

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MANNY DIAZ, JR., AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 23-0920PL

YOJARY E. MUNDARAY,

Respondent.

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings (“DOAH”), for final hearing by Zoom teleconference on July 25, 2023.

APPEARANCES

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

For Respondent: Yojary E. Mundaray, pro se
1501 Northeast 175th Street
Miami, Florida 33162

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a teacher, imposed her personal religious views upon a sixth-grade student, as Petitioner alleges; and, if so, whether disciplinary action should be taken against her educator certificate.

PRELIMINARY STATEMENT

On December 12, 2022, the Commissioner of Education (“Commissioner”) issued an Administrative Complaint charging Yojary E. Mundaray (“Mundaray”) with violating the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules, in violation of section 1012.795(1)(j), Florida Statutes; failing to make reasonable efforts to protect a student from conditions harmful to learning and/or to the student’s mental and/or physical health and/or safety, in violation of Florida Administrative Code Rule 6A-10.081(2)(a).; and failing to take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated, in violation of rule 6A-10.081(2)(b)1. On May 5, 2023, the undersigned granted the Commissioner leave to file an Amended Administrative Complaint, which added a fourth charge, namely, having been found guilty of personal conduct which seriously reduces the teacher’s effectiveness as an employee of the school board, in violation of section 1012.795(1)(g).

Mundaray timely requested a formal administrative hearing by filing an Election of Rights, which she later revised. On March 7, 2023, the Florida Department of Education referred the matter to DOAH for a formal evidentiary hearing. Upon assignment, the undersigned set the case for a final hearing, which took place, after one unopposed continuance, on July 25, 2023.

At the final hearing, the Commissioner called three witnesses: Hellen Arellano, April Thompson-Williams, and Sergio Nieves. Mundaray testified on her own behalf and called no other witnesses.

In addition to the testimony, Petitioner's Exhibits 1 through 8 were admitted without objection, as were Respondent's Exhibits 1 through 19.

The parties requested and were granted a period of 20 days from the filing of the final hearing transcript within which to submit their proposed recommended orders. The final hearing transcript was filed on August 16, 2023. Neither party submitted a proposed recommended order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2023, 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. At all times relevant to this matter, including specifically the 2019-2020 school year, Mundaray was employed as a teacher at Jose de Diego Middle School ("JDD") in the Miami-Dade County School District ("District"), where she taught science.

2. Mundaray holds Florida Educator Certificate No. 1353178, making her subject to the regulatory jurisdiction of the Department of Education, which is headed by the Commissioner. As a certificate holder, Mundaray is under the disciplinary authority of the Education Practices Commission ("EPC"). In this case, the Commissioner has charged Mundaray with offenses arising from allegations that she imposed her personal religious views on a sixth-grade student who will be referred to herein by the pseudonym, "Pat."

3. The alleged misconduct occurred, if at all, during a single incident on December 19, 2019. Only one witness having personal, firsthand knowledge of the incident testified at the final hearing: Mundaray. Her testimony does not support a finding that she subjected Pat to religious indoctrination. To

the contrary, according to Mundaray, it was Pat, not she, who initially opined about God's nature. Mundaray merely expressed polite disagreement with the student's theological statement, which was both heterodox and disparaging.

4. The Commissioner offered nothing but hearsay to contradict Mundaray's testimony, and hearsay, without more, is not competent substantial evidence. Thus, the Commissioner has failed to prove the truth of his allegations of misconduct. Because Mundaray is not required to prove her innocence, moreover, the undersigned need not make exculpatory findings of fact based upon Mundaray's testimony. Nevertheless, what follows is a brief account of the situation,¹ which makes clear that this case is not about proselytizing but about transgender ideology.²

5. The incident at issue started when Mundaray reprimanded Pat and another student for engaging in routine classroom horseplay. In doing so, Mundaray told Pat to stop "playing rough with the boys." It is undisputed that Pat is a biological female, and that she is so identified in the school records that were available to Mundaray. Until December 20, 2019, Mundaray had no reason to think that Pat was not the girl she objectively appeared to be.

6. Soon after being reprimanded, Pat asked to speak privately with Mundaray, and the two stepped away from the other students for that purpose. Pat then revealed to Mundaray that she is transgender and now identifies as a male, which was news to Mundaray. Pat told Mundaray that

¹ The findings of historical fact are based upon Mundaray's credible testimony, which is at least more likely than not true, if not clear and convincing.

² Advocates of transgenderism can be as doctrinaire as religious zealots these days. As this case demonstrates, adhering to the traditional view that gender is biologically determined can get a person excommunicated, from a job in this instance. Indeed, a reasonable argument can be made that transgenderism is fast becoming, if it has not already become, a kind of state-sponsored religion. Ironically, if anyone attempted to impose beliefs in this instance, it was Pat and, more importantly, the District who did so. Each sought to force Mundaray to conform her conduct to tenets of transgenderism, which she rejects. Mundaray's refusal to convert to this new secular faith cost her dearly.

henceforth she wanted Munday to address her using masculine pronouns. Munday explained that she could not do that due to her Christian beliefs. Pat's response was, "I think God made a mistake." Pat meant that God had erred in causing or allowing her to be born a female, rather than a male.

7. Pat's statement contradicts the orthodox Christian belief that God is inerrant and infallible. Regardless, she was clearly criticizing God (or more likely, by mocking the teacher's faith, insulting Munday). Munday replied, "I'm a Christian, and my God made no mistakes."

8. That was it, as far as the alleged religious imposition goes. Given that Munday made no attempt to force Pat to accept, conform to, or even acknowledge any Christian doctrine, the allegation that she imposed her personal religious views on Pat is untrue. At most, Munday expressed her view that God is inerrant, which is about as anodyne a theological statement as one could make.³ Further, she did so only in defense of the God she worships. Surely, such cannot constitute a disciplinable offense in a country whose foundational principles include religious freedom.

9. Pat complained to the JDD administration, not about Munday's supposed proselytizing, but about the teacher's refusal to refer to Pat using masculine pronouns, which is what this case has always *really* been about. Naturally, the District investigated, and inevitably Munday was found guilty of having discriminated against Pat "by refusing to refer to him using the pronouns of the gender he identifies as." As a result, the District terminated Munday's employment on June 4, 2020.

10. Unfortunately for Munday, these events took place before July 1, 2023, on which date the recently enacted section 1000.071, Florida Statutes, went into effect. Florida law currently provides as follows:

³ Munday's statement implicitly contradicted Pat's declaration that she is a boy, to be sure, but there is no evidence that Munday attempted to change Pat's mind on this point, nor that she took issue with Pat's claim head-on. There is no reason to suppose that Munday would have expressed any disagreement, even indirectly, with Pat's subjective belief that she is a boy, had Pat not somewhat provocatively introduced the subject of God's nature.

It shall be the policy of every public K-12 educational institution that is provided or authorized by the Constitution and laws of Florida that a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex.

§ 1000.071(1), Fla. Stat.⁴ Further, no teacher may “be required, as a condition of employment ... , to refer to another person using that person's preferred personal title or pronouns if such personal title or pronouns do not correspond to that person's sex.” § 1000.071(2), Fla. Stat. In short, had the incident with Pat occurred today, instead of three years ago, Mundaray would have been protected against the significant loss she suffered simply for refusing to do what the law now deems “false.”

DETERMINATIONS OF ULTIMATE FACT

11. In the Amended Administrative Complaint, the Commissioner accused Mundaray of having committed four disciplinable offenses, namely those defined in subsections (1)(g) and (1)(j) of section 1012.795; and including violations of subsections (2)(a)1. and (2)(b)1. of rule 6A-10.081, which are part of the Principles of Professional Conduct for the Education Profession in Florida. If proved by clear and convincing evidence, the alleged rule violations would be grounds for discipline under section 1012.795(1)(j).

12. The Commissioner alleges, factually, that Mundaray “imposed her personal religious views on [Pat], a sixth-grade student,” by telling Pat “that God created him as a girl and does not make mistakes, or words to that effect.”

⁴ The term “sex” is defined as meaning “the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth.” § 1000.21(9), Fla. Stat.

13. It is determined as a matter of ultimate fact that the evidence adduced fails to prove the Commissioner's allegations against Mundaray by the requisite standard of proof, i.e., clear and convincing evidence.

CONCLUSIONS OF LAW

14. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 1012.796(6), Florida Statutes.

15. 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.

16. If the Commissioner proves any of the grounds for discipline enumerated in section 1012.795(1), then 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 \$2,000.00 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 EPC may specify. §§ 1012.796(7), 1012.795(1), Fla. Stat.

17. Section 1012.795(1)(g) authorizes EPC to take disciplinary action against a teacher when it has been shown that she "has been found guilty of personal conduct that seriously reduces that person's effectiveness as an employee of the district school board." This is the offense which the Commissioner has charged in Count 1 of the Amended Administrative Complaint.

18. Section 1012.795(1)(j) authorizes EPC to take disciplinary action against a teacher when it has been shown that she "[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 2 through 4 of the Amended Administrative Complaint, with Counts 3 and 4 specifying the rules that Mundaray is alleged to have violated.

19. Rule 6A-10.081, entitled “Principles of Professional Conduct for the Education Profession in Florida,” provides, in pertinent part, as follows:

(2) Florida educators shall comply with the following disciplinary principles. 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.

(a) Obligation to the student requires that the individual:

1. 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/or safety.

* * *

(b) Obligation to the public requires that the individual:

1. Shall take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated.

20. Section 1012.795(1)(g) authorizes disciplinary action against a teacher who, “[u]pon investigation, has been found guilty of personal conduct that seriously reduces that person’s effectiveness as an employee of the district school board.” The factual basis for charging Mundaray under this statute is the District’s termination of her employment for refusing to use masculine pronouns in reference to Pat. Although the District did, in fact, take such action, the undersigned concludes, as a matter of law, that Mundaray’s

refusal to use false pronouns⁵ does not reduce her effectiveness as a teacher. Mundaray's conduct in this regard is statutorily protected as of this writing, and, going forward, she must be allowed to use only the pronouns that correspond to a student's sex, should she so choose. § 1000.071(2), Fla. Stat.

21. Statutory and rule provisions that are penal in nature must be strictly construed, with ambiguities being resolved in favor of the licensee. *Lester v. Dep't of Pro. & Occ. Reguls.*, 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 Env't Prot.*, 696 So. 2d 962, 964 (Fla. 1st DCA 1997). Whether Mundaray 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).

22. For 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 Pro. Regul.*, 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

23. 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:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to

⁵ § 1000.071(1), Fla. Stat.

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.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 1279 (Fla. 1992) (citation omitted).

24. The Commissioner presented insufficient proof of his material allegations of fact against Mundaray. This negative determination of ultimate fact is dispositive.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order exonerating Mundaray of all charges brought against her in this proceeding.

DONE AND ENTERED this 2nd day of October, 2023, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
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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.