

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS )  
COMMISSIONER OF EDUCATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-6633PL  
 )  
DANIEL PRESMY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on a stipulated record.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire  
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For Respondent: Thomas L. Johnson, Esquire  
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Daniel Presmy, committed the violations alleged in a five-count Administrative Complaint issued by Petitioner, Dr. Eric J. Smith, as Commissioner of Education, on March 30, 2009, and, if

so, what disciplinary action should be taken against his Florida educator's certificate.

PRELIMINARY STATEMENT

On March 30, 2009, a five-count Administrative Complaint, Education Practices Commission Case No. 089-0426, was issued by Petitioner, Dr. Eric J. Smith, as Commissioner of Education, against Respondent, Daniel Presmy, who holds a Florida educator's certificate. It is alleged in the Administrative Complaint that Respondent violated the following provisions of Florida law: Section 1012.795(1)(f), Florida Statutes (Count 1); Section 1012.795(1)(g), Florida Statutes (Count 2); Section 1012.795(1)(j), Florida Statutes (Count 3); Section 1012.795(1)(n), Florida Statutes, by having been disqualified from qualification for an educator's certificate under Section 1012.315, Florida Statutes (Count 4); and Florida Administrative Code Rule 6B-1.006(3)(a), in that "Respondent has failed to make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental health and/or physical healthy and/or safety" (Count 5).

On or about May 26, 2009, Respondent, through counsel, filed an executed Election of Rights form selecting a "settlement option" and a formal administrative hearing should settlement not be reached. On December 7, 2009, Petitioner filed the Administrative Complaint, Respondent's Election of

Rights form, and a letter requesting that an administrative law judge be assigned to hear the matter. The request for hearing was designated DOAH Case No. 09-6633PL and was assigned to the undersigned.

On December 14, 2009, the final hearing of this matter was scheduled for January 29, 2010, by Notice of Hearing by Video Teleconference.

On January 15, 2010, a Joint Request for Joint Status Conference was filed, in which it was represented, in pertinent part:

. . . .

2. There is no dispute regarding the material allegations; however, there are legal issues regarding the application of Section 1012.315, Florida Statute[s,] which remain for a determination.

3. The parties are willing to dispense with the formal hearing and stipulate to the material allegations and instead submit their respective Briefs/Proposed Recommended Orders on the remaining legal issues.

. . . .

On January 26, 2010, the status conference requested by the parties was conducted by telephone. After discussing the matter, it was agreed that the final hearing would be cancelled, that the parties would be given until March 1, 2010, to file proposed recommended orders, that responses to the proposed recommended orders would be filed by March 15, 2010, and that a

recommended order would be issued thereafter. An Order memorializing the status conference was entered February 9, 2010.

Three extensions of the date for filing proposed recommended orders were subsequently requested and granted without objection. Ultimately, proposed recommended orders were to be filed on or before March 23, 2010, and responses thereto were to be filed on or before April 6, 2010.

Both parties filed a Proposed Recommended Order timely. After reviewing the Proposed Recommended Orders, it was realized that there were issues concerning the alleged statutory violations cited in the Administrative Complaint. Petitioner had cited to the letter of the subsections of the pertinent provisions of Florida Statutes as they appear in the 2008-2009 versions of Florida Statutes rather than the version in effect in 2006 and 2007 when the alleged offenses took place. Petitioner quoted, however, the actual language of the alleged statutory violations from the 2006 and 2007 version of Florida Statutes. Therefore, a conference was held by telephone with the parties during which this apparent scrivener's error was pointed out and the parties were requested to address the error in their responses to the Proposed Recommended Orders.

In addition to the issue concerning the correct alleged statutory violations, a dispute also arose concerning exactly

what "facts" have been stipulated to. Respondent takes the position that the agreed facts include Findings of Fact made in the Recommended Order in School Board of Palm Beach County, Florida v. Daniel Presmy, DOAH Case No. 07-5125, which was entered August 11, 2008 (hereinafter referred to as the "School Board Decision"). Petitioner takes the position that only the facts alleged in the Administrative Complaint were stipulated to. Exactly what "facts" have been stipulated to was not clearly enunciated by the parties in any pleading or conference held by the undersigned. It has ultimately been concluded in this Recommended Order, however, that including the findings made in the School Board Decision will not materially impact the ultimate recommendation in this Recommended Order.

After granting further extensions of time to file responses to the Proposed Recommended Orders, on April 20, 2010, Petitioner filed Petitioner's Response to the Respondent's Proposed Recommended Order/Petitioner's Motion to Amend Counts 1, 2, & 3 of the Administrative Complaint. The same day Respondent filed Respondent's Reply to Petitioner's Proposed Recommended Order.

No response has been filed by Respondent to Petitioner's Motion to Amend Counts 1, 2, & 3 of the Administrative Complaint. Therefore, that Motion is hereby granted. Accordingly, at issue in this case is whether Respondent

violated the following provisions of Florida law: Section 1012.795(1)(e), Florida Statutes (2007)(Count 1); Section 1012.795(1)(f), Florida Statutes (2007)(Count 2); Section 1012.795(1)(i), Florida Statutes (2007)(Count 3); Section 1012.795(1)(n), Florida Statutes (2008-2009), by having been disqualified from educator certification under Section 1012.315, Florida Statutes (Count 4); and Florida Administrative Code Rule 6B-1.006(3)(a), in that "Respondent has failed to make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental health and/or physical healthy and/or safety" (Count 5).

The Proposed Recommended Orders and the responses thereto filed by the parties have been fully considered in preparing this Recommended Order.

#### FINDINGS OF FACT

1. The following findings of fact were alleged in the Administrative Complaint and stipulated to by the parties:

1. The Respondent holds Florida Educator's Certificate 850876, covering the area of Elementary Education, which was valid through June 30, 2008.

2. At all times pertinent hereto, the Respondent was employed as a Third Grade Teacher at Roosevelt elementary School in the Palm Beach County School District.

3. On or about December 11, 2006, Respondent struck D.H., a twelve-year-old male student, against the will of D.H. On

or about July 30, 2007, Respondent pled and the court adjudicated him guilty of one count of Battery in violation of Florida Statutes Section 784.03.

4. Conviction of Battery in violation of Florida Statutes Section 784.03 when the victim is a minor now disqualifies an individual from holding an Educator's Certificate under Section 1012.315 of the Florida Statutes.

2. The following findings of fact were made in the School Board Decision:

1. Daniel Presmy (hereinafter "Presmy" or "Respondent") has been a teacher for six years with Palm Beach County School Board (hereinafter "School Board"). He has always taught elementary students.

2. Presmy has had no prior disciplinary action taken against him by the Superintendent of Palm Beach County School Board or the School Board.

3. Presmy was a certified teacher in the School Board of Palm Beach County.

4. On December 11, 2006, while in his classroom Presmy was teaching his third-grade class, and three students who were not students in his classroom showed up and disrupted the class. Presmy requested that the students leave his room. The students did not leave upon the initial request. One student informed Presmy that a student in the class had his eraser. Presmy then asked his class who had the eraser. Subsequently, an eraser flew to the front of the classroom and fell on the floor. Presmy picked up the eraser and handed the eraser to the student who had requested it.

5. Presmy turned back to his class and was hit on the temple with the eraser.

Presmy turned back around toward the student who he had given the eraser to and the student raised his hand. Again, Presmy told the student to leave. The student continued to stand in the middle of the doorway to Presmy's classroom and would not leave.

6. While Presmy remained in his classroom, he used his fingertips to push the student's head and told the student (hereinafter "student victim") to "leave and don't come back here." Presmy "didn't think that [he] was doing anything wrong by telling him to leave with a gesture to leave."

7. Presmy's reaction of touching the student was inappropriate. However, no evidence was demonstrated that the student was hurt during the incident.

8. Presmy did not press the buzzer or contact and ask for any assistance regarding the incident because he didn't think it was necessary.

9. On December 11, 2006, Officer Price was paged regarding the incident and she returned the call. She was informed that a student reported that he had been hit by a teacher at Roosevelt.

10. Price interviewed the student victim and witnesses regarding the incident with Presmy.

11. The School Board initiated an investigation into the incident. During the investigation, Respondent met with Detective Walton. Presmy told the investigator that he pushed the student victim in the head and told him to leave. [Endnote omitted].

12. The investigator concluded his investigation and presented the case to the State Attorney's Office for review. As a result, Daniel Presmy was criminally charged



with Battery as a violation of Florida Statutes.

13. On August 2, 2007, Presmy pled guilty to the battery charge as a negotiated plea agreement so as not to put himself and his family through a lengthy trial and under the advice of his lawyer. His sentence was 45 hours community service, 12 weeks of anger management, 12 months of probation with early termination after six months and a \$595 court fee.

14. Petitioner alleges Respondent, by his conduct, violated School Board Policies 0.01, 1.013 and 3.12, and State Board of Education Rules 6B-1.001 and 6B-1.006.

15. Subsequently, the School Board of West Palm Beach County at a meeting on October 24, 2007, voted to suspend Presmy without pay effective October 25, 2007, and initiated dismissal proceedings.

3. Although included as a Conclusion of Law in the School Board Decision, the following fact was also found in the School Board Decision: "There is no evidence that Presmy's physical contact with the student in any way impaired his effectiveness in the school system."

#### CONCLUSIONS OF LAW

##### A. Jurisdiction.

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

B. The Burden and Standard of Proof.

5. Petitioner seeks to impose penalties against Mr. Presmy pursuant to the Administrative Complaint that include the suspension or revocation his Florida educator's certificate. Therefore, Petitioner has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

6. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear 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 evidence 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaint.

7. In the Administrative Complaint it is charged that Mr. Presmy committed four acts for which Section 1012.795(1), Florida Statutes, authorizes the Education Practices Commission (hereinafter referred to as the "EPC"), to impose discipline on an educator's certificates. The four disciplinable acts of Section 1012.795(1), Florida Statutes, alleged to have been violated in the original Administrative Complaint are Sections 1012.795(1)(f), (g), (j), and (n).

8. The Administrative Complaint also quotes the actual statutory violation Petitioner believes Mr. Presmy violated. The quoted statutory violations for the first three counts do not match the letters of the subsection of Section 1012.795(1), Florida Statutes, Mr. Presmy is alleged to have violated.

9. In its response to Mr. Presmy's Proposed Recommended Order, Petitioner filed a Motion to Amend the first three counts of the Administrative Complaint to identify the correct letter of the statutory violations Mr. Presmy allegedly violated. Mr. Presmy has not responded to the Motion to Amend. Finding no prejudice to Mr. Presmy, the Motion to Amend has been granted.

10. As alleged in the Administrative Complaint, as amended, Mr. Presmy has been charged in Counts 1 through 3 with having committed the following three violations of Section 1012.795(1), Florida Statutes (2007):

(e) Has been convicted of a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation.

(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.

. . . .

11. In Count 4 of the Administrative Complaint, as amended, it is alleged that Mr. Presmy also violated Section 1012.795(1)(n), Florida Statutes (2008-2009). This offense was created in 2008, after the factual events at issue in this case. Ch. 2008-108, § 32, Laws of Fla. 2008. Section 1012.795(1)(n), Florida Statutes (2008-2009), defines the following disciplinable offense: "[h]as been disqualified from educator certification under s. 1012.315."

12. Finally, Count 5 alleges that Mr. Presmy violated Florida Administrative Code Rule 6B-1.006(3)(a), in that "Respondent has failed to make reasonable effort to protect the student from conditions harmful to learning and/or to the

student's mental health and/or physical health and/or safety." This count simply specifies which of the Principles of Professional Conduct for the Education Profession Mr. Presmy is alleged to have failed to follow in violation of Section 1012.795(1)(i), Florida Statutes (2007). Florida Administrative Code Rule 6B-1.-006(3)(a) does not authorize discipline and, therefore, Count 5 is simply a sub-part of Count 3.

D. Count 1: Violation of Section 1012.795(1)(e), Florida Statutes (2007).

13. The parties stipulated that Mr. Presmy was adjudicated guilty of battery in violation of Section 784.03, Florida Statutes, a misdemeanor of the first degree.

14. Petitioner has proved clearly and convincingly that Mr. Presmy has violated Section 1012.795(1)(e), Florida Statutes (2007), as alleged in the Administrative Complaint, as amended.

E. Count 2: Violation of Section 1012.795(1)(f), Florida Statutes (2007).

15. The parties stipulated that Mr. Presmy was adjudicated guilty of battery and that he "struck D.H., a twelve-year-old male student, against the will of D.H.."

16. Respondent argues that the foregoing stipulated facts and the facts found in the School Board Decision are inadequate to find that "he has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board."

17. Petitioner argues that Mr. Presmy's loss of effectiveness as an employee of the district school board can be inferred based upon the criminal violation. See Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000). While Petitioner is correct in arguing that ineffectiveness may be inferred in some cases, it is also true that not all conduct supports such an inference. See Walker v. Highlands County School Board, 752 So. 127, 128 (Fla. 2d DCA 2000).

18. In this matter, the facts which Petitioner has stipulated to are simply insufficient to infer ineffectiveness, even ignoring the Findings of Fact made in the School Board Decision. If the facts found in the School Board Decision were considered, Petitioner's argument is even less convincing. Those findings point out the reason why looking at only the crime for which guilt has been found, without more, may not support an inference of ineffectiveness.

19. Petitioner has failed to prove clearly and convincingly that Mr. Presmy "has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board" in violation of Section 1012.795(1)(f), Florida Statutes (2007).

F. Counts 3 and 5: Violation of Section 1012.795(1)(i), Florida Statutes (2007).

20. In Count 3 it is alleged that Mr. Presmy violated the "Principles of Professional Conduct for the Education Profession . . . ." In Count 5, it is alleged that the specific Principle violated is found in Florida Administrative Code Rule 6B-1.-006(3)(a), which requires that certificate holders "make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental health and/or physical healthy and/or safety."

21. In light of the fact that Mr. Presmy agrees that he "struck" a 12-year-old student and that he was adjudicated guilty of battery on that student, Petitioner has proved clearly and convincingly that Mr. Presmy failed to comply with Florida Administrative Code Rule 6B-1.-006(3)(a), in violation of Section 1012.795(1)(i), Florida Statutes (2007).

G. Count 4: Violation of Section 1012.795(1)(n), Florida Statutes (2008-2009).

22. Section 1012.795(1)(n), Florida Statutes (2008-2009), authorizes the EPC to take action against an educator's certificate if he or she "[h]as been disqualified from educator certification under s. 1012.315."

23. Section 1012.315(2)(a), Florida Statutes (2008-2009), provides as follows:

A person is ineligible for educator certification, and instructional personnel and school administrators, as defined in s.

1012.01, are ineligible for employment in any position that requires direct contact with students in a district school system, charter school, or private school that accepts scholarship students under s. 220.187 or s. 1002.39, if the person, instructional personnel, or school administrator has been convicted of:

. . . .

(2) Any misdemeanor offense prohibited under any of the following statutes:

(a) Section 784.03, relating to battery, if the victim of the offense was a minor.

24. The evidence proved clearly and convincingly that Mr. Presmy has been convicted of a misdemeanor defined in Section 1012.315(2)(a), Florida Statutes (2008-2009), that makes him "ineligible for educator certification" and "ineligible for employment in any position that requires direct contact with students . . . ."

25. As a consequence of his ineligibility for certification, the EPC is authorized by Section 1012.795(1)(n), Florida Statutes (2008-2009), to impose discipline on his educator's certificate.

26. Because Section 1012.795(1)(n), Florida Statutes (2008-2009), was enacted after Mr. Presmy was adjudicated guilty of battery, he argues that disciplining him for his 2007 conviction would constitute a prohibited retroactive application of a statute. Mr. Presmy, however, bases this argument on the



fact that his "conviction of Battery" took place before Section 1012.795(1)(n), Florida Statutes (2008-2009), was enacted.

While true, Mr. Presmy ignores the fact that Section 1012.795(1)(n), Florida Statutes (2008-2009), does not authorize discipline of his educator certification due to his conviction for battery or the acts which led to his conviction. Section 1012.795(1)(n), Florida Statutes (2008), authorizes discipline for his failure to remain eligible for certification, an act which took place upon enactment of Section 1012.315(2)(a), Florida Statutes.

27. Cases cited by Mr. Presmy are all distinguishable from this matter and contrary to the decision in Cirnigliaro v. Florida Police Standards and Training Commission, 409 So. 2d 80 (Fla. 1st DCA 1982). That decision, which supports Petitioner's position in this case, was explained in Taylor v. Department of Professional Regulation, Board of Medical Examiners, 534 So. 2d 782, 784 (Fla. 1st DCA 1988), as follows:

In Cirnigliaro we held that the Commission properly revoked Cirnigliaro's police officer's certification due to his pre-application conviction of a misdemeanor involving moral turpitude. Appellee cites Cirnigliaro as authority for the proposition that it has jurisdiction over appellant's prelicensure conduct. Cirnigliaro, however, involved not a disciplinary action for misconduct but rather the revocation of Cirnigliaro's certificate pursuant to a statutory mandate provide that a minimum qualification for certification was that an

applicant must not have been convicted of a felony or a misdemeanor involving moral turpitude. Unlike appellant, Cirnigliaro was not disciplined for any past misconduct but rather was relieved of his certification due to his present and continuing disqualification for certification. . . .

28. While Section 1012.795(1)(n), Florida Statutes (2008-2009), does not take into account events which took place prior to its enactment, Section 1012.315, Florida Statutes, does have the effect of disqualifying a person based upon convictions which may have taken place prior to enactment of that section of the law. The courts in Florida, however, have consistently upheld disqualification from employment based upon convictions occurring before the effective date of Chapter 435, Florida Statutes, which was effective October 1, 1995. Sledge v. Department of Children and Families, 861 So. 2d 1189 (Fla. 5th DCA 2003); Heburn v. Department of Children and Families, 772 So. 2d 561 (Fla. 1st DCA 2000); and Phillips v. Department of Juvenile Justice, 736 So. 2d 118 (Fla. 4th DCA 1999).

29. As explained in Petitioner's Response to the Respondent's Proposed Recommended Order, the Legislature, in enacting Section 1012.315, Florida Statutes, intended that convictions which took place prior to enactment of that Section were to be considered in determining whether an individual is eligible for certification to teach in Florida.

30. Based upon the foregoing, it is concluded that

Petitioner has proved clearly and convincingly that Mr. Presmy is in violation of Section 1012.795(1)(n), Florida Statutes (2008-2009).

H. Penalty

31. Petitioner has requested the permanent revocation of Mr. Presmy's educator's certificate. In light of the conclusion that Mr. Presmy is in violation of Section 1012.795(1)(n), Florida Statutes (2008-2009), in addition to his other violations, permanent revocation is justified. No longer being qualified for certification, revocation is the only reasonable penalty to be imposed in this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Education Practices Commission:

1. Finding that Daniel Presmy violated Sections 1012.795(1)(e) and (i), Florida Statutes (2007), and Section 1012.795(1)(n), Florida Statutes (2008-2009), as alleged in Counts 1, 3/5, and 4 of the Administrative Complaint, as amended;

2. Dismissing Count 2 of the Administrative Complaint, as amended; and

3. Permanently revoking Mr. Presmy's educator's certificate.

DONE AND ENTERED this 19th of May, 2010, in Tallahassee,  
Leon County, Florida.



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LARRY J. SARTIN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 19th day of May, 2010.

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 these cases.