, as charged, is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

20. For the Commission to suspend or revoke a teacher's certificate, or to impose any other penalty provided by law, the Commissioner must prove the charges by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); McKinney, 667 So. 2d at 388. Further, the grounds proven must be those specifically alleged in the administrative complaint. See, e.g., Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

21. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that

> clear and convincing evidence 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 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.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (1992)(citation omitted).

22. As set forth in the Findings of Fact above, the trier has determined as matter of ultimate fact that Goldberg did not violate the Principles of Professional Conduct as alleged. These factual findings, however, were necessarily informed by the administrative law judge's application of the law. A brief discussion of the pertinent legal principles, therefore, will illuminate the dispositive findings of ultimate fact.

Rules 6B-1.006(3)(e) & (f)

23. Rule 6B-1.006(3)(e), Florida Administrative Code, requires a finding that the teacher "intentionally" embarrassed or disparaged a student.[6] Subsection (3)(f) similarly prohibits the intentional violation or denial of a student's legal rights. To prevail under either provision, therefore, the Commissioner must prove that "the teacher made a conscious decision not to

comply with the rule." Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). Because the undersigned is not convinced that Goldberg deliberately sought to harm any student in violation of these rules, the offenses were not established.[7]

Rule 6B-1.006(3)(g)

24. Rule 6B-1.006(3)(g), Florida Administrative Code, also requires a showing of intent on the teacher's part——an intent to harass or discriminate on the basis of an impermissible factor such as political beliefs. Based on the evidence in this case, the undersigned is unable to find, without hesitancy, that Goldberg acted out of a conscious desire to harass or discriminate against students whose parents had voted for Bush. Therefore, this offense was not proved.

Rule 6B-1.006(3)(a)

25. Rule 6B-1.006(3)(a), Florida Administrative Code, imposes on teachers the affirmative duty to protect students from harmful conditions. The standard against which a teacher's performance of this duty is measured is an objective one: she must make a "reasonable effort." Therefore, a teacher's subjective intent is not determinative of whether Rule 6B-1.006(3)(a) was violated.

26. Interestingly, the rule does not expressly prohibit a teacher from creating a harmful condition.[8] The rule's drafters seem to have envisioned that the duty to make a reasonable

protective effort would arise most often in situations where the harmful condition was not one of the teacher's own doing.[9] Nevertheless, if a teacher creates a harmful condition, then the rule clearly requires that she make a reasonable effort to protect the student from it.

27. In this case, the Commissioner failed to establish clearly and convincingly that the conditions in Goldberg's classroom were harmful in any manner contemplated by Rule 6B-1.006(3)(a), Florida Administrative Code; hence, the duty to make a reasonable protective effort was not triggered, and as a result there can be no finding that Goldberg violated this provision.

Rule 6B-1.006(3)(i)

28. Under Rule 6B-1.006(3)(i), Florida Administrative Code, a teacher must not disclose "personally identifiable information" about her students except in the service of "professional purposes" or as required by law. The awkward phrase "personally identifiable information" is not defined in the rule but most certainly was intended to describe information that permits the personal identification of a student. See Florida State University v. Hatton, 672 So. 2d 576, 578-79 & n.3 (Fla. 1st DCA 1996). In other words, the rule does not refer generally to all personal information, but rather, more narrowly, to information unique to a person (e.g. name, address,

social security number) which reveals, discloses, or points to that particular student's identity.

29. The information at issue here——how parents voted in a presidential election——is personal information, certainly, but not "personally identifiable information." Consider that approximately 50 million voters cast their ballots for Bush. Therefore, if Student A reveals in class that his parents voted for Bush, such disclosure might violate his parents' confidence, but the datum divulged is simply too common to identify Student A. That being so, Goldberg was not shown impermissibly to have disclosed personally identifiable information concerning any student.

Rule 6B-1.006(4)(a)

30. Teachers are required to take "reasonable precautions" to distinguish their personal views from those of the school and other institutions with which they are affiliated. See Rule 6B-1.006(4)(a), Florida Administrative Code. There is no evidence that Goldberg failed to do this. To the contrary, the evidence shows clearly that the students understood Goldberg to have expressed her own personal views concerning the candidates and issues. Thus, the alleged violation of this rule was not established.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order dismissing the Amended Administrative Complaint against Respondent Ellen Goldberg. Jurisdiction is retained in this cause to enter a final order disposing of Goldberg's motion for sanctions (i.e. an award of attorney's fees and costs) pursuant to Section 120.569(2)(e), Florida Statutes. If the Commissioner wants to be heard on this matter, he shall file a written response no later than December 27, 2002.

DONE AND ENTERED this 6th day of December, 2002, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of December, 2002.

ENDNOTES

[1]/ The undersigned takes official recognition of the fact, which is generally known, that the outcome of the presidential election held on November 7, 2000, hinged upon the canvassing of

votes in Florida, a process that continued, in one form or another, until December 12, 2000, when the U.S. Supreme Court issued a decision that effectively stopped the vote counting. See Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525 (2000).

[2]/ No one, apparently, rose in support of Green Party candidate Ralph Nader or Reform Party candidate Pat Buchanan.

[3]/ The student in question had expressed support for Bush and received extra credit for his answer. Goldberg had told the student that he could receive additional extra credit if he wrote a report on Bush's record.

[4]/ In his Proposed Recommended Order, the Commissioner asserts that Goldberg "is a seventh grade teacher who crossed over the line separating good from bad judgment." As indicated, the undersigned concurs with this assessment. To be fair, however, several important qualifications should be attached to this observation.

First, poor judgment, standing alone, is not a disciplinable offense pursuant to Section 231.2615(1)(i), Florida Statutes. Here, the undersigned has determined, as a matter of ultimate fact, that Goldberg did not violate a specific disciplinary rule.

Second, the undersigned's determination that Goldberg exercised poor judgment is, he concedes, primarily based on a personal opinion that public school teachers, as a matter of tact and discretion, should refrain from engaging in openly partisan political advocacy——and from making comments that reasonably could be interpreted as such——in their classrooms. For whatever reasons, however, the Principles of Professional Conduct for the Education Profession in Florida do not explicitly forbid political proselytizing.

It is interesting, in this regard, to note that Goldberg has been lauded in the past for classroom activities that could easily be considered a form of issue advocacy with political overtones. In newspaper clippings that Goldberg offered into evidence, she is described, favorably, as a "born rebel" and "an ardent whale and dolphin advocate" who has "fired up" her students to become "anti-whaling crusaders" who write letters to governmental officials and make videos, posters, and placards "denouncing the killing of whales." In one article, Goldberg is praised by a spokesperson for the Environmental Investigation

Agency, which is described as "a nonprofit group dedicated to saving endangered animals." Not everyone, of course, subscribes to aggressive save-the-whale efforts, which some might consider to be part of a broader, left-leaning environmental movement. Surely, there must be some parents who prefer that their children not be urged at school to join an anti-whaling crusade.

Imagine, by way of contrast, a hypothetical middle school teacher, "Mr. Smith," who is a firearms enthusiast and an ardent Second Amendment rights advocate. Mr. Smith inspires his students to become anti- gun control crusaders, encouraging them to write letters and make videos, posters, and placards denouncing efforts to create a national database of ballistics imaging data. For this he is applauded by the National Rifle Association, a nonprofit organization dedicated to firearms education and the protection of Second Amendment rights.

Conceptually, our hypothetical Mr. Smith's actions are identical to Goldberg's; only the underlying cause is different. And neither form of issue advocacy is expressly prohibited under the state's disciplinary rules (although the undersigned suspects that Mr. Smith would not be permitted to advance a pro-gun agenda in his classroom).

As this brief discussion illustrates, formally regulating teachers' speech would be a delicate matter requiring a careful balancing of competing interests. At present, it appears that setting the boundaries of acceptable classroom discourse concerning political subjects is a responsibility largely committed to the teacher's discretion and judgment. While the undersigned thinks Goldberg crossed the line in this instance, she cannot be disciplined based on the administrative law judge's personal preferences. If the Department of Education wants to impose more stringent controls on classroom speech, it should adopt a specific disciplinary rule on the topic.

Finally, the undersigned personally believes that a teacher should not ask students how their parents voted in an election, even if answering the question is voluntary, for the same reasons that students should not be asked what books and magazines their parents read, what websites they visit, what clubs they belong to, what religion they practice, and so forth. But the disciplinary rules do not explicitly proscribe such conduct, again apparently leaving to the teacher's discretion the matter of where to draw the line between appropriate and inappropriate inquiry of students respecting their parents'

private lives. Absent a specific rule concerning such inquiries, the undersigned cannot recommend discipline against Goldberg based on the facts at hand.

[5]/ The statutory references herein are to the 2001 Florida Statutes. In 2002, the legislature substantially revised the Education Code. Most of the provisions of the recently enacted legislation will not take effect until January 7, 2003. See Ch. 2002-387, s. 1064, Laws of Florida.

[6]/ The First District Court of Appeal has described Rule 6B-1.006(3)(e), Florida Administrative Code, as an "aspirational" rule, the "violation of which could only justify suspension of a teaching certificate if there was factual evidence that the violation was so serious as to impair the teacher's effectiveness in the school system." Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995); MacMillan v. Nassau County School Board, 629 So. 2d 226, 228 (Fla. 1st DCA 1993). There is no evidence in this record showing that Goldberg's effectiveness in the school system has been impaired.

[7]/ Further, the undersigned agrees with Goldberg's contention that the Commissioner failed to articulate clearly any legal right(s) of students that Goldberg intentionally could have denied or violated under these circumstances. The Commissioner argues that Goldberg violated her students' parents' right of privacy concerning political beliefs, which is a reasonable concern, see endnote 4, but one not specifically addressed by Rule 6B-1.006(3)(f), Florida Administrative Code.

[8]/ The rule might be construed to imply that the creation of a harmful condition is a per se violation of the "reasonable effort" standard. Were the rule so understood, then the creation of a harmful condition would bespeak a lack of reasonable effort under all circumstances. This, however, would be an impermissibly liberal or expansive interpretation of a rule that is penal in nature and hence must be strictly construed. Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

[9]/ In imposing on a teacher the duty to protect students against harmful conditions created by others, the rule deviates from the common law, under which a person is not required to protect another from danger unless he himself has created the danger. Thompson v. Baniqued, 741 So. 2d 629, 631 (Fla. 1st DCA 1999).

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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.