

STATE OF FLORIDA
DEPARTMENT OF EDUCATION
OFFICE OF PROFESSIONAL PRACTICE SERVICES

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DIVISION OF
ADMINISTRATIVE
HEARINGS

DEPT. OF EDUCATION
TALLAHASSEE FLA

2010 DEC 10 P 12:05

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CICIEL GHOBRIAL,

Petitioner,

vs.

DOAH Case No. 10-0549

DR. ERIC J. SMITH, as
COMMISSIONER OF EDUCATION,

Respondent.

FINAL ORDER

Upon review of the record, the Commissioner of the Florida Department of Education hereby enters this Final Order pursuant to §§ 120.569 and 120.57(1), Fla. Stat. (2010).

PRELIMINARY STATEMENT

On August 27, 2009, Respondent, Dr. Eric J. Smith, as Commissioner of the Florida Department of Education (Department), notified Respondent, Ciciel Ghobrial, that she had received an "INVALID" score on the essay subtest of the Florida Teacher Certification Examination General Knowledge test (FTCE) that she had taken on July 25, 2009. Respondent informed Petitioner that the raters who reviewed Petitioner's essay had determined that it did not appear to be an original essay in terms of sentence structure, diction, organization or content. Petitioner timely filed a request for a formal hearing which was forwarded to the Division of Administrative Hearings. The hearing

was held on May 21, 2010, in Winter Park, Florida, before Administrative Law Judge R. Bruce McKibben.

During the final hearing, Petitioner, for whom English is a second language, appeared with the assistance of her son, Robert Ghobrial. Both Petitioner and her son testified on her behalf. Petitioner's Exhibits 2 through 20 were admitted into evidence. Respondent called five witnesses: Phil Canto, Director of Postsecondary Assessment with the Florida Department of Education; Virginia D'Attoma, Exam Supervisor; Dr. Diorah Nelson, Exam Rater; Elizabeth Griffey, Chief Exam Rater; and Ada Yahner, Investigator with the Office of Professional Practices at the Florida Department of Education. Respondent's Exhibits 1 through 10 and 12 were admitted into evidence. Each party timely filed a Proposed Recommended Order and on July 12, 2010, the Administrative Law Judge issued a Recommended Order (RO), which is incorporated by reference into this Final Order.

On July 26, 2010, Respondent timely filed Exceptions to the RO. Petitioner did not file any exceptions to the RO. A transcript of the hearing has been reviewed in the preparation of this Final Order, and references to it will be (T-*).

STATEMENT OF THE ISSUE

The issue in this case is whether the essay which Petitioner submitted at the July 25, 2009 Florida Teacher's Certification Exam constituted cheating, pursuant to the test administration directions.

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STANDARD OF REVIEW

Florida Statute § 120.57(1)(1) provides different standards of review when an agency reviews exceptions to a recommended order's findings of fact and conclusions of law. In the instant case, Respondent raised exceptions to the RO's Conclusions of Law, contained in paragraphs 29 and 30, and the Recommendation. As a result, only the standard of review for conclusions of law is discussed below.

An agency may reject or modify a RO's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretations are "as or more reasonable" than that which was rejected or modified. § 120.57(1)(1), Fla. Stat. (2010). Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit state agencies from reviewing conclusions of law that are based upon the administrative law judge's application of legal concepts such as collateral estoppel or hearsay, but not from reviewing conclusions of law containing the administrative law judge's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. See, Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA, 2001); Barfield v. Department of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA, 2001). Moreover, even when the agency's interpretation is not the only possible interpretation, the most logical interpretation, or even the most desirable interpretation, an agency's interpretation of the statutes and rules that it administers is entitled to great weight. See, State Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA, 1998).

EXCEPTIONS

The Department rejects the RO's Conclusions of Law, contained in paragraphs 29 and 30, and the Recommendation. The RO's Conclusions of Law are not supported by the testimony or the evidence presented at the hearing. The Department also finds that its interpretation of §1008.24(1), Fla. Stat., and the test administration directions at issue are as, or more, reasonable than the one proffered in the RO. Furthermore, the Department rejects the RO's Recommendation because it is unsupported by the record and the Conclusions of Law, contained in this Order, and it exceeds the question presented at the hearing.

Exception A

1. Respondent objects to the RO's Conclusion of Law, Paragraph 29, which provides:

It is, therefore, incumbent upon Respondent to provide evidence that Ghobrial knowing and willfully violated the test security rules for the Exam. That would include proof that Ghobrial entered the test site with the willful intention of writing an essay that was not original in content. In order to do that, Ghobrial would have had to have known the topics that would be offered during the essay portion of the Exam. There has been no showing that Ghobrial, or anyone else, knew what the topics would be. The mere fact that one of the topics had found its way to an online test preparation site does not implicate Ghobrial.

Respondent contends that this Conclusion of Law is contrary to the evidence on record, Petitioner's testimony and the RO's Findings of Fact.

2. During the FTCE essay subtest, an examinee is presented two topic prompts on which to write an essay. (RO ¶7). The purpose of the essay examination is to test the examinee's ability within an allotted time to extemporaneously compose and write an original essay that addresses the topic in an effective, well organized manner, with good

grammar and spelling. (RO ¶3, T-20). The essay score is not based on the examinee's knowledge of the topic, but rather on the examinee's ability to organize a logical essay using correct grammar. (RO ¶8).

3. The FTCE General Knowledge Exam registration materials, the test admission ticket, the oral instructions read to Petitioner and the other examinees prior to the exam and an oath signed by Petitioner prior to taking the exam, define "cheating" as:

writing an essay that shows evidence of having been prepared before the examination; that is, presenting an essay that is not an original essay composed by the examinee during the test in direct and specific response to an essay topic presented on the test.

(RO ¶7, T-14 – 15, Respondent's Exhibits 1A, 1B, 2, 3, 5, and 6).

4. On July 25, 2009, Petitioner took the FTCE essay subtest for the 13th time. (RO ¶5).

5. Furthermore, on the day of the test Petitioner signed the Test Booklet Receipt Card (Respondent's Exhibit 3) which provides:

By signing below, I acknowledge that the essay I am about to write will be an original essay, composed and organized by me during this test administration. It is not a pre-prepared essay written or composed ahead of time by me or anyone else. I further acknowledge that presenting a pre-prepared essay is considered cheating, and, if discovered by raters, will result in an invalid score for this Essay subtest and all other tests or subtests taken on this date.

6. Petitioner testified that during her previous examination attempts she had been provided the foregoing test instructions concerning what constituted cheating on the FTCE essay subtest. (T-194).

7. Petitioner's essay was scored by two test raters specifically trained to score these essays. (RO ¶9, ¶12). Essays which receive the same or contiguous scores by both raters are accepted. Essays that receive scores which vary by more than one point, discrepant

scores, are flagged and reviewed again by a Chief Rater. (RO ¶12). The purpose of the Chief Rater's review is to referee the discrepant score and assign a score. (T-85).

8. Petitioner's essay was flagged because her essay had received noncontiguous scores. (RO ¶12). When the assistant Chief Rater reviewed Petitioner's essay, she recognized that there were similarities between Petitioner's essay and two other essays also from the July 25, 2009 FTCE, but from different locations. (RO ¶13, T-85). As a result, Petitioner's essay was never scored and was assigned an "INVALID".

9. In her previous attempts to pass the FTCE essay subtest, Petitioner testified that she had seen the same essay topic prompt offered at the July 25, 2009 examination. (RO ¶10, T-182).

10. Petitioner testified that prior to taking the FTCE on July 25, 2009, she had practiced writing essays in response to this topic prompt in preparation for the FTCE essay subtest. Petitioner introduced a practice essay on the same topic as evidence at the hearing. (Petitioner's Exhibit 15, T-181 - 197).

11. Petitioner testified that during her extensive test preparation she had viewed hundreds of sample online essays. (RO ¶18, T-180).

12. A comparison between the essay that Petitioner submitted during the July 25, 2009 FTCE essay subtest (Respondent's Exhibit 6B), the practice essay that Petitioner prepared prior to the examination (Petitioner's Exhibit 15) and the on-line essay (Respondent's Exhibit 8) revealed numerous similarities in word choice, sentence structure, organization, examples, and paragraph conclusions. (RO ¶14 - ¶17).

13. The most significant similarities between Petitioner's July 25, 2009 FTCE essay, her practice essay, and the on-line essay are the organization of the essays and the choice

of topics and examples used for support, i.e., paragraphs on how computers have influenced the world of business, science, medicine and education. (RO ¶14 - ¶15, ¶17).

14. The Chief Rater testified that the majority of examinees who submitted essays on July 25, 2009 to this essay prompt discussed personal computer uses, such as finding directions to a location, making a purchase using the Internet, etc., as opposed to the topics and examples contained in Petitioner's essay. (T-98).

15. Two other essays submitted on July 25, 2009, also contained similarities to the on-line essay on computers. (RO ¶13, Respondent's Exhibit 7). Both of these essays received an invalid score. Neither of the examinees who received an invalid score on the essay contested the score. (RO ¶13).

16. Florida Statutes § 1008.24(1), entitled "Test security," provides:

It is unlawful for anyone knowingly and willfully to violate test security rules adopted by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants for certification or administered by school districts pursuant to 1008.22, or, with respect to any such test, knowingly and willfully to:

(f) Fail to follow test administration directions specified in the test administration manuals;

17. The RO's Conclusion of Law specifically provides that "it is incumbent upon Respondent to prove that [Petitioner] knowingly and willfully violated the test security rules for the exam" and that "[t]here had been no showing that [Petitioner], or anyone else, knew what the topics would be". The Conclusion of Law is premised on the argument that because Petitioner did not know what topics would be presented at the exam that Petitioner lacked the intent to cheat. The Department rejects this Conclusion of Law and asserts that it is as, or more, reasonable that Petitioner's own testimony

regarding her extensive preparation for this exam, her understanding of the test administration rules, her own exhibit (Petitioner's Exhibit 15), an essay that Petitioner had prepared prior to the exam on the same topic with very similar structure and supporting examples, and the on-line essay on the same topic (Respondent's Exhibit 8) which also had very similar structure and supporting examples, demonstrate that Petitioner did not submit an original essay as required by the FTCE test administration rules and § 1008.24(1)(f), Fla. Stat. (2010). See, John L. Winn v. Popescu, 2006 WL 2460672 (Fla. Div. Admin Hrgs.)

18. Therefore, the Department finds that the record, the Exhibits and Petitioner's testimony support the conclusion that the essay which Petitioner submitted at the July 25, 2009 FTCE was not original and therefore, did not meet the test administration directions specified in the test administration manuals that the essay be original and composed by the examinee during the test. Accordingly, Respondent's exception is GRANTED.

Exception B

19. Respondent's second exception concerns the RO's Conclusion of Law, Paragraph 30, which provides:

Based upon a careful review of the evidence and the demeanor of the witnesses, Respondent has not proven that Ghobrial did anything more than create a new original essay using knowledge she had gleaned from prior exposure to the essay topic.

Respondent takes exception to this Conclusion of Law and the reasoning on which it is premised.

20. The Department rejects the RO's interpretation of the law and finds that its interpretation of the law is as, or more, reasonable. The reason for this conclusion is

based upon the analysis provided in response to Exception A and the following discussion.

21. Petitioner's admitted understanding of the test administration instructions (T-194), followed by her choice to write an essay similar to an essay that she had previously prepared and submitted as evidence (Petitioner's Exhibit 15), and may have seen online (RO ¶17), circumvents the purpose of the FTCE essay subtest which is to assess the examinee's ability to extemporaneously organize and convey an original essay using correct grammar and spelling. Accordingly, the Exception is GRANTED.

Exception C

22. Respondent's last exception concerns the RO's Recommendation, which provides:

RECOMMENDED that a final order be entered by Respondent, Dr. Eric J. Smith, as Commissioner of Education, deeming Petitioner, Ciciel Ghobrial's essay to have been an original composition deserving of a passing grade.

Respondent takes exception to this Recommendation and argues that it exceeds the court's jurisdiction by issuing an order that directs a passing grade for Petitioner's essay. Respondent argues that the issue presented at the formal hearing was whether Petitioner cheated on the FTCE essay subtest and whether the Department appropriately invalidated the exam on these grounds, not whether Petitioner's essay constituted a passing score on the exam.

23. The Department rejects the RO's Recommendation and finds that its interpretation of the law is as, or more reasonable, than that contained in the RO's Recommendation. This conclusion is based on the Department's rejection of the RO's

Conclusions of Law, contained in paragraphs 29 and 30, without which the RO's Recommendation is unsupported.

24. Furthermore, a review of the record supports Respondent's contention that both parties at the hearing and in their Proposed Recommended Orders similarly defined the issue as "whether Petitioner's essay constituted cheating". During the hearing, the issue of whether Petitioner had received a passing score was never addressed due to the fact that Petitioner's essay was flagged and given an invalid score before a valid score was assigned. (T-99). Therefore, the RO's Recommendation prescribing a passing grade for Petitioner's essay exceeds the question presented at the hearing and is not supported by the Conclusions of Law contained in this order. Accordingly, the Exception is GRANTED.

Findings of Fact

Neither party raised any exceptions to the RO's Findings of Fact, contained in paragraphs 1 through 22. Therefore, the Department adopts the RO's Findings of Fact as the Findings of Fact of this Final Order.

Conclusions of Law and Recommendation

Based on the forgoing analysis, Respondent's exceptions to the RO's Conclusions of Law, contained in paragraphs 29 and 30, are granted. Accordingly, the Department rejects the RO's Conclusions of Law and incorporates the Conclusions of Law set forth in this Final Order. Respondent also raised an exception to the RO's Recommendation. Based on the foregoing, the Department rejects the RO's Recommendation and grants Respondent's exception.

DISPOSITION

Upon review of the entire record, the foregoing Findings of Fact, Conclusions of Law, and ruling on Respondent's Exceptions, the Department of Education, Office of Professional Practice Services, it is

ORDERED and ADJUDGED that Petitioner's essay submitted at the July 25, 2009 FTCE is invalid because it was a not an original essay and did not comply with test security rules.

DONE AND ORDERED this 10 day of December 2010, in Tallahassee, Leon County, Florida.



Eric J. Smith
Commissioner of Education
State of Florida

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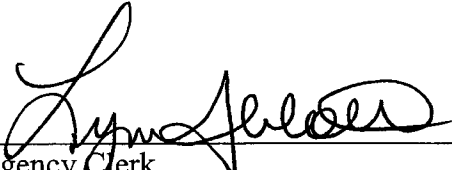
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NOTICE OF APPEAL RIGHTS

This Order constitutes final agency action. Judicial review of final agency action may be obtained by filing two Notices of Appeal within 30 days of the date of this Order. The Notices of Appeal must be filed with the Agency Clerk, Florida Department of Education, 325 West Gaines Street, Suite 1514, Tallahassee, Florida 32399-0400 and with the Clerk of the District Court of Appeal which has jurisdiction where the Petitioner resides. §120.68, Fla. Stat.; Fla. R. App. P. 9.110. UNLESS A NOTICE OF APPEAL IS TIMELY FILED, NO FURTHER REVIEW IS PERMITTED.

CERTIFICATE OF SERVICE BY THE AGENCY CLERK

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order has been furnished by United States mail to the persons listed below this 10 day of December 2010.



Agency Clerk

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