

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN L. WINN, AS COMMISSIONER)
OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 06-1620PL
)
ADELA POPESCU,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on June 15, 2006, by video teleconference with sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
Whitelock & Associates, P.A.
300 Southeast 13th Street
Fort Lauderdale, Florida 33316

For Respondent: Mary F. Aspros, Esquire
Meyer and Brooks, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue presented is whether Respondent is guilty of the allegations in the Amended Administrative Complaint filed

against her, and, if so, what disciplinary action should be taken against her, if any.

PRELIMINARY STATEMENT

Petitioner John L. Winn, as Commissioner of Education, filed an Amended Administrative Complaint against Respondent Adela Popescu, alleging that she had violated various statutory and rule provisions regulating her conduct as a teacher in the State of Florida. Respondent timely requested an administrative hearing regarding the allegations in the Amended Administrative Complaint, and this cause was transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

Petitioner presented the testimony of Varonda Stone-Lardge, Willa Wolcott, Elizabeth Novinger, Michael Jones, and Cornelia Orr. Respondent did not testify but presented the testimony of Julie Arnold. Additionally, Petitioner's Exhibits numbered 2-13 and 15-20 were admitted in evidence.

Following the conclusion of the hearing, both parties submitted proposed recommended orders. Those proposed orders have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. Respondent Adela Popescu holds Florida Educator's Certificate 876674 covering the area of mathematics, which was valid through June 30, 2006. She was employed by the Broward County School District as a math teacher.

2. The Florida Teacher Certification Examination ("FTCE") is a statewide examination. It is given four times a year at multiple locations. The Department of Education contracts with the Institute of Instructional Research and Practice of the University of South Florida to administer the examination, and the Institute contracts with persons to serve as room proctors and to grade the essay part of the general knowledge portion of the examination. The general knowledge portion of the examination is a basic skills test.

3. Respondent applied to take the general knowledge portion of the test on April 16, 2005. That portion required the examinees to write a short essay on a choice of topics.

4. The Department provided to Respondent, along with her admission card allowing her to take the examination, the Department's written guidelines prohibiting cheating on the examination and itemizing some activities considered cheating following the words "including but not limited to."

5. Respondent took the essay portion of the general knowledge examination on April 16, 2005. At the beginning of the examination, the examinees were given written instructions. The instructions specifically provided: "You will have 50 minutes to plan, write, and proofread an ORIGINAL essay on one of the two topics presented below." Two topics were presented and then the following sentence provided: "Read the two topics

again and select the one on which you wish to write your ORIGINAL essay." The word "original" was in capital letters in both sentences.

6. In addition to the written instructions, the room supervisor for the test read the following instructions to the group of examinees:

You must write an original essay that specifically and directly responds to the topic you select. Pre-prepared essays that are discovered to contain memorized sentences or passages will be marked accordingly. For example, if the essay raters discover passages that appear in two or more essays, the essays will be brought to the attention of the Florida Department of Education.

7. The above-quoted language was read three times in succession in order to emphasize the need to write an original essay. Therefore, the requirement that the essay be original was presented to the examinees two times in writing and three times verbally, for a total of five times.

8. There was no minimum or maximum length to the essay. The topics given required no particular level of knowledge of anything; rather, the topics were akin to asking an elementary school student to write an essay on what the child did during the summer vacation. It is surprising to find such a basic task on an examination given to college graduates, but at hearing the Department presented testimony to the effect that it is only

trying to ascertain if the examinee can communicate extemporaneously, i.e., whether he or she is capable of writing a note to a student's parents.

9. The five-paragraph-long essay that Respondent turned in as her original work is virtually identical to an essay the Department has seen so many times that Department staff refer to it as "the lush green hills essay." Admitted in evidence were the essays of three examinees who took the exam prior to Respondent and two examinees who took the exam on the same date. The primary differences in the essays arise from inferior skills in the English language so, for example, one examinee wrote "the lunch green hills," Respondent wrote "the lash green hills," one examinee apparently forgot that the green hills were "lush," and one examinee apparently thought there was only one hill. Otherwise, there are few differences in the essays.

10. Respondent's essay was flagged by the essay readers, referred to the chief reader, and then forwarded to the Department. The Department agreed with the determination that the essay was not "original," that Respondent had cheated on the examination, and that her essay should be declared invalid. The Department so advised Respondent by letter dated May 16, 2005.

11. In addition to advising Respondent that her score on the essay subtest of the general knowledge examination was invalid, the Department also advised Respondent that she had a

right to an administrative hearing on that determination. Respondent did request an administrative hearing, and the case was transferred to the Division of Administrative Hearings and assigned Case No. 05-2318. Before the final hearing in that case, Respondent filed a Notice of Voluntary Dismissal of her request for a hearing.

12. There is a dearth of evidence in the record in this cause as to how or when Respondent was issued a Florida Educator's Certificate. However, the parties have stipulated that she was licensed, with her license expiring June 30, 2006. Prior to that date, the Commissioner of Education issued the Amended Administrative Complaint which is the subject of this proceeding.

13. There is no evidence as to how Respondent plagiarized someone else's work: whether she brought it into the examination, whether she memorized it, or whether she obtained it through the use of technology. The method she used to cheat, however, is irrelevant since she represented someone else's work as her own and admits it was not an original essay.

14. Shortly before the final hearing in this cause, the parties filed a number of motions typically designed to resolve a case without the need for a hearing. Petitioner argued that jurisdiction over this matter should be relinquished since by Respondent's admission that she did not turn in an original

essay, which constituted cheating, there were no longer genuine issues of material fact. In opposition to that motion, Respondent asserted that Petitioner was relying on two policies which were required to be promulgated as rules but were not, thereby preventing Petitioner from taking disciplinary action against Respondent.

15. Respondent alleges that the two unpromulgated rules upon which Petitioner relies are the definition of cheating, which appeared in the materials allowing Respondent admission to the examination, and the examination instructions, which required that an original essay be submitted and which were provided to Respondent twice in writing and three times verbally. Respondent did not raise these issues in her administrative challenge to the Department of Education's decision to declare her essay to be invalid, which would have been the appropriate proceeding since the question of whether she should be given a score for her essay or whether it should be declared invalid was the subject matter of that proceeding, not this proceeding.

16. The two challenged policies, the definition of cheating and the essay instructions, are not rules and, therefore, need not be promulgated pursuant to Section 120.54, Florida Statutes. Further, neither the definition of cheating

nor the essay instruction is vague, and neither vests unbridled discretion in anyone.

17. The words "cheating" and "original" are not statutory terms, requiring interpretation. Further, they are not specialized terms unique to the Commissioner of Education or the Department of Education. They are words of common usage.

18. Copying someone else's work and representing it to be one's own is a willful and intentional act. It is also unethical and dishonest to plagiarize.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

20. The Amended Administrative Complaint filed against Respondent contains seven Counts. Petitioner bears the burden of proving the allegations in the Amended Administrative Complaint by clear and convincing evidence since the document seeks disciplinary action against Respondent up to and including suspension or revocation of her teaching certificate. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

21. Count 1 charges Respondent with violating Section 1012.795(1)(a), Florida Statutes, which prohibits obtaining or attempting to obtain an educator certificate by fraudulent means. The Amended Administrative Complaint does not allege

that she attempted to obtain but only that she obtained her teaching certificate by fraudulent means. Since there is no evidence as to when Respondent obtained her teaching certificate, Petitioner has failed to prove that Respondent violated that statutory provision. If she had her teaching certificate before she cheated on the examination, there is no evidence that she obtained it by fraudulent means. If she obtained her teaching certificate after she was caught cheating, again there is no evidence that she obtained it by fraudulent means since her cheating was known by the Department of Education right after it occurred.

22. Count 2 alleges that Respondent violated Section 1012.795(1)(c), Florida Statutes, in that she has been guilty of gross immorality or an act involving moral turpitude. The statute does not define those terms. However, Rule 6B-4.009, Florida Administrative Code, which contains definitions for use by school districts in disciplining instructional staff, provides assistance.

23. Florida Administrative Code Rule 6B-4.009(2), provides a definition of "immorality," albeit not gross immorality, as ". . . conduct that is inconsistent with the standards of public conscience and good morals." Cheating on a certification examination, like plagiarism, is inconsistent with the standards of public conscience and good morals.

24. "Gross immorality" has been determined to mean an act of misconduct that is serious, rather than minor in nature; it is a flagrant disregard of proper moral standards. Education Practices Commission v. Knox, 3 F.A.L.R. 1373-A (Dept. of Education 1981).

25. Florida Administrative Code Rule 6B-4.009(6), defines moral turpitude as:

. . . 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.

As leaders and role models in the community, teachers are held to a high moral standard. Adams v. Professional Practices Council, 46 So. 2d 1170 (Fla. 1st DCA 1981). As a teacher, it is not necessary that Respondent be charged with or convicted of a crime to be disciplined for conduct reflecting gross immorality or moral turpitude. Walton v. Turlington, 444 So. 2d 1082 (Fla. 1st DCA 1984).

26. Respondent's duties as a teacher include evaluating her students by testing their knowledge. Her apparent belief that cheating or plagiarizing is acceptable conduct cannot be permitted to be taught to her students. The public has a right to rely on the placement of only honest persons in charge of

teaching the community's youth. Petitioner has proven Respondent guilty of gross immorality and an act involving moral turpitude since she, as a teacher, submitted someone else's work as her own as part of her examination for certification.

27. Count 3 of the Amended Administrative Complaint alleges that Respondent has violated Section 1012.795(1)(i), Florida Statutes, by violating the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules. Those Principles are found in Florida Administrative Code Rule 6B-1.006. Petitioner has proven Respondent guilty as alleged in Count 3 as set forth below in the discussion of Counts 6 and 7.

28. Count 4 alleges that Respondent has violated Section 1008.24(1), Florida Statutes, in that she knowingly and willfully violated test security rules adopted by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants for certification. The only evidence offered by Respondent in this proceeding was a witness, alleged to be a character witness, who speculated, with no first-hand knowledge, as to different scenarios that might have happened during Respondent's essay examination. This purported character witness also tried to excuse Respondent's cheating by reasoning that since Respondent

was a math teacher, cheating only mattered if Respondent was taking a math examination and that it was acceptable for Respondent to cheat on, for example, an English examination.

29. Respondent did not testify in this proceeding, and Petitioner did not prove whether Respondent brought written material into the examination with her, copied from another examinee, or memorized a "canned" essay and submitted it as her original work. Since the record in this cause fails to show how Respondent cheated, Petitioner has failed to prove Respondent guilty of Count 4.

30. Count 5 alleges that Respondent violated Section 1008.24(1)(f), Florida Statutes, by knowingly and willfully failing to follow test administration directions specified in the test administration manuals. Respondent was advised 5 times, in writing or verbally, that she was to write an original essay during the time allotted to do so. She knew that the essay she wrote was not her original work, and she willfully and intentionally submitted it. Petitioner has proven Respondent guilty of Count 5.

31. Counts 6 and 7 involve the Principles of Professional Conduct for the Education Profession in Florida. Count 6 alleges that Respondent failed to maintain honesty in all professional dealings, as required by Rule 6B-1.006(5)(a). Count 7 alleges that Respondent submitted fraudulent information

on a document in connection with professional activities, as prohibited by Florida Administrative Code Rule 6B-1.006(5)(h). Petitioner has proven Respondent guilty of Counts 6 and 7 of the Amended Administrative Complaint.

32. Respondent's defense to the allegations in the Amended Administrative Complaint is that she can be found guilty of no statutory or rule violation in this proceeding because Petitioner is relying on two unpromulgated rules as the basis for alleging that Respondent violated the statutes and rules with which she has been charged. Respondent is in error.

33. Section 120.52(15), Florida Statutes, provides the following definition:

'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

This proceeding, conducted pursuant to Section 120.57(1), permits the non-agency party to challenge an agency's reliance upon alleged unpromulgated rules on certain statutorily-enumerated grounds. Respondent argues that the two statements she challenges are unadopted rules which cannot be applied to her because they (1) enlarge, modify, or contravene the specific provisions of law implemented, and (2) are vague, fail to

establish adequate standards for agency decisions, or vest unbridled discretion in the agency. § 120.57(1)(e)2.c and d, Fla. Stat.

34. Petitioner responds that the Department is exempt from rulemaking for the challenged statements pursuant to Section 120.81(1)(c), Florida Statutes, which provides:

Notwithstanding s. 120.52(15), any tests, test scoring criteria, or testing procedures relating to student assessment which are developed or administered by the Department of Education pursuant to s. 1003.43, s. 1003.438, s. 1008.22, or s. 1008.25, or any other statewide educational tests required by law, are not rules.

The teacher certification examination is not a student assessment test as provided for in the statutory sections quoted above; those statutes apply to students in the public school system. It is not necessary to reach the question of whether the teacher certification examination, a basic skills exam, is a statewide educational test required by law.

35. Not every agency statement meets the definition of a rule requiring rulemaking pursuant to Section 120.54, Florida Statutes. The disciplinary action sought in this proceeding is based upon the statutes and rules alleged in the Amended Administrative Complaint. For example, those cited statutes and rules prohibit gross immorality and fraudulent documentation regarding professional activities and require honesty in all

professional dealings. The facts alleged in the Amended Administrative Complaint are simply the factual basis for the allegation that Respondent violated certain statutes and rules regulating her conduct as a member of the teaching profession. There is no legal requirement that an agency promulgate rules forbidding every conceivable set of facts which might form the basis for a statutory or rule violation. Environmental Trust, et al. v. Florida Dept. of Environmental Protection, etc., 714 So. 2d 493 (Fla. 1st Dist. 1998).

36. Further, the statements challenged by Respondent are the definition of cheating, with examples thereof, and the requirement that her essay be original. The Department determined that Respondent did not submit an original essay and that she, therefore, had cheated on her examination. The Department declared her score invalid and notified her of her right to challenge that preliminary decision. Respondent did request an administrative hearing on that decision. That request for hearing was assigned DOAH Case No. 05-2318. Respondent's assertion that the definition of cheating and the essay instructions requiring an original essay are unadopted rules were issues to be determined in that prior proceeding regarding whether her score should be invalidated. When Respondent voluntarily dismissed that proceeding, the Department's preliminary decision became final. In addition,

Respondent has admitted in this proceeding that she did not write an original essay, which admission can lead to only one factual conclusion: she plagiarized someone else's work and that is cheating.

37. It is uncertain that the Department or the State Board of Education could promulgate rules defining the word "cheating" or the word "original." These are not statutory terms unique to the Department of Education or the State Board of Education or statutory terms requiring definition. They are common, everyday words understood by children and adults alike. It is unlikely that any agency has been given the statutory responsibility or authority to define those common words. Under Respondent's reasoning, every word in the test instructions would need to be adopted as a rule, including whether the test should be taken in pen or pencil. Respondent's argument defies common sense.

38. Section 1012.56, Florida Statutes, provides the requirements for teacher certification. Subsections (8)(e) and (g) specify that the examination and any developmental materials and work papers are exempt from public records disclosure pursuant to Section 119.07(1), Florida Statutes, and shall be confidential. See also § 119.071(1)(a), Fla. Stat. Accordingly, Petitioner's Exhibits numbered 7-13 are transmitted herewith in a sealed envelope.

39. Although Petitioner's attorney represented during the final hearing that he would include in his proposed recommended order a recommended disciplinary action to be taken against Respondent, he failed to do so. Section 1012.795(1), Florida Statutes, sets forth a range of disciplinary actions which the Education Practices Commission is authorized to take against a teacher who has violated statutes or rules regulating that teacher's conduct. The fact that the record in this cause lacks evidence as to the current status of Respondent's educator's certificate makes determining an appropriate penalty more difficult. The evidence is clear that Respondent held an educator's certificate which, by its terms, expired June 30, 2006. Whether she still possesses a certificate, whether it has been renewed or re-issued, whether the certificate expired, or whether Respondent is currently without a certificate but remains eligible to be re-issued one as a merely ministerial act is unknown.

40. Although the record in this cause makes it difficult to recommend a specific penalty, there is no doubt that a meaningful penalty must be imposed. That penalty should be severe enough that Respondent will understand that dishonest persons should not be classroom teachers. Anything less than a one-year suspension or revocation, whichever is appropriate based upon the status of her certificate, would be insufficient

to communicate to Respondent the severity of her egregious behavior.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding Respondent guilty of Counts 2, 3, and 5-7, as alleged in the Amended Administrative Complaint filed in this cause and suspending or revoking Respondent's educator's certificate for a period of one year.

DONE AND ENTERED this 23rd day of August, 2006, in Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2006.

COPIES FURNISHED:

Kathleen M. Richards, Executive Director
Education Practices Commission
Department of Education
Turlington Building
325 West Gaines Street, Room 224
Tallahassee, Florida 32399-0400

Daniel J. Woodring, General Counsel
Department of Education
Turlington Building
325 West Gaines Street, Room 1224
Tallahassee, Florida 32399-0400

Marian Lambeth, Program Specialist
Bureau of Educator Standards
Department of Education
Turlington Building
325 West Gaines Street, Room 224-E
Tallahassee, Florida 32399-0400

Charles T. Whitelock, Esquire
Whitelock & Associates, P.A.
300 Southeast 13th Street
Fort Lauderdale, Florida 33316

Mary F. Aspros, Esquire
Meyer and Brooks, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32301

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.