

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 16-3078PL

WINSTON NORTHERN,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final formal administrative hearing was conducted in this case on September 26, 2016, in Jacksonville, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Ron Weaver, Esquire
Post Office Box 770088
Ocala, Florida 34477-0088

For Respondent: Stephanie Marisa Schapp, Esquire
Teddy Rivera, Esquire
Duval Teachers United
1601 Atlantic Boulevard
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue in this case is whether just cause exists to impose sanctions against Respondent, Winston Northern

("Northern" or the "Teacher"), up to and including revocation of his Educator's Certificate.

PRELIMINARY STATEMENT

An Administrative Complaint was filed by Pam Stewart, as Commissioner of Education (the "Commissioner"), on August 25, 2015. The Teacher submitted an Elections of Rights form dated September 10, 2015, wherein he requested a formal administrative hearing to contest the allegations in the Administrative Complaint. The matter was referred to DOAH on June 3, 2016. On July 27, 2016, the Commissioner filed an Unopposed Motion for Leave to Amend the Administrative Complaint; the motion was granted.

At the final hearing, the Commissioner called five witnesses: Michael King Byrd, school technology coordinator; Diamond Williams, former student; B.B., student; Robert Lewis, principal; and Lizzie Peeples, assistant principal. The Commissioner's Exhibits 2 through 5 were admitted into evidence. Mr. Northern testified on his own behalf. Respondent's Exhibits 1 and 6 were admitted. Joint Exhibit 1 was also admitted. (All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent such hearsay did not supplement or explain non-hearsay evidence, it will not be used solely as a basis for any finding herein.)

The parties advised the undersigned that a transcript of the final hearing would be ordered. They are allowed 10 days by rule from the date the transcript is filed at DOAH to submit proposed recommended orders. The Transcript was filed on October 25, 2016. Each party timely submitted a proposed recommended order, and both parties' submissions were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Florida Education Practices Commission is the state agency charged with the duty and responsibility to revoke or suspend, or take other appropriate action with regard to Florida Educator Certificates, as provided in sections 1012.795 and 1012.796(6), Florida Statutes (2016). The Commissioner of Education is charged with the duty to file and prosecute administrative complaints against individuals who hold Florida Educator Certificates and who are alleged to have violated standards of teacher conduct. § 1012.796(6), Fla. Stat. (2016)

2. At all times relevant hereto, Northern held a Florida Educator Certificate and was employed as a teacher in the Duval County School System, teaching at A. Philip Randolph Academy of Technology, a charter school within the Duval County school system (and referred to herein as the "School").

3. On October 30, 2013, L.E. was a ninth-grade male student in the Teacher's fourth period class, Introduction to

Information Technology. L.E., who had a history of misbehaving in class, was one of 25 students in class on that day.

4. The facts of this case read like A Tale of Two Cities; "It was the best of times, it was the worst of times." Although the duration of the incident in question was very short, and the location where it occurred was limited in size, the disparity in the testimony of eye witnesses could not be greater. For some, there was clearly an egregious event precipitated by the Teacher's actions. For others, there was only a minor disruption of class with little significance. Few of the witnesses seemed to have a clear memory of the events that transpired that day, as evidenced by the contradictory and imprecise testimony evoked at final hearing.

The Commissioner's View

5. Mrs. Byrd (formerly Ms. King) was the School's "computer technology coordinator." She would often come into Mr. Northern's classroom because most of the School's computer-related supplies were kept in a closet in that classroom. Mrs. Byrd came into Mr. Northern's room on October 30, 2013, to get some IT supplies out of the closet. As she exited the classroom, Mrs. Byrd saw a woman walking quickly towards the classroom door; the woman appeared to be very agitated. Mrs. Byrd asked the woman (later identified as T.E., L.E.'s mother, and also referred to herein as the "Mom") if she needed

assistance. Mrs. Byrd noticed that the woman was not wearing a Visitor's badge, as required by school rules.

6. The woman said she did not need any help and that Mr. Northern had called her to come and deal with her son's behavior issues. At that point, Mr. Northern opened the door and ushered T.E. into the classroom, indicating to Mrs. Byrd that it was "okay." Mrs. Byrd followed them back into the classroom.

7. T.E. immediately made a beeline to where her son, L.E., was sitting. Mrs. Byrd remembered T.E. physically attacking her son as she yelled profanities at him. The beating, with fists and open hands to L.E.'s face, lasted "a long time." Mrs. Byrd initially estimated it to be about a minute and a half in length, but later agreed that it was probably about 15 seconds in duration. During the time that L.E. was being physically attacked by his mother, Mr. Northern did not intervene.

8. Mrs. Byrd was in shock at what she was witnessing. At some point, Mrs. Byrd recovered from her shock and began to shout Mr. Northern's name over and over to get his attention. Mr. Northern then directed the Mom and L.E. out into the open area outside the classroom. A student told Mrs. Byrd she "needed to do something" after L.E., his mom and Mr. Northern left the room. She obtained L.E.'s name from a student so that she could report the incident.

9. Once outside the classroom, T.E. continued to berate both L.E. and Mr. Northern. At that point, Mrs. Byrd (who had walked out of the classroom sometime after the others) walked towards the elevator which was located just across from the classroom. As she neared the elevator, she met Mr. Lewis, the principal at the school. She indicated to Principal Lewis that she needed to talk to him about something important, i.e., the incident she witnessed in Mr. Northern's classroom. However, Principal Lewis heard the Mom cursing loudly at T.E. and instead of talking to Mrs. Byrd, he went to speak to the Mom. Mrs. Byrd entered the stairwell next to the elevator and went downstairs.

10. Principal Lewis explained to the Mom that the language she was using was not allowed on campus and that she needed to calm down. She did so. T.E. then took her son downstairs and presumably signed him out of school for the remainder of the day. Mr. Northern did not indicate to Principal Lewis that there had been a problem of any kind in the classroom. Principal Lewis' testimony overall was not persuasive. He seemed very unclear as to how the events unfolded and seemed to contradict other, more believable witness testimony.

11. Mrs. Byrd was upset by the incident and immediately called the abuse hotline at the Department of Children and Families ("DCF") to report the incident. DCF advised Mrs. Byrd to notify administration at the School about the incident.

Mrs. Byrd contacted the assistant principal, Mrs. Peeples, but not until the next day. Mrs. Peeples asked Mrs. Byrd to provide a written statement about the incident and Mrs. Byrd prepared the statement.

12. At about 4:15 p.m. on the day of the incident, Mrs. Peeples allegedly received a telephone call from the parent of one of the other students in Mr. Northern's class. The student had purportedly told his/her parent a fellow student, L.E., had been severely beaten by his mother in the presence of the entire classroom. Based on that call, Mrs. Peeples contacted Principal Lewis to tell him what she had heard from the parent. Principal Lewis remembered that he, not Mrs. Peeples, received the parent's phone call on that day. He also remembered talking with Mrs. Peeples about the incident and that she recounted her conversation with Mrs. Byrd. Mrs. Byrd, however, said she did not talk to Mrs. Peeples about the incident until the following day. Therefore, who talked to whom and when the conversations occurred are not completely clear from the testimony provided.

13. Principal Lewis contacted Mr. Northern and told him they needed to talk, so Mr. Northern later stopped by Mr. Lewis' office. A short conversation was held, but Mr. Northern did not say that the Mom had physically attacked her son in the classroom. Mr. Northern did not remember being summoned to

Principal Lewis' office, but remembered talking briefly to him in the breezeway on the first floor of the School.

14. The School gathered statements from six of the 25 children in Mr. Northern's classroom that day. Three of the statements were not signed and did not clearly indicate who had written them. Mrs. Peeples, who decided which students to ask for statements and was present as each child wrote his or her statement, could not--on the day of final hearing--identify the authors of the unsigned statements. Mrs. Peeples's testimony was credible, but not substantively helpful.

15. Some of the students' hearsay statements seem to confirm what Mrs. Byrd reported; some do not. From the affirming statements came these remarks: "His mom came up there and kept punching [L.E.] in the face." (K.B.) "His mom had just started beating on him." (W.W.) "[His] mother just started hitting him in the face." (J.W.) "A mom . . . came in and was very angry, very verbal about her anger and started hitting her son and yelling." (Unsigned) "[L.E.'s] mom started hitting him." (Unsigned) None of the hearsay statements were particularly credible as they are all unverified and without information as to the author.

The Teacher's View

16. On October 30, 2016, L.E. was engaged in playing a very violent video game on a classroom computer in

Mr. Northern's classroom. L.E. had accessed the game by way of a "modified" thumb drive which made his actions undetectable by school administration, which may have been monitoring the computer. Mr. Northern told L.E. to put the game away, because it was prohibited by school policy. Further, a school assembly had been held recently wherein the consequences for playing such video games were announced, i.e., five days suspension from school and 45 days restriction from use of school computers--at least that was Mr. Northern's description of the events at final hearing. In his deposition (taken on July 18, 2016), Mr. Northern said the issue with L.E. was that L.E. was "playing video games" instead of logging on to the appropriate website. He made no mention of the nature of the video games or that they were violent or prohibited by school policy, only that L.E. was told three times to stop playing videos and log on to the website as directed. After the third warning, Mr. Northern decided to call in reinforcements, to wit: L.E.'s mom. It was customary for Mr. Northern to call L.E.'s mom or Dean Lapkin, a school administrator, when L.E. would act out in class or fail to stay focused on his work.

17. Mr. Northern said L.E. was a bright student, very versed in computer skills. He had a lot of potential, but was very often off-track and off-task. When L.E. refused to comply with instructions, Mr. Northern would call T.E. and have her

talk with her son. That was usually enough to get L.E. back on track. Principal Lewis confirmed that calling a student's parent was an acceptable method for dealing with recalcitrant students.

18. On the day in question, Mr. Northern finally pulled L.E. off the computer (whether for playing video games despite being warned three times or for playing forbidden violent video games) and telephoned L.E.'s mother. Mr. Northern said at final hearing that he had first contacted Dean Lapkin to see if L.E. might be released from the prescribed discipline for watching violent video games on campus. Dean Lapkin said the discipline was to be imposed, that Mr. Northern should write a referral and he, Lapkin, would make the call to L.E.'s mom. But somehow Mr. Northern determined that the dean was too busy to call T.E., so Mr. Northern called the Mom himself. Mr. Northern said he received the Mom's telephone number from Dean Lapkin that very day, but that statement flies in the face of his prior testimony that he had called the Mom several times in the past about L.E.'s behavior. (This sort of discrepant testimony severely clouds the facts in this case.) As Mr. Northern was talking to the Mom, she put him on hold to take another call, reputedly from Dean Lapkin. When she returned to the phone call with Mr. Northern, the Mom said she was already at the School. In his deposition, Mr. Northern said that he called T.E.

immediately, i.e., there was no mention of calling the dean first, and that she arrived at the School as they talked.

19. Mr. Northern anticipated receiving a call from downstairs for him to send L.E. down to the Guidance Office to check out, or, possibly, that the Mom would be escorted to his classroom to get L.E. Instead, a few minutes after Mr. Northern completed his call to T.E., she appeared in his classroom. Mrs. Byrd had just left the room, so Mr. Northern assumed she had let T.E. into the room (as the door is generally locked). However she gained entrance, Mr. Northern heard L.E. say to someone, "Bitch, what you gonna do now?" and turned around to see T.E. racing toward L.E., cursing loudly.

20. Mr. Northern testified that he "tried to rush over" to intercept the Mom before she got to L.E. He stated that he was able to get between the two and fend off the Mom's attempts to hit her son. As far as he knew, the Mom never landed any blows on L.E. Mr. Northern did not remember anyone in the classroom saying anything to him during the confrontation. After some unspecified amount of time, Mr. Northern escorted T.E. and L.E. outside the classroom into the hallway area. The Mom continued haranguing her son in that area until Principal Lewis intervened.

21. One student's statement seems to confirm Mr. Northern's comments: The student wrote, "Mr. Northern call

[L.E.] to his desk then his mom came and took him out of the classroom." At final hearing, Ms. Williams, a former student who was present on the day in question, remembered the Mom slapping at L.E. but could not remember if the Mom ever made contact.

22. Hearsay evidence at final hearing presented by Mrs. Byrd, uncorroborated but not objected to, indicates that during the DCF investigation L.E. had reported that his mom never hit him, but neither L.E. nor T.E. testified at final hearing to verify what actually happened.

23. According to Mr. Northern and at least two of the students, Mrs. Byrd was not in the classroom during the confrontation between L.E. and his Mom.

24. Mr. Northern did speak to Principal Lewis at some point after the incident. According to Mr. Northern, they met in the breezeway on the first floor for a few moments. Principal Lewis maintained that he called Mr. Northern to his office to talk about the incident later on the day it happened. Mr. Northern's testimony was not persuasive as to the specifics of his meeting with Principal Lewis.

Other Factors in the Dispute

25. The Mom's physical size was discussed by three witnesses. Mrs. Byrd described her as being "bigger than me." (Mrs. Byrd is approximately five feet, two inches tall and stout

in stature.) Ms. Williams said the Mom was about five feet, four inches tall and "not that big." Mr. Northern said she was about five feet, one inch tall and weighed about 102 pounds. L.E. was a ninth-grade student and was sort of slight in stature.

26. Mrs. Byrd said the Mom did not have a Visitor's badge on her person. She could not remember what the Mom was wearing on that day, but did not see a badge. Mr. Northern said the Mom was wearing a halter top and tight jeans that day, totally inappropriate clothing under the student dress code (as he initially thought T.E. was a student). She did have a Visitor's badge but, with no place to put it on her clothes, she had it in her purse. Neither party presented the Visitor's log for that day to substantiate whether T.E. had registered or not, so we shall never know. It is interesting that Principal Lewis never asked T.E. about a Visitor's badge.

27. There were allegedly three investigations done concerning the alleged incident: One by the school; one by DCF; and one by law enforcement. None of the investigative reports (or their ultimate findings) was introduced into evidence in order to substantiate either party's position. It was not mentioned whether photographs were taken of L.E. to ascertain bruising or other injuries from the alleged beating. So, again, we shall never know. After the investigations were concluded,

Principal Lewis did not "trespass" the Mom from coming on campus in the future, even though he had authority to do so if warranted.^{1/}

28. Neither the Mom nor L.E. was called to testify or bring some clarity to the matter at hand. Presumably they would have confirmed the position of one side or another in this matter, but again we shall never know. Nor was Dean Lapkin called to verify his involvement in the situation.

29. Mr. Northern served as a teachers' union representative at the School. He has brought complaints to Principal Lewis on numerous occasions as part of his duties in that role. Mr. Northern has also brought direct complaints to Principal Lewis regarding computer equipment issues in his own classroom. The two men have a "history" outside the present dispute. In fact, just about two weeks prior to the alleged incident, Mrs. Byrd wrongfully removed ten computers from Mr. Northern's classroom, forcing him to have Principal Lewis intervene to have the equipment returned.

30. The Amended Administrative Complaint in this matter contains four counts: Count I is a general count alleging that Mr. Northern violated the Principles of Professional Conduct for the Education Profession; Count II alleges Mr. Northern's failure to protect a student from conditions harmful to learning or to the student's mental health and/or physical health and

safety; Count III alleges intentional distortion of facts concerning an event; and Count IV alleges failure to maintain honesty.

31. What the unrefuted evidence at final hearing proved is this: Mr. Northern was teaching his class on October 30, 2013. L.E. was a student in that class. L.E.'s mother came to the classroom cursing loudly and took L.E. away. Mrs. Byrd had been in the classroom in close proximity to L.E. as he was being removed from the classroom by his mom and/or Mr. Northern. Mrs. Byrd reported an incident to DCF and to the School administration. Mr. Northern discussed the matter with Principal Lewis.

32. "Tis a far harder decision I make in this case than I have ever made . . .," at least as to what actually transpired that fateful day in Mr. Northern's classroom. The conflicting and unclear stories delivered by the key players in this incident (minus the two primary protagonists), does little to explain what actually happened on that day. Based on the totality of the conflicting testimony, it is likely that T.E. came into the classroom and accosted her son. The finer details of what she did, however, seem to be forever lost.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this case

pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

34. The Commissioner is responsible for filing complaints and prosecuting allegations of misconduct against instructional personnel holding educator certificates. § 1012.795(1), Fla. Stat. (2016). In the case at issue, the Commissioner relies on section 1012.796(6), Florida Statutes (2013), which provides in pertinent part:

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

- (a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. The denial may provide that the applicant may not reapply for certification, and that the department may refuse to consider that applicant's application, for a specified period of time or permanently.
- (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. An educator who has been placed on probation shall, at a minimum:

1. Immediately notify the investigative office in the Department of Education upon employment or termination of employment in the state in any public or private position requiring a Florida educator's certificate.
 2. Have his or her immediate supervisor submit annual performance reports to the investigative office in the Department of Education.
 3. Pay to the commission within the first 6 months of each probation year the administrative costs of monitoring probation assessed to the educator.
 4. Violate no law and shall fully comply with all district school board policies, school rules, and State Board of Education rules.
 5. Satisfactorily perform his or her assigned duties in a competent, professional manner.
 6. Bear all costs of complying with the terms of a final order entered by the commission.
- (e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.
 - (f) Reprimand of the teacher, administrator, or supervisor in writing, with a copy to be placed in the certification file of such person.
 - (g) Imposition of an administrative sanction, upon a person whose teaching certificate has expired, for an act or

acts committed while that person possessed a teaching certificate or an expired certificate subject to late renewal, which sanction bars that person from applying for a new certificate for a period of 10 years or less, or permanently.

- (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.

35. In this case, the Commissioner seeks to take action against Mr. Northern's educator certificate. Such a proceeding to impose discipline against a professional license is penal in nature, so the Commissioner bears the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994). See also Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

36. 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)). In the instant case, there is almost no clear and convincing evidence under the Slomowitz definition.

37. Section 1012.795, Florida Statutes (2016), states in pertinent part:

- (a) [The Commissioner] may suspend the educator certificate of any person . . . [or] may revoke permanently the educator certificate . . . if the person:

* * *

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

38. The principles of professional conduct are codified in Florida Administrative Code Rule 6A-10.081(3), which states in relevant part:

- (b) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
- (c) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties provided by law.
- (d) Obligation to the student requires that the individual:
- (e) Shall make reasonable effort to protect the student from conditions harmful to

learning and/or to the student's mental and/or physical health and safety.

* * *

- (j) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

* * *

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

* * *

- (b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

* * *

- (5) Obligation to the profession of education requires that the individual:
 - (a) Shall maintain honesty in all professional dealings.

39. The statutes and rules providing grounds for disciplining a teacher's Education Certificate are penal in nature and must therefore be construed in favor of the teacher. Beckett v. Dep't of Fin. Servs., 982 So. 2d (Fla. 1st DCA 2008); Lester v. Dep't of Banking & Fin., 348 So. 2d 923 (Fla. 1st DCA 1977).

40. The facts do not support a conclusion that Mr. Northern intentionally exposed L.E. (or any other student in the class, for that matter) to "unnecessary embarrassment or

disparagement." While it is true that Mr. Northern called L.E.'s mother for the purpose of disciplining him, there is no competent evidence that Mr. Northern knew how aggressive the Mom would be upon her arrival. After all, Mr. Northern had called the Mom on several previous occasions without such a raucous response by her. The completely divergent accounts of what transpired in the classroom fall well short of clear and convincing evidence that Mr. Northern did not make a reasonable effort to protect L.E. from harm.

41. Likewise, the allegation that Mr. Northern was untruthful or distorted the facts is also not proven by the evidence. Again, the disparate testimony was not clear and convincing on any side. The passage of time since the event in question has undoubtedly clouded the memories of those involved. Thus, the testimony is not "lacking in confusion as to the facts in issue."

42. Although Mr. Northern's testimony was far from totally believable, he did not bear the burden of proof in this case. The Commissioner, who does have the burden, did not prove by clear and convincing evidence that Mr. Northern violated section 1012.795, Florida Statute (2013), or any portion of Florida Administrative Code Rule 6A-10.081.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Pam Stewart, as Commissioner of Education, dismissing the Administrative Complaint against Respondent, Winston Northern.

DONE AND ENTERED this 15th day of November, 2016, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of November, 2016.

ENDNOTE

^{1/} "Trespass" is a term of art in school parlance that is equivalent to a restraining order.

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 this case.