STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD CORCORAN, AS
COMMISSIONER OF EDUCATION,

Petitioner,

Case No. 19-1125PL

vs.

JAVIER CUENCA,

Respondent.
_______________________________/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on August 20, 2019, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
300 Southeast 13th Street
Fort Lauderdale, Florida 33316

For Respondent: James C. Casey, Esquire
Law Offices of Slesnick and Casey, LLP
2701 Ponce de Leon Boulevard, Suite 200
Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

Whether Respondent, a teacher and basketball coach, engaged in sexual misconduct, including lewd or lascivious molestation, with student athletes; if so, whether disciplinary action, up to

and including permanent revocation, should be taken against his educator certificate.

PRELIMINARY STATEMENT

On February 12, 2018, the Commissioner of Education ("Commissioner") issued an Administrative Complaint against Javier Cuenca. The Commissioner charged Mr. Cuenca, the holder of a valid Florida Educator Certificate, with having violated the statutes and ethical rules governing teachers based on allegations that Mr. Cuenca had engaged in sexually inappropriate behavior, including lewd or lascivious molestation, with several students. Mr. Cuenca timely requested a hearing to contest the allegations, and, on March 4, 2019, the Education Practices Commission referred the matter to the Division of Administrative Hearings.

The Administrative Law Judge scheduled a final hearing for May 2, 2019. On April 18, 2019, the parties filed a joint motion for continuance of the final hearing, which was granted. The undersigned also granted the Commissioner leave to file an Amended Administrative Complaint, which he did on July 10, 2019. Thereafter, the final hearing took place as rescheduled on August 20, 2019, with both parties present.

At hearing, the Commissioner called five witnesses: Laura Adams, Giovanna Blanco, Helen Pina, Alicia Neal, and O.Q. Petitioner's Exhibits 1 through 11 were received in evidence. Respondent's Exhibits 1 through 3 and 7 through 9 were admitted

at hearing without objection, as well. By agreement of the parties, the depositions of D.N., D.F., and Mr. Cuenca were taken after the hearing and submitted in lieu of personal appearances. These depositions have been received in evidence as hearing testimony. Finally, the affidavits of R.C. and E.L. are admitted (over the Commissioner's hearsay objection) as Respondent's Exhibits 5 and 6, respectively, pursuant to, and for the limited purposes specified in, section 120.57(1)(c), Florida Statutes.[1/]

The final hearing transcript was filed on September 10, 2019. On Mr. Cuenca's motion, the original filing deadline established for proposed recommended orders was extended to October 28, 2019. The parties' respective submissions were carefully reviewed and fully considered.

Unless otherwise indicated, citations to the official statute law of the State of Florida refer to Florida Statutes 2019, except that all references to statutes or rules defining disciplinable offenses or prescribing penalties for committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

FINDINGS OF FACT

1. Respondent Javier Cuenca ("Cuenca") holds Florida Educator Certificate 958539, which covers the areas of educational leadership, mathematics, and physical education and

is valid through June 30, 2022. During the time relevant to this case, Cuenca worked as a teacher in the Miami-Dade County Public School District ("District"). For the 2011-2012 school year, Cuenca was employed by Mater Academy, a charter School in Hialeah Gardens, Florida, after which he took a yearlong leave of absence from the District to work for a private company as a tutor. Otherwise, Cuenca taught in traditional public schools. In addition to teaching, Cuenca served as a basketball coach at several schools, including Hialeah Gardens Middle School and Hialeah Gardens Senior High School. Cuenca continued coaching for these schools on a part-time basis even while on leave from his teaching position.

2. Cuenca's employment with the District ended on November 7, 2013, simultaneously with the commencement of an investigation into allegations that he had engaged in sexual misconduct with male students on the basketball teams he coached. The facts giving rise to these allegations are relevant to some of the instant charges against Cuenca and will be addressed further below in this Recommended Order.

3. Cuenca was arrested in 2014 and charged under three separate criminal informations with multiple felonies arising from allegations of lewd or lascivious child molestation. The alleged victims were Students D.N., D.F., and R.D., each of whom was a basketball player coached by Cuenca. Later, a fourth

criminal information was filed, charging Cuenca with lewd or lascivious conduct against O.Q., another student athlete whom Cuenca had coached.

4. On October 4, 2016, Cuenca accepted a deal under which he agreed to plead nolo contendere to the reduced charge of felony battery in the cases involving D.F. and O.Q., which would be consolidated in the process, in exchange for the dismissal of the cases involving D.N. and R.D. Accepting the plea that same day, the Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, immediately entered a Finding of Guilt and Order of Withholding Adjudication/Special Conditions.[2/] Cuenca was placed on probation for a period of two years.

5. The upshot is that Cuenca has a criminal record comprising a pair of felony batteries committed, on separate occasions, against two student athletes. At the same time, however, Cuenca was not "found guilty" by a jury; was not adjudicated guilty by the court; and did not plead guilty to, or otherwise admit committing, these crimes. In short, strange as it might seem, Cuenca——who was sentenced and punished as a felon——is not a *convicted* felon. As we will see, moreover, although entering a plea of nolo contendere to a criminal charge is a disciplinable offense under current law, the statute in effect at the time Cuenca entered his plea did not authorize the Education Practices Commission ("EPC") to discipline a teacher

for pleading no contest to a crime. If Cuenca has committed a disciplinable offense, it is because of his conduct leading to the criminal proceedings, not his criminal background per se.

6. The evidence of underlying wrongdoing in this case concerns Cuenca's interactions with three players, O.Q., D.N., and D.F. The most serious allegations involve O.Q., a young man who, unlike D.N., D.F., and Cuenca himself, appeared at hearing to testify, rather than testifying via deposition as did the others. O.Q. testified credibly that, when he was between the ages of 15 and 16, his basketball coach, Cuenca, had "inappropriately touched" him on multiple occasions. O.Q. was unable to remember how many times.

7. There was "one incident," however, which stands out in O.Q.'s mind as the "main incident" that will "stay with [him] for the rest of [his] life." O.Q. says that this incident is "constantly on the back of [his] mind," having left a "scar," which "haunts" him "[e]ven though it was years ago." For O.Q., it is "embarrassing even to mention or speak about" this incident.

8. The incident happened at Cuenca's house, in "his room." According to O.Q., on this particular occasion, Cuenca grabbed and fondled O.Q.'s penis, for the purpose of masturbating O.Q., which he did.[3/] The undersigned believes O.Q. and finds that this incident did, in fact, take place as O.Q. described it.[4/]

9. As a practical matter, this finding, alone, is dispositive because, obviously, a teacher found to have masturbated a 16-year-old student will be guilty of one or more disciplinable offenses sufficient to revoke his or her certificate. Here, the Commissioner has proved additional acts of misconduct involving D.N. and D.F., which should be addressed nonetheless, if for no other reason than to reinforce the inevitable outcome.

10. Cuenca's modus operandi for exploiting his relationships with these players relied on his authority as a coach to pressure them into exposing themselves. He frequently asked them questions to determine whether they were sexually active, ostensibly to urge abstinence and warn against becoming involved in situations that might interfere with school work and athletics. To some extent, these conversations were unobjectionable. Coaches should not be discouraged from counseling student athletes about age-appropriate sexual behavior. Cuenca, however, overreached.

11. Using the abstinence angle as a pretext, Cuenca pestered the players to show him their "virgin lines." There is, of course, no such thing as a "virgin line." Cuenca used this mumbo jumbo to trick his young players into believing that there is some sort of physical mark of virginity visible on the

penis. Cuenca constantly demanded to see this "proof" of virginity to confirm that his players were not misbehaving.

12. Another approach that Cuenca used was the offer of steroids, which athletes sometimes take illicitly to gain muscle mass and improve their performance. Cuenca told the boys that he needed to examine their genitals to ascertain their steroid readiness.[5/] If they refused, Cuenca used the stick of retaliation, such as the threat of reduced playing time or expulsion from the team.

13. Cuenca used these methods on D.N. and D.F. In February 2013, Cuenca succeeded in convincing D.N., then a junior in high school, to drop his shorts while the two were alone together in the weight room. Cuenca stared at D.N.'s penis and testicles, and declared that D.N. soon would be ready for steroids.[6/]

14. For D.F., the violation occurred in October 2012, when he was a 15-year-old freshman. Under the guise of inspecting D.F.'s "virgin line," and to gauge his readiness for steroids, Cuenca directed D.F. to sit on a table in an empty classroom for an examination. D.F. pulled down his pants, Cuenca took a look, and then he reached in to touch D.F.'s genitals. D.F. slapped Cuenca's hand, and Cuenca withdrew. In D.F.'s words, which the undersigned credits as truthful and telling, the incident left

D.F. "in a dark place," "depressed," and "sad," and "nothing has been the same [for him] since" this happened.

The Charges

15. In the Amended Administrative Complaint against Cuenca, the Commissioner accused Cuenca of having committed six disciplinable offenses, namely those defined in subsections (1)(d), (1)(f), and (1)(g) of section 1012.795, Florida Statutes; and violations of subsections (2)(a)1., (2)(a)5., and (2)(a)8. of Florida Administrative Code Rule 6A-10.081, which are part of the Principles of Professional Conduct for the Education Profession in Florida.[7/] If proved by clear and convincing evidence, the alleged rule violations would be grounds for discipline under section 1012.795(1)(j).

16. It is determined as a matter of ultimate fact that Cuenca is guilty of gross immorality, which is an offense punishable under section 1012.795(1)(d); and that he exploited his relationships with O.Q., D.N., and D.F. for personal gain or advantage, namely sexual gratification, in violation of rule 6A-10.081(2)(a)8., which is an offense punishable under section 1012.795(1)(j). It is further determined that Cuenca is not guilty of having been convicted or found guilty of, or of having pleaded guilty to, any criminal charge; such a criminal record, if established, would have constituted a disciplinable offense under section 1012.795(1)(f), Florida Statutes (2016).

17. As for the remaining charges, to determine Cuenca's guilt or nonguilt would require the undersigned to explicate the meaning of statutory and rule provisions whose applicability to the facts at hand is not readily apparent. Because there are ample grounds for permanently revoking Cuenca's educator certificate without these additional legal conclusions, the undersigned makes no findings of ultimate fact regarding Cuenca's alleged violations of section 1012.795(1)(g) and rules 6A-10.081(2)(a)1. and 5. If the EPC determines that such findings are necessary, it may remand this case to the undersigned for the entry of a supplemental recommended order.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 1012.796(6), Florida Statutes (2019).

19. Upon a finding of probable cause to believe that grounds exist to revoke or suspend a teaching certificate, or to impose any other appropriate penalty against a teacher, the Commissioner is responsible for prosecuting the formal administrative complaint. § 1012.796(6), Fla. Stat.

20. If the Commissioner proves any of the grounds for discipline enumerated in section 1012.795(1), then the EPC is empowered to punish the certificate holder by imposing penalties

that may include one or more of the following: permanent certificate revocation; certificate revocation, with reinstatement following a period of not more than ten years; certificate suspension for a period of time not to exceed five years; an administrative fine not to exceed $2,000 for each count or separate offense; restriction of the authorized scope of practice; issuance of a written reprimand; and placement of the teacher on probation for a period of time and subject to such conditions as the EPC may specify. §§ 1012.796(7), 1012.795(1), Fla. Stat.

21. Section 1012.795(1)(d), Florida Statues (2012), authorizes the EPC to take disciplinary action against a teacher when it has been shown that he "[h]as been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education." This is the offense which the Commissioner has charged in Count 1 of the Amended Administrative Complaint.

22. Section 1012.795(1)(f), Florida Statutes (2016), authorizes the EPC to take disciplinary action against a teacher when it has been shown that he "[h]as been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation." This is

the offense that the Commissioner has charged in Count 2 of the Amended Administrative Complaint.

23. Section 1012.795(1)(j), Florida Statues (2012), authorizes the EPC to take disciplinary action against a teacher when it has been shown that he "[h]as violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules." This is the offense which the Commissioner has charged in Counts 4 through 7 of the Amended Administrative Complaint, with Counts 5 through 7 specifying the particular rules that Cuenca is alleged to have violated.

24. Florida Administrative Code Rule 6A-10.081 (Jan. 1, 2013)[8/] provides, in pertinent part, as follows:

> (1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
>
> (2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.
>
> (3) Obligation to the student requires that the individual:
>
> * * *
>
> (h) Shall not exploit a relationship with a student for personal gain or advantage.

25. The foregoing statutory and rule provisions are penal in nature and must be strictly construed, with ambiguities being

resolved in favor of the licensee. Lester v. Dep't of Prof'l & Occ. Regs., 348 So. 2d 923, 925 (Fla. 1st DCA 1977). The controlling version of such statutes and rules is the one in effect at the time the alleged disciplinable offense was committed. Childers v. Dep't of Envtl. Prot., 696 So. 2d 962, 964 (Fla. 1st DCA 1997). Whether Cuenca committed an offense, as charged, is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).[9/]

26. For the EPC to suspend or revoke a teacher's certificate, or to impose any other penalty provided by law, the Commissioner must prove the charges by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); McKinney, 667 So. 2d at 388. Further, the grounds proven must be those specifically alleged in the administrative complaint. See, e.g., Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842, 844 (Fla. 2d DCA 1984). Where a licensed professional has been charged with sexual misconduct, as here, "[t]he testimony of the victim of the sexual misconduct need not be corroborated." § 120.81(4)(a), Fla. Stat.

27. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear 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 testimony must be precise and explicit and the witnesses must be lacking 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

Gross Immorality

28. At the time Cuenca committed the offenses at issue, neither the legislature nor the State Board of Education had defined the term "gross immorality" for purposes of section 1012.795(1)(d).[10/] The Findings of Fact here, however, obviate the need for legal analysis. While reasonable people may disagree as to the relative immorality of many acts, child molestation is not one of them. It goes without saying that where, as here, a teacher has masturbated a 16-year-old boy, that teacher is guilty of gross immorality. There is no reason to belabor this point.

29. It is concluded that Cuenca is guilty of violating section 1012.795(1)(d).

Criminal Conviction

30. At the time Cuenca made his bargain with the prosecutor, pleading nolo contendere to a criminal charge was not an administrative offense under section 1012.795(1)(f). The legislature amended the statute in 2018 to close this loophole. See Ch. 2018-150, § 12, Laws of Fla. As a result, it is now a disciplinable offense to plead nolo contendere to a criminal charge. Section 1012.795(1)(f), Florida Statutes (2019), cannot be applied retroactively to no-contest pleas entered before its effective date, however, which means that the version of the statute in effect on October 4, 2016, is controlling as to

Cuenca. To be found guilty of violating section 1012.795(1)(f), Florida Statutes (2016), Cuenca must have been "convicted" or "found guilty of" a criminal charge, or have "entered a plea of guilty to" such charge.

31. Cuenca did not plead guilty. Nor was Cuenca "convicted" of a crime by the entry of a judgment of conviction or an adjudication of guilt. See State v. McFadden, 772 So. 2d 1209, 1216 (Fla. 2000)(absent specific statutory definition, "conviction" is understood as requiring adjudication of guilt or judgment of conviction by trial court). Yet, upon accepting his no-contest plea, the circuit court entered an order containing the words "finding of guilt" in its title and stating that Cuenca has "been found guilty" of felony battery charges. In this nominal sense, then, Cuenca was "found guilty." Legally speaking, however, Cuenca was not "convicted" or "found guilty" of felony battery, despite appearances, for reasons discussed at length in Department of Health v. Higginbotham, Case No. 10-2796PL, 2011 Fla. Div. Admin. Hear. LEXIS 106, at *25-34 (Fla. DOAH May 11, 2011), adopted in toto, Case No. 2004-50405 (Fla. DOH Aug. 26, 2011).

32. It is concluded that Cuenca is not guilty of violating section 1012.795(1)(f).

Exploiting a Relationship With a Student

33. The interactions between Cuenca and O.Q., D.N., and D.F., respectively, took place within the context of the teacher/coach-student relationship, and it is clear that Cuenca leveraged this relationship in gaining the trust and, ultimately, compliance of these student athletes. To be sure, there is no direct evidence of any personal gain or advantage that Cuenca derived from his lewd or lascivious acts against these boys. Given, however, that Cuenca could have had no reasonable grounds for fondling O.Q.'s genitals and examining the penises of D.N. and D.F., other than to satisfy some prurient curiosity or gratify a sexual desire, the undersigned has drawn the inescapable inference that Cuenca obtained a personal gain from these encounters.

34. For the foregoing reasons, the Commissioner succeeded in proving by clear and convincing evidence that Cuenca exploited relationships with O.Q., D.N., and D.F. for personal gain or advantage. Therefore, Cuenca is guilty of violating rule 6A-10.081(3)(h), which is a disciplinable offense under section 1012.795(1)(j).

35. The EPC imposes penalties upon teachers in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 6B-11.007 (Apr. 4, 2009).[11/] The penalty range for being guilty of gross immorality when a

student is involved is "Suspension - Revocation." See Fla. Admin. Code R. 6B-11.007(2)(c)2. The prescribed penalty for an offense involving "[s]exual misconduct with any student or any minor in violation of paragraphs 6B-1.006(3)(a), (e), (g), (h), (4)(c), F.A.C." is "Revocation." See Fla. Admin. Code R. 6B-11.007(2)(i)5. (emphasis added).[12/]

36. Rule 6B-11.007(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances may be taken into account:

> (a) The severity of the offense;
>
> (b) The danger to the public;
>
> (c) The number of repetitions of offenses;
>
> (d) The length of time since the violation;
>
> (e) The number of times the educator has been previously disciplined by the Commission;
>
> (f) The length of time the educator has practiced and the contribution as an educator;
>
> (g) The actual damage, physical or otherwise, caused by the violation;
>
> (h) The deterrent effect of the penalty imposed;
>
> (i) The effect of the penalty upon the educator's livelihood;
>
> (j) Any effort of rehabilitation by the educator;

(k) The actual knowledge of the educator pertaining to the violation;

(l) Employment status;

(m) Attempts by the educator to correct or stop the violation or refusal by the educator to correct or stop the violation;

(n) Related violations against the educator in another state including findings of guilt or innocence, penalties imposed and penalties served;

(o) Actual negligence of the educator pertaining to any violation;

(p) Penalties imposed for related offenses under subsection (2) above;

(q) Pecuniary benefit or self-gain inuring to the educator;

(r) Degree of physical and mental harm to a student or a child;

(s) Present status of physical and/or mental condition contributing to the violation including recovery from addiction;

(t) Any other relevant mitigating or aggravating factors under the circumstances.

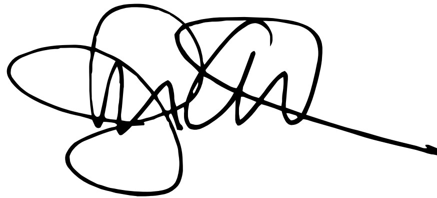
Having considered these criteria, the undersigned concludes that no good cause exists to deviate from the recommended penalties.

37. The Commissioner proposes that Cuenca's teaching certificate be permanently revoked and that he be barred from ever reapplying for a certificate. The undersigned concurs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order permanently revoking Cuenca's educator certificate and deeming him forever ineligible to apply for a new certificate in the State of Florida.

DONE AND ENTERED this 26th day of November, 2019, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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 26th day of November, 2019.

ENDNOTES

1/ It is questionable whether these affidavits should be given any consideration at all, for the out-of-court statements therein do not really supplement or explain any nonhearsay evidence of record, but they possess so little probative value that there is no point in excluding the exhibits on principle. If the averments of R.C. and E.L. were credited as truthful and persuasive, then D.N.'s credibility would be called into doubt, requiring, perhaps, that his testimony in support of the charges

against Cuenca be rejected as less than clear and convincing. The undersigned does not give the affidavits such weight, however, because the affiants——unlike D.N.——did not face cross-examination in this proceeding (or any proceeding as far as the undersigned knows). Further, the affidavits do not impeach the credibility of either D.F. or O.Q., or rebut the testimony of either young man, both of whom the undersigned found to be truthful and reliable witnesses for the Commissioner. The outcome of this case, in short, would have been the same even if D.N. had not testified.

[2/] At the time Cuenca entered his plea, there was some confusion or indecision as to which statute——section 784.03 or section 784.041, Florida Statutes——should be cited as the legal foundation for the crimes to which Cuenca was being sentenced pursuant to the plea bargain. Cuenca now claims that he pleaded no contest to "section 784.03," implying that he was sentenced for misdemeanor offenses. This is clearly untrue. Cuenca plainly pleaded to felonies; the statute is irrelevant. The government had not charged Cuenca with battery and could not have proved him guilty of felony battery. The crime was chosen because the government refused to allow Cuenca to plead to anything less than a felony, and Cuenca was unwilling to plead to a sex offense. Felony battery was the compromise on which the parties agreed.

[3/] O.Q. agreed, in response to a leading question on direct examination, that Cuenca had "masturbated" him, but he did not speak the word himself. Although no objection was made, the testimony would have been more persuasive had the witness not been spoon fed this rather important detail. Nevertheless, the undersigned has not discounted the testimony, because it is clear from the form of the question that the Commissioner's counsel, who conducted the direct examination, was quoting from O.Q.'s prior statement to the police. Cuenca's attorney must have been familiar with this prior statement. Had the Commissioner's counsel been putting words in O.Q.'s mouth that O.Q. had never spoken, Cuenca's counsel presumably would have brought out that fact on cross-examination. He didn't.

[4/] Because O.Q.'s testimony was not detailed, the undersigned cannot find more than what is set forth in the text above. Yet, the witness was not confused or hesitant. O.Q.'s testimony was distinctly remembered as far as it went, and his responses were as precise and explicit as the questions required; that is, he provided all the information his examiner sought to elicit. There is no good reason to suppose that O.Q. could not have

provided a more thorough narrative, had he been asked to do so. His bare-bones account is explained by the fact that the Commissioner's counsel, who conducted the direct examination, asked few questions about the signal event and did not ask the witness to elaborate upon or explain his answers, probably to avoid embarrassing O.Q. It is possible that a vigorous cross-examination would have exposed weaknesses sufficient to discredit O.Q.'s testimony. We will never know because Cuenca's counsel declined to cross-examine O.Q.

[5/] Although the record in this case lacks evidence concerning steroid usage, it is fairly common knowledge that ingesting synthetic testosterone can have adverse side effects on the male sex organs. So, Cuenca's request, while outrageous, had some logical connection to the subject matter——sufficient plausibility, that is, potentially to overcome the resistance of an inexperienced and trusting young athlete.

[6/] In or around October 2013, Cuenca sent a series of text messages to D.N., of questionable propriety. Cuenca admits that the texts are unprofessional, which they are; worse than that, they are immature. Cuenca comes across as a teenager, not a teacher, in these texts. Still, while the messages do not reflect well on Cuenca, they are not lewd or lascivious, and they contain no solicitations to engage in any type of misconduct. In the most blameworthy of these texts, Cuenca accuses D.F. of being dishonest about his (D.F.'s) sexual activity in vulgar terms: "You get your meat wet. Then lie." This puerile remark is unworthy of a teacher, but under the circumstances, without more than has been shown here, its utterance does not, of itself, constitute a disciplinable offense.

[7/] The Commissioner cited the March 23, 2016, version of the rule, which postdates the events at issue. The relevant Florida Administrative Code provisions, however, have not been substantively revised since before the misconduct involved here took place.

[8/] Former rule 6A-10.081(3)(h), quoted above in the text, is substantively the same as current rule 6A-10.081(2)(a)8., and both are indistinguishable from Florida Administrative Code Rule 6B-1.006(3)(h) (Dec. 29, 1998). Each iteration of this particular rule provision proscribes the exploitation of a teacher-student relationship for personal gain or advantage.

[9/] If, on appeal from final agency action, "the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding." § 120.595(5), Fla. Stat.

[10/] The terms "gross immorality" and "act of moral turpitude" are currently defined in rule 6A-10.083, which took effect after the events at issue, on May 27, 2015; thus, these definitions are not authoritative in this case. Similarly, section 1012.795(1)(d), Florida Statutes (2019), specifies that "engaging in or soliciting sexual, romantic, or lewd conduct with a student or minor" constitutes a violation. Cuenca's conduct clearly falls within this statutory language, but the statutory language was not in effect at the time of the conduct. See Ch. 2018-150, §§ 12 and 15, Laws of Fla.

[11/] A newer version of the rule took effect on May 29, 2018, but the undersigned must apply the disciplinary guidelines in effect at the time of the alleged violations. Orasan v. Ag. for Health Care Admin., 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996).

[12/] Florida Administrative Code Rule 6A-10.081(3)(h) (Jan. 1, 2013) is identical to former rule 6B-1.006(3)(h).

COPIES FURNISHED:

Charles T. Whitelock, Esquire
Charles T. Whitelock, P.A.
300 Southeast 13th Street, Suite E
Fort Lauderdale, Florida 33316
(eServed)

James C. Casey, Esquire
Law Offices of Slesnick and Casey, LLP
2701 Ponce de Leon Boulevard, Suite 200
Coral Gables, Florida 33134
(eServed)

Gretchen Kelley Brantley, Executive Director
Education Practices Commission
Department of Education
Turlington Building, Suite 316
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Randy Kosec, Jr., Chief
Office of Professional Practices Services
Department of Education
Turlington Building, Suite 224-E
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

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.