

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

UNIVERSITY OF FLORIDA, )  
)  
Petitioner, )  
)  
vs. ) Case No. 01-4324  
)  
BRIAN BOWEN, )  
)  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, this cause came on for a disputed-fact hearing on January 28-29, 2002, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven D. Prevaux, Esquire  
University of Florida  
123 Tigert Hall  
Post Office Box 113125  
Gainesville, Florida 32611-3125

For Respondent: Carla D. Franklin, Esquire  
Franklin, Donnelly & Gross  
408 West University Avenue  
Suite 601  
Gainesville, Florida 32601

Kirk Y. Griffin, Esquire  
50 Staniford Street  
Boston, Massachusetts 02114

STATEMENT OF THE ISSUES

Petitioner University of Florida seeks to terminate Respondent, pursuant to Rules 6C1-1.007, 6C1-1.008, 6C1-7.018, and 6C1-7.048, Florida Administrative Code, for conduct alleged as follows:

- (a) Abusing the faculty member-student relationship;
- (b) Fostering, by example, an environment in which substance abuse is promoted to students whom Respondent supervises;
- (c) Creating a hostile learning environment; and
- (d) Retaliation in the course of a sexual harassment investigation.

PRELIMINARY STATEMENT

Respondent was employed as a non-permanent Assistant Professor at Petitioner University of Florida (UF). On July 23, 2001, a complaint of sexual harassment was filed with UF against Respondent. On August 27, 2001, UF concluded its investigation, which expanded the original charges. On August 28, 2001, Respondent issued a Notice of Proposed Dismissal. On September 18, 2001, a Predetermination Meeting was held at Respondent's request. UF subsequently issued its October 8, 2001, decision to dismiss Respondent, effective October 10, 2001.

This cause was referred, under contract, to the Division of Administrative Hearings on or about November 2, 2001.

A disputed-fact hearing was convened on January 28-29, 2002. Petitioner presented the oral testimony of William Fleming, Alicia Pearce, Katherine Moore, Joel Carlin, and Dr. Richard Jones. Petitioner had Exhibits P-1 through 12 and P-15 admitted in evidence. P-12 is the deposition of Dr. William Lindberg. Respondent presented the oral testimony of Anna Bass and testified on his own behalf. Exhibits R-1 through 7 and R-10 were admitted in evidence. The Joint Prehearing Stipulation was also admitted in evidence as Joint Exhibit A.<sup>1</sup>

A Transcript was filed on March 4, 2002. Proposed Recommended Orders were due on March 19, 2002. Petitioner timely filed its proposal but agreed that Respondent could file his proposal on or before March 26, 2002. That agreement was ratified by an Order entered March 22, 2002. Respondent filed its proposal timely under that Order, but also filed a reorganized proposal on May 10, 2002.<sup>2</sup> The latter has not been considered. The parties' timely proposals have been considered.

#### FINDINGS OF FACTS

1. In order to resolve the legal issues herein, it is not necessary to relate all the evidence taken, to relate the stipulated facts verbatim, or to record the entire sequence of events and all the opinions various witnesses expressed of one another. Accordingly, and in accord with Section 120.57(1), Florida Statutes, only material findings of fact have been made.<sup>3</sup>

In doing so, effort has been made to reconcile the witnesses' respective testimony so that all witnesses may be found to speak the truth, but where conflicts existed, the credibility issue has been resolved on the characteristics listed in Standard Jury Instruction, (Civil) 2.2b.<sup>4</sup>

2. Respondent was initially hired at UF on July 17, 1992, in a non-permanent position as a Research Scientist, at its main campus in Gainesville, Florida.

3. Beginning April 1, 1997, and at all times material, Respondent was employed on the main campus as a non-permanent Assistant Professor in the Institute of Food and Agriculture Sciences (IFAS), Department of Fisheries and Aquatic Sciences, at UF. As such, Respondent was assigned teaching, research, and extension duties that include teaching undergraduate and graduate courses and mentoring students. Respondent did not hold tenure, but was in a tenure-earning status for nine years.

4. Respondent is an ichthyologist and was employed in the specialized academic field of wildlife conservation genetics, within a limited professional community comprised of only approximately 100 professionals in the United States.

5. Students, graduate students, and colleagues of Respondent understand that this is a tight-knit professional community and that Dr. Robert Chapman of the University of Charleston, South Carolina, is part of that "elite 100." As with

any profession, networking is important to students' career paths.

6. Anna Bass was never a UF student or a student of Respondent. However, she was directly employed by UF from March 1995 to the summer of 2000, as Respondent's lab manager. She worked for Respondent elsewhere prior to that period and has known him since approximately 1992 or 1993.

7. As Assistant Professor, Respondent served as the Major Professor and Thesis Committee Advisor for UF graduate students Joel Carlin, Alicia Pearce, and Luiz Rocha.

8. Currently, and at all times material, Joel Carlin was enrolled as an IFAS graduate student at UF. Alicia Pearce graduated from the UF-IFAS program in May 2001.

9. Katherine Moore was never Respondent's student and never attended UF. However, Respondent had been on Ms. Moore's graduate thesis committee when she was a student at the University of Charleston. She graduated from that university approximately 1998-1999. Ms. Moore has been employed as a biologist at the National Ocean Service in Charleston, South Carolina, since 1990.

10. The student-professor relationship is based on mutual trust and respect, with the student's best interest at heart, for either undergraduate or graduate students.

11. As major professor and chair of thesis committees, Respondent has substantial power over the career paths of graduate students he has advised. Major professors are expected to serve as mentors to their students, providing guidance and acting as professional role models to assist and mold judgment. They are relied upon by students and former students for future educational, job, and research grant references. The graduate student-major professor relationship persists beyond graduation and often endures for a life-time. Graduates often continue original research in cooperation with their mentors and co-author professional research articles with them. Graduates frequently seek the counsel of their mentors for important professional post-graduate decisions.

12. Among his students and colleagues, Respondent has a reputation for partying. His liquor of choice is tequila. He has held what are called "late night lab sessions" with his graduate students in off-campus Gainesville music clubs and bars. Student attendance at these "late night lab sessions" are not required, but it is understood they can be helpful for building both rapport and a career. Respondent also entertains, as do other professors, by serving food and alcohol in his home, so that students may meet and network with visiting speakers/colleagues in their chosen field(s). During a party hosted by Respondent at his home in May of 1997, he served and consumed

beer and tequila in the presence of adult IFAS students. He became inebriated at that party. Respondent, Mr. Carlin, and a visiting scientist, met at a music club in Gainesville and drank alcohol together on one occasion. In early June 2001, Respondent attended an informal going-away party for the same colleague at a Gainesville restaurant with Mr. Carlin and Mr. Carlin's undergraduate girlfriend. Alcohol was consumed and at the end of the evening, the three felt too inebriated to drive legally or safely. However, Respondent drove home and did nothing to prevent the others from driving home. Respondent's explanation for this last occasion was that he was under great emotional stress due to his wife's recent miscarriage.

13. Respondent has consumed alcoholic beverages at off-campus locations at least 3-4 times per year with adult IFAS students whom he academically supervised.

14. In 1998, when Mr. Carlin, an adult, was interviewing on the UF Campus at a morning appointment with Respondent for admission to the UF graduate program, Respondent invited him to meet that night, at approximately 11:00 p.m., with Respondent and his graduate students in a Gainesville establishment where they consumed alcohol. Attendance at the bar was not a quid pro quo for admission, and Mr. Carlin never thought it was. Mr. Carlin remained for the meeting and drinking and was ultimately admitted into the program. Respondent considered his invitation to be a

friendly opportunity for Mr. Carlin to talk informally with other graduate degree candidates so that all concerned could determine if the fit was right for Mr. Carlin in the program he wanted to pursue at UF. Mr. Carlin did not object to the drinking, but he felt the late night hour was inconvenient, since he had expected to leave town after his morning interview, and unprofessional, since he never got to discuss dissertation ideas at that time with Respondent.

15. Once, when Respondent had been in Charleston, South Carolina, helping Ms. Moore "finish up [her] Masters," they were at a post-reception party in Respondent's motel room. Other guests were drinking alcohol and smoking pot (marijuana). Dr. Robert Chapman was also present. Respondent and Dr. Chapman settled which of their names should appear first on a jointly-authored professional publication with a "tequila bottle toss." Each professor-author tossed an empty tequila bottle into the motel swimming pool from the motel room balcony. The man whose bottle hit closest to the pool's center, won. The date of this event is not clear, but apparently it occurred while Respondent was employed by UF. There is no reason to suppose UF students were present.

16. Respondent has possessed liquor at off-campus professional conferences in the presence of adult UF students for whom he had some academic responsibility.



17. Several years ago, at a professional reception held for Respondent, he autographed the closure strap at the back of the bra worn by a non-UF undergraduate female, approximately nineteen years old, who was flirting with him in the presence of Ms. Moore. Ms. Moore described the young woman as someone attending her first professional conference who was in awe of Respondent as a "star" in their field. Respondent admitted to making sexually suggestive witticisms to the undergraduate female at the time. No one took him seriously or was offended.

18. Respondent has repeatedly possessed or smoked marijuana, a controlled substance under Florida law, in the presence of others with whom he was professionally associated.<sup>5</sup> Use or possession of marijuana on campus offends UF's "drug-free policy." Use or possession of marijuana by a UF faculty member or student anywhere is considered "disruptive behavior" subject to UF discipline. See Rules 6C1-1.008(1)(m) and 6C1-7.048(1)(n), Florida Administrative Code, and the following Conclusions of Law.

19. In June 2001, Respondent used marijuana at Mr. Carlin's house with Mr. Carlin and Mr. Carlin's live-in undergraduate girlfriend present. Respondent's explanation for this was that he was under great emotional stress due to his wife's recent miscarriage.

20. Ms. Moore has observed Respondent smoke marijuana in the presence of students at most of the off-campus professional meetings they have attended over the years from 1992 to the present, but the students she referred-to probably attended universities other than UF.

21. Ms. Pearce has observed Respondent smoke marijuana in the presence of UF students approximately 15 times. She did not specify the locations as on- or off-campus.

22. While she was his student and in his UF office, on the UF campus, Respondent showed Ms. Pearce a "highlighter" pen that he carried in his pocket, which pen had a false bottom for hiding a stash of marijuana.

23. Ms. Bass has smoked marijuana with Petitioner multiple times. She did not specify the location(s) as on- or off- the UF campus.

24. In July 2001, Alicia Pearce was 29 years old. During her UF graduate studies, Respondent had been her major professor and thesis committee advisor. She had received her Master's Degree diploma from UF on May 5, 2001, and UF could not require her to complete any further requirements. (See Finding of Fact 8.) However, according to Dr. Richard Jones, UF Dean of Research, it was expected that after award of their degrees, former graduate students would place their theses in reviewed (preferably peer-reviewed) publications.

25. Respondent had agreed that Ms. Pearce could present her thesis after graduation, due to her relocation to North Carolina.

26. In order to present her paper after graduation, Ms. Pearce submitted her research paper abstract and her registration papers and fees for the American Society of Ichthyologists and Herpetologists (ASIH) Conference in February, 2001, before her graduation from UF. The conference was scheduled to be held on July 5-10, 2001, at State College, Pennsylvania (Penn State).

27. Respondent also attended the July 5-10, 2001, ASIH Conference in the capacity of a UF-IFAS faculty member to, among other purposes, mentor his graduate students, Pearce, Carlin, and Rocha, all of whom were presenting papers at the conference. Respondent was not required to request leave, and did not request leave, from UF to attend the conference. He was on salary from UF while at the conference. Respondent was entitled to request a travel reimbursement from UF, as did Mr. Carlin, but elected not to do so.

28. Respondent has attended the ASIH Conference approximately four times while employed by UF-IFAS.

29. At the 2001 ASIH Conference, Ms. Pearce roomed in a dorm with Luiz Rocha.

30. On July 6, 2001, Respondent used his credit card to purchase dinner and alcoholic drinks at a restaurant/bar in the

Penn State Conference Center Hotel for a group of adult colleagues and adult students, including Carlin, Pearce, and Rocha. The ASIH Conference was being held in the hotel. The hotel was considered part of the Penn State campus. During dinner, Respondent made a sexually suggestive comment to Ms. Pearce, who was the only female present, and remarked that it could not be sexual harassment because she was no longer his student. Neither Ms. Pearce nor anyone else took him seriously or was offended.

31. After dinner, Petitioner invited Ms. Pearce to his hotel room, along with another senior colleague, to discuss a tip Respondent had received several weeks earlier that a UF student had fabricated research. Respondent wanted the senior colleague's advice. He wanted Ms. Pearce's perspective because she had been in the lab during a relevant period of time. Their conversation in Respondent's hotel room lasted about an hour. During this period of time, marijuana was present in Respondent's hotel room. Respondent did not admit to bringing the drug with him to the conference, but the fact that marijuana was present in Respondent's hotel room means the contraband drug was in his constructive possession. Respondent admitted holding, sniffing, and/or smoking<sup>6</sup> a "token toke" in the hotel during the dates of the 2001 ASIH Conference, and apparently in the presence of Ms. Pearce and the adult colleague. Marijuana use or possession

is contrary to Penn State University's drug-free policy and rules.

32. Respondent, his colleague, and Ms. Pearce next attended the official conference reception downstairs in the hotel. Alcohol was served and consumed.

33. Later the same evening, Respondent and Ms. Pearce returned to his hotel room. Both had already drunk a great deal of alcohol and proceeded to drink more. They were observed alone together in the hotel room by Mr. Carlin, whom they sent away. Ms. Pearce became further inebriated during a long conversation with Respondent, which included discussion of her fear of doing the professional presentation coming up at the conference, past lab work, and intimate details of their respective married lives. She then passed out in the bathroom.

34. Respondent knew Ms. Pearce was already partially inebriated and vulnerable before he took her to his hotel room, because she had begun to cause a scene at the conference's reception. Respondent also knew she had a history of irresponsible behavior with regard to alcohol because in May 2000, she and Mr. Carlin, high on alcohol, had telephoned Respondent's home repeatedly at approximately 2:00 a.m., in the morning. They then drove, in that condition, to Anna Bass's house, where they "crashed" for the night. Thereafter, Respondent had told them he was distancing himself from them;

told them they should never call him again at that hour; and gave them extra lab work.

35. On July 6, 2001, Respondent assisted Ms. Pearce from the hotel bathroom into one of his hotel room beds. It is undisputed that the couple then kissed and groped each other.

36. Respondent's and Ms. Pearce's versions of what happened next, or how long it took, are fairly similar. Where they differ, the undersigned has balanced Ms. Pearce's candor and demeanor or lack thereof while testifying, her past experiences with marijuana and excessive use of alcohol, her expressed intent to go to the ASIH Conference with the purpose of indulging in heavy drinking, and her inability to recall the evening's events in sequence or in detail, against Respondent's testimony, which is discredited in part by his prior inconsistent statements and admissions. Having assessed their respective versions, it is found that: Respondent removed or dislodged Ms. Pearce's shirt and bra. Their groping progressed to Respondent's massaging Ms. Pearce's breasts and the two of them mutually massaging each other's genitals. At that point, Respondent broke it off and removed himself from the bed. Ms. Pearce then turned over and passed out or went to sleep. Respondent then went to sleep in another bed.

37. About 4:00 a.m., Ms. Pearce awoke, dressed, and left the room, but since the shuttle bus had left, she was unable to

return to her dorm. Respondent followed her to the lobby. She wanted to know if they had had intercourse. Respondent felt he was very clear in stating that no intercourse had occurred. However, Respondent's answer seemed non-specific to Ms. Pearce and did not satisfy her that intercourse had not occurred. She was very concerned, because she and her husband had been trying to conceive a child. However, she allowed Respondent to persuade her to return to his room to talk until 7:00 a.m., when the shuttle began to run again, and she then left the hotel.

38. Respondent explained the July 6, 2001, sexual incident with Ms. Pearce as his being emotionally unstable due to his wife's recent miscarriage.

39. Ms. Pearce did not say anything more to Respondent about their sexual incident until later on July 7, 2001, when she asked him not to tell anybody. He agreed that there was "no use in other people getting hurt." They behaved normally to each other in public throughout the next several days and were not alone together.

40. Respondent helped Ms. Pearce prepare to present her paper later that weekend, and she did well for her first presentation on July 10, 2001. She presented Respondent with an autographed copy of her completed thesis after her presentation. The dedication warmly expressed her thanks to him for his mentorship of her.

41. On Tuesday, July 10, 2001, the last day of the conference, after her presentation, Ms. Pearce also filed a criminal complaint with the Penn State University Police Department, alleging Respondent had sexually assaulted her. Respondent was confronted by two police officers and questioned extensively. He cooperated and provided a statement and blood for a blood test. He was not arrested or charged.

42. Back in Gainesville, Respondent spoke to Mr. Carlin by telephone on July 13, 2001. Upon Respondent's inquiry, Mr. Carlin stated that he had learned of the Penn State investigation from Ms. Pearce when he drove her to the airport on July 10, 2001. Both Respondent and Mr. Carlin agreed Mr. Carlin had no first-hand knowledge of the situation. Respondent advised Mr. Carlin to stay way clear of the situation.

43. On Monday, July 16, 2001, Respondent again spoke with Mr. Carlin by telephone. On that date, Respondent told Mr. Carlin that Mr. Carlin's and Luiz Rocha's names had also been of interest to the Penn State Police. Because Respondent said, "How would you like to be accused of rape?" Mr. Carlin could have interpreted this conversation as a threat. He did not.

44. On July 22, 2001, Dr. William Lindberg, Respondent's Department Chairman, submitted his evaluation of Respondent's academic performance for the 2000-2001 academic year, which rated Respondent as overall "exemplary." This was a precursor to



Respondent's getting tenure. Dr. Lindberg did not know about the events of the 2001 ASIH Conference when he submitted the evaluation.

45. It is undisputed that Respondent is a "star" in "the elite 100," has published widely, is a popular professor, and has obtained valuable research grants for UF.

46. On July 23, 2001, Ms. Pearce filed a complaint regarding Respondent with UF-IFAS. It was categorized as "sexual harassment." The investigation was cloaked in confidentiality.

47. At the time of his July 13 and 16, 2001, telephone conversations with Mr. Carlin, Respondent could not have known that UF would be investigating him.

48. On August 6, 2001, Ms. Pearce was interviewed by the UF investigator.

49. On or about August 6-8, 2001, Mr. Carlin was interviewed by, and/or provided chronological notes to, the UF investigator and Dr. Lindberg.

50. On August 8, 2001, Ms. Moore was interviewed by the UF investigator and related the "signing of the bra strap" event.

51. On August 16, 2001, Respondent met with Dean Cheek, Dean Jones, Chairman Lindberg, and the investigator. Respondent saw notes on, or was made aware of, all or some of the statements made by those interviewed. He was informed that he probably would be terminated. He also was instructed to be circumspect

and respectful in dealing with the situation and potential witnesses. Respondent and Dr. Lindberg shared a car back to their department after this meeting. On the ride, Respondent asked Lindberg what he should do about the paper he was co-authoring with Pearce. Lindberg told him that if he did not have much invested in it, the high ground was to step away. Lindberg did not recall Respondent's also asking what he should do about papers he co-authored with Carlin and Moore.

52. Mr. Carlin was interviewed by Dr. Lindberg and the investigator again after Respondent met with the Deans.

53. At hearing, Ms. Pearce presented speculations, but no credible evidence, that Respondent had done, or planned to do, anything to her in retribution for her sexual harassment charge. As of the disputed-fact hearing, Respondent had not removed his name from their joint paper.

54. On August 17, 2001, Respondent telephoned Ms. Moore and told her to remove his name from the publication they had recently co-authored and were preparing for publication. He asked her never to contact him again because it was painful for him to talk to someone who told stories about him and he was tired of her complaints about her employer, who was a friend of his. Ms. Moore considered Respondent's telephone call to constitute her "professional excommunication." Respondent's withdrawal of his authorship created an awkward situation for

Ms. Moore that necessitated her sending a letter of explanation to the publisher to clarify that Respondent's withdrawal was not due to a disagreement regarding her research results. The paper will be published anyway.

55. Ms. Moore contacted Chairman Lindberg on August 23, 2001, and complained about Respondent's action and expressed her fear of further professional reprisals from Respondent. Dr. Lindberg agreed that if the withdrawal of Respondent's name became an issue with the publisher, he would write to the publisher for Ms. Moore and explain the situation in general terms.

56. On August 14, 2001, Anna Bass was interviewed by the UF investigator.

57. On August 19, 2001, Ms. Bass sent an e-mail message to Mr. Carlin which amounted to a diatribe against him and Ms. Pearce for speaking to the UF investigator.

58. On August 28, 2001, a Notice of Proposed Dismissal was issued against Respondent by UF.

59. On September 14, 2001, after learning that Respondent's dismissal had been proposed, Ms. Bass contacted Chairman Lindberg and charged Mr. Carlin with sexual harassment against her which allegedly occurred more than a year previous, when he and Ms. Pearce "crashed" at her home. (See Finding of Fact 34.)

Ms. Bass denied that Respondent put her up to filing these belated charges.

60. Respondent denied asking anyone to retaliate against, or speak to, Mr. Carlin for the purpose of preventing or altering the information Mr. Carlin gave in interviews with the UF investigator or UF authorities or to discredit his information. Respondent further testified that he did not ask Dr. Robert Chapman to author any correspondence related to the investigation. However, he admitted discussing his situation under the sexual harassment charges with Dr. Chapman.

61. Respondent had problems with Mr. Carlin previous to the current investigation. On one occasion, he had to request that Mr. Carlin not annoy his female lab assistant. Respondent had previously disciplined Mr. Carlin for making annoying late night telephone calls to Respondent's home. (See Finding of Fact 34.) At the 2001 ASIH Conference, Respondent had approached Mr. Carlin about whether Mr. Carlin wanted to remain in competition for the Stoye Award, because of some concerns over the eligibility of his research. Mr. Carlin and Respondent have different understandings of what was involved in this discussion, but Mr. Carlin did not remove his name and Respondent did not interfere with that choice. Mr. Carlin went on to win the prestigious award.

62. Some other members of "the elite 100" had also had a problem with Mr. Carlin concerning access to a limited supply of endangered species samples he and another graduate student needed. Mr. Carlin and the other researcher were in a race to publish their respective dissertations first. Dr. Robert Chapman was aware of the controversy.

63. On Friday, September 14, 2001, after hearing about Respondent's proposed dismissal from employment, Dr. Chapman and Respondent had a telephone conversation during which they discussed Mr. Carlin. Respondent expressed his frustration at the complaint filed by Ms. Pearce and accused her of "filing false claims" against him. Respondent stated that Ms. Moore had made an unflattering anecdote and "contributed a story that portrayed [Respondent] in a negative light." Respondent also stated that Mr. Carlin had alleged that Respondent had harassed him. Dr. Chapman was then critical of the "ethics" of Mr. Carlin and described him as "shiftless."

64. On Friday, September 14, 2001, Dr. Chapman sent an e-mail message to Mr. Carlin expressing anger and shame and stating in part that, "I fear that your career is in severe jeopardy. No one I have talked to will hire you after this." These comments of Dr. Chapman were directed to the rare species sample controversy but mixed in with a diatribe about

Respondent's situation, as if they were part of the same complaint.

65. On Saturday, September 15, 2001, Dr. Chapman sent an e-mail message to Jimmy Cheek, UF-IFAS Dean of Academic Programs, accusing Mr. Carlin of aiding and abetting a shameful assault upon Respondent and questioning Mr. Carlin's "honor and integrity," referring to Mr. Carlin as "a slimy worm." In this same e-mail, Dr. Chapman stated that "Ms. Moore is a thief," and a radical feminist who was out to get Respondent. Apparently, Dr. Chapman sent a similar missive to Dean Jones. Respondent had provided the deans' names to Dr. Chapman and did not dissuade him from writing them.

66. On Sunday, September 16, 2001, Dr. Chapman sent an e-mail message to Mr. Carlin, apologizing for writing him in anger but not for what he had written to him on September 14, 2001. He told Mr. Carlin that his "first allegiance is to the professor" and advised him that "[I]nterviews with administrators are not an obligation. You have the right to decline and only the courts can force it." Dr. Chapman also stated that Mr. Carlin should talk with Respondent "about whether he should continue to serve as your professor" and further advised him to "take a low profile." While stating he would not circulate rare species sample rumors beyond those persons who knew of the rare species sample controversy before, and that he would be

professional if asked about Mr. Carlin's competence, Dr. Chapman also stated he would volunteer nothing for Mr. Carlin.

67. Dr. Chapman is a former employment supervisor of Mr. Carlin who strongly recommended him for admission to UF's graduate school on December 16, 1997. Mr. Carlin now feels he is unable to list Dr. Chapman as a reference because he questions Mr. Carlin's intellect and moral character and will accordingly give Mr. Carlin bad references rather than good ones. Mr. Carlin has great concern that Respondent has ostracized and vilified him for his role in the UF complaint review process. Mr. Carlin informed Chairman Lindberg that he fears his career is over and he has lost his place in his chosen academic field.

68. Mr. Carlin also speculates that Respondent will now attempt to have his Stoye Award revoked, but there is no evidence Respondent has made any move in that direction to date.

69. After Mr. Carlin was interviewed in the complaint review process, Respondent substituted his name for Mr. Carlin's name as the "corresponding author" on one of their current joint research publications which had been pending since June. He did not remove Mr. Carlin's name as first author. Changing the name of the corresponding author is not an unusual occurrence with regard to academic publications. In this case, it may benefit Mr. Carlin in getting published, because Respondent is friends with the publisher. However, the effect of the name-switch is

that Mr. Carlin has lost control over the correspondence, putting Respondent in a position to delay or take the publication out of sequence for printing, if he chooses to retaliate against Mr. Carlin.

70. On September 18, 2001, a Predetermination Meeting was held at Respondent's request.

71. On October 8, 2001, UF issued its decision to dismiss Respondent effective October 10, 2001.

72. Even after termination, sometime in December, 2001, Respondent was cooperating with input for a second publication he and Mr. Carlin co-authored. He has, however, begun to investigate the data behind Ms. Pearce's and Mr. Carlin's papers presented at the 2001 ASIH Conference.

73. According to Chairman Lindberg, who testified by deposition, Respondent breached his professional ethics and student mentoring responsibilities by his behavior at the ASIH conference with Ms. Pearce.

74. According to Dean Jones, Respondent's conduct at the ASIH Conference was contrary to UF-IFAS expectations of a responsible faculty member's interactions with students and abused the faculty member-student relationship.

#### CONCLUSIONS OF LAW

75. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause,



pursuant to Section 120.57(1), Florida Statutes, and its contract to hear such cases.

76. The duty to go forward is upon Petitioner UF. The parties are agreed that notwithstanding the case of Florida State University v. McHugh, DOAH Case No. 99-3858 (Recommended Order March 15, 2000; Final Order May 5, 2001), the burden of proof herein is "by a preponderance of the evidence," and the standard of proof is "just cause."

77. A state university is entitled to administer standards of conduct for faculty and other personnel, imposing discipline which can range from reprimand to dismissal. In this case, UF seeks to dismiss Respondent.

78. Although this case arose from a sexual harassment allegation, subsequent investigation resulted in additional charges. Respondent's proposed dismissal is not predicated upon Rule 6C1-1.008(1)(r), Florida Administrative Code, prohibiting "sexually harassing a member or guest of the University."

79. The October 8, 2001, Letter of Dismissal lists all the following rules as grounds for dismissing Respondent.

80. Rule 6C1-7.048 Academic Affairs; Suspension, Termination, and other Disciplinary Action for Faculty:

Definition of Just Cause, Termination,  
Suspension Pending Investigation,  
Notification and Records of Disciplinary  
Action.

(1) Just cause for termination, suspension, and/or other disciplinary action imposed on a faculty member shall be defined as incompetence or misconduct, which shall include, but not be limited to, the following:

\* \* \*

(e) Conduct, professional or personal, involving moral turpitude;

\* \* \*

(g) Action(s) which impair, interfere with, or obstruct; or aid, abet, or incite the impairment, interference with, or obstruction of; the orderly conduct, processes, and functions of the University. Refer to Article V, Section (5)(G) of the University Constitution and Rules 6C1-1.1007, 6C1-1.1008 and 6C1-7.010, F.A.C.

\* \* \*

(n) Possession, Sale, Distribution of Alcoholic Beverages or Nonprescribed Drugs.

81. 6C1-1.007 University of Florida; Code of Penalties.

(1) The following constitutes a uniform code of penalties for violation of University and Board of Regents rules which the President or the President's designee is authorized to impose on students, and faculty members, administrative and Professional staff and University Support Personnel System personnel (hereinafter "employees"):

\* \* \*

(c) Penalties for violation of standards of conduct may range from counseling to expulsion in the case of students or oral reprimand to termination in the case of employees.

\* \* \*

(2) These remedies are not exclusive of other remedies provided under law.

82. 6C1-1.008 University of Florida; Disruptive Behavior.

(1) Faculty, students, Administrative and Professional staff members, and other

employees . . . who intentionally act to impair, interfere with, or obstruct the mission, purposes, order, operations, processes, and functions of the University shall be subject to appropriate disciplinary action by University authorities for misconduct, as set forth in the applicable rules of the Board of Regents and the University and state law governing such actions. Disruptive conduct and state law governing such actions. Disruptive conduct shall include, but not be limited to, the following:

\* \* \*

(m) Illegal possession or misuse of drugs and other controlled substances.

\* \* \*

(p) Endangering the health, safety and welfare of members or guests of the University.

\* \* \*

(q) Actions or statements which by design or intent amount to intimidation or hazing or abuse of others.

\* \* \*

(s) Actions which impair, interfere with or obstruct, or aid and abet or initiate the impairment, interference with or obstruction of the orderly conduct, processes and functions of the University.

\* \* \*

(2) This rule shall apply to acts conducted on or off campus when relevant to the orderly conduct, processes and functions of the University.

83. 6C-7.018 Academic Affairs; Academic Freedom and Responsibility.

(1) Academic Freedom and Responsibility.

\* \* \*

(b) The established policy of the University continues to be that the faculty member must fulfill his/her responsibility to society and

to his/her profession by manifesting academic competence, scholarly discretion, and good citizenship. The university instructor should be constantly mindful that these roles may be inseparable in the public view, and should therefore at all times exercise appropriate restraint and good judgment.

\* \* \*

(2) Academic freedom is accompanied by the corresponding responsibility to:

\* \* \*

(b) Respect students, staff and colleagues as individuals and avoid any exploitation of such persons for private advantage;

\* \* \*

(e) Recognize the responsibilities arising from the nature of the educational process, including such responsibilities, but not limited to, observing and upholding the ethical standards of their discipline; participating, as appropriate, in the shared system of collegial governance, especially at the department/unit level; respecting the confidential nature of the relationship between professor and student; and adhering to one's proper role as teacher, researcher, intellectual mentor and counselor.

84. Rule 6C1-7.018, Florida Administrative Code, applies a higher standard of behavior to professors than to ordinary persons and requires them to be good citizens in their personal life as well as in their public life. It is the province of university administrators to determine how instruction is delivered and what is, and is not, acceptable faculty behavior. The determination of how students are instructed and treated is the right of the university's management, within the procedural confines of the university's duly promulgated rules. A professor's "conduct is not to be viewed in the same context as

would the conduct of an ordinary 'person on the street.' Rather it must be judged in the context of the relationship existing between a professor and a student within an academic environment," Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984).

85. Rule 6C1-1.008, Florida Administrative Code, does not limit good citizenship of professors to any campus boundaries or only to situations when they are dealing with UF students. UF faculty members hold a position of trust and power in the academic community that extends beyond the geographical confines of the university campus. Regardless of whether a faculty member's personal misbehavior directly impacts his own students, or any UF student, that faculty member still represents the university in all his/her professional contexts. Faculty misconduct reflects unfavorably on the university as a whole and can discourage responsible students from selecting the university, not to mention discourage responsible parents from financing students' attendance, and discourage responsible foundations from bestowing scholarships on students and grants upon the university.

86. Respondent's unspoken pressure upon his students to attend "late night lab sessions" in local bars abuses the faculty member-student relationship. Use of his position and power over their education and future careers in this manner is

unacceptable. Rule Sections 6C1-1.008(1)(q) and (2), Florida Administrative Code, have been violated.

87. That is not to say that UF has a right to expect Respondent to be a watchdog or babysitter for other adults, which all of his graduate students were. The fact that Respondent occasionally legally possessed alcohol, served alcohol, or drank alcohol, even to excess, in the presence of other adults, in his home, in bars, or even at professional conferences where the conference organizers also served alcoholic beverages is without significance. Unlike a high school teacher, a college professor's conduct "must be judged in the context of her more liberal, open, robust college surroundings." Texton v. Hancock, 359 So 2d 895 (Fla. 1st DCA 1978). If Respondent had been convicted of a specific traffic offense involving alcohol or drugs (i.e. driving while intoxicated, driving under the influence, vehicular homicide) or had injured someone while driving drunk, it would be a different situation. As it is, the fact that Respondent occasionally drove a car while inebriated or did not interfere with other adults driving while inebriated is non-determinative in this proceeding.

88. Respondent's sexual adventure with Ms. Pearce at Penn State was not a quid pro quo situation. Respondent did not "hold Ms. Pearce's paper presentation or career advancement over her head" in order to receive sexual favors from her. Respondent did

the right thing in "backing off," but with his knowledge of her condition and vulnerabilities, Respondent should never have taken her to his room in the first place. His involvement with Ms. Pearce under those conditions was the worst form of bad judgment, violated his position of trust as her professor and mentor, and violated the trust UF had placed in him to guide and mentor graduate students. Rules 6C1-7.048(1)(e), 6C1-1.008(1)(s) and (2), and 6C1-7.018 (1)(b) and (2)(b) and (c), Florida Administrative Code, have been violated.

89. Respondent also evidenced poor judgment, poor mentoring skills, and reckless public behavior by the tequila bottle toss and bra strap signing. These incidents could have exposed Respondent, and/or his employer UF, to legal action for reckless endangerment with the bottle or sexual harassment due to the signing and sexual witticisms. Rules 6C1-7.048(1)(g), 6C1-1.008(1)(s), and 6C1-7.018(1)(b) and (2)(b) and (e), Florida Administrative Code, have been violated.

90. There are two lines of Florida case law regarding the "morality" of possession of minimal amounts of marijuana. One line of cases holds that mere possession, without intent to sell, does not constitute moral turpitude or bad moral character. Dept. of Ins. V. Panagos, DOAH Case No. 00-0455 (Recommended Order June 30, 2000; Milliken v. Dept. of Business and Professional Regulation, 709 So. 2d 595 (Fla. 5th DCA 1998);

Pearl v. Florida Board of Real Estate, 394 So. 2d 189 (Fla. 3d DCA 1981). However, the courts have taken another approach where school teachers are involved. For teachers, mere possession of marijuana is grounds for job termination and license revocation. Brogan v. Ramputi, DOAH Case Nos. 98-0571 and 98-0572, (Recommended Order October 28, 1998; Final Order December 28, 1998); Walton v. Turlington, 444 So. 2d 1082 (Fla. 1st DCA 1984); Adams v. Professional Practices Services, 406 So. 2d 1170 (Fla. 1st DCA 1981). Although Respondent is a college professor, the reasoning in the latter line of cases that possession of marijuana for personal use constitutes moral turpitude is more appropriate and in keeping with the Florida Administrative Code rules cited in UF's letter of dismissal. Rule 6C1-7.048(1)(e), Florida Administrative Code, has been violated.

91. There is no way UF or Penn State can promote their drug-free workplace policies if UF employees in positions of trust and mentorship flaunt those policies and the controlled substance laws of the respective states.

92. The attitude of Ms. Moore, Ms. Bass, and Ms. Pearce, to their own and/or Respondent's casual and repetitive possession and use of marijuana is disturbing. The concept that Respondent could have led them astray as to drugs and alcohol is questionable. Mr. Carlin does not come off very well, either, since Respondent apparently used marijuana in his home.



Nonetheless, Respondent's personal possession and use of the drug and his tolerance of his students' and associates' use of this controlled substance constitutes much more than a petty violation of UF's drug-free workplace policy, as asserted in his Proposed Recommended Order. It is a failure of responsible mentoring and leading by example. Rules 6C1-7.048(1)(n) and 6C1-1.008(1)(m), and Rule 7.018(2)(e), Florida Administrative Code, have been violated.

93. Retaliation by Respondent against Ms. Moore was proven, although mitigated in part by his misunderstood conversation with Dr. Lindberg. Direct, intentional retaliation by Respondent against Ms. Pearce was not proven, but his now investigating her research leads to suspicion. In these circumstances, the change of corresponding author on the work co-authored with Mr. Carlin at least has the appearance of subtle intimidation. Ms. Bass and Dr. Chapman have clearly damaged the professional standing of Mr. Carlin and Ms. Moore. Normally, one should not be held responsible for his friends' rancor in springing to one's defense, but here it is clear that some damage was done to Mr. Carlin by Respondent's confiding in Chapman in the first place instead of keeping the matter confidential as he had been instructed. Respondent's involving Dr. Chapman of "the elite 100," and providing the deans' names and addresses was at the least further evidence of Respondent's bad judgment and has

exposed UF to "retaliation" claims by Mr. Carlin and Ms. Moore under Chapter 760, Florida Statutes. At least indirectly, Respondent has been guilty of the intimidation proscribed by Rule 6C1-1.008(1)(q), Florida Administrative Code.

94. Research has not revealed any case before DOAH in which a state college professor has been terminated on similar grounds. Respondent relies on Texton v. Hancock, supra., wherein a tenured college professor could not be terminated for exercising academic freedom of speech in the classroom, social drinking, and passing out from alcohol in a student's home.

95. The present case does not involve the freedom to state one's opinions in the classroom or on the street. It is more than a single error of judgment or good taste. Respondent's pattern of behavior is beyond Texton's parameters. The charges in the Letter of Dismissal have been established. There is just cause to terminate Respondent. There is no suggestion that Petitioner is an alcoholic or a drug addict whom suspension and rehabilitation may help. Therefore, termination is appropriate.

#### RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the University of Florida enter a final order ratifying its termination of Respondent effective October 10, 2001.

DONE AND ENTERED this 31st day of May, 2002, in Tallahassee, Leon County, Florida.

---

ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of May, 2002.

ENDNOTES

1/ Pursuant to Section 240.253, Florida Statutes, and prior Orders herein, Petitioner's Exhibit 1 and Respondent's Exhibit 9 are confidential items to be returned under seal to Petitioner with this Recommended Order. Petitioner's Exhibits 13 and 14 were returned to Petitioner as not admitted. Respondent's Exhibit 8 was returned to Respondent as neither offered nor admitted.

2/ Respondent apparently received a stipulation for this peculiar procedure from Petitioner but did not seek leave of the Administrative Law Judge.

3/ The parties' stipulated facts are extensive and occasionally ungrammatical. The same information has been conveyed in somewhat less detail without damaging the parties' agreement or intent, and additional Findings of Fact have been made upon the evidence.

4/ Standard Jury Instruction (Civil) No. 2.2b reads in pertinent part:

#### WEIGHING THE EVIDENCE

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Does the witness' testimony agree with the other testimony and other evidence in the case?

6. Was the testimony of the witness reasonable when considered in the light of all the evidence in the case and in the light of your own experience and common sense.

(Give the following paragraphs only as required by the evidence.)

7. Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

8. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

9. Did the witness at some other time make a statement that is inconsistent with the testimony the witness gave in court?

10. Was it proved that the witness had been convicted of a felony or a crime involving dishonesty or false statement?

11. Was it proved that the general reputation of the witness for telling the truth and being honest was bad?

You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

5/ Respondent admits to using illegal drugs in the presence of UF students prior to becoming a professor but not while employed at UF, except as set out infra. on July 6, 2001.

6/ Respondent testified that holding, sniffing, and smoking "to me is the same thing."

COPIES FURNISHED:

Carla D. Franklin, Esquire  
Franklin, Donnelly & Gross  
408 West University Avenue  
Suite 601  
Gainesville, Florida 32601

Kirk Y. Griffin, Esquire  
50 Staniford Street  
Boston, Massachusetts 02114

Steven D. Prevaux, Esquire  
University of Florida  
123 Tigert Hall  
Post Office Box 113125  
Gainesville, Florida 32611-3125

Pam J. Bernard, General Counsel  
University of Florida  
123 Tigert Hall  
Gainesville, Florida 32611

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.