STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| TOM GALLAGHER, Commissioner of Education, | ) | |
| Petitioner, | ) | |
| vs. | ) | Case No. 00-2159 |
| RICARDO F. ARNALDO, | ) | |
| Respondent. | ) | |

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case in Miami, Florida, on November 1 and 2 and on December 18 and 19, 2000, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles Geitner, Esquire
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For Respondent: Kimberly A. McCoy, Esquire
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STATEMENT OF THE ISSUES

This is a license discipline proceeding in which the Petitioner seeks to have disciplinary action taken against the

Respondent on the basis of alleged acts of misconduct set forth in an Administrative Complaint. In the six-count Administrative Complaint it is charged that the Respondent violated three specific statutory provisions and three specific rule provisions.

## PRELIMINARY STATEMENT

At the final hearing in this case, the Petitioner presented the testimony of fourteen witnesses and offered twelve exhibits, all of which were received in evidence.[1] The Respondent testified on his own behalf and presented the testimony of ten additional witnesses. The Respondent also offered seven exhibits which were received in evidence.[2]

At the conclusion of the hearing the parties were allowed until January 31, 2001, within which to file their proposed recommended orders. The last two volumes of the hearing transcript were filed January 5, 2001. On January 15, 2001, the Respondent requested that the deadline for filing proposed recommended orders be extended until February 14, 2001. By order issued on January 24, 2001, the request was granted, and thereafter all parties filed timely Proposed Recommended Orders containing proposed findings of fact and conclusions of law. The proposals submitted by the parties have been carefully considered during the preparation of this Recommended Order.

## FINDINGS OF FACT

1. The Respondent holds Florida Educator's Certificate 355910, covering the areas of Spanish, Supervision, and Social Science, which is valid through June 30, 2002.

2. At all times material to this case, the Respondent was employed as a Social Studies teacher at Hammocks Middle School in the Miami-Dade County School District.

3. The Respondent first became employed as a teacher at the Hammocks Middle School on or about 1984. At Hammocks Middle School the Respondent taught sixth, seventh, and eighth grade American History. He also taught Geography to sixth graders as part of the Bilingual Content Curriculum Program. As of April 1999, the Respondent had been employed by Miami-Dade County Public Schools for approximately twenty-five years. The Respondent had never been the subject of any disciplinary action by his employer or by the Education Practices Commission at any time prior to April 1999.

4. The Respondent has been a naturist since approximately 1971. The Respondent belongs to a local naturist organization and subscribes to naturist publications.

5. On April 26, 1999, between 7:00 a.m. and 7:30 a.m., before the start of the school day and while there were no students in his classroom, the Respondent executed an Internet search by typing the word "naturism" into the search engine on

his school-provided computer. Of the several "hits" resulting from the search, a website entitled Forste side af ialt 6 Naturistsider, caught the Respondent's attention because it appeared to have the word "naturist" in its foreign title. The Respondent "clicked" on and accessed the Forste side af ialt 6 Naturistsider website. On April 26, 1999, the Respondent viewed the website for about one minute and "bookmarked" the site. The Respondent did not access the website again on April 26, 1999, at any time.

6. On April 27, 1999, before the start of the school day and while there were no students in his classroom, the Respondent accessed the site Forste side af ialt 6 Naturistsider via the "bookmark" he had created on April 26, 1999. On that day, the Respondent exited the website before any students arrived at his classroom for his first period class. On the same day, during his third period planning period, while no students were present in the classroom and while the door to his classroom was closed, the Respondent again accessed the Forste side af ialt 6 Naturistsider website. The Respondent left the accessed naturist site on his computer at the end of the planning period but he covered the site by opening his electric gradebook over it. The Respondent did not view the website during the fourth period. During the last ten minutes of the fifth period on April 27, 1999, the Respondent entered student

grades into his electronic gradebook while clicking on and viewing some of the photographs from the Forste side af ialt 6 Naturistsider website. Students were present in the classroom but there is no evidence that any student saw naturist photographs on the Respondent's computer monitor during the fifth period.

7. During his sixth period class on April 27, 1999, the Respondent viewed some more naturist photographs on the Forste side af ialt 6 Naturistsider site while grading geography projects at his desk. The Respondent's geography students were working on an in-class vocabulary assignment. The Respondent's computer monitor was facing away from his students and images on the monitor could not be seen by the students while they were at their desks. However, during the course of the Respondent's sixth period class on April 27, 1999, several of the students had occasion to approach the Respondent's desk or to otherwise be in a position to see the monitor on the Respondent's computer. Several of those students were able to see photographic images of nude people on the monitor, even though the Respondent made efforts to cover the monitor when students approached his desk.

8. Shortly after the end of the sixth period on April 27, 1999, several of the students reported to the school administration that they had seen photographs of nude people on

the Respondent's computer. An investigation was promptly initiated; written statements were obtained from the students, and the Respondent's classroom computer was removed and locked in a secure place until it could be examined.

9. The photographs of nude people that were seen on the Respondent's computer monitor during his sixth period class on April 27, 1999, were all photographs from the Forste side af ialt 6 Naturistsider website.[3] The photographs from that website depict nude men, women, and children of various ages engaged in a variety of outdoor recreational activities such as sunbathing, walking on the beach, sitting or standing by a swimming pool, swimming, boating, and water skiing. The photographs from that website do not depict any acts of sexual intercourse, any acts of sexual touching, or any acts suggestive of sexual conduct. None of the photographs from that website include any sexual innuendo, nor could any of them be fairly described as provocative. Specifically, none of the photographs from that website were obscene or pornographic. But all of the photographs from that website were distinctly inappropriate for display to sixth grade students in a geography class.

10. Examination of the computer that was removed from the Respondent's classroom revealed that the computer had been used to gain access to the Forste side af ialt 6 Naturistsider website. During the course of the investigation, the Respondent

admitted that he had viewed that website during his sixth-grade class on April 27, 1999. Examination of the computer also revealed that it had been used to gain access to other websites that contained images of a sexually suggestive or sexually explicit nature. However, there is no clear and convincing evidence that the Respondent was the person who gained access to the websites that contained sexually suggestive or sexually explicit images.[4]

11. There is no clear and convincing evidence that, in the words of the statute, the Respondent "has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board."[5]

12. The Respondent's act of having photographs of nude people displayed on his computer monitor on April 27, 1999, created a condition harmful to learning, as well as potentially harmful to the mental health of the students. That act also exposed students to unnecessary embarrassment. That act was also a use of institutional privileges for personal gain or advantage.

13. On or about August 25, 1999, the Respondent was terminated from his position with the Miami-Dade County School Board.

## CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57, Florida Statutes.

15. In a disciplinary action of this type, the burden is on the Petitioner to establish the facts upon which its allegations of misconduct are based. The Petitioner must prove its allegations by clear and convincing evidence.

16. The clear and convincing evidence standard requires that the evidence be found to be credible; the facts to which 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 produce in the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

17. Prior to addressing the specific violations with which the Respondent is charged in the six-count Administrative Complaint, it is helpful to take note of the fact that at the time the Administrative Complaint was prepared, the Petitioner believed that the Respondent had engaged in conduct much more serious than was proved at the final hearing. Then it was believed that on numerous occasions the Respondent had used his school computer to gain access to sexually explicit materials of

an obscene or pornographic nature. What was proved at hearing was that on April 26 and 27, 1999, the Respondent used his school computer to gain access to a naturist website containing numerous photographic depictions of nude people, and that on April 27, 1999, he viewed these images under circumstances which made it possible for some of his students to also see the photographic depictions of nude people. What was originally believed to be a case involving a continuing course of immoral conduct has, in the final analysis, proved to be a case of only one incident of a very serious lapse of judgment in which the Respondent placed his personal interests ahead of his responsibilities and duties to his students.

18. Addressing attention now to the specific violations alleged in the Administrative Complaint, in Count I the Respondent is charged with a violation of Section 231.2615(1)(c), Florida Statutes,[6] "in that the Respondent has been guilty of gross immorality or an act involving moral turpitude." The conduct which has been proved in this case by clear and convincing evidence is not conduct that constitutes gross immorality or that involves moral turpitude. There being no persuasive evidence gross immorality or moral turpitude, the allegations in Count I should be dismissed.[7]

19. In Count 2 of the Administrative Complaint the Respondent has been charged with a violation of Section

231.2615(1)(f), Florida Statutes, "in that the Respondent, upon investigation, has been found guilty of personal conduct which seriously reduces his effectiveness as an employee of the school board." As noted in paragraph 11 of the findings of fact and in endnote 5, the evidence is insufficient to establish that the Respondent's effectiveness has been seriously reduced. Accordingly, the allegations in Count 2 should be dismissed.

20. Count 3 of the Administrative Complaint charges the Respondent with violation of Section 231.2615(1)(i), Florida Statutes, "in that the Respondent has violated the Principles of Professional Conduct for the Education Profession in Florida prescribed by State Board of Education [Rules]." The specific principles of professional conduct the Respondent is alleged to have violated are specified in the three following paragraphs identified as Counts 4, 5, and 6 of the Administrative Complaint. Although designated as separate counts in the Administrative Complaint, Counts 4, 5, and 6 are, in essence, additional specific details regarding the violation charged in Count 3. Stated otherwise, the violation charged in Count 3 encompasses all of the additional specific details set forth in Counts 4, 5, and 6. Accordingly, it is not necessary to devote separate discussion to Counts 4, 5, and 6 because the violations alleged there are encompassed by the allegations of Count 3.

21. The provisions of Rule 6B-1.006, Florida Administrative Code, which the Respondent is alleged to have violated read 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:
> (a) 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.
>
> * * *
>
> (e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
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> * * *
>
> (4) Obligation to the public requires that the individual:
>
> * * *
>
> (c) Shall not use institutional privileges for personal gain or advantage.

22. From the facts established at the hearing, it appears that the Respondent, by his conduct on April 26 and 27, 1999, violated all three of the principles quoted above. He certainly failed to protect the students from conditions harmful to learning within the meaning of (3)(a). Quite to the contrary of

what he should have been doing, the Respondent actually created a condition that was harmful to learning. The Respondent also intentionally exposed his students to unnecessary embarrassment within the meaning of (3)(e).[8] And, finally, the Respondent also used institutional privileges for personal gain within the meaning of (4)(c). These violations warrant the imposition of disciplinary action against the Respondent.

23. In determining the appropriate penalty to be imposed in this case, it is appropriate to consider the fact that the Respondent has had a long history of satisfactory performance, that he was never the subject of any prior disciplinary action by either his employer or by the Education Practices Commission, and that the subject violation arose from a single episode of incredibly poor judgement. It is also important to note that, although the violations resulted from an intentional act of the Respondent, the Respondent did not intend the consequences that flowed from his thoughtless act. Specifically, the Respondent was not trying to show the images of nude people to his students. And, finally, it is significant that the images at issue, while totally inappropriate for the classroom setting, were not sexually explicit, pornographic, or obscene. The circumstances here warrant discipline sufficiently severe to discourage the Respondent and others from any future similar

lapses in judgement, but not so severe as to terminate a long and successful career as a teacher.

## RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that a final order be entered to the following effect: (a) dismissing the charges in Counts 1 and 2 of the Administrative Complaint; (b) finding the Respondent guilty of the violations alleged in Counts 3, 4, 5, and 6; and (c) imposing as a penalty an administrative fine in the amount of five hundred dollars ($500.00), and a suspension of the Respondent's certificate for a period of six (6) months.

DONE AND ENTERED this 16th day of May, 2001, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2001.

## ENDNOTES

1/ The Petitioner's Exhibits were marked as S-1, T-1, O-1, O-2, O-3, K, H-1, H-2, H-3, G-1, G-2, and N-1.

2/ The Respondent's Exhibits were marked as R-4 through R-10.

3/ The Respondent admits that he accessed this website during his sixth grade class on April 27, 1999. He denies viewing this website on his classroom computer on any days other than April 26 and April 27, 1999. There is no clear and convincing evidence that the Respondent viewed the Forste side af ialt 6 Naturistsider website at any times other than the times to which he admitted.

4/ The Respondent was not the only person who had access to the computer in his classroom. Other teachers at the school where the Respondent taught described instances when it was discovered that other classroom computers had been used by persons unknown to gain access to sexually explicit images.

5/ While the record contains some conclusory remarks concerning the Respondent's loss of effectiveness as a result of his conduct on April 27, 1999, the greater weight of the evidence is to the effect that his effectiveness as an employee of the district school board has not been seriously reduced. His effectiveness was certainly reduced to some extent, but not seriously reduced.

6/ The Administrative Complaint refers to various provisions of Section 231.28(1), Florida Statutes. Those provisions have since been moved to Section 231.2615(1), Florida Statutes.

7/ In this regard it is important to note that the images seen by the Respondent's students were not sexually explicit images. They were by no means similar to the sexually explicit materials described in paragraphs 16 and 17 of the Recommended Order in Tom Gallagher, as Commissioner of Education v. Stephen Rosenthal, DOAH Case No. 00-3888PL (Recommended Order issued January 10, 2001).

8/ The Respondent argues that he did not violate this Rule provision because his acts were not intentional and he did not intend for the students to see the images. The argument fails because the images were present on the computer monitor only as a result of an intentional act by the Respondent and the consequences which followed (i.e., embarrassed students), while not intended by the Respondent, were certainly foreseeable and predictable consequences that should have been prevented.

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.