

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 03-4041
)
 DANIEL J. EPSTEIN,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 11, 2004, by video teleconference, with the parties appearing in Miami, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Madelyn P. Schere, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Leslie Holland, Esquire
801 Northeast 167th Street, Second Floor
North Miami Beach, Florida 33162

STATEMENT OF THE ISSUE

Whether the Respondent's employment as a teacher with the Petitioner should be terminated.

PRELIMINARY STATEMENT

In a letter dated October 23, 2003, the School Board of Miami-Dade County, Florida ("School Board") advised Daniel J. Epstein that it had taken action to suspend him and that it was initiating proceedings to dismiss him from his employment as a teacher. The School Board stated in the letter that it based its action on charges of immorality, misconduct in office, and incompetency. Mr. Epstein, through his attorney, timely requested a hearing before the Division of Administrative Hearings. The School Board transferred the matter to the Division of Administrative Hearings on October 31, 2003, for assignment of an administrative law judge. Pursuant to notice, the formal administrative hearing was held on February 11, 2004.

On November 17, 2003, the School Board filed a Notice of Specific Charges that contained three counts and detailed the facts on which the School Board based its charges of incompetency, misconduct in office, and immorality. The School Board alleged in its Notice of Specific Charges that Mr. Epstein viewed pornographic web sites on the classroom computer provided by the School Board for his use; viewed pornography during the workday, while students were in the classroom; and masturbated in his classroom while watching pornography on the School Board computer located in his classroom. The School Board charged in Count I of the Notice of Specific Charges that Mr. Epstein's

conduct violated School Board Rules 6Gx13-4A-1.21 and 6Gx13-6A-1.112 and, therefore, constituted incompetency as defined in Florida Administrative Code Rule 6B-4.009(1)(a)1.; in Count II that Mr. Epstein's conduct violated Florida Administrative Code Rules 6B-1.001(2) and/or (3) and 6B-1.006(3)(a) and/or (4)(c) and was so serious that it impaired his effectiveness in the school system and, therefore, constituted misconduct in office as defined in Florida Administrative Code Rule 6B-4.009(3); and in Count III that Mr. Epstein's conduct constituted immorality as defined in Florida Administrative Code Rule 6B-4.009(2). The School Board further charged in the Notice of Specific Charges that these violations warranted Mr. Epstein's dismissal from employment with the School Board pursuant to Section 1012.33(4)(c), Florida Statutes (2003).¹

Prior to the formal hearing, the parties filed a joint Pre-hearing Stipulation, in which they stipulated to certain facts that will be incorporated into the findings of fact herein. At the hearing, the School Board presented the testimony of Sergeant Bradley Rosh, Miami-Dade County Public Schools police; Pedro Valdes, microsystems technician; Michele Lam, media specialist; Linda Van Leer, former assistant principal at Twin Lakes Elementary School ("Twin Lakes Elementary"); Jesus Vigo, microsystems technician; Maria de Leon, principal of Twin Lakes Elementary; and Reinaldo Benitez, district director in the

Office of Professional Standards. Joint Exhibit 1 and Petitioner's Exhibits 1 through 7 and 9 through 14 were offered and received into evidence. Petitioner's Exhibit 8 was offered into evidence but rejected. Mr. Epstein testified in his own behalf, presented the testimony of Carlos Plasencia, Ph.D., a psychotherapist, and proffered the testimony of Reinaldo Benitez. Respondent's Exhibits 1 and 2 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on April 12, 2004. The parties timely filed their proposed findings of fact and conclusions of law.²

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise all free public schools within the School District of Miami-Dade County, Florida. Article IX, Florida Constitution; § 1001.32, Fla Stat (2004).

2. At all times material to this proceeding, Mr. Epstein was employed by the School Board as a music teacher at Twin

Lakes Elementary, under a continuing contract with the School Board.

3. Mr. Epstein was first employed by the School Board in a part-time position in February 1978. Mr. Epstein took a full-time teaching position at Twin Lakes Elementary in 1980, where he taught continuously until he was given an alternate work assignment in June 2003. Mr. Epstein has not previously been the subject of disciplinary action by the School Board.

4. Mr. Epstein consistently received satisfactory annual evaluations during his employment at Twin Lakes Elementary. Although he did not receive an annual evaluation for the 2002-2003 school year, he received a satisfactory observation during that year. In addition, Mr. Epstein was named Teacher-of-the-Year at Twin Lakes Elementary during the 1988-1989 school year.³

5. Mr. Epstein had daily access to a computer that was owned by the Miami-Dade County public school district and placed in his classroom. The classroom computers were to be used to develop instructional programs and to gather lesson materials from the Internet. Mr. Epstein and all of the teachers at Twin Lakes Elementary were required to read and adhere to the school district's Acceptable Use Policy for the Internet.

6. Late in the 2001-2002 school year, Mr. Epstein asked Jesus Vigo, a microsystems technician, to check his computer because Mr. Epstein could not access the Internet. Mr. Vigo

checked the Internet history file to find out when Mr. Epstein had last accessed the Internet. In the history file on Mr. Epstein's classroom computer, Mr. Vigo found several addresses for pornography web sites.

7. After he made certain that Mr. Epstein's computer was operating properly, Mr. Vigo reported to Michele Lam, the computer coordinator and media specialist at Twin Lakes Elementary, that he had found "questionable" web sites on Mr. Epstein's computer.

8. Ms. Lam believed that Mr. Epstein had most likely visited these web sites accidentally, and she told Mr. Vigo not to tell anyone that he had found the addresses on Mr. Epstein's computer. Instead, Ms. Lam told Mr. Vigo that he should regularly monitor Mr. Epstein's computer.

9. Mr. Vigo monitored Mr. Epstein's computer once a week, at random, for approximately four months, until he left his job at Twin Lakes Elementary. During this time, Mr. Vigo found no questionable web-site addresses in the Internet history on Mr. Epstein's computer. No one regularly monitored Mr. Epstein's computer after Mr. Vigo left Twin Lakes Elementary.

10. A new microsystems technician, Pedro Valdes, began work at Twin Lakes Elementary in September 2002, and, in January 2003, new computers were installed in all the

classrooms. These computers operated through the Miami-Dade County public school district's mainframe computer, and the software loaded onto the computers was approved by and licensed to the school district. The mainframe also had a filter that prohibited access to certain web sites from the school district's computers.

11. In February 2003, Mr. Epstein complained to Ms. Lam that he was having problems with his computer. When Mr. Valdes tried to fix the computer, he found that several software programs had been loaded onto the computer. Mr. Epstein admitted that he had loaded Netscape, an Internet browser, so that he could access music sites that he could not access using the school district's Internet browser. Although he tried, Mr. Valdes was not able to fix Mr. Epstein's computer completely, and he moved on to other work.

12. Finally, in April 2003, Mr. Valdes fixed Mr. Epstein's computer and made certain that all of the school district's software was working properly. In early May 2003, however, Mr. Epstein told Mr. Valdes that he could not get into his computer. Mr. Valdes examined the computer and, when he saw that the computer's recycle bin was full, he decided to empty it. When Mr. Valdes opened the recycle bin, he saw that there were several addresses for pornography web sites, as well as addresses for other types of web sites.

13. When Mr. Valdes discovered these web-site addresses, Mr. Epstein admitted to Mr. Valdes that he had downloaded and viewed pornographic videos on the school district computer, in addition to using the computer's Internet access to locate and download information from music and instructional web sites. Mr. Epstein also admitted to Mr. Valdes that he had deliberately by-passed the school district's Internet filter in order to gain access to the pornographic material.

14. Mr. Valdes told Mr. Epstein that he should not view such web sites on the school district's computer, but he agreed not to tell anyone about his discovery. Nonetheless, after he thought about it, Mr. Valdes felt obligated to report his discovery to Ms. Lam because he considered the matter so serious. Mr. Valdes was visibly upset when he told Ms. Lam about the pornography web site addresses.

15. Ms. Lam and Mr. Valdes went to the office of Maria de Leon, the principal of Twin Lakes Elementary, and told her what Mr. Valdes had discovered on Mr. Epstein's computer. Ms. de Leon called Mr. Epstein to her office and, among other things, told him to cease using his classroom computer for any purpose.

16. Mr. Epstein had been downloading pornography from the Internet and viewing pornographic videos in his classroom on the computer provided by the school district for approximately seven

months prior to Mr. Valdes's discovery of the pornography web site addresses. Mr. Epstein knew that access to these pornography web sites was blocked by the filter on the school district's mainframe computer, which is the reason he devised a strategy for circumventing the filter.

17. Mr. Epstein downloaded pornographic videos onto the school district's computer at night, during the workday when students were in his classroom, and during the workday when no students were in the classroom. Mr. Epstein always turned the computer monitor off when he was downloading pornography during class time, so that the students could not glance at his computer and see the material he was downloading. Mr. Epstein also hid the downloaded pornographic videos in folders hidden within other folders, so that it would not be obvious to a substitute teacher who logged onto his classroom computer that pornographic videos were stored in the computer.

18. Mr. Epstein never viewed pornographic videos when students were in his classroom. He did, however, view the videos during the times of the school day when he was expected to plan and prepare lessons, and he also viewed these videos after the students had left school for the day, generally between 3:00 p.m. and 4:30 p.m.⁴ Mr. Epstein viewed pornographic videos and masturbated in his classroom approximately 15 to 20 times during the spring of 2003, after the students had left

school for the day but during the time he was expected to work on lesson plans. When he viewed pornographic videos and masturbated in his classroom, Mr. Epstein was careful to lock the classroom door.⁵

19. Mr. Epstein took precautions to conceal his activities because he knew that his activities violated School Board rules, and he also did not want the materials to be discovered by a student, a substitute teacher, or anyone else.

20. Even though Mr. Epstein took care to see that his classroom door was locked when he viewed pornographic videos and masturbated in his classroom, there was a risk that he would be interrupted. The Twin Lakes Elementary custodial and administrative staff, including secretaries, had keys to all of the classrooms. Occasionally, a parent would return to school with a student who had left something in a classroom, and a school employee would escort the parent and student to the classroom and use his or her key to enter the classroom.

21. The pornographic material that Mr. Epstein downloaded and viewed on his classroom computer did not involve children. It was, however, obscene, as defined by the School Board in its Acceptable Use Policy for the Internet.⁶

22. Ms. de Leon decided to try to keep information about Mr. Epstein's activities confidential because she was very concerned about the reaction of the parents of the children

attending Twin Lakes Elementary and of the community as a whole. Ms. de Leon knew that many of the parents of the children attending Twin Lakes Elementary were conservative Catholics who were very protective of their children.⁷ Ms. de Leon believed that if news of Mr. Epstein's activities became known in the community, Twin Lakes Elementary "would have been in the first page of the [Miami] Herald for quite a long time."⁸

23. On May 6, 2003, the day Mr. Valdes discovered the pornography web-site addresses on Mr. Epstein's computer, Mr. Epstein went to Linda Van Leer, the assistant principal at Twin Lakes Elementary, and asked that she put him on the agenda for the faculty meeting scheduled for that afternoon.

Ms. de Leon had, by this time, notified Ms. Van Leer of the situation involving Mr. Epstein and of her decision to limit knowledge of the matter to as few people as possible.

Mr. Epstein told Ms. Van Leer that he intended to make a statement to the faculty to assure the faculty members that the pornography he downloaded and viewed did not involve children and that he never viewed pornography when students were in the classroom.

24. Ms. Van Leer was as concerned as Ms. de Leon about the disruption at Twin Lakes Elementary if information about Mr. Epstein's activities became known in the community, and she also believed that Mr. Epstein did not appreciate the

ramifications of his announcing his activities to the faculty. Ms. Van Leer denied Mr. Epstein's request to speak to the faculty and told him not to speak of the matter to anyone except Ms. de Leon.

25. Ms. de Leon reported Mr. Epstein's activities to the Miami-Dade County Public Schools police on May 6, 2003, and the investigation was assigned to Bradley Rosh on May 13, 2003. Sergeant Rosh found Mr. Epstein very cooperative during the investigation, and Mr. Epstein prepared a statement in which he described the nature and extent of his activities.

26. Sergeant Rosh submitted his preliminary investigation report on July 16, 2003, in which he concluded that the allegations that Mr. Epstein had violated the School Board's Acceptable Use Policy for the Internet and the responsibilities and duties of School Board employees were substantiated. The investigative report was sent to the Office of Professional Standards for final disposition.

27. Reinaldo Benitez, a district director of the Miami-Dade County Public Schools Office of Professional Standards, convened a Conference-for-the-Record on August 11, 2003, to discuss the investigative report and the charges against Mr. Epstein, to review his record, and to discuss his future employment status with the School Board. Mr. Benitez, Mr. Epstein, Ms. de Leon, and Marie Harrison, Business Director

of ACCESS Center 1, participated in the Conference-for-the-Record.

28. As reflected in the Summary of the Conference-for-the-Record dated August 22, 2003, the findings in the investigative report were discussed with Mr. Epstein, who admitted that he was guilty of the charge that he had downloaded pornographic videos into the school district's computer located in his classroom, that he was aware when he did so that he was violating School Board rules, and that he had used very poor judgment. Mr. Epstein apologized for his actions, and he requested that, if he were allowed to resume teaching, he be provided a computer without access to the Internet.

29. According to the Summary of the Conference-for-the-Record, Mr. Epstein was assigned to an alternative work location at his home at the beginning of the 2003-2004 school year.⁹

30. As reflected in the Summary of the Conference-for-the-Record, Mr. Epstein was offered the option of submitting his resignation, which he refused. Directives were issued to Mr. Epstein at the Conference-for-the-Record, including a directive that he not visit Twin Lakes Elementary at any time. Mr. Epstein was also advised to "keep the information presented in this conference confidential and not to discuss this with any students or staff. Finally, Mr. Epstein was advised that, following a review by the School Board's attorneys, he would be

notified of the recommended disciplinary action, which could include dismissal.

31. On August 13, 2003, Ms. de Leon submitted her recommendation to Margarita Alemany-Moreno, Assistant Superintendent in ACCESS Center 1, that Mr. Epstein be terminated from his employment with the Miami-Dade County Public Schools. Ms. Alemany-Moreno sent this recommendation to Virginia Bradford, Assistant Superintendent in the Office of Professional Standards, with the concurrence of the staff of ACCESS Center 1.

32. Mr. Benitez convened a meeting with Mr. Epstein on September 26, 2003, to address his pending dismissal by the School Board at its meeting on October 22, 2003. Ms. de Leon and Ms. Harrison were also in attendance. Mr. Benitez informed Mr. Epstein that the recommendation for his dismissal was based on charges of immorality, misconduct in office, and incompetency. Mr. Epstein was offered the option of resigning his position or pursuing disability retirement, which he declined.

33. Mr. Epstein submitted a statement dated September 29, 2003, in response to the August 22, 2003, Summary of the Conference-for-the-Record. In this statement, Mr. Epstein did not withdraw his admission that he had downloaded and viewed

pornographic videos on the school district's computer located in his classroom.

34. The Superintendent of Schools notified Mr. Epstein in a letter dated October 8, 2003, that he was recommending to the School Board that Mr. Epstein be dismissed from his employment. The School Board suspended Mr. Epstein and initiated dismissal proceedings at its October 22, 2003, meeting.

35. Mr. Epstein believes that he has had a sexual problem since he was a teenager, when he first became attracted to pornography. He began using the computer in his classroom to download and view pornography after his wife discovered pornography on their home computer. She became angry, and he decided to move his activities to his classroom computer in order to avoid further family conflict.

36. Approximately three years ago, Mr. Epstein was diagnosed with a "sexual addiction," and he began sessions with a sexual therapist. Mr. Epstein attended four individual therapy sessions, but was released in December 2002. Mr. Epstein attended small group therapy sessions for approximately 12 weeks during the time he was seeing Mr. Gray, and he also attended weekly sessions of an "accountability recovery group" from March 2001 until December 2003, when he began working at the Sam Ashe music store.

37. On September 15, 2003, Carlos Plasencia, a mental health counselor, examined Mr. Epstein and initially diagnosed Mr. Epstein with "sexual disorder not otherwise specified." Dr. Plasencia's diagnosis has evolved, and he now believes that Mr. Epstein's diagnosis is "impulse control disorder," with a sexual component.¹⁰ Mr. Epstein is in therapy with Dr. Plasencia, and, at the time of the final hearing, he had been taking Zoloft, an anti-depressant prescribed by a psychiatrist, for approximately two months.¹¹

38. In Dr. Plasencia's opinion, Mr. Epstein's addiction to pornography began approximately 27 years ago, developed slowly over the course of 24 years, and progressed faster than usual over the course of the last two to three years." According to Dr. Plasencia, Mr. Epstein feels powerless to overcome the compulsion to view pornography; he has tried to stop this behavior and has been unable to do so, even though it has disrupted his family and, now, poses a threat to his job.¹² In Dr. Plasencia's opinion, "[c]hances are very likely Mr. Epstein was preoccupied with the attainment of pornography while he was in school. I agree with that because he was viewing it in school and downloading it in school."¹³

39. Although Dr. Plasencia acknowledged that Mr. Epstein's addiction to pornography is a preoccupation that has significantly interfered with his life and the life of his wife

and son, Dr. Plasencia does not consider Mr. Epstein emotionally unstable, in the sense that he does not have extremes in mood or behavior.

40. Mr. Epstein has always been open during his therapy with Dr. Plasencia and has demonstrated a genuine desire to fix his problem. He has been motivated and has followed Dr. Plasencia's suggestions. Dr. Plasencia believes that Mr. Epstein's prognosis for recovery is good.

41. Mr. Epstein considers himself a "recovering" sexual addict and explains his behavior at Twin Lakes Elementary in the spring of 2003 as a "relapse."¹⁴

Summary

42. The evidence presented by the School Board establishes that Mr. Epstein has committed misconduct in office. Mr. Epstein admitted that he deliberately by-passed the Internet filter in the school district's mainframe computer and accessed pornography web sites on his classroom computer; that he downloaded pornographic videos onto his classroom computer while students were in the classroom, during planning periods when the students were in school but not in his classroom, and after the students were dismissed from school; that he viewed pornographic videos on the classroom computer during planning periods when the students were in school but not in his classroom and after the students were dismissed from school; and that he frequently

masturbated in his classroom while he watched pornographic videos. Mr. Epstein admitted that he engaged in the activities described above for approximately seven months prior to May 2003, although the evidence presented by the School Board establishes that addresses for pornography web sites were found in Mr. Epstein's classroom computer as early as June 2002.

43. The evidence establishes that Mr. Epstein took precautions such as turning off the computer monitor when downloading pornographic videos while children were in his classroom, hiding the computer folders containing the pornographic videos in other folders, and locking his classroom door when he viewed pornographic videos and masturbated. It may reasonably be inferred, however, that he took these precautions to keep his activities hidden from students and school personnel and not primarily to protect his students from harm. At the time he was committing these acts, Mr. Epstein knew his behavior violated School Board rules; he knew that he was exercising poor judgment; and he knew that, if he were discovered downloading and viewing pornographic videos and masturbating in his classroom, his job could be in jeopardy.

44. By downloading and viewing pornographic videos on his classroom computer, Mr. Epstein violated the School Board's rule prohibiting the transmission of obscene material, and downloading and viewing pornographic videos on his classroom

computer and masturbating in his classroom constitute conduct unacceptable in a School Board employee.

45. Mr. Epstein viewed pornographic videos and masturbated during his workday rather than planning lessons and engaging in other pursuits that would enhance his abilities as a teacher. The School Board, therefore, paid Mr. Epstein for time during which he did not work. Mr. Epstein could not use his home computer to download and view pornography videos because he feared discovery and disruption of his family life, so he used the classroom computer provided by the school district to satisfy his compulsion to view pornographic videos.

46. Downloading and viewing pornographic videos and masturbating may not be considered objectionable when done in the privacy of one's home; these acts are, however, not consistent with the public conscience and good morals when, as here, they are done in the public space of an elementary school classroom. Nonetheless, the evidence presented by the School Board is not sufficient to establish that Mr. Epstein's activities have become public knowledge.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2004).

48. Because this case is a proceeding to terminate Mr. Epstein's employment with the School Board and does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in the Notice of Specific Charges by a preponderance of the evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

49. Section 1012.33(4), Florida Statutes, provides in pertinent part:

(c) Any member of the district administrative or supervisory staff and any member of the instructional staff, including any school principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against any such employee of the district school board, the district school board may suspend such person without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid. In cases of suspension by the district school board or by the district school superintendent, the district school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are

sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full membership of the district school board and such employee is discharged, his or her contract of employment shall be thereby canceled. Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68 provided such appeal is filed within 30 days after the decision of the district school board.

50. Pursuant to Section 1012.33(4)(c), the School Board charged Mr. Epstein with incompetency, misconduct in office, and immorality. These terms are defined in Florida Administrative Code Rule 6B-4.009 and provide "[t]he basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes [now codified in Section 1012.33, Florida Statutes]."

Incompetency

51. In Count I of the Notice of Specific Charges, the School Board charged Mr. Epstein with incompetency as a result of inefficiency because he failed to perform his duties as prescribed by Section 1012.53(2), Florida Statutes. Specifically, the School Board charged that Mr. Epstein engaged in conduct unbecoming an employee of the School Board, in violation of School Board Rule 6Gx13-4A-1.21, and that he violated the School Board's Acceptable Use Policy for the Internet, which is adopted as School Board Rule 6Gx13-6A-1.112.

52. Florida Administrative Code 6B-4.009(1) provides in pertinent part:

Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes) [now codified as Section 1012.53, Florida Statutes]; (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

53. Section 1012.53(2), Florida Statutes, provides in pertinent part: "Members of the instructional staff of the public schools shall perform all duties prescribed by rules of the district school board. . . ."

54. School Board Rule 6Gx13-4A-1.21, which defines the responsibilities and duties of permanent School Board personnel, provides in pertinent part:

I. Employee Conduct

All persons employed by The School Board of Miami-Dade County, Florida are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves both in their employment and in the community in a manner that will reflect credit upon themselves and the school system.

Unseemly conduct or the use of abusive and/or profane language in the workplace is expressly prohibited.

55. School Board Rule 6Gx13-6A-1.112, Acceptable Use Policy for the Exploration and Utilization of the Internet as a Tool for Learning, Acceptable Use Policy for the Internet, which applies to elementary and secondary school instruction, provides in pertinent part:

Purpose of the rule

The purpose of this rule is to establish a policy for the acceptable use of the Internet as a tool for learning in the School District of Miami-Dade County, Florida (hereinafter referred to as District). In summary, the rule affirms that neither employees nor students may use the Internet to do any action or receive and/or communicate any language that the employee or student could not do in person. Any act or work prohibited by federal, state, and/or local law or regulation, including Miami-Dade County Public Schools (M-DCPS) Rules, and/or collective bargaining agreement if done by a M-DCPS employee or student in person is similarly forbidden by this rule to be done by any employee or student by or through the Internet. Additionally, the rule reflects that there is no expectation of privacy in the use of

e-mail or Internet communications when such communications occur over M-DCPS provided equipment by M-DCPS employees, students, or others.

Purpose of access to the Internet

The purpose of providing students and employees access to the Internet is to promote academic excellence in the District's educational objectives. This computer technology provides resource sharing, innovation and communication that will help launch today's schools into the information age.

* * *

II. Acceptable Use Policy

Utilization of the Internet by students and employees must be in support of and consistent with the educational objectives of the District. When utilizing the Internet all users must adhere to the provisions of this rule and the standards of conduct established in the M-DCPS *Code of Student Conduct* (both elementary and secondary), *Code of Conduct for Adult Students*, the *Code of Ethics for the Education Profession in the State of Florida*, and School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties.

- A. Transmission of any material in violation of local, state, and federal law or regulation is prohibited. This includes, but is not limited to copyright material, threatening or obscene material or material protected by trade secret.

* * *

X. Inappropriate Material

On a global network it is impossible to control effectively the content of data and an industrious user may discover inappropriate material. Inappropriate material is that material that is determined inconsistent with the goals, objectives and policies of the educational mission of the District.

Access and use of the Internet is for use as a regular instructional activity. It is the user's responsibility not to initiate access to materials that are inconsistent with the goals, objectives and policies of the educational mission of the District.

XI. Disciplinary Actions for Improper Use

The act of accessing the Internet through the District's network signifies that the user will abide by the provisions of this rule.

Any user violating this rule, or applicable local, state, or federal law or regulation is subject to loss of network access privileges and any other disciplinary actions, as reflected in the *M-DCPS Code of Student Conduct* (both elementary and secondary), *Code of Conduct for Adult Students*, the *Code of Ethics for the Education Profession in the State of Florida*, applicable collective bargaining units, and School Board Rule 6Gx13-4A-1.21.

56. Based on the findings of fact herein, the School Board has proven by a preponderance of the evidence that Mr. Epstein failed to conduct himself in a manner that reflected credit on himself and that he violated the School Board's Acceptable Use Policy for the Internet by downloading and viewing material that

the School Board has classified as obscene material. School Board Rules 6Gx13-4A-1.21 and 6Gx13-6A-1.112 do not, however, prescribe duties relating to a teacher's carrying out his or her instructional responsibilities.

57. Even though the School Board can prove inefficiency as a result of a teacher's repeatedly failing to perform the duties prescribed by School Board rule, the charge of incompetency as defined in Florida Administrative Code Rule 6B-4.009(1) encompasses a teacher's inability or lack of fitness to discharge the duties related to the responsibility to provide a minimum educational experience to his or her students. The School Board conceded that it was not challenging Mr. Epstein's ability as a teacher, and it has failed to prove by a preponderance of the evidence that Mr. Epstein failed to perform any duties defined by School Board rule or that he deprived his students of a minimal educational experience. The School Board has, therefore, failed to prove by a preponderance of the evidence that Mr. Epstein is incompetent to teach as a result of "inefficiency," as that term is defined in Florida Administrative Code Rule 6B-4.009(1)(a).

Misconduct in Office

58. In Count II of the Notice of Specific Charges, the School Board charged Mr. Epstein with having committed misconduct in office because he violated Florida Administrative

Code Rule 6B-1.001(2) and/or (3) and Florida Administrative Code Rule 6B-1.006(3)(a) and/or (4)(c) and because his violations were so serious that his effectiveness in the school system was impaired.

59. Florida Administrative Code Rule 6B-4.009(3) provides:

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC, and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC, which is so serious as to impair the individual's effectiveness in the school system.

60. Florida Administrative Code Rule 6B-1.001, Code of Ethics of the Education Profession in Florida, provides in pertinent part:

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

61. Based on the findings of fact herein, the School Board has proven by a preponderance of the evidence that Mr. Epstein did not exercise the best professional judgment and integrity

over a period of at least seven months when he regularly downloaded pornographic videos onto his classroom computer while students were present in the classroom and viewed pornographic videos and masturbated in his classroom during the school day, when he was expected to be planning lessons and engaging in other activities related to his role as an elementary-school music teacher.

62. In addition, as set forth above in paragraph 56, the School Board has proven by a preponderance of the evidence that Mr. Epstein violated School Board Rules 6Gx13-4A-1.21 and 6Gx13-6A-1.112. Mr. Epstein's violations of School Board rules governing appropriate conduct and use of the Internet exhibit the failure to exercise the level of professional judgment expected from our public school teachers.

63. Based on the findings of fact herein, the School Board has also proven by a preponderance of the evidence that Mr. Epstein did not sustain the highest degree of ethical behavior. The term "ethical" means, according to *Webster's Third New International Dictionary, Unabridged* (2002), "being in accord with approved standards of behavior or a socially or professionally accepted code[;] conforming to professionally endorsed principles and practices." As discussed below, Mr. Epstein's behavior violated the generally-accepted standards for the education profession in Florida.

64. Florida Administrative Code Rule 6B-1.006, Principles of Professional Conduct for the Education Profession in Florida, provides in pertinent part:

(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.

* * *

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

* * *

(c) Shall not use institutional privileges for personal gain or advantage.

65. Based on the findings of fact herein, the School Board has proven by a preponderance of the evidence that Mr. Epstein violated Rule 6B-1.006(3)(a). Contrary to his obligation to protect his students, Mr. Epstein created conditions that were potentially harmful to his students' learning and mental health and safety. The precautions Mr. Epstein took to ensure that

neither students nor school staff members were aware that he downloaded and viewed pornographic videos and masturbated in his classroom were taken to protect himself, not others.

66. Based on the findings of fact herein, the School Board has also proven by a preponderance of the evidence that Mr. Epstein violated Rule 6B-1.006(4)(c). Mr. Epstein appropriated for his own use a computer owned by the school district and placed in his classroom for instructional and academic purposes and viewed pornographic videos and masturbated during his workday, when he was being paid to prepare lessons and gather instructional material. Mr. Epstein, therefore, misused his institutional privileges for his own personal gratification and denied the school system the benefit of his attention to his responsibilities during the workday.

67. Although the School Board has established that Mr. Epstein violated Florida Administrative Code Rules 6B-1.001(2) and (2) and 6B-1.006 (3)(a) and (4)(c), it must also establish that Mr. Epstein's conduct was "so serious as to impair the [his] effectiveness in the school system." The court in Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000), concluded that some conduct is so serious that, even without a public scandal or evidence of impaired effectiveness, it can appropriately be inferred that a teacher's effectiveness in the school system has been impaired. In

Purvis, the teacher lied under oath and resisted arrest, and the court found that, because the offense undermined the teacher's trustworthiness, his impaired effectiveness in the school system could be inferred. See id.; Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000)(impaired effectiveness can be inferred when conduct is sufficiently serious; court distinguished situation where conduct took place at school from one in which conduct was private). In this case, Mr. Epstein showed such a profound lack of good judgment that it is appropriate to infer that his effectiveness in the school system was impaired.

Immorality

68. In Count III of the Notice of Specific Charges, the School Board charged Mr. Epstein with immorality. Florida Administrative Code Rule 6B-4.009(2) provides in pertinent part:

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

Based on the findings of fact herein, the School Board has proven that Mr. Epstein's conduct was not consistent "with the public conscience and good morals." The School Board has, nonetheless, failed to prove that Mr. Epstein is guilty of

immorality because it has failed to prove that his conduct was notorious.

69. *Webster's Third New International Dictionary, Unabridged* (2002) defines "notorious" as "widely and unfavorably known or discussed for something reprehensible or scandalous or for some negative quality or trait." In this case, due to the efforts of Ms. de Leon and other School Board employees, apparently only a few School Board employees know of Mr. Epstein's conduct.

Mitigation

70. Mr. Epstein suggests that, in consideration of certain mitigating factors, a penalty of 30-days' suspension without pay would be the appropriate discipline in this case. Mr. Epstein presented uncontroverted evidence establishing that, when the addresses for pornography web sites were discovered on his classroom computer, he readily confessed that he downloaded and viewed pornographic videos, and he was cooperative during the investigation by the Miami-Dade County Public Schools police. The uncontroverted evidence also establishes that, since December 2003, Mr. Epstein has been in therapy with a mental health counselor for a sexual disorder and that the mental health counselor believes that Mr. Epstein is motivated to continue in therapy. On the other hand, the uncontroverted

evidence also establishes that Mr. Epstein cannot control his need to view pornography.

71. The School Board is responsible for ensuring the safety of the children entrusted to the Miami-Dade County Public Schools, and the issue in this case is whether the School Board should continue Mr. Epstein's employment as an elementary school teacher. Having considered all of the evidence presented by Mr. Epstein, including his history of satisfactory teaching performance and his lack of prior discipline, it is concluded that the seriousness and duration of Mr. Epstein's conduct, as well as his inability to exercise good judgment even when he knew that his actions violated School Board rules and could jeopardize his job, warrants dismissal from his employment with the School Board.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order finding that Daniel J. Epstein committed misconduct in office and that he should be dismissed from his employment as a teacher pursuant to Section 1012.33(4)(c), Florida Statutes.

DONE AND ENTERED this 26th day of May, 2004, in
Tallahassee, Leon County, Florida.

S

PATRICIA HART MALONO
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 2004.

ENDNOTES

^{1/} Unless otherwise noted, citations to the Florida Statutes are to the 2003 edition.

^{2/} On May 3, 2004, the date the parties' proposed recommended orders were due to be filed, Mr. Epstein's attorney, Leslie Holland, telephoned this office and stated that, due to a medical emergency involving herself and her daughter, she would not be able to file Mr. Epstein's proposed recommended order on that date. Ms. Holland requested a one-day extension of time for filing the proposal, which was granted over the School Board's objections. Ms. Holland's proposal was received at the Division of Administrative Hearings at 7:38 p.m. on May 4, 2004, and is considered timely.

^{3/} The School Board conceded at the final hearing that it did not question Mr. Epstein's teaching ability.

^{4/} Students were dismissed from school at 3:00 p.m. every day except Wednesday, when they were dismissed at 2:00 p.m. Teachers were dismissed every day at 3:20 p.m. Teachers were

expected to use the time after the students were dismissed as planning time.

^{5/} His classroom had no windows.

^{6/} According to Mr. Epstein, the videos showed "scenes of oral sex (a woman servicing a man)." Petitioner's Exhibit 7.

^{7/} This perception was based on the reaction of parents and the community to an incident involving a teacher at another elementary school located near Twin Lakes Elementary. Parents protested at the elementary school, and Telemundo, a Spanish-language television network, broadcast the protest. School was disrupted for several days, and, although the teacher involved was not terminated, she was transferred to another school and ultimately forced to retire because of the parents' protests.

^{8/} Transcript at page 59.

^{9/} Mr. Epstein continued teaching at Twin Lakes Elementary through June 9, 2003. He was assigned to one of the School Board's regional offices from June 10, 2003, until the end of the 2002-2003 school year.

^{10/} The DSM-IV (Diagnostic and Statistical Manual - IV) does not contain a diagnosis of "sexual addiction" or "addiction to pornographic material," and Dr. Plasencia opined that either "sexual disorder not otherwise specified" or "impulse control disorder" accurately describes Mr. Epstein's problem.

^{11/} Dr. Plasencia, whose doctorate is in "Interdisciplinary Arts and Sciences, Specialization in Marriage and Family Therapy," testified that "Zoloft has the effect of helping with depressive feelings, helping with anxiety feelings, which may very well be at the very, very root of the cause of Mr. Epstein's addiction." Transcript at page 131. Dr. Plasencia also stated that one of the side effects of Zoloft was a decrease in sexual desire, which would help Mr. Epstein; Dr. Plasencia acknowledged, however, that not every patient experiences this side effect. This testimony is too vague and qualified to support a finding that Mr. Epstein currently has his addiction to pornography under control.

^{12/} Dr. Plasencia also stated that, in his professional opinion, Mr. Epstein does not pose a threat to children: "I don't believe that he is a pedophile. I don't believe that that

excites him at all. I don't believe that that's the focus of any of his fantasy. It's not in his particular profile." Transcript at page 136. It is uncontroverted that Mr. Epstein is not a pedophile and does not view pornography containing children. The School Board did not, however, base its charges against Mr. Epstein on such allegations that he posed a threat to children in the sense meant by Dr Plasencia. Accordingly, Dr. Plasencia's opinion on this point is largely irrelevant to the issues presented in this case.

¹³/ Transcript at page 144

¹⁴/ Petitioner's Exhibit 5 (Mr. Epstein's statement of September 29, 2003).

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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.