

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 16-1693PL

JEAN-BAPTISTE GUERRIER,

Respondent.

_____ /

RECOMMENDED ORDER

On May 9, 2016, a duly-noticed hearing was held by video teleconference at locations in Miami and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
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Fort Lauderdale, Florida 33316

For Respondent: Michelle A. Delancy, Esquire
Hamilton, Miller, & Birthisel, LLP
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent, Jean-Baptiste Guerrier, made inappropriate comments to, or engaged in inappropriate conduct with, female students, or inappropriately

discussed the topic of sex with his class, as alleged in the Administrative Complaint; and, if so, what sanction is appropriate.

PRELIMINARY STATEMENT

On or about August 12, 2013, Pam Stewart, as Commissioner of Education (Commissioner or Petitioner), filed an Administrative Complaint against Mr. Jean-Baptiste Guerrier (Mr. Guerrier or Respondent). Respondent subsequently filed an Election of Rights form on September 5, 2013, disputing the allegations in the Administrative Complaint and requesting a formal hearing. On March 27, 2014, the case was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge.

The parties attempted to settle this matter. However, on March 24, 2016, Petitioner filed a Motion to Re-open Case, asserting that the parties had not been able to enter into a settlement agreement. The motion was granted.

The hearing was conducted on May 9, 2016, by video teleconference. The parties stipulated to certain facts, which were accepted and have been incorporated into the Findings of Fact below. At hearing, Petitioner presented the testimony of Ms. Ana Sanchez, an investigator for the Miami-Dade County School Board, and Ms. Anne-Marie DuBoulay, the district director of the Office of Professional Standards for Miami-Dade County Public

Schools. Petitioner offered Exhibits P-1, P-4, P-6, and P-8 through P-10, which were admitted into evidence. Exhibit P-4, a district investigative report prepared by Ms. Sanchez, was admitted over objection that it was hearsay, as discussed below. Respondent testified on his own behalf.

The Transcript was filed on May 25, 2016. Both parties filed proposed recommended orders that were considered in the preparation of this Recommended Order.

Citations to statutes and rules are to those versions in effect between August 2011 and August 2012, the time the conduct is alleged to have occurred.^{1/}

FINDINGS OF FACT

1. The Commissioner is responsible for investigating and prosecuting misconduct allegations against individuals holding Florida educator's certificates.

2. Mr. Guerrier held Florida Educator's Certificate 596926, covering the areas of English and middle grades, which was valid through June 30, 2015.

3. At all times pertinent hereto, Mr. Guerrier was employed as a vocational education teacher at D.A. Dorsey Education Center School in the Miami-Dade County School District.

4. Mr. Guerrier primarily taught English to students who had dropped out of school earlier and were returning for

vocational education. Some of his students were adults, and some were still minors.

5. On August 2, 2012, Ms. Ana Sanchez, an investigator for the Miami-Dade County School Board, received a case alleging that Mr. Guerrier had made inappropriate comments of a sexual nature to his students and had inappropriately touched female students.

6. Ms. Sanchez interviewed students and prepared an investigative report detailing what each student told her regarding Mr. Guerrier's conduct in class. She did not personally observe Mr. Guerrier's conduct in the classroom.

7. On September 6, 2012, Mr. Guerrier wrote a letter to Ms. Anne-Marie DuBoulay, the district director of the Office of Professional Standards. In the letter, Mr. Guerrier indicated that he had read the allegations and that he denied them.

8. On or about October 5, 2012, the Miami-Dade County School District notified Mr. Guerrier that he would be recommended for suspension without pay and dismissal.

9. On or about October 8, 2012, Mr. Guerrier submitted his resignation from his position at the Miami-Dade County School District.

10. On October 10, 2012, Ms. DuBoulay prepared a memorandum for the file indicating that Mr. Guerrier had resigned and that the investigative information had been transmitted to

Professional Practices Services of the Florida Department of Education.

11. On August 12, 2013, an Administrative Complaint was filed against Mr. Guerrier by the Commissioner. It was subsequently sent to the Division of Administrative Hearings.

12. At hearing, Ms. Sanchez testified that she interviewed several students from Mr. Guerrier's classes. She testified that some students told her that Mr. Guerrier often made inappropriate comments about sex and female anatomy to his students. She testified that students told her that he inappropriately touched students. She testified that students told her that he had asked female students, "What would you do for a grade?" She testified that Elijah Del'Valle, a 21-year-old student, told her that he saw Mr. Guerrier pulling a female student's G-string, confirming the female student's statement to her.

13. The investigative report prepared by Ms. Sanchez indicated that D.W., a 25-year-old female student, told Ms. Sanchez that Mr. Guerrier would make sexual comments to his female students on a daily basis. The report indicates that D.W. told Ms. Sanchez that Mr. Guerrier asked her in class if he could see her private parts and asked "what she would do for the grade."

14. The report indicates that K.L., a minor female student, told Ms. Sanchez that Mr. Guerrier rubbed her stomach and asked

her to kiss him. The report indicates that K.L. told Ms. Sanchez that Mr. Guerrier told a story in class about a student who had reported him and that he told his class that the student was mad because he would not have sexual relations with her. The report indicates that K.L. told Ms. Sanchez that Mr. Guerrier told K.L. that her boyfriend "could not handle her." The report says that K.L. told Ms. Sanchez that she witnessed Mr. Guerrier pull G.C.'s underwear in class.

15. The report indicates that J.S., a minor female student, told Ms. Sanchez that Mr. Guerrier always used inappropriate slang terms for female anatomy in class and that she heard Mr. Guerrier ask K.L. to show him her private parts. The report indicates that J.S. told Ms. Sanchez that she saw Mr. Guerrier touching K.L.'s stomach. The report indicates that J.S. told Ms. Sanchez that Mr. Guerrier told one female student, "What if I turn off the lights and tell you to undress?" The report indicates that J.S. told Ms. Sanchez that she did not recall which student Mr. Guerrier made this comment to.

16. The report indicates that Mr. Del'Valle, an adult male student, told Ms. Sanchez that he observed Mr. Guerrier flirting with female students and making sexual remarks in class. The report indicates that Mr. Del'Valle told Ms. Sanchez that Mr. Guerrier would ask his female students what they would do for a grade. The report indicates that Mr. Del'Valle told

Ms. Sanchez that he saw Mr. Guerrier pull a student's pants from behind during class and then ask the young lady where she was going. The report indicates that Mr. Del'Valle told Ms. Sanchez that Mr. Guerrier was always looking at the female students when they walked by and would rub his shoulder and arm against them.

17. The report indicates that G.C., a minor female student, told Ms. Sanchez that she saw Mr. Guerrier rub K.L.'s belly area and say, "let me lick that belly ring of yours." The report indicates that G.C. told Ms. Sanchez that Mr. Guerrier is always brushing himself up against the female students. The report indicates that G.C. told Ms. Sanchez that Mr. Guerrier told a story in class about a student who had reported him and that that student was mad because he had not had sexual relations with her. The report indicates that G.C. told Ms. Sanchez that she once asked Mr. Guerrier for help with a lesson and that he pulled her G-string when she was getting up from the chair and pulled her back down.

18. Mr. Guerrier testified at hearing that he did not do any of the things he was accused of. Mr. Guerrier said that his accusers had a motive to fabricate their stories because they were very poor students. He said that some of them slept in class, others texted throughout class, and others did not show up at all. He stated that some of them had no grades in his grading

book and that he had no basis to give them a grade. He stated the students went to a counselor and fabricated the stories.^{2/}

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

20. Petitioner is responsible for filing complaints and prosecuting allegations of misconduct against instructional personnel holding educator certificates. §§ 1012.795(1) and 1012.796(6), Fla. Stat.

21. Petitioner seeks to take action against Respondent's educator certificate as provided in sections 1012.795 and 1012.796, Florida Statutes. A proceeding to impose discipline against a professional license is penal in nature, and Petitioner bears the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

22. Clear and convincing evidence has been said to require:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

23. Respondent is substantially affected by Petitioner's intended decision to discipline his Florida educator's certificate and has standing to maintain this proceeding.

Count 1

24. At the time of the alleged conduct, section 1012.795(1)(d) provided that persons who are "guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education" may have their licenses disciplined by the Education Practices Commission.

25. The Ethics in Education Act, chapter 2008-108, Laws of Florida, added the phrase "as defined by rule of the State Board of Education." It is unclear whether this new language was intended to modify only "an act involving moral turpitude" or if it instead modifies the entire phrase "gross immorality or an act involving moral turpitude." The absence of a comma after the word "immorality" suggests that it modifies the entire phrase. In any event, when construing penal statutes, any statutory ambiguity should be resolved in favor of Respondent. Cilento v. State, 377 So. 2d 663, 668 (Fla. 1979) (where criminal statute is

ambiguous, construction most favorable to accused should be adopted). Cf. also § 775.021, Fla. Stat. ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."). The first portion of section 1012.795(1)(d) is only violated if an educator is guilty of gross immorality as defined by rule of the State Board of Education. Petitioner did not cite to any rule of the State Board of Education defining "gross" immorality, and none was found.

26. There was a hearsay objection to those portions of the testimony of Ms. Sanchez as to what students told her, or what she testified that her report said that students told her. This testimony was hearsay. As discussed at hearing, section 120.57(1)(c), Florida Statutes (2015), states in part that "[h]earsay evidence may be used for the purposes of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding."

27. Exhibit P-4 was also objected to by Respondent as hearsay. The document was admitted, because chapter 120 allows the admission of hearsay, with the caveat that it was hearsay and could only be used to supplement or explain other competent evidence, and could not itself support a finding of fact.

28. The foundation for admission of the investigative report as a business record under section 90.803(6), Florida Statutes (2015), was not fully laid. In any event, it is clear that the relevant information about Mr. Guerrier's actions was not supplied by Ms. Sanchez or other person with knowledge acting within the course of regularly conducted business activity. Reichenberg v. Davis, 846 So. 2d 1233, 1234 (Fla. 5th DCA 2003) (report of investigator which contained witness interviews not admissible because not based on knowledge of an agent of the business). All of the information in the report about Mr. Guerrier's actions was provided by students, not employees, and so was hearsay within hearsay. M.S. v. Dep't of Child. & Fams., 6 So. 3d 102, 104 (Fla. 4th DCA 2009) ("The general rule is that a hearsay statement which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception.") (quoting Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 809 (Fla. 1st DCA 1986)).

29. No students testified. Neither the testimony of Ms. Sanchez nor her investigative report provided evidence that would support a finding that Respondent was guilty of gross immorality. Ag. for Health Care Admin. v. Genesis Eldercare Nat'l Ctrs., Inc., d/b/a Oakwood Ctr., Case Nos. 02-3849; 02-3850 (Fla. DOAH Mar. 21, 2003; Fla. AHCA Apr. 22, 2003). No other record evidence supports that charge.

30. Up until July 8, 2012, the State Board of Education had defined the term "moral turpitude," at least as it relates to crimes, in Florida Administrative Code Rule 6A-5.056(6) entitled, "Criteria for Suspension and Dismissal," which provided:

(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.

31. This is almost identical to the definition of moral turpitude adopted by the Florida Supreme Court in Florida Bar v. Davis, 361 So. 2d 159 (Fla. 1978) ("A crime involves moral turpitude if it is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general.").

32. After July 8, 2012, rule 6A-5.056 was amended to define "moral turpitude" as pertaining to specifically listed crimes.

33. No competent evidence, only the hearsay or hearsay within hearsay evidence already discussed, was offered by Petitioner to prove that Respondent was guilty of acts of moral turpitude under either definition.

34. Petitioner failed to prove by clear and convincing evidence that Respondent violated section 1012.795(1)(d).

Count 2

35. Section 1012.795(1)(g) provided that the Education Practices Commission may suspend the educator's certificate of a person who, upon investigation, has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board.

36. There was no evidence showing reduction of effectiveness presented at hearing.

37. Petitioner failed to prove by clear and convincing evidence that Respondent violated section 1012.795(1)(g).

Count 3

38. Count 3 alleges that Respondent is in violation of section 1012.795(1)(j), in that he has violated the Principles of Professional Conduct for the Education Profession. Counts 4 through 6 are subsidiary to Count 3 and go on to allege specific violations of these principles. Count 3, therefore, does not constitute a distinct disciplinary violation.

Counts 4, 5, and 6

39. The only evidence that Respondent committed any violation of the Principles of Professional Conduct for the Education Profession, as alleged in Counts 4, 5, and 6, was again hearsay, or double hearsay.

40. Petitioner failed to prove by clear and convincing evidence that Respondent violated section 1012.795(1)(j) or any portion of Florida Administrative Code Rule 6A-10.081(3).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order dismissing the Administrative Complaint against Jean-Baptiste Guerrier.

DONE AND ENTERED this 20th day of June, 2016, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 2016.

ENDNOTES

^{1/} There were no changes to sections 1012.795 or 1012.796, Florida Statutes, from the 2012 legislative session. Prior to July 8, 2012, Florida Administrative Code Rule 6A-5.056 required a violation of the Principles of Professional Conduct for the Education Profession in Florida to be "so serious as to impair the teacher's effectiveness in the school system" in order for that violation to constitute "just cause" for suspension or

dismissal--a requirement deleted in the amended rule. Since the record evidence was insufficient to show a violation of the principles, this additional element need not be addressed.

^{2/} While Mr. Guerrier's testimony was not very credible, it was not his burden to prove his version of events. Rather, the burden was on the Commissioner to establish the conduct it alleged. See Bose Corp. v. Consumers Union, 466 U.S. 485, 508 (1984) ("When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.").

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.