STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN L. WINN, AS COMMISSIONER OF EDUCATION, Petitioner, vs. DANIEL W. GARDINER, Respondent.	)	Case No. 08-6171PL

RECOMMENDED ORDER

On March 3, 2009, a duly-noticed hearing was held in Gainesville, Florida, before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Todd Resavage, Esquire
Brooks, LeBoeuf, Bennett,
Foster & Gwartney, P.A.
909 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Daniel Gardiner, pro se
504 Northwest 97th Terrace
Gainesville, Florida 32607

STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are whether the Respondent committed the acts alleged in the Amended Administrative Complaint and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On August 17, 2008, John L. Winn as Commissioner of Education (the Commissioner) filed a seven-count Administrative Complaint against Respondent alleging violations of Section 1012.795, Florida Statutes,[1/] and Florida Administrative Code Rule 6B-1.006. The factual allegations in the Administrative Complaint asserted that Respondent entered a restricted area in a state park to engage in sexual activity, for which he was arrested; that the criminal charges were nolle prossed following Respondent's completion of a pre-trial intervention program; and that when Respondent applied for a Florida Educator's certificate in 2002, he failed to acknowledge his criminal background as required by law. The Administrative Complaint further alleged that during the 2004-2005 year, Respondent repeatedly engaged in inappropriate and unprofessional conduct with students and parents, and that during the pendency of the school district's investigation of this conduct, Respondent repeatedly violated lawful directives issued by superiors concerning his presence on school board property and contacting school board employees.

Respondent filed an Election of Rights form on August 30, 2008, indicating that he disputed the factual allegations in the Administrative Complaint and requested a disputed fact hearing. On December 10, 2009, the matter was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was assigned to the undersigned and on December 19, 2008, a Notice of Hearing was issued scheduling the case to be heard on March 3, 2009. A request for a continuance filed by Petitioner was denied, and the case proceeded as scheduled. On the day before hearing, Respondent filed an Amended Motion for Dismissal, which was denied at the commencement of the hearing. On March 2, 2009, Petitioner also filed a Motion to Amend the Administrative Complaint. The Motion sought to eliminate those factual allegations related to the 2004-2005 school year and Respondent's violation of directives during the investigation of the 2004-2005 school-year conduct, and to allege additional statutory and rule violations with respect to the remaining conduct.

After discussion of the proposed amendment at the commencement of the hearing, Respondent did not object to the amendment of the Administrative Complaint and the Motion to Amend was granted. Respondent was also given the opportunity to have the case continued in light of the amendments, and chose to go forward with the hearing.

Petitioner presented the testimony of Respondent, and presented Petitioner's Exhibits 1-2, which were admitted. Respondent testified on his own behalf and presented no exhibits. The Transcript was filed with the Division on March 24, 2009, and both parties timely filed Proposed Recommended Orders. Both

submissions have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to the allegations in the Amended Administrative Complaint, Respondent held Florida Educator's Certificate 726297, covering the areas of biology and technology education, which was valid through June 30, 2006.[2/]

2. At all times relevant to these proceedings, Respondent was employed as a teacher at Fort Clark Middle School in the Alachua County School District.

3. On or about December 22, 1999, Respondent was given a Citation/Notice to Appear by the Department of Environmental Protection, Division of Law Enforcement, at the Paynes Prairie Preserve, and charged with trespass in a restricted area, a misdemeanor offense. The case was docketed as State of Florida v. Daniel Gardiner, Case No. 99-14490-MMA (Eighth Judicial Circuit, in and for Alachua County, Florida).

4. On March 28, 2000, Respondent entered into an agreement for deferred prosecution of the criminal charge (the Deferred Prosecution Agreement). The Deferred Prosecution Agreement provided in pertinent part:

> It appearing that you have committed offenses(s) against the State of Florida referenced above and it further appearing after an investigation of those offense(s) and your background that the best interests of justice will be served by the following procedures:

On the authority of ROD SMITH as State Attorney for Alachua County, Florida, prosecution in this matter will be deferred for a period of 6 months from the date hereof, and your bond(s), if any, returned now, PROVIDED you agree to do (sic) fully abide by the following terms and conditions during said period:

(1) You shall refrain from violating any federal or state law or county municipal ordinance. If arrested, you shall immediately inform the State Attorney's Office in writing of the charge, and promptly advise in writing of the final disposition of the charge (i.e., dismissed, plea of guilty or not guilty by a judge or jury).

(2) Your execution of this instrument shall constitute a withdrawal of any demand for speedy trial previously filed by you pursuant to Florida Statute 918.015 and Fla.R.Cr.Pr. 3.191, and a stipulation that the periods of time established by said Rule for trial and any other rights conferred upon you by said Rule are waived.

* * *

(5) SPECIAL CONDITIONS, if any:

1. Donate $150.00 to Newberry High School Academy of Criminal Justice Scholarship Fund, ...
2. Perform 24 hours of Community Service . . . .
3. You shall not enter any state parks.

* * *

If you comply with these conditions during the period of deferred prosecution, the charge(s) referred to above will be dismissed.

The period of deferred prosecution may be shortened or terminated early by the State Attorney. . . .

5. Respondent was represented by counsel in connection with the Deferred Prosecution Agreement, and signed a statement acknowledging that he understood the conditions of the Agreement and had received advice from his attorney regarding the matter.

6. On or about July 11, 2000, the Assistant State Attorney entered a nolle proseque/no information with respect to the above-referenced charge, and the charge was dismissed based upon Respondent's completion of the Deferred Prosecution Agreement.

7. Respondent reported his Deferred Prosecution Agreement to the assistant principal of Fort Clark Middle School. He did so because he believed it was required under what he referred to as the educator's Code of Ethics.

8. The Principles of Professional Conduct for the Education Profession are adopted by rule at Florida Administrative Code Rule 6B-1.006, and are in the Chapter referred to as the Code of Ethics of the Education Profession in Florida. The reporting requirement with respect to criminal proceedings provides the following:

> (4) Obligation to the profession of education requires that the individual:
>
> * * *
>
> (m) Shall self-report within forty-eight (48) hours to appropriate authorities (as determined by the district) any arrests/charges involving the abuse of a child or the sale and/or possession of a controlled substance. . . . In addition, shall self-report any conviction, finding of guilt, withholding of adjudication, commitment to a pretrial diversion program,

> or entering a plea of guilty or Nolo Contendre for any criminal offense other than a minor traffic violation with forty-eight (48) hours after the final judgment. . . .

9. On or about January 18, 2002, Respondent submitted an application to the Florida Department of Education to add an additional subject to his certification. The application contained the following question:

> 28. Have you ever been convicted, found guilty, had adjudication withheld, entered a pretrial diversion program, or pled guilty or nolo contendere (no contest) to a criminal offense other than a minor traffic violation (DUI is NOT a minor traffic violation)? Failure to answer this question accurately could cause denial or a certificate.

10. Respondent answered question 28 "no." The text of the rule quoted above that identifies what conduct triggers self-reporting, and the text of the question on the application submitted to the Department, are virtually identical.

11. The application contained the following statement:

> I hereby certify that I subscribe to and will uphold the principles incorporated in the Constitutions of the United States of America and the State of Florida. I understand that Florida Statutes provide for revocation of an Educator's Certificate if evidence and proof are established that the certificate has been obtained by fraudulent means. I further certify that all information pertaining to this application is true, correct, and complete.

12. Respondent signed the application, and his signature is notarized.

13. Respondent did not consult his attorney before signing and submitting the application. His testimony that he did not believe that pretrial intervention encompassed a deferred prosecution agreement is not credible.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

15. This is a penal proceeding in which Petitioner seeks to impose discipline against Respondent's ability to maintain a teaching certificate. Petitioner has the burden to prove the allegations against Respondent by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); § 120.57(1)(j), Fla. Stat. (2008). Clear and convincing evidence is defined as follows:

> 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 in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

16. The Amended Administrative Complaint contains the following factual allegations:

> 3. On or about December 22, 1999, Respondent entered a restricted area in a state park to engage in sexual activity. Respondent was issued a notice to appear on the charge of Trespass in Restricted Area. On or about July 11, 2000, the state attorney's office nolle prossed the case following Respondent's completion of a pre-trial intervention program.
>
> 4. On his application for a Florida Educator's Certificate date January 18, 2002, Applicant failed to acknowledge his criminal background as required by Florida law and in conflict with his sworn statement on the application that all information provided was true, correct and complete in that he failed to acknowledge his 1999 charge.

17. The Commissioner did not demonstrate by clear and convincing evidence that Respondent entered a restricted area in a state park for the purpose of engaging in sexual activity. The only evidence of this allegation is the hearsay statement of the law enforcement officer contained in the narrative of the incident report. This type of hearsay statement, standing alone, is insufficient to support a finding of fact. Scott v. Department of Professional Regulation, 603 So. 2d 519 (Fla. 1st DCA 1992); Harris v. Game and Fresh Water Fish Commission, 495 So. 2d 806 (Fla. 1st DCA 1986).

18. Petitioner did demonstrate by clear and convincing evidence, however, that Respondent was issued a notice to appear on the charge of trespass of a restricted area; that the charges were nolle prossed after successful completion of a pretrial

intervention program; and that Respondent failed to acknowledge the participation in the pretrial intervention program in his application filed with the Department of Education January 18, 2002.

19. Respondent claimed at hearing that he did not understand his participation in the Deferred Prosecution Agreement to be the same as pretrial intervention. His testimony on this issue is not credible. First, Section 948.048, Florida Statutes (2008), authorizes and describes pretrial intervention programs. It provides in pertinent part:

> (2) Any first offender . . . who is charged with any misdemeanor or felony of the third degree is eligible for release to the pretrial intervention program on the approval of the administrator of the program and the consent of the victim, the state attorney, and the judge who presided at the initial appearance hearing of the offender. However, the defendant may not be released to the pretrial intervention program unless, <u>after consultation of his or her attorney, he or she has voluntarily agreed to such program and has knowingly and intelligently waived his or her right to a speedy trial for the period of his or her diversion</u>. . . .
>
> (3) The criminal charges against an offender admitted to the program shall be continued without final disposition for a period of 90 days after the date the offender was released to the program, if the offender's participation in the program is satisfactory, and for an additional 90 days upon the request of the program administrator and consent of the state attorney, if the offender's participation in the program is satisfactory.

> (4) Resumption of pending criminal proceedings shall be undertaken at any time if the program administrator or state attorney finds that the offender is not fulfilling his or her obligations under this plan or if the public interest so requires.
> . . .
>
> (5) At the end of the intervention period, the administrator shall recommend:
> (a) That the case revert to normal channels for prosecution in instances in which the offender's participation in the program has been unsatisfactory;
> (b) That the offender is in need of further supervision; or
> (c) <u>That dismissal of charges without prejudice shall be entered in instances in which prosecution is not deemed necessary.</u>
>
> The state attorney shall make the final determination has to whether the prosecution shall continue.

20. The terms of the Deferred Prosecution Agreement track the requirements of Section 948.08. Respondent was counseled on the requirements of the Deferred Prosecution Agreement, which he signed, and he knew that entry into the Agreement meant that, prior to trial on the criminal charges against him, he was provided an alternative to prosecution.

21. Second, Respondent admitted that he notified the assistant principal at the middle school where he taught that he had entered a Deferred Prosecution Agreement because he thought he was required to do so by the rules governing the conduct of teachers. Like the application, the Rule 6B-1.006 uses the term pretrial diversion program. For Respondent to claim that he did not understand the term to include a deferred prosecution

agreement when he had already self-reported based upon a rule using the same language as the application is not credible.

22. Count I of the Amended Administrative Complaint alleges that Respondent is in violation of Section 1012.795(1)(d), Florida Statutes, which authorizes discipline for being guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education. Immorality and moral turpitude are both defined in Florida Administrative Code Rule 6B-4.009:

> (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.
>
> * * *
>
> (6) Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties; which, according to 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.

23. Petitioner asserts that Respondent engaged in an act of gross immorality by entering into an area of a public park for the purpose of engaging in sexual activity. As stated above, there is no clear and convincing evidence that Respondent trespassed for the purpose of engaging in sexual activity. The evidence only supports the finding that he was given a citation

for trespass in a restricted area. This violation does not rise to the level of gross immorality, or a crime of moral turpitude. Accordingly, Count I of the Amended Administrative Complaint should be dismissed.

24. Count II charges Respondent with violating Section 1012.795(1)(j), Florida Statutes, which prohibits violations of the Principles of Professional Conduct for the Education Profession prescribed by the State Board of Education rules. Violation of the applicable rule provisions are charged in Counts IV and V of the Amended Administrative Complaint. As discussed below, Petitioner has demonstrated violation of the rule provisions alleged. Accordingly, Count II of the Amended Administrative Complaint has been proven by clear and convincing evidence.

25. Count III of the Amended Administrative Complaint charges that Respondent violated Section 1012.795(1)(a), Florida Statutes, by obtaining or attempting to obtain an educator certificate by fraudulent means. No evidence was presented to show whether Respondent actually received the additional subject certification sought by his January 18, 2002, application. However, it is clear that he was seeking an additional area of certification by means of his application.

26. The essential elements of a fraud claim in a civil proceeding are 1) a false statement concerning a material fact, including nondisclosure when a duty exists to disclose; 2) made

with knowledge that the representation (or omission) is false and with the intention of inducing another's reliance on the representation or omission; and 3) consequent injury to the other party acting in reliance on the false representation. Cohen v. Kravit Estate Buyers, Inc., 843 So. 2d 989, 991 (Fla. 4th DCA 2003). In a disciplinary context, there is no need to prove actual injury, because it is the potential for injury or reliance that is sought to be prevented. Major v. Department of Professional Regulation, 531 So. 2d 411 (Fla. 3d DCA 1988); Britt v. Department of Professional Regulation, 492 So. 2d 697 (Fla. 1st DCA 1986), overruled on other grounds, Department of Professional Regulation v. Bernal, 531 So. 2d 967 (Fla. 1988).

27. The Commissioner has demonstrated by clear and convincing evidence that Respondent falsely answered question 28 "no" when he knew he had entered into a pretrial diversion program by virtue of the Deferred Prosecution Agreement, and had previously reported his participation as required by Rule 6B-1.006(5)(m). He made the false statement on an application, which he certified to be true, correct and complete, submitted for the purpose of obtaining certification in an additional teaching area. He clearly intended for the Department to rely on the information furnished. Count III has been demonstrated by clear and convincing evidence.

28. Count IV of the Amended Administrative Complaint alleges that Respondent violated Florida Administrative Code Rule

6B-1.006(5)(a), by failing to maintain honesty in his professional dealings. By showing that Respondent submitted information that he knew to be false in a certification application, the Department has demonstrated a violation of Count IV by clear and convincing evidence. The same fraudulent response also forms a basis for the violation alleged as Count V, by submitting fraudulent information on a document in connection with professional activities, prohibited by Florida Administrative Code Rule 6B-1.006(5)(h).

29. Section 1012.796(7), Florida Statutes, provides the range of lawful penalties for violations of Section 1012.795:

> (7) A panel of the commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:
>
> (a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. . . .
>
> (b) Revocation or suspension of a certificate.
>
> (c) Imposition of an administrative fine not to exceed $2,000 for each count or separate offense.
>
> (d) Placement of the teacher . . . on probation and subject to such conditions as the commission may specify including requiring the certified teacher, administrator, or supervisor to complete additional appropriate college courses or work with another certified educator, with the administrative costs of monitoring the probation assessed to the educator placed on probation. An educator who has been placed on probation shall, at a minimum:

1. Immediately notify the investigative office in the Department of Education upon employment or termination of employment in the state in any public or private position requiring a Florida educator's certificate.
2. Have his or her immediate supervisor submit annual performance reports to the investigative office in the Department of Education.
3. Pay to the commission within the first 6 months of each probation year the administrative costs of monitoring probation assessed to the educator.
4. Violate no law and shall fully comply with all district school board policies, school rules, and State Board of Education rules.
5. Satisfactorily perform his or her assigned duties in a competent, professional manner.
6. Bear all costs of complying with the terms of a final order entered by the commission.

(e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.

(f) Reprimand of the teacher . . . in writing, with a copy to be placed in the certification file of such person.

(g) Imposition of an administrative sanction, upon a person whose teaching certificate has expired, for an act or acts committed while that person possessed a teaching certificate or an expired certificate subject to late renewal, which sanction bars that person from applying for a new certificate for a period of 10 years or less, or permanently.

(h) Refer the teacher, . . . to the recovery network program provided in s. 1012.798 under such terms and conditions as the commission may specify.

30. Petitioner has suggested that an appropriate penalty would be a letter of reprimand in Respondent's file, an administrative fine of $500.00, and a two-year probationary period. Based upon the representations of both parties, Respondent's certification expired in June of 2006. While Section 1012.796(7)(d) clearly authorizes probation, it appears to be intended for those persons who have an active certificate and are working in the teaching field. That does not appear to be the case in this instance.

31. Section 796(7)(g), by contrast, is reserved for a person, such as Respondent, whose teaching certificate was active at the time of the offenses alleged but has expired in the interim.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered finding Respondent to be guilty of the violations alleged in Counts II-V and dismissing Count I of the Amended Administrative Complaint; imposing a reprimand, a $500.00 fine, and an administrative sanction barring Respondent from applying for a new certificate for a period of six months.

DONE AND ENTERED this 17th day of April, 2009, in Tallahassee, Leon County, Florida.

LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2009.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes are to those provisions applicable to the violations alleged in the Amended Administrative Complaint, i.e., the 2004 codification of the Florida Statutes.

2/ No evidence was presented at hearing regarding Respondent's certificate number, the areas of certification or the expiration date of his certificate. However, both parties have submitted identical proposed findings of fact regarding this information. No dispute regarding the accuracy of this finding appears to exist, and it is considered a stipulated fact.

COPIES FURNISHED:

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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.