

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 09-3590PL
)
BRADLEY JOSEPH MAGID,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 27, 2009, by video teleconference with connecting sites in West Palm Beach and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
300 Southeast Thirteenth Street
Fort Lauderdale, Florida 33316

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 10
Clearwater, Florida 33761

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Amended Administrative Complaint issued on May 28, 2009, and, if so, what action should be taken.

PRELIMINARY STATEMENT

On May 28, 2009, Dr. Eric J. Smith, as Commissioner of Education (COE), issued a five-count Amended Administrative Complaint (Amended AC) against Bradley Joseph Magid. The COE charged Mr. Magid with three counts of violating Section 1012.795: Count 1, violating Section 1012.795(1)(d), Florida Statutes, by being guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education; Count 2, violating Section 1012.795(1)(g), Florida Statutes, by being guilty of personal conduct which seriously reduces his effectiveness as an employee of the school board; and Count 3, violating Section 1012.95(1)(j), Florida Statutes, by violating the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules. Further, the Amended AC charged Mr. Magid with two counts of violating Florida Administrative Code Rule 6B-1.006: Count 4, violating Florida Administrative Code Rule 6B-1.006(4)(c) by using institutional privileges for personal gain or advantage; and Count 5, violating Florida Administrative Code Rule 6B-1.006(5) by failing to maintain honesty in all

professional dealings. Mr. Magid challenged the material allegations in the Amended AC and requested a hearing. On July 9, 2009, this matter was referred to the Division of Administrative Hearings.

Prior to hearing, the parties filed a Joint Pre-hearing Stipulation. At hearing, the COE presented the testimony of four witnesses and entered 11 exhibits (Petitioner's Exhibits numbered 1-4, and 6-12), one exhibit being the deposition testimony of Mr. Magid, into evidence. Mr. Magid did not testify at hearing. Mr. Magid requested leave to take the deposition testimony of his father subsequent to the hearing, and submit it as a late exhibit. The COE did not object and the request was granted. The deposition testimony of Mr. Magid's father was late-filed and entered into evidence as Respondent's Exhibit numbered 1.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on December 10, 2009. The parties timely filed post-hearing submissions, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that, at all times material hereto, the COE was charged with the duty of investigating and prosecuting complaints against individuals who hold a Florida educational certificate and who are alleged to have violated Section 1012.795, Florida Statutes.

2. At all times material hereto, Mr. Magid held Florida Educator's Certificate No. 936553, covering the area of Elementary Education, which is valid through June 30, 2012.

3. During the 2006-2007 and 2007-2008 school years, Mr. Magid was employed as a kindergarten teacher with the Palm Beach County School Board (School Board) at Westwood Elementary School (Westwood).

4. In January 2008, Mr. Magid arranged to obtain a tripod from another teacher, Janae Dean, at Westwood. On January 9, 2008, Mr. Magid contacted Ms. Dean, who was in a meeting in a classroom other than her own, to obtain the keys to her classroom in order to get the tripod from her locked classroom. Ms. Dean kept her classroom locked when she was not in the classroom. Ms. Dean gave Mr. Magid the keys to her classroom. Later, Mr. Magid returned to the classroom where the meeting was being held and returned Ms. Dean's keys to her.

5. After the meeting, Ms. Dean returned to her classroom and discovered that a \$100 bill was missing from her purse,

which was locked inside a file cabinet in her classroom.

Ms. Dean called another teacher, Josette Archbold,¹ a media specialist, to her (Ms. Dean's) classroom. Ms. Dean requested Ms. Archbold to look into her (Ms. Dean's) purse and determine if a \$100 bill was in the purse; Ms. Archbold verified that no \$100 bill was in Ms. Dean's purse.

6. Ms. Dean went to confront Mr. Magid. She discovered that he had left the Westwood's campus and was working as a referee at a high school basketball game. She went to the basketball game and confronted Mr. Magid, who admitted to taking the money, but told her that it was a practical joke. Ms. Dean informed him that she wanted her money, and Mr. Magid wrote her a check for \$100.

7. Ms. Dean did not wish to file a criminal complaint against Mr. Magid. However, she did report the incident to the Westwood's principal, Melvis Pender, that same evening.

8. The following day, Mr. Pender met with Mr. Magid and Ms. Dean. Mr. Magid admitted taking the \$100 bill from Ms. Dean's purse that was secured in the locked cabinet in her classroom. However, he (Mr. Magid) indicated that it was a practical joke, which was refuted by Ms. Dean. Mr. Pender determined that the incident was not a practical joke.

9. Mr. Pender issued a directive to Mr. Magid, characterizing Mr. Magid's behavior as "unprofessional and

inappropriate," and directing Mr. Magid to discontinue the type of behavior in which Mr. Magid had engaged. Mr. Magid executed an acknowledgement of the directive on January 24, 2008.

10. On March 14, 2008, Ms. Archbold was reporting to work at Westwood. As she entered the area where the circulation desk was located, which was outside of her office, a colleague approached her and immediately needed some paperwork on an audit, which the two of them were preparing. Ms. Archbold placed her wallet and other material on the circulation desk and entered her office to retrieve the paperwork that her colleague requested. Considerable time had elapsed, and Ms. Archbold noticed Mr. Magid going in and out of the media office; then she realized that she had left her wallet outside of her office on the circulation desk.

11. Ms. Archbold had \$20 in her wallet. The day before, March 13, 2008, she had gone to the bank to borrow money because her refrigerator had stopped working and food in the refrigerator had spoiled. She borrowed money from the bank to purchase another refrigerator and replace groceries that had spoiled; and, after doing that, she had only \$20 remaining.

12. Ms. Archbold went to the circulation desk and opened her wallet. The \$20 was missing.

13. Ms. Archbold's colleague went to Mr. Magid and confronted him about the missing \$20. He admitted to taking the

\$20 and gave Ms. Archbold's colleague \$20 to give to Ms. Archbold.

14. Prior to the incident on March 14, 2008, Ms. Archbold had encountered other thefts involving Mr. Magid. On one occasion, he stole \$100 from money being raised at a book fair at Westwood. Ms. Archbold was responsible for the money, so she replaced the \$100 from her personal funds, instead of confronting Mr. Magid. None of these thefts were reported to Mr. Pender and, therefore, were not the subject of any disciplinary action.

15. Mr. Pender was notified of theft of the \$20 and went to his office. When Mr. Pender entered his office, he found Mr. Magid "cowering" behind his (Mr. Pender's) desk. Mr. Magid admitted to Mr. Pender that he took the \$20. Mr. Magid also indicated to Mr. Pender that he (Mr. Magid) was seeing a therapist for his behavior.

16. Mr. Pender reported the theft to the Palm Beach County School District Police for investigation. Mr. Magid was placed on alternative assignment during the investigation.

17. Before any formal action was taken by the School Board, regarding the thefts, Mr. Pender notified Mr. Magid by letter dated March 24, 2008, that he (Mr. Pender) was not recommending Mr. Magid for reappointment for the 2009-2010 school year; and that, therefore, as a non-reappointed employee,

he (Mr. Magid) would be terminated from employment with the School Board at the end of his (Mr. Magid's) contractual period

18. Even though Mr. Pender had rated Mr. Magid as satisfactorily performing his duties as a classroom teacher, Mr. Pender had reached the conclusion that Mr. Magid had become untrustworthy and no longer wanted him (Mr. Magid) to work at Westwood. As a result, Mr. Pender recommended non-reappointment of Mr. Magid.

19. Instead of being faced with termination proceedings, Mr. Magid resigned from employment with the School Board.

20. Mr. Pender believes that, if Mr. Magid can successfully control his behavior, i.e., successfully control whatever is causing him (Mr. Magid) to steal money, he (Mr. Magid) could be a capable, competent teacher.

21. Mr. Magid admits that the conduct in which he engaged was inappropriate and "very stupid."

22. Mr. Magid suffers from dyslexia and Attention Deficit Disorder (ADD). He contends that dyslexia and ADD have caused him throughout his life to make poor decisions in the taking of things and the situations involving the taking of money in this instant matter. No medical evidence was presented to show that dyslexia and ADD cause one, and specifically Mr. Magid, who suffers from the medical conditions to engage in the conduct in which Mr. Magid has engaged. The evidence fails to demonstrate

that Mr. Magid's dyslexia and ADD caused him to engage in the conduct in which he engaged.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

24. The ultimate burden of proof is on the COE to establish by clear and convincing evidence that Mr. Magid committed the violations as set forth in the Amended AC dated May 28, 2009. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995); § 120.57(1)(j), Fla. Stat.

25. Mr. Magid committed the alleged violations in 2008. Section 1012.795, Florida Statutes (2007), provides in pertinent part:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for a period of time not to exceed 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the

educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for a period of time not to exceed 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; . . . or may impose any other penalty provided by law, provided it can be shown that the person:

* * *

(c) Has been guilty of gross immorality or an act involving moral turpitude.

* * *

(f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board.

* * *

(i) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

* * *

(4)(a) An educator certificate which has been suspended under this section is automatically reinstated at the end of the suspension period, provided the certificate did not expire during the period of suspension. If the certificate expired during the period of suspension, the holder of the former certificate may secure a new certificate by making application therefor

and by meeting the certification requirements of the state board current at the time of the application for the new certificate. . . .

(b) A person whose educator certificate has been revoked under this section may apply for a new certificate at the expiration of that period of ineligibility fixed by the Education Practices Commission by making application therefor and by meeting the certification requirements of the state board current at the time of the application for the new certificate.

26. Section 1012.795, Florida Statutes (2009), provides in pertinent part:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for up to 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; . . . or may impose any other penalty provided by law, if the person:

* * *

(d) Has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.

* * *

(g) Upon investigation, has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board.

* * *

(j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

* * *

(4)(a) An educator certificate that has been suspended under this section is automatically reinstated at the end of the suspension period, provided the certificate did not expire during the period of suspension. If the certificate expired during the period of suspension, the holder of the former certificate may secure a new certificate by making application therefor and by meeting the certification requirements of the state board current at the time of the application for the new certificate. . . .

(b) A person whose educator certificate has been revoked under this section may apply for a new certificate at the expiration of that period of ineligibility fixed by the Education Practices Commission by making application therefor and by meeting the certification requirements of the state board current at the time of the application for the new certificate.

27. The COE referenced the incorrect statutory provisions of Section 1012.795, Florida Statutes, in the Amended AC:

Mr. Magid was charged with the statutory provisions that were in effect in 2009, not 2008, which is the relevant time period. The statutory provisions in effect for the relevant time period in 2008 were Section 1012.795(1)(c), (f), and (i), not Section 1012.795(1)(d), (g), and (j). However, even though there is an erroneous reference to the statutory provisions in the Amended AC, the wording for the charged violations and the violations that should have been charged are essentially the same, the necessary elements of the offenses are alleged, and the proof required for the elements is the same. Consequently, having erroneously referenced the statutory provisions is not fatal and should be treated as a scrivener's error. Danzy v. State, 603 So. 2d 1320, 1322 (Fla. 1st DCA 1992). Moreover, the parties knowingly litigated the instant matter, addressing the necessary elements of the charges in spite of the erroneously referenced statutory provisions.

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

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

* * *

(c) Shall not use institutional privileges for personal gain or advantage.

* * *

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

(a) Shall maintain honesty in all professional dealings.

29. Florida Administrative Code Rule 6B-4.009 provides guidance in the instant case and provides in pertinent part:

(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 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.

30. "Gross immorality," as the term suggests, is misconduct that is more egregious than mere "immorality." It is "immorality which involves an act of conduct that is serious, rather than minor in nature, and which constitutes a flagrant disregard of proper moral standards." See Castor v. Lawless, 1992 WL 880829 (EPC 1992) (Final Order); Turlington v. Knox, 3 FALR 1373A, 1374A (EPC 1981) (Final Order).

31. "Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties

owed by man to man or by man to society. . . It has also been defined as anything done contrary to justice, honesty, principle or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated. . . ." State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (1933).

32. "By virtue of their leadership capacity, teachers are traditionally held to a high moral standard in a community." Adams v. Florida Professional Practices Council, 406 So. 2d 1170, 1172 (Fla. 1st DCA 1981).

33. The evidence demonstrates that Mr. Magid stole money from his colleagues and that he intended to steal the money. Further, the evidence demonstrates that he used his position, as a teacher, to steal from his colleagues for his personal gain or advantage.

34. Also, the evidence does not demonstrate that the theft of the money was a practical joke. Further, the evidence does not demonstrate that Mr. Magid's conduct was the result of his medical conditions of dyslexia and ADD.

35. Additionally, the evidence demonstrates, and the parties agree, that Mr. Magid engaged in personal conduct that seriously reduced his effectiveness as an employee of the School Board and that his conduct was unprofessional.

36. Further, the evidence demonstrates that Mr. Magid, through his conduct, had become untrustworthy and that he failed to maintain honesty in all of his professional dealings.

37. Furthermore, the evidence demonstrates that Mr. Magid committed gross immorality or acts involving moral turpitude.

38. Hence, the evidence demonstrates that Mr. Magid violated Section 1012.795(1)(c), (f), and (i), Florida Statutes (2007), and violated Florida Administrative Code Rules 6B-1.006(4)(c) and 6B-1.006(5)(a).

39. As to penalty, Section 1012.796(7), Florida Statutes (2007), provides in pertinent part:

(7) A panel of the commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:

* * *

(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, administrator, or supervisor on probation for a period of time 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. . . .

* * *

(h) Refer the teacher, administrator, or supervisor to the recovery network program

provided in s. 1012.798 under such terms and conditions as the commission may specify.

40. Florida Administrative Code Rule 6B-11.007 provides penalties for the violations ranging from probation to revocation. Furthermore, the said Rule provides for the consideration of mitigating and aggravating factors. The following mitigating factors should be considered: the evidence does not demonstrate any prior disciplinary action; the evidence does not demonstrate the involvement of or harm to a student or child; Mr. Pender's belief that Mr. Magid can be a capable and competent teacher if he (Mr. Magid) can get control of his behavior; and Mr. Magid's seeking the help of a therapist in 2008 with his behavior.

41. The COE suggests permanent revocation of Mr. Magid's certificate. Mr. Magid suggests probation, with the requirement of obtaining proper medical treatment and counseling and complying with all requirements imposed by the medical provider and the COE.

42. Considering the totality of the circumstances, permanent revocation is too harsh a penalty, but probation, with the medical treatment and counseling, is too lenient. However,

the totality of the circumstances indicates that the appropriate penalty is revocation of Mr. Magid's certificate for five years.

RECOMMENDATION

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

RECOMMENDED that Dr. Eric J. Smith, as Commissioner of Education enter a final order:

1. Finding that Bradley Joseph Magid violated Section 1012.795(1)(c), (f), and (i), Florida Statutes (2007), and violated Florida Administrative Code Rules 6B-1.006(4)(c) and 6B-1.006(5)(a).

2. Imposing a penalty of revocation of Mr. Magid's certificate for five years.

DONE AND ENTERED this 1st day of March 2010, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
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 1st day of March, 2010.

ENDNOTE

^{1/} Ms. Archbold's deposition testimony was admitted into evidence as Petitioner's Exhibit 12.

COPIES FURNISHED:

Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
300 Southeast Thirteenth Street
Fort Lauderdale, Florida 33316

Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 10
Clearwater, Florida 33761

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Kathleen M. Richards, Executive Director
Department of Education
Florida Education Center
Turlington Building, Suite 224-E
325 West Gaines Street
Tallahassee, Florida 34399-0400

Marian Lambeth, Bureau Chief
Bureau of Professional
Practices Services
Department of Education
Turlington Building, Suite 224-E
325 West Gaines Street
Tallahassee, Florida 34399-0400

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.