

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 10-2784PL
)
MARIA ELENA MALVAR,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted on July 12, 2010, by video teleconferencing between sites in Tallahassee and Miami, Florida, before Administrative Law Judge (ALJ) Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Ron Weaver, Esquire
Post Office Box 5675
Douglasville, Georgia 30154-0012

For Respondent: Henry Lopez-Aguilar, Esquire
9415 Sunset Drive, Suite 119
Miami, Florida 33173

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the subject Administrative Complaint, and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

On February 19, 2010, Petitioner issued an Administrative Complaint against Respondent, Maria Elena Malvar (Respondent or Ms. Malvar). Ms. Malvar applied for certification from the National Board for Professional Teaching Standards (NBPTS) in March 2007. Ms. Malvar was a classroom teacher at the time of her application. As part of the application process, a candidate for certification is required to submit written entries that will be described below. These written portfolio entries are required to be the candidate's original work. Succinctly stated, the Administrative Complaint alleged that parts of two portfolio entries submitted by Respondent were not her work, but were taken from entries submitted by another candidate.

Based on that conduct, Petitioner charged Ms. Malvar with committing the following violations:

Count I: . . . Section 1012.795(1)(d), Florida Statutes,¹ in that Respondent has been guilty of gross immorality or an act involving moral turpitude as defined by the rule of the State Board of Education;

Count II: . . . Section 1012.795(1)(j), Florida Statutes, in that Respondent has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules;

Count III: . . . Rule 6B-1.006(5)(a), Florida Administrative Code, in that

Respondent has failed to maintain honesty in all professional dealings; and
Count IV: . . . Rule 6B-1.006(5) (h), Florida Administrative Code, in that Respondent has submitted fraudulent information on a document in connection with professional activities.

Ms. Malvar timely requested a formal administrative hearing to challenge the allegations of the Administrative Complaint, the matter was referred to DOAH, and this proceeding followed.

Prior to the formal hearing, the parties filed a Joint Pre-Hearing Stipulation that stipulated to certain facts. Those stipulated facts have been accepted by the undersigned and have been incorporated into this Recommended Order by the Findings of Fact set forth in paragraphs 1-6.²

At the formal hearing, Petitioner presented the testimony of Ms. Ileana Saenz (a teacher and the other candidate referred to in the Administrative Complaint). Petitioner offered 14 sequentially-numbered exhibits, each of which was admitted into evidence. Petitioner's Exhibit 1 is a composite consisting of Exhibits 1A, 1B, 1C, and 1D. Respondent testified on her own behalf and presented the character witness testimony of Laura Grabiell, Maria Macia, and Lourdes De La Portilla. Respondent's witnesses were all current or former employees of the Miami-Dade County School Board. Respondent offered three consecutively numbered exhibits, each of which was admitted into evidence.

Respondent's Exhibits 1 and 2 are composite exhibits.

Respondent's Exhibit 3 is a copy of a video presentation.

On the motion of the Petitioner and without objection from Ms. Malvar, official recognition was taken of the website of the NBPTS (www.nbpts.org).

The Transcript, consisting of one volume, was filed August 2, 2010. On Respondent's motion, to which Petitioner had no objection, the deadline for submitting proposed recommended orders (PROs) was extended to August 23, 2010. The parties timely filed their respective PROs, which have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent holds Florida Educator's Certificate 776701, covering the areas of Elementary Education and English for Speakers of Other Languages, which is valid through June 30, 2010.³

2. At all times pertinent hereto, Respondent was employed as a fifth grade teacher at Fairlawn Elementary School (Fairlawn Elementary) in the Dade County School District.

3. On or about October 27, 2006, Respondent submitted an application for national certification through the NBPTS. Respondent's application fee to the NBPTS was subsidized by state funds designated for that purpose.

4. If Respondent had received national certification, she would be eligible for annual salary bonuses.

5. During 2006/2007, Respondent, in an attempt to qualify for national certification, submitted two portfolio entries, titled Entry 2 and Entry 3, to NBPTS that were not entirely her own work.

6. On or about July 8, 2008, NBPTS disqualified Respondent's Entry 2 and Entry 3 because the two portfolio entries had an unacceptable high degree of overlap to two portfolio entries submitted by a previous national board certification candidate.

7. NBPTS is a nationwide, advanced teaching credential that complements, but does not replace, a teaching certificate issued by a state, in this case, the State of Florida. The rigorous evaluation process includes the submission of four portfolio entries.

8. The issues in this case pertain to Ms. Malvar's portfolio Entry 2 and her portfolio Entry 3. Both portfolio entries were submitted to NBPTS by Ms. Malvar in March 2007.

9. Materials provided to candidates for certification by NBPTS include specific instructions for Entry 2 and Entry 3. Both portfolio entries required detailed written comments from the candidate as to his or her teaching methodologies and strategies.

10. The following is found in Part 1 of the General Portfolio Instructions under the heading of "Ethics and Collaboration":

Collaboration with colleagues is a valued part of the process: engage them in professional discussions about the NBPTS Standards; have them help you video record, watch, and analyze the video recordings; and have them read and comment on your analyses and on the student work you have chosen.. **However, the work you submit as part of your response to each portfolio entry must be yours and yours alone.** Your written commentaries, the student work you submit, and your video recordings must all feature teaching that you did and work that you supervised. (Emphasis is in the original.)

11. Ms. Malvar knew that the work a candidate submits as part of the candidate's response to each portfolio entry, including the written comments, must be the candidate's work and only the candidate's work.

12. Ms. Ileana Saenz is a classroom teacher at Fairlawn Elementary. Ms. Saenz has been a teacher for 20.5 years. Ms. Saenz has been a NBPTS certified teacher in reading literacy since December of 2006.

13. Ms. Malvar has been a teacher for 11 years. Ms. Malvar taught at Fairlawn Elementary until October 2009, when she was appointed to supervise the School District's Bilingual Parent Outreach Program, which was the position she held as of the date of the formal hearing.

14. Ms. Saenz and Ms. Malvar have known each other for 15 years.

15. Ms. Elizabeth Gonzalez is also a classroom teacher at Fairlawn Elementary.

16. Ms. Malvar, Ms. Saenz, and Ms. Gonzalez were candidates for NBPTS certification in the 2005-2006 school year. In March 2006, Ms. Saenz and Ms. Gonzalez submitted their entries to NBPTS. Ms. Malvar did not complete her portfolio entries and dropped out of the application process. In December 2006, NBPTS notified Ms. Saenz that she had attained certification.

17. While the three teachers were in the application process, Ms. Saenz gave to Ms. Malvar her four portfolio entries to proofread and to provide feedback.

18. In the fall of 2006, Ms. Malvar reapplied for NBPTS certification. Ms. Malvar submitted her four portfolio entries, including Entry 2 and Entry 3, to NBPTS in March 2007.

19. While packing her portfolio entries for submission to NBPTS, Ms. Malvar inadvertently gave Ms. Saenz a copy of each of her four portfolio entries. As will be discussed below, Ms. Saenz did not realize that she had a copy of these portfolio entries until February 2008.

20. In November 2007, Ms. Malvar received her score report from NBPTS. Ms. Malvar received a passing score on her Entry 3,

but she did not receive a passing score for her other three portfolio entries, including Entry 2. The score Ms. Malvar received for her Entry 3 was identical to the score Ms. Saenz had received for her Entry 3 the year before.

21. Ms. Saenz and Ms. Gonzalez encouraged Ms. Malvar to redo and submit the portfolio entries for which she had not received a passing grade. They offered to act as mentors.

22. In January 2008, Ms. Saenz asked Ms. Malvar to give her Ms. Malvar's Entry 1 and Entry 2 that had been submitted to NBPTS in March 2007, so that Ms. Saenz could review them and provide feedback to Ms. Malvar. Ms. Malvar complied with that request, but, as will be discussed below, Ms. Saenz did not have time to read the portfolio entries until the following month.

23. In February 2008, Ms. Saenz read a few pages of the draft of Ms. Malvar's new Entry 2 and noticed that the portfolio entry was very similar to the Entry 2 Ms. Saenz had submitted in March 2006. The strategies were the same and the wording was similar.

24. Shortly thereafter, Ms. Saenz retrieved the copy of the Entry 2 that Ms. Malvar had submitted to NBPTS in March 2007. (This was one of the two portfolio entries that Ms. Malvar had given Ms. Saenz in January 2008 to review and provide feedback.)

25. There was a great deal of overlap between the Entry 2 Ms. Saenz submitted in March 2006 and the Entry 2 Ms. Malvar submitted in March 2007. Ms. Saenz highlighted the overlap with a marker.

26. Ms. Malvar plagiarized parts of Ms. Saenz's Entry 2.

27. Ms. Saenz confronted Ms. Malvar and asked to see Ms. Malvar's other portfolio entries. Ms. Malvar told Ms. Saenz that she would provide her with a copy of the other portfolio entries.

28. The next morning, Ms. Saenz wanted more assurances from Ms. Malvar that her work would no longer be used. Shortly thereafter, Ms. Malvar informed Ms. Saenz that she had decided to drop out of the certification process. That afternoon, Ms. Malvar filled out the form to drop out of the certification process, faxed it in to NBPTS, and gave a copy to Ms. Saenz.

29. Later Ms. Saenz discovered the copy of Ms. Malvar's Entry 3 that had been submitted to NBPTS by Ms. Malvar in March 2007. This is the copy that Ms. Malvar had inadvertently given Ms. Saenz when Ms. Malvar and Ms. Gonzalez were packing Ms. Malvar's submissions to NBPTS in March 2007.

30. There was a great deal of overlap between the Entry 3 Ms. Saenz submitted in March 2006 and the Entry 3 Ms. Malvar submitted in March 2007. Ms. Saenz highlighted the overlap with a marker.

31. Ms. Malvar plagiarized parts of Ms. Saenz's Entry 3.

32. After learning that Entry 2 and Entry 3 had been plagiarized, Ms. Saenz was justifiably upset that Ms. Malvar had used her work. Ms. Saenz had received additional compensation as a result of her certification from NBPTS certification. Ms. Malvar's use of Ms. Saenz's work could have cost Ms. Saenz her certification from NBPTS and the loss of her additional compensation.

33. After consulting her assistant principal and her direct supervisor, Ms. Saenz held a conference call with the person who is head of the national boards for the Miami-Dade County School District. Following that conference call, Ms. Saenz reported to NBPTS her observations as to the similarities between her own Entry 2 and Entry 3 submitted in March 2006, and the Entry 2 and Entry 3 that Ms. Malvar submitted in March 2007.

34. On April 28, 2008, a representative of the NBPTS advised Ms. Malvar that NBPTS had identified "a high degree of overlap" between her portfolio entries and those of "another current or former candidate." The letter invited Ms. Malvar to explain no later than May 12, 2008, how the overlap could have occurred.

35. Because Ms. Malvar did not timely respond to the April 28, 2008, letter, a second letter was sent to her by the

same representative of NBPTS extending the response time to May 19, 2008.

36. By letter dated May 19, 2008, Ms. Malvar responded to NBPTS with the following after she had referenced the two letters she had received:

In response to the aforementioned letters, I would like to state that all the implemented lessons were my original ideas, I did all the research as well as planning that it took to create them and I was the only person involved in their implementation. At the same time, I do acknowledge that the way some of the lessons were expressed on paper were not my original words. This was done without malice and without the consent of the other person. I do regret this unfortunate incident since I did put many hours of hard work in the creation of the lessons.

37. By letter dated July 8, 2008, the president of NBPTS notified Ms. Molvar of his decision. The letter provided, in part, as follows:

Before making my decision I closely reviewed the various materials regarding this case, while taking into consideration the obligation that NBPTS has to maintain an assessment that is fair to all teachers seeking certification. This is a serious issue, and I did not make my decision lightly. After reviewing all of the documentation regarding this situation, I find unacceptable the high degree of overlap between [Ms. Sanez's 2006 entries and Ms. Malvar's 2007 entries].

While collegial teamwork is valued by the National Board, the guidelines set forth in the portfolio directions are in place to ensure all candidates seeking certification

submit original work and analyses that are a result of personal reflection on their individual teaching practices.

In your situation, I find that the overlap is significant enough to cause concern. Therefore, it is my decision to disqualify your current scores for the above-mentioned portfolio entries and to remove the scores from your score report. It is also my decision to grant you the opportunity to retake these portfolio entries and any other entries/exercises you choose to retake.

38. Ms. Malvar had not reapplied for certification as of the date of the formal hearing.

39. Ms. Malvar has never received any letters of reprimand, letters of direction, or verbal warnings at any time during her professional career as an educator.

40. Ms. Malvar has received numerous certificates of achievement.

41. Ms. Malvar has always received high marks on her evaluations as an educator and has never received an unsatisfactory evaluation.

42. Ms. Malvar presented the testimony of three current or former educators as character witnesses. These character witnesses testified, credibly, that Ms. Malvar enjoys a good reputation in the teaching community.

43. Ms. Malvar knew, or should have known, that her use of Ms. Sanez's work constituted cheating.

44. Ms. Malvar testified, credibly, that she was ashamed of what she had done.

CONCLUSIONS OF LAW

45. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

46. In this proceeding the Commissioner of Education seeks to discipline Respondent's educator's certification. Consequently, the Commissioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994). The evidence in this proceeding is not only clear and convincing, the evidence is undisputed.

47. Count I of the Administrative Complaint alleged that Respondent violated Section 1012.795(1)(d), Florida Statutes. Count II alleged that Respondent violated Section 012.795(1)(j), Florida Statutes. Count III alleged Respondent violated the provisions of Florida Administrative Code Rule 6B-1.006(5)(a). Count IV alleged Respondent violated the provisions of Florida Administrative Code Rule 6B-1.006(5)(h).

48. Section 1012.795(1), Florida Statutes, provides, in relevant 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; may suspend the educator certificate, upon an order of the court or notice by the Department of Revenue relating to the payment of child support; 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.

* * *

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

49. Florida Administrative Code Rule 6B-1.006(5) provides, in relevant part, as follows:

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

(a) Shall maintain honesty in all professional dealings.

* * *

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

50. The subject statute does not define the term "gross immorality" or the phrase "an act involving moral turpitude". Florida Administrative Code Rule 6B-4.009, which contains definitions for use by school districts in disciplining instructional staff, provides assistance.

51. No rule defines the term "gross immorality." However, Florida Administrative Code Rule 6B-4.009(2) contains the following definition of the term immorality:

(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.

52. "Gross immorality" has been defined to mean an act of misconduct that is serious, rather than minor in nature; it is a flagrant disregard of proper moral standards. See Education Practices Commission v. Knox, 3 FALR 1373-A (Fla. Dept. of

Education 1981) and Frank T. Brogan v. Eston Mansfield, Case No. 96-0286 (Fla. DOAH Aug. 1, 1996; Fla. Education Practices Commission Oct. 18, 1996).

53. The moral standard to be upheld must be viewed in context with the profession at issue. As leaders and role models in the community, teachers are held to a high moral standard. Adams v. Professional Practices Council, 46 So. 2d 1170 (Fla. 1st DCA 1981). In John L. Winn, as Commissioner of Education v. Adela Popescu, Case No. 06-1620PL (DOAH August 2006) a teacher was found to have plagiarized material on a state certification examination. The ALJ in that case made the following conclusion of law at paragraph 26 of her Recommended Order, which the undersigned adopts:

26. Respondent's duties as a teacher include evaluating her students by testing their knowledge. Her apparent belief that cheating or plagiarizing is acceptable conduct cannot be permitted to be taught to her students. The public has a right to rely on the placement of only honest persons in charge of teaching the community's youth. Petitioner has proven Respondent guilty of gross immorality and an act involving moral turpitude since she, as a teacher, submitted someone else's work as her own as part of her examination for certification.

54. The Education Practices Commissions adopted the Recommended Order in DOAH Case No. 06-1620PL by its Final Order entered January 17, 2007.

55. Based on the foregoing, it is concluded that Petitioner proved by clear and convincing evidence the violation alleged in Count I of the Administrative Complaint by submitting someone else's work as her own in an effort to achieve a prestigious and lucrative national board certification from the NBPTS.

56. Petitioner proved by clear and convincing evidence that Respondent failed to maintain honesty in all professional dealings as alleged in Count III of the Administrative Complaint and in violation of Florida Administrative Code Rule 6B-1.006(5) (a).

57. Petitioner proved by clear and convincing evidence that Respondent submitted fraudulent information on a document in connection with professional activities as alleged in Count IV of the Administrative Complaint and in violation of Florida Administrative Code Rule 6B-1.006(5) (h).

58. Petitioner proved by clear and convincing evidence that Respondent violated the Principles of Professional Conduct for the Education Profession as alleged in Count II of the Administrative Complaint and in violation the provisions of Section 1012.795(1), Florida Statutes, by committing the violations found in Counts III and IV of the Administrative Complaint.

59. In making the penalty recommendation that follows, the undersigned has considered Respondent's favorable reputation and work history. The conduct at issue in this proceeding appears to be an anomaly in an otherwise distinguished career. However, plagiarizing or cheating to obtain a prestigious and lucrative national board certification by a school teacher cannot be tolerated, and the penalty for such conduct should be substantial. The recommendation that follows is consistent with the penalty imposed in the analogous DOAH Case No. 06-1620PL.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding Respondent guilty of Counts I, II, III, and IV of the Administrative Complaint. It is further recommended that the final order suspend Respondent's educator's certificate for a period of one year.

DONE AND ENTERED this 13th day of September, 2010, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of September, 2010.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2010).
There has been no material change to these statutes at any time
relevant to this proceeding.

^{2/} Few, if any factual disputes remained after the parties filed
their Pre-Hearing Stipulation. In her PRO, Ms. Malvar admits
the violations alleged in Counts II, III, and IV, but argues
that her conduct does not rise to the level of "gross
immorality" and does not constitute an act of "gross
immorality". Ms. Malvar argues Petitioner should not suspend
her teaching certificate for more than six months. In its PRO,
Petitioner argues that Ms. Malvar is guilty of the violations
alleged and that the penalty should include the suspension of
her teaching certificate for a period of one year.

^{3/} This finding is taken verbatim from the Pre-Hearing
Stipulation. The record is silent as to whether Ms. Malvar
extended her certificate prior to June 30, 2010. In her PRO,
Ms. Malvar represents that her teaching certificate had been
renewed. Neither party has suggested that the proceeding is
moot, which suggests that the certificate has been extended and
that she holds a valid teaching certificate.

COPIES FURNISHED:

Kathleen M. Richards, Executive Director
Education Practices Commission
Department of Education
Turlington Building Suite 224
325 West Gaines Street
Tallahassee, Florida 32399-0400

Ron Weaver, Esquire
Post Office Box 5675
Douglasville, Georgia 30154-0012

Henry Lopez-Aguilar, Esquire
9415 Sunset Drive, Suite 119
Miami, Florida 33173

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

Marian Lambeth, Bureau Chief
Bureau of Professional Practice Services
Department of Education
Turlington Building, Suite 224E
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.