

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COLLIER COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 09-2905
)
RUSSELL WHEELER,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 9 and October 16, 2009, in Naples, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jon D. Fishbane, Esquire
Collier County School Board
5775 Osceola Trail
Naples, Florida 34109

For Respondent: Robert J. Coleman, Esquire
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Post Office Box 2089
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has just cause to terminate the employment of Respondent.

PRELIMINARY STATEMENT

By letter dated May 18, 2009, the superintendent of the Collier County School District (School District) advised Respondent, Russell Wheeler (Mr. Wheeler), that he intended to recommend to Petitioner, Collier County School Board (School Board), that Mr. Wheeler be terminated from his employment with the School District. Mr. Wheeler requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge. The case was originally assigned to Administrative Law Judge R. Bruce McKibben, but was transferred to Administrative Law Judge Susan B. Harrell to conduct the final hearing.

The final hearing was scheduled for July 30, 2009. On July 22, 2009, the School Board filed Petitioner's Stipulated Motion for Continuance, which was granted by Order dated July 23, 2009.

At the final hearing, the School Board called the following witnesses: Russell Wheeler, Manny Touron, Debra Ogden, Linda Salazar, Troy Ann Kirkland, Dawn Holmer, Debbie Terry, and Peggy Aune. Mr. Wheeler called Rita Healy as his witness. Joint Exhibit 1 was received in evidence. Petitioner's Exhibits 1 through 31 were admitted in evidence. Respondent's Exhibits 1 through 29 and 31 through 36 were admitted in evidence at the final hearing. Mr. Wheeler was given leave to file Respondent's

Exhibit 30 as a late-filed exhibit. Respondent's Exhibit 30 was filed on November 3, 2009, and is admitted in evidence.

The two-volume Transcript was filed on November 6, 2009. On November 16, 2009, the parties filed their Proposed Recommended Orders, which have been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Wheeler was employed as a teacher with Lee County School District (Lee County) from 1989 to May 6, 2004. From 1994 to 2003, Mr. Wheeler taught driver education at Lehigh Senior High School (Lehigh). Mr. Wheeler taught health at Lehigh during the 2003-2004 school year.

2. In addition to teaching at Lehigh during 2000 to 2004, Mr. Wheeler owned a driver training school and traffic school. When Mr. Wheeler taught driver education at Lehigh, he was authorized by the Department of Highway Safety and Motor Vehicles (DHSMV) to be a third-party tester. As a third-party tester, Mr. Wheeler was allowed to test secondary school students on their knowledge of road rules and road signs and their road skills. Mr. Wheeler was authorized to issue Driver Education Licensing Assistance Program (DELAP) waivers to his high school students who passed the tests and were applying for a driver license so that they could bypass the driver license

tests conducted by the DHSMV. The DELAP waivers had to be signed by an authorized representative of Lehigh.

3. Mr. Wheeler misused his authorization as a third-party tester and granted DELAP waivers to students in his private driving school, who were not high school students.

4. Sometime in the summer of 2003, Mr. Wheeler became the subject of a criminal investigation concerning the issuance of DELAP waivers to students through his employment at Lehigh to students in his private driving school.

5. On August 6, 2003, the DHSMV received a complaint against Mr. Wheeler concerning his issuance of a DELAP waiver to a person who was not a high school student. On the same date, the DHSMV stopped accepting any DELAP waivers issued by Mr. Wheeler.

6. On August 29, 2003, the Department of Education (DOE) notified Mr. Wheeler that a complaint had been filed against him, alleging that he had engaged in inappropriate conduct.

7. On January 22, 2004, Mr. Wheeler was arrested on charges of driver license fraud. On April 16, 2004, a No Information Notice was filed by the State Attorney's Office, advising the Clerk of the Court of the Twentieth Judicial Circuit that the State Attorney's Office was declining to prosecute Mr. Wheeler. No further criminal actions were taken against Mr. Wheeler based on the issuance of DELAP waivers.

8. By letter dated February 11, 2004, the DHSMV advised Mr. Wheeler that his certification as a commercial driving school instructor had been cancelled.

9. In early 2004, Lee County began investigating Mr. Wheeler for possible disciplinary action regarding his issuance of DELAP waivers. By letter dated March 30, 2004, Lee County advised Mr. Wheeler that probable cause was found to discipline him and that a recommendation would be made to the Lee County superintendent of schools to terminate Mr. Wheeler's employment.

10. Mr. Wheeler resigned from his employment with Lee County effective May 6, 2004, citing that the reason for his resignation was personal reasons. Mr. Wheeler's resignation was accepted by Lee County on the condition "that should [Mr. Wheeler] apply at a later time for employment with the District, the District in its sole and exclusive discretion, may refuse such application and/or deny him employment should it believe [Mr. Wheeler] has not been sufficiently rehabilitated in relation to the issues raised in the investigation which preceded his resignation." Mr. Wheeler agreed to the condition imposed by Lee County.

11. On May 11, 2004, Mr. Wheeler submitted an on-line application to the School Board for employment as an instructor. On his application he stated that he had 16 years of teaching

experience. However, he listed his employment at Lehigh as commencing in 1994 and ending in 2000; his employment at Gulf Middle School as commencing in 1992 and ending in 1993; and his employment at Riverdale High School as commencing in 1989 and ending in 1992. The employment dates listed for these three schools totaled 11 years. Mr. Wheeler also listed that he had been employed from December 2000 to February 2004 as the owner-instructor of a private driving school.

12. On his application, Mr. Wheeler listed the reason for terminating his employment with Lee County as personal. Although this reason is technically correct, Mr. Wheeler should have disclosed the circumstances under which he resigned, meaning that he should have disclosed that Lee County intended to discipline him and that he reached a settlement agreement in which he resigned for personal reasons. Mr. Wheeler listed Brian Botts, who was an assistant principal at Lehigh, as a reference. Although Mr. Botts completed a reference form, nothing on the form alluded to the problems that Mr. Wheeler had when he taught at Lee County.

13. Mr. Wheeler submitted a resume to the School Board as part of his application package. The resume correctly listed his employment dates with Lee County and correctly listed his employment with Lehigh as commencing in 1994 and ending in 2004. In addition, Mr. Wheeler's resume listed a year of employment at

Temple Christian School in Connersville, Indiana. The number of years of teaching experience listed on the resume totaled 16 years as he had stated on his on-line application.

14. On August 25, 2004, the School Board received a Verification of Teaching/Experience from Lee County, showing that Mr. Wheeler had been continuously employed by Lee County from 1989 to 2004.

15. Mr. Wheeler was hired by the School Board as a substitute teacher effective August 18, 2004.

16. Although Mr. Wheeler incorrectly listed the dates of employment at Lehigh on his on-line application, such incorrect listing was not intentional based on the evidence as a whole, particularly the submission of the resume as part of the application package, the listing of Brian Botts as a reference, and the statement on the on-line application that correctly showed the number of years Mr. Wheeler had been employed as a teacher. The School Board was not duped concerning the number of years that Mr. Wheeler had taught at Lehigh because the School Board had received an employment verification form from Lee County, which accurately showed the number of years that Mr. Wheeler had worked as a teacher at Lehigh.

17. Although Mr. Wheeler did not intend to deceive the School Board about the number of years that he worked for Lee County, he should have at least informed the School Board of the

circumstances surrounding his resignation from Lee County. Such information had a direct bearing on his qualifications for teaching and should have been disclosed.

18. For the 2004-2005 school year, Mr. Wheeler worked for the School Board as a substitute teacher. Most of his teaching during this period was done at Immokalee High School (Immokalee). Mr. Manny Tournon was the principal at Immokalee during the time Mr. Wheeler worked as a substitute teacher. Ms. Troy Kirkland, an assistant principal at Immokalee, was familiar with Mr. Wheeler's work while he was substituting.

19. By letter dated April 1, 2005, DOE notified Mr. Wheeler that a complaint had been filed with DOE, alleging that Mr. Wheeler had engaged in inappropriate conduct. DOE further advised Mr. Wheeler that an investigation was being conducted based on the allegations.

20. In the summer of 2005, a full-time teaching position came open at Immokalee for a health teacher. Mr. Tournon recommended Mr. Wheeler for the position. Mr. Tournon completed a Recommendation/Personnel Action Form, indicating that he had contacted two references concerning Mr. Wheeler. One of the references was Ms. Kirkland. The other reference was Ms. Darlene Weber, who had worked with Mr. Wheeler at Lehigh.

21. At the time Mr. Tournon recommended Mr. Wheeler for the health teacher position, he was aware Mr. Wheeler had been

arrested for fraud at one time. On July 18, 2004, Mr. Touron sent an e-mail to an investigator with the School Board's Human Resources Department. The e-mail stated:

Peter, I just sent a recommendation for Russell Wheeler for the position of Health. He has been subbing for us all year and has done a great job. He taught at Riverdale and Lehigh. At Lehigh there was an issue that he was arrested for fraud. Something to do with drivers [sic] licenses. I need to know if he has been cleared from that charge. I assume that he has because of his sub status. Please let me know.

Two days later Mr. Touron received a reply from the investigator, stating that Mr. Wheeler had been cleared of the criminal charges.

22. On July 22, 2005, Mr. Wheeler completed a Criminal Record form in which he omitted to say whether he had ever had a criminal record expunged. At some time, Mr. Wheeler did have his arrest records expunged, but he does not know when that was done.

23. Mr. Wheeler was hired on an annual contract basis, effective August 3, 2005, as a full-time health teacher at Immokalee. In November 2005, a full-time position for a driving education teacher position came open at Immokalee. Mr. Touron recommended Mr. Wheeler for the position, and Mr. Wheeler's assignment was changed from health teacher to driver education teacher.

24. Ms. Debra Ogden, who was the coordinator of the driver education program, gave Mr. Wheeler an Application for Driver Education Teacher Certification as a Third Party Tester to complete and submit.¹ Mr. Wheeler did not advise Ms. Ogden that his certification as a third-party tester had been cancelled when she asked him to complete and submit the application form. Mr. Wheeler submitted the application certification as a third-party tester, and the application was denied in December 2005. Ms. Ogden learned of the denial in January 2006.

25. Ms. Ogden asked Mr. Wheeler about the denial of his application, and he explained that he had lost his certification as a third-party tester and that his certification as a commercial driving school instructor had been cancelled. He told her that he had had some problems in Lee County concerning DELAP waivers, but that he was trying to take care of the problem and was working on getting recertified as a third-party tester.

26. Ms. Ogden contacted a driver education teacher at another school in Collier County and arranged to have that teacher do the third-party testing for the students at Immokalee. She advised Mr. Tournon that she had arranged to have another teacher do the third-party testing for Mr. Wheeler.

27. On April 3, 2006, the commissioner of education filed a six-count Administrative Complaint against Mr. Wheeler,

alleging that Mr. Wheeler "engaged in inappropriate and unprofessional conduct in that he fraudulently issued waivers to individuals who were not students at Lehigh Senior High School but in fact were customers of his private business" and that he "resigned in lieu of termination." The Administrative Complaint charged that Mr. Wheeler violated Subsections 1012.795(1)(c), 1012.795(1)(f), and 1012.795(1)(i), Florida Statutes (2003), and Florida Administrative Code Rules 6B-1.006(4)(c), 6B-1.006(5)(a), and 6B-1.006(5)(h). When Mr. Wheeler received the Administrative Complaint, he did not advise any of the School Board's administrators, including Mr. Touron, that an administrative complaint had been filed against him.

28. On July 24, 2006, Mr. Wheeler and the commissioner of education entered into a settlement agreement (Settlement Agreement), which was contingent on being accepted by the Education Practices Commission (EPC). The Settlement Agreement stated that Mr. Wheeler "neither admits nor denies, but elects not to contest the allegations set forth in the [commissioner of education's] Administrative Complaint." Mr. Wheeler agreed to accept a letter of reprimand and to be placed on probation for two employment years. The Settlement Agreement further provided that, if Mr. Wheeler was currently employed as a teacher, the probation would begin upon the issuance of a final order by the EPC, accepting the Settlement Agreement. Among other

conditions, the Settlement Agreement provided that Mr. Wheeler would contact DOE within ten days of the issuance of the final order and provide the name and address of his work site as well as the name, address, and telephone number of his immediate supervisor. The Settlement Agreement required Mr. Wheeler to "make arrangements for his immediate supervisor to provide the EPC with a true and accurate copy of each written annual performance evaluation or assessment prepared by his supervisor within ten (10) days of it[s] preparation." At the time he entered into the Settlement Agreement, Mr. Wheeler did not advise any of the School Board's administrators that he had executed a settlement agreement with the commissioner of education.

29. The School Board gave Mr. Wheeler an annual contract for the 2006-2007 school year.

30. By letter dated October 5, 2006, Mr. Wheeler was advised by the EPC that the Settlement Agreement had to be accepted by the EPC and that a final order would be issued by the EPC upon the EPC's acceptance of the Settlement Agreement.

31. The EPC filed its Final Order on February 8, 2007, accepting the Settlement Agreement. On February 20, 2007, Mr. Wheeler sent a facsimile transmission to Rita Healy, his probation officer with DOE, advising her that his supervisor was Mr. Touron and providing contact information.

32. Mr. Touron was advised by Mr. Wheeler that a Final Order had been issued, placing Mr. Wheeler on probation for two years. Mr. Wheeler also told Mr. Touron that Mr. Touron would need to provide to DOE a copy of Mr. Wheeler's annual evaluation when it was completed.

33. On March 20, 2007, Ms. Healy advised Mr. Touron that a Final Order had been issued by the EPC, placing Mr. Wheeler on probation for two years. Ms. Healy sent a copy of the Final Order to Mr. Touron by facsimile transmission and by e-mail. For some unknown reason, the Final Order was never placed in Mr. Wheeler's personnel file,

34. In the 2006-2007 school year, Immokalee was on status as an "F" school. In order to rehabilitate the school, a new principal, Ms. Linda Salazar, was appointed as principal at Immokalee for the 2007-2008 school year. Ms. Salazar met with the faculty at Immokalee to determine which teachers she would retain for the 2007-2008 school year. She interviewed Mr. Wheeler, and there was no discussion concerning the Final Order that had been issued by the EPC, reprimanding Mr. Wheeler and placing him on probation for two years. Mr. Wheeler thought that Ms. Salazar knew about the disciplinary action against him because he had told Mr. Touron about the Final Order. Mr. Touron did not advise Ms. Salazar or the School Board's

Human Resources Department about the Final Order disciplining Mr. Wheeler.

35. By letter dated March 15, 2007, Ms. Salazar notified Mr. Wheeler that he had been selected to teach at Immokalee for the 2007-2008 school year. His employment at Immokalee for the 2007-2008 school year was on an annual contract basis.

36. Mr. Wheeler sent Ms. Healy a copy of his evaluation for the 2006-2007 school year after he received it in April 2007. Mr. Wheeler also sent a copy of his evaluation for the 2007-2008 school year to Ms. Healy. Although, the Settlement Agreement required that Mr. Wheeler make arrangements for his immediate supervisor to provide the EPC with a copy of the annual evaluation, Ms. Healy considered it to be Mr. Wheeler's responsibility to make sure that she received copies of the evaluations, regardless of who actually sent them. There was no dispute regarding the authenticity of the evaluations which Mr. Wheeler provided to Ms. Healy.

37. On June 11, 2008, Mr. Wheeler entered into a professional service contract with the School Board. Unlike the annual contracts, the professional service contract was to "be renewed each year in accordance with and subject to the provisions of F.S. §1012.33 and in conformity with Board policy and any applicable collective bargaining agreement then in place."

38. In August 2008, Mr. Wheeler again applied to the DHSMV for his third-party tester certification. On or about August 1, 2008, he dropped off the application for Ms. Salazar to sign as representative of Immokalee. At this time, Ms. Salazar was unaware that Mr. Wheeler's third-party tester certification had been canceled and assumed that the application was a recertification document that teachers often left in her mail box to be signed. Ms. Salazar signed the application form.

39. On September 9, 2008, Ms. Ogden sent an e-mail to Ms. Salazar, requesting that Ms. Salazar write a letter of recommendation for Mr. Wheeler for his third-party tester application. The e-mail stated:

Hi, Linda, would you be willing to write a letter of support for Russ Wheeler to become a Third Party Tester through the DMV, so he can legally administer the written and road test and issue waivers for your students? I am not sure if you know the history, but there were charges brought against him in Lee Co. and the [sic] he is having trouble getting the state to allow him to become a Third Party Tester. I will be writing one for him and if you are willing, here is the contact information. . . .

40. Ms. Salazar asked Mr. Wheeler to come and talk about the charges that had been brought against him. Mr. Wheeler brought all the documentation that he had relating to the criminal charges. He explained to Ms. Salazar that the charges had been dropped. He told her that he had owned a private

driving school and that he had been framed for fraud, and that was the reason that he resigned from Lee County. No mention was made by Mr. Wheeler that disciplinary action had been taken against him by the EPC. Mr. Wheeler assumed that Ms. Salazar knew about his probation because he had discussed the issue with Mr. Tournon. Ms. Salazar declined to write a letter of support on behalf of Mr. Wheeler. At this time, Ms. Salazar was unaware that Mr. Wheeler had been reprimanded and was on probation.

41. Mr. Wheeler received his third-party tester certification on October 24, 2008.

42. On November 21, 2008, Ms. Debbie Terry, the School Board's director of Staffing, Recruitment, and Retention, conducted an Administrator Academy Training for personnel of the School Board, which included training school principals on the use of the internet website, myfloridateacher.com, which is maintained by DOE to document discipline taken against teachers holding Florida Educator's Certificates. Ms. Terry advised the administrators attending the training that in hiring a new teacher they would be required to contact the applicant's previous employers, access the DOE website to determine if there had been disciplinary action against the applicant, and to speak with the applicant's references.

43. The School Board had instituted a policy of not renewing annual contracts of teachers who had been disciplined

by the EPC. Additionally, applicants for teaching positions who had been disciplined by the EPC were not hired.

44. Ms. Terry checked the DOE website and found that Mr. Wheeler was listed as having been disciplined by the EPC. In December 2008, Ms. Terry called Ms. Salazar to inquire why Mr. Wheeler had been recommended for a professional service contract when he had been disciplined by the EPC. Ms. Salazar was unaware until Ms. Terry contacted her that Mr. Wheeler had been reprimanded and placed on probation by a Final Order from the EPC.

45. The School Board started an investigation concerning Mr. Wheeler. The investigation included interviewing Ms. Healy, who told the School Board's staff that she had sent a copy of the Final Order to Mr. Tournon. Mr. Wheeler was also interviewed.

46. On December 12, 2008, the School Board sent Mr. Wheeler's evaluations for the prior two years to Ms. Healy. On December 5, 2008, Mr. Wheeler again sent Ms. Healy by facsimile transmission copies of his evaluations. The fax cover sheet stated that Ms. Salazar was the principal at Immokalee.

47. After the investigation was complete, the superintendent advised Mr. Wheeler by letter dated May 18, 2009, that he would be recommending to the School Board that Mr. Wheeler's employment be terminated. The superintendent

alleged in the Notice of Intent Recommendation to Terminate Employment that the recommendation for termination was based on the following acts:

Count 1: [He] falsely indicated the reasons for [his] separation from Lee County, Florida schools. In addition, [he] failed to disclose pertinent and relative information on [his] employment application; specifically, that [he] resigned from Lee County, Florida, schools "in lieu of termination."

Count 2: [He] falsely represented in [his] employment application the correct termination date of May 6, 2004, leaving a four-year employment discrepancy.

Count 3: [He] violated the terms of [his] probation and settlement agreement with the Florida Department of Education by failing to disclose that [his] immediate supervisor, effective August 2007, was Linda Salazar, principal of Immokalee High School. In addition, [he] did not disclose the fact to Ms. Salazar that [he] entered into a settlement agreement. At some point in time, Ms. Salazar confronted [him] after learning that there was an issue relative to [his] certifying drivers' education certificates; however, [he was] not forthcoming and indicated to her that there wasn't a problem and assured her that the FLDOE case had been dropped.

Count 4: In furtherance of [his] deception, [he] failed to follow the directive of [his] settlement that required that [his] evaluations be forwarded to the FLDOE by [his] supervisor. [He] directly forwarded the evaluations to FLDOE without the knowledge of [his] supervisor and the FLDOE.

Count 5: [He was] found "guilty of an act involving gross immorality or an act

involving moral turpitude" and attempted to conceal this knowledge from the school district.

48. On May 5, 2008, Mr. Wheeler was approved to teach a driver education course for migrant students during summer school. Mr. Wheeler was to work 32 hours per week for nine weeks at a rate of pay of \$40 per hour. His total compensation for the summer school employment was to have been \$11,520. By e-mail dated May 27, 2009, Ms. Salazar advised Mr. Wheeler that he could not teach during summer school because of the recommendation to terminate his employment.

49. Mr. Wheeler successfully completed his probation with DOE. Ms. Healy notified Mr. Wheeler by letter dated March 20, 2009, that the probation was closed. Ms. Healy did not consider that any actions by Mr. Wheeler during his probation constituted a breach of the Settlement Agreement which would be prosecuted by the EPC.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

51. Subsection 1012.33(1), Florida Statutes (2008),² provides that instructional staff may be dismissed for just cause and provides that just cause "includes, but is not limited to, the following instances, as defined by rule of the State

Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude."

52. The School Board has the burden to establish by a preponderance of the evidence that it has just cause to terminate Mr. Wheeler's employment. See Sublett v. Sumpter County School Board, 664 So. 2d 883 (Fla. 5th DCA 1995); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990).

53. The School Board alleged in its Notice of Intent Recommendation to Terminate Employment that Mr. Wheeler committed the following violations:

- (1) violated the terms of [his] settlement agreement with the FLDOE (Section 5);
- (2) fraudulently signed the disclosure on [his] employment application in which [he] attested, among other things, "that the facts contained in this application are true and complete to the best of my knowledge and belief . . .";
- (3) violated [his] responsibilities and obligations under Section 6B-1.006(5), Principles of Professional Conduct for the Education Profession in Florida, F.A.C., subsections (a), (g), (h), (i), and (n); 6B-1.001, Code of Ethics of the Education Profession in Florida, subsections[1-3];

(4) violated School Board Policies #3120 (Employment of Instructional Staff), #3121 (Application for Employment and Re-Employment of Instructional Staff), #3139 (Educator Misconduct), and #3210 (Code of Ethics).

54. Florida Administrative Code Rule 6B-1.006(5) provides:

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

* * *

(g) Shall not misrepresent one's own professional qualifications.

(h) Shall not submit fraudulent information on any document in connection with professional activities.

(i) Shall not make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.

* * *

(n) Shall report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.

55. Florida Administrative Code Rule 6B-1.001 provides:

(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 School Board's Policy 3121 provides:

False or misleading statements or answers or omissions made by a person in connection with seeking employment may bar a person from employment with the Board or, if discovered after employment, may result in disciplinary action, including termination upon the recommendation of the Superintendent and the approval of the Board. Each case shall be considered on its own merits.

57. In Count 1, the School Board alleges that Mr. Wheeler falsely indicated his reasons for separation from Lee County and failed to disclose pertinent and relative information on his employment application, specifically that he resigned from Lee County in lieu of termination. Mr. Wheeler did not falsely indicate his reasons for separation from Lee County. His reasons were personal. However, Mr. Wheeler did fail to state the circumstances under which he resigned. That information was pertinent and relevant to his resignation and should have been disclosed to the School Board. Thus, the School Board has

established by a preponderance of the evidence that Mr. Wheeler violated Florida Administrative Code 6B-1.006(5)(i) and School Board Policy 3121.

58. In Count 2, the School Board alleges that Mr. Wheeler falsely represented on his employment application the date of his termination from Lee County. Mr. Wheeler did inaccurately state on his application that his employment with Lee County ended in 2000. However, this inaccuracy was not intentional and was a scrivener's error. This conclusion is based on Mr. Wheeler stating in the application that he had 16 years of teaching experience. Additionally, Mr. Wheeler listed Mr. Botts, who was an assistant principal at Lehigh, as a reference. If Mr. Botts were contacted, Mr. Botts could verify Mr. Wheeler's dates of employment. Mr. Wheeler provided the School Board with a copy of his resume which accurately showed the dates of his employment with Lee County. The School Board received a verification of employment from Lee County accurately stating the dates of employment of Mr. Wheeler. There was no intention of Mr. Wheeler to deceive the School Board concerning his employment with Lee County. The School Board has failed to establish the allegations in Count 2 by a preponderance of the evidence.

59. In Count 3, the School Board alleges that Mr. Wheeler violated the Settlement Agreement with DOE by failing to

disclose that his supervisor had changed from Mr. Touron to Ms. Salazar. The School Board has failed to establish this allegation.

60. The Settlement Agreement did not specifically require Mr. Wheeler to notify DOE if his supervisor changed; however, the requirement that he advise DOE within ten days of the issuance of the Final Order could be understood to mean that the requirement to notify DOE of the name of his supervisor was a continuing requirement. Even if it were considered to be a continuing requirement, no time frame is stated for advising DOE of a supervisory change. Mr. Wheeler notified Ms. Healy in February 2007 that his supervisor was the principal at Immokalee. Mr. Wheeler had sent his evaluations for 2006-2007 and for 2007-2008, and both evaluations showed that Mr. Wheeler continued to be employed at Immokalee. He continued to be supervised by the principal of Immokalee. Thus, any question that Ms. Healy had concerning Mr. Wheeler's supervision or performance would have been directed to the principal of Immokalee. Mr. Wheeler sent a facsimile transmission to Ms. Healy on December 5, 2008, which clearly showed that Ms. Salazar was the principal of Immokalee.

61. In Count 3, The School Board also alleges that Mr. Wheeler failed to advise Ms. Salazar that he had entered into a settlement agreement with the EPC. Mr. Wheeler had

previously advised Mr. Touron that he had entered into the Settlement Agreement and that a Final Order had been issued. Mr. Wheeler fulfilled his obligation to the School Board to notify it of the Settlement Agreement and Final Order when he advised Mr. Touron of same and was under no obligation to advise Ms. Salazar. If Mr. Touron had fulfilled his responsibilities, Mr. Wheeler's personnel file would have contained the pertinent information, and Ms. Salazar would have known of the Final Order. The School Board can not fault Mr. Wheeler for the failure of its administrator to take appropriate action. Mr. Wheeler was understandably under the impression that the School Board was aware of the Final Order because he had notified Mr. Touron.

62. In Count 3, the School Board also alleges that when Ms. Salazar confronted him about his third-party tester certification, he was not forthcoming and indicated that there was not a problem and assured her that the DOE case had been dropped. The School Board has failed to establish this allegation by a preponderance of the evidence. Mr. Wheeler was forthcoming concerning the criminal charges against him. He never told Ms. Salazar that the DOE case had been dropped against him. In fact, at the time that Mr. Wheeler and Ms. Salazar had the conversation concerning third-party tester certification, the EPC had entered a Final Order, and

Mr. Wheeler thought that Ms. Salazar was aware because he had informed Mr. Tournon.

63. In Count 4, the School Board alleges that Mr. Wheeler "failed to follow the directive of the settlement agreement that [his] evaluations be forwarded to the FLDOE by [his] supervisor." The Settlement Agreement required that Mr. Wheeler "make arrangements for his immediate supervisor to provide the EPC" with a copy of the evaluation within ten days of its preparation. Mr. Wheeler did talk to Mr. Tournon about the requirement of sending the evaluations to DOE, and Mr. Wheeler had no reason to think that Mr. Tournon would not comply. Ms. Healy considered that Mr. Wheeler had the ultimate responsibility to make sure that she got copies of the evaluation, and he fulfilled that responsibility by sending in evaluations himself. The School Board has failed to establish the allegations in Count 4 by a preponderance of the evidence.

64. In Count 5, the School Board alleges that Mr. Wheeler was "'found guilty of an act involving gross immorality or an act involving moral turpitude'" and attempted to conceal this knowledge from the School District. Mr. Wheeler was not found guilty of any criminal charges. A Final Order was entered against Mr. Wheeler based on the Settlement Agreement which had been accepted by the EPC. The Final Order does not make a finding of guilt of the violations set forth in the

Administrative Complaint, and the Settlement Agreement specifically states that Mr. Wheeler neither admits nor denies the allegations in the Administrative Complaint but elects not to contest them.

65. Mr. Wheeler did not attempt to hide the existence of the Final Order from the School Board. He notified Mr. Touron that a Final Order had been issued. Additionally, Ms. Healy contacted Mr. Touron and advised him that a Final Order had been issued and provided Mr. Touron a copy of the Final Order by facsimile transmission and by e-mail. Mr. Wheeler is not at fault if Mr. Touron failed to advise the School Board's Human Resources Department and Ms. Salazar of the existence of the Final Order. The School Board has failed to establish the allegations in Count 5 by a preponderance of the evidence.

66. In its Proposed Recommended Order, the School Board states that Mr. Wheeler failed to answer a question on his new-hire paperwork on July 22, 2005, which concerned whether Mr. Wheeler had ever had a criminal record expunged. The School Board also stated in its Proposed Recommended Order that Mr. Wheeler did not advise the School Board that an administrative complaint had been filed against him by DOE. Such allegations were not raised in the notice of intent to terminate and cannot serve as a basis now for discipline. See Aldrete v. Department of Health, Board of Medicine, 879 So. 2d

1244, 1246 (Fla. 1st DCA 2004); Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

67. Based on the totality of the circumstances of this case, termination is not warranted. However, the School Board has established that Mr. Wheeler failed to disclose relevant and pertinent information to the School Board on his 2004 employment application. Therefore, Mr. Wheeler should be disciplined for failing to disclose this information.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order finding that Mr. Wheeler is guilty of failing to disclose the relevant and pertinent information on his employment application in violation of Florida Administrative Code Rule 6B-1.006(5)(i) and School Board Policy 3121; finding that Mr. Wheeler is not guilty of the other violations set forth in the notice of intent to terminate; suspending Mr. Wheeler without pay for eight months, beginning May 18, 2009; and reinstating Mr. Wheeler to his employment at the end of his suspension.

DONE AND ENTERED this 22nd day of December, 2009, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2009.

ENDNOTES

^{1/} At the beginning of the 2005-2006 school year, all the driver education teachers were retested and retrained as a result of DHSMV changing its DELAP system and requiring all third party testers to reapply for certification. Thus, as the incoming driver education teacher, Mr. Wheeler would be required to reapply for certification.

^{2/} Unless otherwise indicated, all references to the Florida Statutes are to the 2008 version.

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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.