

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 06-1073
)
MICHAEL SPIVEY,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,¹ before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on October 16, 2006, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jean Marie Middleton, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Mark F. Kelly, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Notice of Specific Charges and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On March 15, 2006, the Miami-Dade County School Board (School Board) took action to suspend Respondent from his teaching position and initiate dismissal proceedings against him. By letter dated March 20, 2006, Respondent "request[ed] a hearing to be held before an administrative law judge" on the matter. Respondent's hearing request was referred to DOAH on March 24, 2006.

On April 19, 2006, the School Board filed a Notice of Specific Charges (Notice). The Notice contained the following Statement of Facts:

Statement of Facts

5. The School Board has employed Spivey since August 1979.
6. Spivey was originally employed by the School Board [as] an hourly teacher.
7. In November 1980, Spivey was hired as [a] full-time Teacher. He was assigned to Miami Norland Middle School. From August 1988 until his suspension without pay, he was assigned to Myrtle Grove Elementary School.
8. Spivey admitted that he paid for and received transcripts for college credit from

Eastern Oklahoma State College and submitted those transcripts to the District for the purpose of receiving or renewing a teaching certificate.

9. Spivey's alleg[ations] that he completed midterm and final exams and performed presentations as evidence of academic effort lack credibility in light of conflicting information that no exams or coursework was required by the instructor.

Count I of the Notice alleged that "Spivey's admission that he accepted and reported college credits that were not earned through academic effort does not reflect credit upon himself or the community and violates School Board Rule 6Gx13-4A-1.21."

Count II of the Notice alleged that "Spivey has demonstrated a lack of good moral character by admitting he accepted college credit[s] and reported them without engaging in any academic effort" and that therefore his "actions violate [S]ection

1012.32, Florida Statutes." Count III of the Notice alleged that "Spivey's actions constitute a violation of the School Board Rule 6Gx13-[]1.213, as well as Rule 6B-1.001 and Rule 6B-

1.006, Florida Administrative Code," and that these violations "constitute[] just cause for termination." Count IV of the

Notice alleged that "Spivey's violation of the code of ethics [referenced in Count III of the Notice] constitutes misconduct in office and constitutes just cause for termination."

On July 11, 2006, the parties filed a Joint Prehearing Stipulation, which contained, among other things, Respondent's

admission that the allegations set forth in paragraphs 5 through 8 of the Notice's Statement of Facts were true.

The final hearing in this case was held, as noted above, on October 16, 2006.² Five witnesses testified at the hearing: Respondent, Oliver Ashley, Leonard Walencikowski,³ Charlene Burks, and Lucy Iturrey. In addition, 27 exhibits (Petitioner's Exhibits 1 through 22 and 24, and Respondent's Exhibits 1 through 4) were offered and received into evidence. At the close of the evidentiary portion of the hearing on October 16, 2006, the undersigned established a deadline (30 days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The Transcript of the final hearing (which consists of one volume) was filed with DOAH on January 11, 2007.

On February 13, 2007, the School Board, on behalf of both parties, filed a motion requesting an extension of the deadline for filing proposed recommended orders. The motion was granted later that same day.

The School Board and Respondent both filed their Proposed Recommended Orders on February 21, 2007.

FINDINGS OF FACT

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

1. The School Board is responsible for the operation, control and supervision of all public schools (grades K through 12) in Miami-Dade County, Florida (including, among others, Miami Palmetto Senior High School (Palmetto) and Myrtle Grove Elementary School (Myrtle Grove)) and for otherwise providing public instruction to school-aged children in the county.

2. At all times material to the instant case, Palmetto was the site from where William McCoogle, Ph.D., a physical education teacher and basketball coach at the school, operated his own privately-run continuing education enterprise, Moving on Toward Education and Training (M.O.T.E.T.), which offered courses, including physical education courses, for which teachers could receive college credit.

3. Respondent has been employed by the School Board as a physical education teacher since August 1979, when he was hired to teach part-time. He began teaching on a full-time basis in November 1980. Prior to his suspension and the initiation of this termination proceeding, he was assigned to Myrtle Grove, where he had been teaching since 1988.

4. As a School Board employee, Respondent is expected to conduct himself in accordance with School Board rules, including School Board Rules 6Gx13-4A-1.21 and 6Gx13-1.213.

5. At all times material to the instant case, School Board Rule 6Gx13-4A-1.21I has provided as follows:

Permanent Personnel

RESPONSIBILITIES AND DUTIES

I. Employee Conduct

All persons employed by The School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

Unseemly conduct or the use of abusive and/or profane language in the presence of students is expressly prohibited.

6. At all times material to the instant case, School Board Rule 6Gx13-4A-1.213 has provided, in pertinent part, as follows:

Permanent Personnel

CODE OF ETHICS

I. INTRODUCTION

All . . . teachers . . . , because of their dual roles as public servants and educators are to be bound by the following Code of Ethics. Adherence to the Code of Ethics will create an environment of honesty and integrity and will aid in achieving the common mission of providing a safe and high quality education to all Miami-Dade County Public School students.

As stated in the Code of Ethics of the Education Profession in Florida (State Board of Education Rule 6B-1.001):

1. The educator values . . . the pursuit of truth

2. The educator . . . will seek to exercise the best professional judgment and integrity.

3. Aware of the importance of maintaining the respect and confidence of one's colleagues, students, parents, and other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

* * *

II. APPLICATION

This Code of Ethics applies to all . . . teachers

Employees are subject to various other laws, rules, and regulations, including but not limited to "The Code of Ethics for the Education Profession in Florida and the Principles of Professional Conduct of the Education Profession in Florida," Chapter 6B-1.001 and 1.006, F.A.C., . . . which are incorporated herein by reference and this Code of Ethics should be viewed as additive to these laws, rules and regulations. . . .

III. FUNDAMENTAL PRINCIPLES

The fundamental principles upon which this Code of Ethics is predicated are as follows:

* * *

- Honesty - Dealing truthfully with people, being sincere, not deceiving them nor stealing from them, not cheating nor lying.

- Integrity - Standing up for your beliefs about what is right and what is wrong and resisting social pressure to do wrong.

* * *

- Responsibility - Thinking before you act
and being accountable for your
actions

Each employee agrees and pledges:

1. To abide by this Code of Ethics, making
the well-being of the students and the
honest performance of professional duties
core guiding principles.

2. To obey local, state and national laws,
codes and regulations.

* * *

5. To take responsibility and be
accountable for his or her actions.

* * *

7. As an instructional employee of the School Board,
Respondent is a member of a collective bargaining unit
represented by the United Teachers of Dade (UTD) and covered by
a collective bargaining agreement between the School Board and
UTD (UTD Contract).

8. Article V of the UTD Contract addresses the subject of
"[e]mployer [r]ights."

9. Section 1 of Article V provides, in part, that the
School Board has the exclusive right to suspend, dismiss or
terminate bargaining unit employees "for just cause."

10. Article XXI of the UTD Contract addresses the subject
of "[e]mployee [r]ights and [d]ue [p]rocess."

11. Section 2 of Article XXI provides, in part, that "[d]ismissals and suspensions shall be effected in accordance with applicable Florida Statutes, including the Administrative Procedures Act (APA)"

12. Respondent "first heard of Dr. McCoogle" at a physical education workshop when colleagues mentioned that Dr. McCoogle "taught out-reach independent [college credit physical education] courses" on weekends at Palmetto (a time and location that were "convenient for [Respondent]").

13. Some time after the workshop, while at Palmetto to referee a basketball game, Respondent introduced himself to Dr. McCoogle, who gave Respondent his M.O.T.E.T. business card.

14. In or about November 2002, Respondent decided that he wanted to take the six credit hours of college coursework in physical education that he needed to renew his teaching certificate. It was two years before he was due to be recertified, but he wanted to "take the courses early."

15. Having had spoken to "numerous . . . people" who had recommended "taking [recertification] courses through [Dr.] McCoogle" at Palmetto, Respondent contacted Dr. McCoogle by telephone to express his interest in pursuing such coursework.

16. In accordance with the instructions that he had been given by Dr. McCoogle during their telephone conversation, the

Saturday "right before Thanksgiving" Respondent went to Palmetto to sign up for the courses he needed to take to be recertified.

17. When he arrived at the school, there were "numerous . . . people" waiting to speak individually with Dr. McCoogle. Respondent recognized some of the people there as School Board instructional employees. One such person was Oliver Ashley, who has been employed by the School Board as a teacher for the past 33 years.

18. After waiting his turn, Respondent "went up to see Dr. McCoogle." He told Dr. McCoogle that he needed six credit hours of coursework. Dr. McCoogle then advised Respondent to register for two three-credit physical education courses offered by Eastern Oklahoma State College⁴ through M.O.T.E.T.: Psychology of Sports I (Course Number 2803) and Organization and Administration of Physical Education (Course Number 2823). Respondent thereupon filled out the paperwork to register for these two courses (with the assistance of a woman whom Respondent had been told was Dr. McCoogle's wife). After completing the paperwork, he gave the woman a "down payment" on the registration fee. He was told that Dr. McCoogle would let him know at a later date when classes were going to start.

19. Mr. Ashley registered for the same two courses that Respondent did.

20. There were three other students (aside from Respondent and Mr. Ashley) enrolled in each of these two courses.

21. Leonard Walencikowski was one of the three other students enrolled in Course Number 2803 along with Respondent and Mr. Ashley.

22. "Right after the Thanksgiving break," Respondent received a telephone call from Dr. McCoogle, who told him that classes were "getting ready to start on that Saturday" at Palmetto and that he should be there at 8:00 a.m.

23. Respondent reported to Palmetto at 8:00 a.m. the following Saturday. Upon his arrival, he again observed "numerous . . . people" waiting to speak individually with Dr. McCoogle. When Respondent's turn came, Dr. McCoogle told him that he could either take the courses he signed up for online or by attending, in person, classes taught by Dr. McCoogle at Palmetto from 8:00 a.m. to 1:00 p.m. on Saturdays. Respondent indicated that he preferred the latter course delivery method. (He selected this option because he had "no computer knowledge.") Dr. McCoogle then briefly described for Respondent what the course requirements were for the two courses Respondent was taking. This was followed by an "hour or so" discussion between Dr. McCoogle and Respondent about coaching and refereeing. Following this discussion, Respondent departed.

24. Respondent attended all of the required Saturday classes for the two courses in which he was enrolled.

25. Students received individual instruction from Dr. McCoogle in these classes. Each student went up to the front of the classroom to meet with Dr. McCoogle individually, while the other students remained "in the audience."

26. During each 8:00 a.m. to 1:00 p.m. class session, Respondent met individually with Dr. McCoogle on two separate occasions: once to discuss matters relating to Course Number 2803 and again to discuss matters relating to Course Number 2823.

27. In addition to attending class and engaging in course-relevant "one-on-one discussions" with Dr. McCoogle, Respondent completed all of the assignments that were given for the two courses.

28. For Course Number 2803, Respondent wrote a term paper on "why every coach should be a referee and every referee should be a coach."

29. For Course Number 2823, Respondent prepared lesson plans and demonstrated in class, by oral presentation, his knowledge of the proper procedures to be followed in developing a lesson plan. He also simulated teaching a lesson on softball and "produce[d] a [written] test" on the material covered in the lesson.

30. After he had successfully completed Course Numbers 2803 and 2823 (by doing everything Dr. McCoogle had asked of him⁵), Respondent went to Palmetto to pay Dr. McCoogle the balance of the registration fee he owed. Upon Respondent's doing so, Dr. McCoogle gave him a sealed envelope containing an official transcript from Eastern Oklahoma State College reflecting the grades he had received in the two courses he had taken through M.O.T.E.T.: a "B" in Course Number 2803 and an "A" in Course Number 2823. The transcript indicated that these were "adult continuing education" courses. Dr. McCoogle told Respondent to take the envelope to the School Board's certification office and submit it, along with a completed application for renewal of his teaching certificate and a \$56.00 application fee, for transmission to the state Department of Education. Respondent believed that he was eligible to receive the recertification for which he was applying. Because "so many others [had taken] classes through [Dr. McCoogle]," Respondent did not have "any suspicions that the courses [he had taken from Dr. McCoogle] at Palmetto⁶ were not legitimate."

31. Respondent ultimately obtained his recertification from the state Department of Education.

32. A criminal investigation of Dr. McCoogle and his M.O.T.E.T. program led the School Board police to investigate the following allegation against Respondent:

It is alleged that Mr. Michael Spivey, Teacher, Miami-Dade County Public Schools (MDCPS), fraudulently obtained credit(s) from Eastern Oklahoma State College (EOSC) through the intricate and unlawful enterprise of Moving on [T]oward Education and Training, Inc. (MOTET), under the auspices of Mr. William McCoogle. In essence, the employee paid to obtain academic credit(s) for the purpose of certification, re-certification, and/or endorsements without availing himself of actual academic class time, work, or effort.

33. This allegation was "substantiated" by the School Board police following its investigation.

34. As part of its investigation, the School Board police interviewed Respondent and asked him, among other things, "if he had any records or any copies of any classwork or test results from [the] courses [he had taken from Dr. McCoogle]." Respondent responded that he had "turned in" all his work to Dr. McCoogle and "did not have any copies in his possession."

35. Following the School Board police investigation, the matter was referred to the School Board's Office of Professional Standards.

36. On February 23, 2006, Lucy Iturrey of the School Board's Office of Professional Standards, along with two other School Board administrators, conducted a conference-for-the-record (CFR) with Respondent and his UTD representatives to address the allegation against him that had been "substantiated" by the School Board police. At the CFR, Respondent, through his

UTD representatives, indicated that, during the School Board police investigation, he had told the police that "he had turned in all of his classwork and did not have any copies in his possession."

37. The School Board's Superintendent of Schools recommended to the School Board that it suspend Respondent and initiate termination proceedings against him "based on the allegation that he fraudulently obtained and utilized credit(s) from Eastern Oklahoma State College through Moving On Toward Education and Training, Inc. (MOTET)."

38. The School Board took such action at its March 15, 2006, meeting.

39. Sometime after the School Board had acted, Respondent, while going through the many documents he had amassed over his years with School Board, discovered two lesson plans and a test that he had prepared for Course Number 2823, items he had not realized were in his possession.

40. He ultimately gave these documents to his attorney, and they were offered and received into evidence at the final hearing in this case (as Respondent's Exhibits 1 through 3).

CONCLUSIONS OF LAW

41. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

42. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat.

43. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See §§ 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat.

44. The latter statutory provision, Section 1012.23(1), Florida Statutes, grants district school boards the authority to "adopt rules governing personnel matters."

45. The "rules governing personnel matters" that have been adopted by the School Board include School Board Rules 6Gx13-1.213 (which prescribes a "Code of Ethics" for School Board personnel) and 6Gx13-4A-1.21 (dealing with "[r]esponsibilities and [d]uties").

46. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons," provided it exercises

these powers in a manner that is consistent with the requirements of law. § 447.209, Fla. Stat.

47. Each district school board employee serving in an instructional capacity must possess an appropriate teaching certificate issued by the Florida Department of Education. See Bush v. Holmes, 919 So. 2d 392, 410 (Fla. 2006)("[P]ublic school teachers must be certified by the state."); and § 1012.55(1), Fla. Stat. ("Each person employed or occupying a position as school supervisor, school principal, teacher, library media specialist, school counselor, athletic coach, or other position in which the employee serves in an instructional capacity, in any public school of any district of this state shall hold the certificate required by law and by rules of the State Board of Education in fulfilling the requirements of the law for the type of service rendered."). There are four types of teaching certificates: "the professional certificate, the nonrenewable professional certificate, the temporary certificate, and the athletic coaching certificate." Fla. Admin. Code R. 6A-4.002(1). "The professional certificate is the highest type of full-time certificate issued." Fla. Admin. Code R. 6A-4.004(2).

48. The state Department of Education has been delegated the authority to "designate the certification subject areas." § 1001.03, Fla. Stat. Among the certification areas that the Department of Education has designated is physical education

(grades K-12). See Fla. Admin. Code R. 6A-4.0283 (which, effective July 1, 2003, "supersede[d]" the provisions of Fla. Admin. Code R. 6A-4.028, which had provided for "Certification in Physical Education (Grades K-8) and Physical Education (Grades 6-12)").

49. Once issued, a professional certificate must be renewed every five years. See § 1012.56(6)(a), Fla. Stat.; and Fla. Admin. Code R. 6A-4.0051(3)(c).

50. Florida Administrative Code Rule 6A-4.0051 provides that a professional certificate may be renewed if the certificate holder "[c]ompletes six (6) semester hours of college credit . . . earned at an accredited or approved institution or community or junior college as specified in Rule 6A-4.003, F.A.C.," provided that, for "each course used for the renewal of [the] certificate," a "grade of at least 'C' or the equivalent," or a "grade of pass," is "earned." The "college credit" that may be used for certificate renewal purposes is further described in Florida Administrative Code Rule 6A-4.002(3), which provides as follows:

College credit. College credit used for educator certification purposes shall be undergraduate or graduate credit earned at an accredited or approved institution as specified in Rule 6A-4.003, F.A.C. All college credit shall be computed by semester hours. One (1) quarter hour of college credit shall equal two-thirds (2/3) of one (1) semester hour. Community and junior

college credit used for educator certification purposes shall parallel those of the first and second years of course work at an accredited or approved institution and shall be comparable to courses offered at Florida community and junior colleges which have been approved by the Florida Department of Education.

51. Florida Administrative Code Rule 6A-4.003(1) describes those "accredited" institutions referred to in Florida Administrative Code Rules 6A-4.002(3) and 6A-4.0051. It provides as follows:

Accredited institutions. Degrees and credits awarded by an institution of higher learning accredited by one (1) of the accrediting associations listed below shall be acceptable for educator certification purposes.

(a) Regional accrediting associations. The regional accrediting associations are as follows:

1. The Southern Association of Colleges and Schools,
2. The Middle States Association of Colleges and Secondary Schools,
3. The New England Association of Colleges and Secondary Schools,
4. The North Central Association of Colleges and Secondary Schools,
5. The Northwest Association of Secondary and Higher Schools, and
6. The Western Association of Colleges and Schools.

(b) Accrediting agencies approved by the United States Department of Education.

52. Florida Administrative Code Rule 6A-4.003(2) describes those "approved" institutions referred to in Florida Administrative Code Rules 6A-4.002(3) and 6A-4.0051. It provides as follows:

Nonaccredited approved institutions. A non-accredited approved institution of higher learning shall be identified as having a quality program resulting in a bachelor's or higher degree by one (1) of the following criteria:

(a) The institution is accepted for certification purposes by the state department of education where the institution is located,

(b) The institution holds a certificate of exemption pursuant to Section 1005.06, Florida Statutes,

(c) The institution is a newly created Florida public college or university that offers a bachelor's or higher degree program,

(d) The institution is located outside the United States and awards a degree that is the equivalent to a bachelor's or higher degree awarded by an accredited or approved institution in the United States. Isolated credit will be acceptable for certification purposes provided the credit is the equivalent of college credit earned in the United States, or

(e) The degree from the institution was accepted by an accredited or approved institution either in transfer or as a basis for admission into the graduate program which resulted in the conferral of a higher

degree. An applicant who holds a valid standard educator's certificate issued by a state other than Florida which may be used to satisfy the eligibility requirements for a professional certificate as described in Sections 1012.56(1) and (2), Florida Statutes, or to demonstrate mastery of subject matter knowledge as in Section 1012.56(4), Florida Statutes, is considered to have met the requirements of this rule.^[7]

53. At all times material to the instant case, district school boards have had the right, under Section 1012.33(4), Florida Statutes, to dismiss continuing contract teachers "based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude, as these terms are defined by rule of the State Board of Education."

54. At all times material to the instant case, "immorality" and "misconduct in office" have been defined by rule of the State Board of Education (specifically Florida Administrative Code Rule 6B-4.009, "Criteria for Suspension and Dismissal") as follows:

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-

1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

55. The Code of Ethics of the Education Profession (set forth in Florida Administrative Code Rule 6B-1.001), at all times material to the instant case, has provided as follows:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

56. The Principles of Professional Conduct for the Education Profession in Florida (set forth in Florida Administrative Code Rule 6B-1.006), at all times material to the instant case, have required a teacher to, among other things, "not intentionally distort or misrepresent facts concerning an

educational matter in direct or indirect public expression"; to "maintain honesty in all professional dealings"; to "not misrepresent one's own professional qualifications"; and to "not submit fraudulent information on any document in connection with professional activities."

57. "Immorality" and "misconduct in office" may be established, even in the absence of "specific" or "independent" evidence of impairment, where the conduct engaged in by the teacher is of such a nature that it "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands County School Board, 752 So. 2d 127, 128-29 (Fla. 2d DCA 2000); Summers v. School Board of Marion County, 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995); Brevard County School Board v. Jones, No. 06-1033, 2006 Fla. Div. Adm. Hear. LEXIS 287 *17 (Fla. DOAH June 30, 2006)(Recommended Order)("[T]he need to demonstrate 'impaired effectiveness' is not necessary in instances where the misconduct by a teacher speaks for itself, or it can be inferred from the conduct in question."); and Miami-Dade County School Board v. Lefkowitz, No. 03-0186, 2003 Fla. Div. Adm. Hear. LEXIS 675 *23-24 (Fla. DOAH July 31, 2003)(Recommended Order)("The School Board failed

to prove by a preponderance of the direct evidence that Mr. Lefkowitz's actions were so serious that they impaired his effectiveness as a teacher. Nonetheless, based on the findings of fact herein, it may be inferred that Mr. Lefkowitz's conduct impaired his effectiveness as a teacher in the Miami-Dade County public school system.")(citation omitted). A teacher's engaging in deceitful or dishonest conduct to obtain or renew a teaching certificate is an example of such conduct that "speaks for itself." See Broward County School Board v. Sapp, No. 01-3803, 2002 Fla. Div. Adm. Hear. LEXIS 1574 *16 (Fla. DOAH September 24, 2002)(Recommended Order)("[A]s a teacher and coach, Sapp was required to be a role model for his students. To be effective in this position of trust and confidence, he needed to maintain a high degree of trustworthiness, honesty, judgment, and discretion.").

58. "Under Florida law, a [district] school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."⁸ Sublett, 617 So. 2d at 377.

59. The teacher must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify

the [statute,] rule, [regulation, or policy] the [district school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring).

60. The teacher may be suspended without pay pending the outcome of the termination proceeding; "but, if the charges are not sustained, [the teacher] shall be immediately reinstated, and his or her back salary shall be paid." § 1012.33(4)(c), Fla. Stat.

61. At the termination hearing, the burden is on the district school board to prove the allegations contained in the notice. Unless there is a collective bargaining agreement covering the bargaining unit of which the teacher is a member that provides otherwise⁹ (and there is not such a collective bargaining agreement controlling the instant case), the district school board's proof need only meet the preponderance of the evidence standard. See McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal."); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We agree with the hearing officer that for the School Board to demonstrate just cause for termination, it

must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true"); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not involve the loss of a license and, therefore, Allen's losses are adequately protected by the preponderance of the evidence standard."); and Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence to support both charges by a preponderance of the evidence standard.").

62. In determining whether the district school board has met its burden of proof, it is necessary to evaluate the district school board's evidentiary presentation in light of the specific allegation(s) made in the written notice of charges. Due process prohibits a district school board from terminating a continuing contract teacher based on matters not specifically alleged in the notice of charges, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824

So. 2d 208, 210 (Fla. 4th DCA 2002); and Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

63. In the instant case, the School Board has alleged in its Notice that "just cause" exists to terminate Respondent's employment as a continuing contract teacher with the School Board because he "paid for and received transcripts for college credit from Eastern Oklahoma State College and submitted those transcripts to the District for the purpose of receiving or renewing a teaching certificate" "without engaging in any academic effort." According to the Notice, by engaging in this conduct, Respondent violated School Board Rule 6Gx13-4A-1.21 (Count I); demonstrated a lack of the "good moral character" required by Section 1012.32(1), Florida Statutes, which provides, in pertinent part, that, "to be eligible for appointment in any position in any district school system, a person shall be of good moral character" (Count II); violated School Board Rule 6Gx13-1.213 (Count III); and was guilty of "misconduct in office" (Count IV).

64. The preponderance of the record evidence does not support these allegations of wrongdoing.

65. Central to the School Board's case against Respondent is its allegation that the Eastern Oklahoma State College credits Respondent used to renew his teaching certificate were

obtained "without [his having] engag[ed] in any academic effort."

66. In the testimony he gave at the final hearing, Respondent denied this allegation and described his "academic effort" in the two courses for which he received these credits.

67. Oliver Ashley was the only other person with personal knowledge of what students in these courses did to earn credits to testify at the final hearing about the matter.¹⁰ Although he was called to the stand by the School Board, Mr. Ashley's testimony undermined, rather than supported, the School Board's case. Mr. Ashley testified that, as a student in these courses, he "did various types of lesson plans," made "in-class presentations . . . on some the lesson plans [he] did," and "did a paper." Mr. Ashley may not have corroborated everything Respondent testified to regarding what "academic effort" he (Respondent) made in these courses, but Mr. Ashley's testimony nonetheless (like Respondent's) unequivocally refuted the factual premise underlying the School Board's prosecution of Respondent--that being that Respondent put forth no "academic effort" whatsoever.

68. The School Board did present evidence of what Dr. McCoogle and others who did not testify at hearing had reportedly said during investigative interviews about the lack of "academic effort going on" in the courses Dr. McCoogle

offered on behalf of Eastern Oklahoma State College. This hearsay testimony, however, even assuming that it would be admissible over objection in a civil proceeding and therefore legally sufficient to support a finding of fact in this administrative proceeding,¹¹ is not sufficiently persuasive to outweigh the combined effect of the credible testimony to the contrary given by Respondent and Mr. Ashley, both of whom, unlike Dr. McCoogle and the other hearsay declarants, testified under oath before the undersigned (who therefore was able to observe their demeanor) and were subjected to cross-examination.

69. Not having established by a preponderance of the evidence the underlying factual premise upon which the allegations of wrongdoing made in the Notice are based (to wit: that Respondent engaged in no "academic effort" to earn the credits reflected on the official Eastern Oklahoma State College transcript he submitted as part of the recertification application process), the School Board must immediately reinstate Respondent with back pay, in accordance with Section 1012.33(4)(c), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the School Board issue a final order dismissing the charges against Respondent and reinstating him with back pay.

DONE AND ENTERED this 28th day of February, 2007, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2007.

ENDNOTES

¹ Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2006).

² The hearing was originally scheduled to commence on July 17, 2006, but was continued (for good cause) at Respondent's request.

³ Mr. Walencikowski was called to testify by the School Board. After stating his name and testifying that he had been a School Board employee from 1968 until June 3, 2005, he refused to answer any additional questions on Fifth Amendment grounds. The School Board did not seek to have Mr. Walencikowski directed to answer the questions it posed.

⁴ This was "the first [Respondent] had heard" of Eastern Oklahoma State College.

⁵ What, if any, minimum course requirements Eastern Oklahoma State College (as opposed to Dr. McCoogle) had established for Course Numbers 2803 and 2823, the evidentiary record does not establish.

⁶ That Dr. McCoogle operated his courses on School Board property added to their appearance of legitimacy.

⁷ Inasmuch as Respondent's application for recertification was granted, it would appear that the Department of Education, in evaluating the application, determined that Eastern Oklahoma State College was either an "accredited institution" or a "nonaccredited approved institution," as described in Florida Administrative Code Rule 6A-4.003. The record is devoid of any evidence that this determination made by the Department of Education was erroneous.

⁸ "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

⁹ Where the district school board, through the collective bargaining process, has agreed to bear a more demanding standard, it must honor, and act in accordance with, its agreement. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment"); and Palm Beach County School Board v. Auerbach, No. 96-3683, 1997 Fla. Div. Adm. Hear. LEXIS 5185 *13-14 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . . However, in this case, the district must comply with the terms of the collective bargaining agreement, which, as found in

paragraph 27, above, requires the more stringent standard of proof: clear and convincing evidence.").

¹⁰ See endnote 3 above regarding Respondent's and Mr. Ashley's classmate in Course Number 2803, Leonard Walencikowski.

¹¹ See § 120.57(1)(c), Fla. Stat. ("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.").

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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.