



TABLE OF CONTENTS

	<u>Page</u>
I STATEMENT OF THE CASE AND THE FACTS.....	1
II SUMMARY OF ARGUMENT.....	5
III ARGUMENT.....	6
A. THE HEARING OFFICER IN HIS REPORT DID NOT REQUIRE THAT CORROBORATIVE TESTIMONY BE PRESENTED NOR APPLY AN INCORRECT STANDARD OF PROOF AND SUCH CONSTRUCTION OF THE REPORT INVOLVED AN ISSUE OF FACT OR JUDGMENT THAT WAS IMPROPERLY REDETERMINED BY THE DISTRICT COURT.....	7
B. IT IS CLEAR FROM THE FACE OF THE HEARING OFFICER'S RECOMMENDED ORDER, ADOPTED BY THE EDUCATION PRACTICES COMMISSION, THAT HE DID NOT BASE HIS FINDINGS, CONCLUSIONS, OR RECOMMENDATION UPON A VIEW THAT A MINOR VICTIM'S TESTIMONY MUST BE CORROBORATED IN ORDER TO SUSTAIN A FINDING OF SEXUAL MISCONDUCT.....	8
C. THE HEARING OFFICER'S RECOMMENDED ORDER, AS ADOPTED BY THE EDUCATION PRACTICES COMMISSION, STATES THAT THE CASE AGAINST THE PETITIONER WAS NOT SUSTAINED UNDER <u>ANY</u> STANDARD OF PROOF AS APPLIED BY THE COURTS.....	9
D. THE APPROPRIATE STANDARD OF PROOF IN A LICENSE REVOCATION CASE, THE POTENTIAL RESULT OF WHICH IS TO EXTINGUISH THE PROFESSIONAL CAREER OF A PUBLIC SCHOOL TEACHER, IS THE <u>BOWLING</u> , OR "CLEAR AND CONVINCING" STANDARD, AND NOT "PREPONDERANCE OF THE EVIDENCE.".....	10
V CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	15

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).....	15
Anson v. Florida State Board of Architecture, 354 So.2d 386, 387 (Fla. 1st DCA 1977).....	2
Bach v. Florida State Board of Dentistry, 378 So.2d 34, 36 (Fla. 1st DCA 1980).....	2
Board of Education v. State Board of Education, 497 N.E.2d 984 (Ill. 1986).....	14
Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981).....	Passim
Fallon v. Wyoming State Board of Medical Examiners, 441 P.2d 322 (Wyo. 1968).....	14
Ferris v. Austin, 487 So.2d 1163, 1166 (Fla. 1st DCA 1986).....	4
In Re Polk License Revocation, 449 A.2d 7 (N.J. 1982).....	13
Jenkins v. State Board of Education, 399 So.2d 103, 105 (Fla. 1st DCA 1981).....	1
Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2nd DCA 1966).....	14
Robinson v. Florida Board of Dentistry, Department of Professional Responsibility, 447 So.2d 930 (3rd DCA 1984).....	9
School Board of Pinellas County v. Noble, 384 So.2d 205 (Fla. 1st DCA 1980), on remand from 372 So.2d 1111 (Fla. 1979).....	1
Sherburne v. School Board of Suwannee County, 455 So.2d 1057, 1066 (Fla. 1st DCA 1984).....	11
The Florida Bar v. McCain 361 So.2d 700, 706 (Fla. 1978).....	2, 13
The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).....	2, 13

Florida Statutes

Fla. Stat. §120.57.....	12
Fla. Stat. §120.57(1)(b)(4).....	4
Fla. Stat. §120.68 (10).....	12
Fla. Stat. §231.262.....	12
Fla. Stat. §231.262(6).....	1
Fla. Stat. §231.28.....	12
Fla. Stat. §231.28(1).....	1

Other

3 <u>Fla. Jur.</u> Appellate Review §346.....	8
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I  
STATEMENT OF THE CASE AND THE FACTS

In his Answer Brief, the Respondent addresses four areas of disagreement with the Statement of the Case and Facts contained within the Petitioner's initial brief. Not surprisingly, the Petitioner takes exception to each of those points.

First, as to point 1, the Respondent argues that the term "penalty" should not be applied to the characterization of disciplinary action, in a proceeding such as the one initiated by the Respondent below, which seeks to revoke a teacher's certificate to teach. Ironically, the Respondent later in the same brief, in his discussion of the appropriate standard of proof, repeatedly refers to the assessment of the "penalty," in "license disciplinary cases," as the appropriate point at which the substantiality of the evidence should be considered. See pp. 17 and 19 of the Respondent's brief. Moreover, the proceedings under which the action below was initiated by the Respondent, §231.28, Fla. Stat., expressly describes the potential action against the teaching certificate as a "penalty". See, §231.28(1) ("The Education Practices Commission shall have the authority to suspend... (4); to revoke permanently the teaching certificate of any person; or to impose any other penalty provided by law...."); see also §231.262(6), Fla. Stat. also referring to "other appropriate penalties" including "revocation or suspension of a certificate"). Finally, the First District Court of Appeal, from which this appeal is taken, has described proceedings initiated to revoke teaching certificates as involving the assessment of a penalty or as being penal in nature. See, e.g. School Board of Pinellas County v. Noble, 384 So.2d 205 (Fla. 1st DCA 1980), on remand from 372 So.2d 1111 (Fla. 1979); Jenkins v. State Board of Education, 399 So.2d 103, 105

(Fla. 1st DCA 1981); Cf., Bowling v. Department of Insurance, 394 So.2d 165, 171; Bach v. Florida State Board of Dentistry, 378 So.2d 34, 36 (Fla. 1st DCA 1980); Anson v. Florida State Board of Architecture etc., 354 So.2d 386, 387 (Fla. 1st DCA 1977). The Respondent's attempt to euphemize the terminology betrays the basic flaw in his argument on the burden of proof issue; a proceeding seeking revocation of a teaching certificate as a potential penalty carries the same import, i.e., loss of professional livelihood, as does disciplinary action against an attorney which may result in disbarment, for which this Court has said that the standard of proof to be applied is "clear and convincing evidence". The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978) (citing The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970)).

Secondly, the Respondent objects to the Petitioner's statement that the Hearing Officer concluded that the allegations of misconduct were not supported by the weight of the evidence and that the Petitioner had no sexual contact with the alleged victim. The sole basis for that objection is the Hearing Officer's reference, at paragraph 16 of his recommended order, to the allegations made against the Petitioner. Although the Respondent's point is vague at best, it appears that this is an extension of the argument that because the Hearing Officer referred to the existence of the allegations brought against the the Petitioner in his Findings of Fact, those allegations should be deemed accepted as either true or unresolved, even though the Hearing Officer expressly states in his recommended order that he credited the contradictory evidence submitted by the Petitioner. The Petitioner, in the same fashion as both the EPC and the Fifth District Court of Appeal, finds that this analysis ignores both the facial language of the Hearing Officer's report and

every reasonable construction that could be applied to its interpretation.

The Respondent's third area of disagreement with the Petitioner's Statement of the Case and Facts relates to the Respondent's Exceptions to Recommended Order filed by his attorney with the Education Practices Commission, which was considered and rejected by the Commission on April 18, 1985. See, the Record on Appeal filed in this Court (hereinafter referred to as "R.") at pages 17 - 53. The first exception, (R. 18-22), is couched in the following terms by the Respondent:

...the Hearing Officer concluded that the case against the Respondent should be dismissed for failure of the Petitioner to present sufficient corroborative evidence of the minor's testimony.  
R. 18.

The Respondent then proceeded in his Exceptions to examine the evidence presented which he considered corroborative of the charges, arguing that the Hearing Officer overlooked it or ignored it. In point II of his Exceptions, the Respondent states:

...it is the Petitioner's [the Commissioner's] position based upon the foregoing legal authorities that the minor's testimony standing alone is sufficient to establish the allegations of misconduct set forth in the Administrative Complaint. R. 23.

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Using this Hearing Officer's standard of proof, any case brought upon this set of facts would be dismissed for lack of corroboration of the student's testimony. R. 24

The Respondent, in contesting the Petitioner's Statement of the Case and Facts filed here, now claims his exceptions did not argue that the Hearing Officer erred as a matter of law in requiring corroboration of the minor's testimony. That statement appears to be clearly contradicted by the Record. However, assuming that claim to be true, it appears then, that the

Respondent now concedes that prior to the presentation of its issues on appeal to the First District Court of Appeal, it did not argue in the form of an exception that the hearing officer had required corroboration of the minor's testimony, and presumably drew the same conclusions from the face of the Hearing Officer's report as did the Fifth District Court of Appeal in Ferris v. Austin, 487 So.2d 1163, 1166, i.e. that the hearing officer found insufficient evidence to support the Respondent's case and did not assert that corroboration was necessary as a matter of law in such cases.

Had that been clear below, the Petitioner would have argued that the issue was waived by the Respondent in that it was not asserted before the EPC by way of exception and preserved for appeal, and, or in the alternative, that the post-final-order shift of the Respondent's position on the interpretation of the hearing officer's report indicated the tenuousness of that point on appeal. See §120.57(1)(b)4. In either case, the Respondent appears to be pulling himself up by his bootstraps.

The same argument also applies to the second element of the Respondent's third area of disagreement as to the Petitioner's Statement of the Case and Facts; i.e., that it is now claimed that issues were asserted before the First District Court which were not addressed in Exceptions before the EPC. It appears, again, that the Respondent's attempt to distinguish between its argument to the EPC as contained in its Exceptions and the issues address on appeal in the First District Court falls flat. The Respondent, in its Exceptions at point "II" states:

The burden of proof in administrative proceedings, like civil proceedings, is by a preponderance of the evidence.

The Respondent then argued that the hearing officer failed to properly consider the evidence supporting the charges against the

Petitioner under that standard of proof in that the Hearing Officer considered numbers of witnesses as opposed to the quality of their testimony. The EPC considered the exception and rejected it. An element of that question necessarily was whether the Hearing Officer's recommended order stated that the case was not sustained even applying the Respondent's preponderance standard.

The fourth area of the Respondent's disagreement with the Petitioner's Statement of the Case and Facts is his reference to a "Negotiation Memorandum." It is not clear from the remaining text of the Answer Brief how this comment is relevant to the argument of the points on appeal. In fact, it does not appear to be mentioned again in any part of the Respondent's brief. The fact is that the acceptance of the convenience plea did not adjudicate nor affect the issues to be submitted to the EPC; the fact of its existence was addressed by the Respondent in the evidentiary hearing, for what it was worth, which was primarily its prejudicial value. It is referenced by the Hearing Officer in his recommended order at page 3 immediately prior to his assessment of the facts as presented in the administrative hearing and his ultimate finding that the facts did not sustain the charges against the Petitioner. It bears no further discussion nor consideration in this appeal.

## II SUMMARY OF ARGUMENT

A. THE HEARING OFFICER IN HIS REPORT DID NOT REQUIRE THAT CORROBORATIVE TESTIMONY BE PRESENTED NOR APPLY AN INCORRECT STANDARD OF PROOF AND SUCH CONSTRUCTION OF THE REPORT INVOLVED AN ISSUE OF FACT OR JUDGMENT THAT WAS IMPROPERLY REDETERMINED BY THE DISTRICT COURT.

The EPC's resolution of the Respondent's Exceptions below required a consideration of the facial language of the Hearing Officer's recommended order. Its rejection of the exceptions,

which later became the basis of the points on appeal, was essentially a determination of fact or an exercise of judgment which the District Court could not disturb without showing absence of substantial competent evidence or that the EPC's decision was clearly erroneous.

B. IT IS CLEAR FROM THE FACE OF THE HEARING OFFICER'S RECOMMENDED ORDER, ADOPTED BY THE EDUCATION PRACTICES COMMISSION, THAT HE DID NOT BASE HIS FINDINGS, CONCLUSIONS OR RECOMMENDATION UPON A VIEW THAT A MINOR VICTIM'S TESTIMONY MUST BE CORROBORATED IN ORDER TO SUSTAIN A FINDING OF SEXUAL MISCONDUCT.

The Court can determine from the face of the Hearing Officer's recommended order that he did not conclude that the minor's testimony required corroboration.

C. THE HEARING OFFICER'S RECOMMENDED ORDER, AS ADOPTED BY THE EDUCATION PRACTICES COMMISSION, STATES THAT THE CASE AGAINST THE PETITIONER WAS NOT SUSTAINED UNDER ANY STANDARD OF PROOF, AS ADOPTED BY THE COURTS.

The Court can determine from the face of the Hearing Officer's recommended order that he found that the charges against the Petitioner were not sustained under any standard of proof, including preponderance of the evidence.

D. THE APPROPRIATE STANDARD OF PROOF IN A LICENSE REVOCATION CASE, THE POTENTIAL RESULT OF WHICH IS TO EXTINGUISH THE PROFESSIONAL CAREER OF A PUBLIC SCHOOL TEACHER, IS THE BOWLING OR THE "CLEAR AND CONVINCING" STANDARD, AND NOT "PREPONDERANCE OF THE EVIDENCE."

Where, in an administrative case, the charged party may suffer loss of a professional or business license, in this case a teaching certificate, the standard of proof to be applied is "clear and convincing evidence," or the Bowling standard, and not preponderance of the evidence.

### III ARGUMENT

A. THE HEARING OFFICER IN HIS REPORT DID NOT REQUIRE THAT CORROBORATIVE TESTIMONY BE PRESENTED NOR APPLY AN INCORRECT STANDARD OF PROOF AND SUCH CONSTRUCTION OF THE REPORT INVOLVED AN ISSUE OF FACT OR JUDGMENT THAT WAS IMPROPERLY REDETERMINED BY THE DISTRICT COURT.

The Respondent misstates and, consistently, misunderstands the Petitioner's first argument in his initial Brief. The Respondent suggests that the trust of that argument is that the court below improperly substituted its findings of fact and judgment "for that of the hearing officer" when it is the finding and judgment of the EPC that was the subject of concern.

Stated succinctly, in order for the two issues to be argued that are the of subject of the First District's order of remand, it was first necessary to create a factual foundation for the contentions. This was done by the Respondent in asserting that the Hearing Officer's recommended order states, either directly or by inference (1) that corroboration of a victim's testimony is necessary in a sexual battery case litigated in the context of an administrative proceeding; and (2) that the Hearing Officer failed to consider the evidence below under the proper standard of proof. Thus, the threshold question was essentially one of fact: what did the Hearing Officer state in his recommended order? If the report contained neither of the two offensive assertions, there is simply nothing to argue about; i.e., they are "straw men".

The Petitioner in his initial brief points out that the two straw men referenced above were first presented to the EPC in the form of exceptions. Those exceptions were expressly rejected by the EPC where a fair reading of the Hearing Officer's report showed that the claimed errors never existed. It was not necessary for the EPC to undertake a legal analysis, only to read within the four corners of the recommended order and apply common meaning to common language. It is further argued that, therefore,















