

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIM HORNE, AS COMMISSIONER OF)
EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 04-0733PL
)
MARK S. SANCHEZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 19, 2004, in Clearwater, Florida, and on August 20, 2004, by telephone at sites in Tampa, Tallahassee, and Jacksonville, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert E. Sickles, Esquire
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For Respondent: Joan Stewart, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint dated December 17, 2003, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated December 17, 2003, the Commissioner of Education (Petitioner) charged Respondent, Mark Sanchez (Respondent or Sanchez), with inappropriate use of his classroom computer, the material allegations being:

During the 2000-2001 school year, the Respondent used a school computer in his classroom to access pornographic websites while students were in the classroom. Additionally, he used the school computer to receive and send e-mails containing sexually explicit language and profanity. On or about August 8, 2001, he resigned his position with the Pinellas County School District effective that same date.

Based upon these allegations, Sanchez is charged with violations of Sections 1012.795(1)(c), 1012.795(1)(f), and 1012.795(1)(i), Florida Statutes; and Florida Administrative Code Rule 6B-1.006(4)(c).

The identity of witnesses, exhibits and attendant rulings are contained in the two-volume transcript of the August 19, 2004, proceedings filed on September 8, 2004. The one-volume transcript of the August 20, 2004, proceedings was filed on September 20, 2004.

Timely Proposed Recommended Orders were submitted and have been carefully considered.

Statutory references are to Florida Statutes (2004). References to rules are to rules promulgated in the Florida Administrative Code (2003).

FINDINGS OF FACT

1. Petitioner, as Commissioner of the Florida Department of Education, is responsible to investigate and prosecute complaints against individuals who hold a Florida educator's certificate and are alleged to have violated provisions(s) of Section 1012.795 and related Rules.

2. In cases where there is clear and convincing evidence to support any alleged violation, Petitioner is responsible to bring the case forward to the Education Practices Commission (EPC) for the imposition of discipline.

3. At all times material to this case, Sanchez holds a Florida educator's certificate and is certified to teach social science.

4. Sanchez was employed as a social studies teacher at Pinellas County's Northeast High School from January 1996 until August 8, 2001. He resigned on that date when confronted with the allegations which give rise to this case.

5. Sanchez is a second-generation educator. Over the years he has been an effective teacher in a variety of settings, and has had a positive impact upon the lives of many students.

6. At times relevant to this case, Sanchez had personal problems which he describes as "marriage problems, ex-wife hassles, money issues, lack of focus."

7. In an effort to address the "money issues," Sanchez took a part time job at Sam's Club (Sam's), where he continues to work.

8. At times relevant to this case, Sanchez was considered an excellent employee and team player by both Sam's and Northeast High School.

9. At times relevant to this case, Sanchez shared a classroom at Northeast High with a teacher colleague. Each was provided by the Pinellas County school district with a classroom computer with Internet access. The computers were to be used exclusively for pedagogical purposes, including work related communications.

10. Sanchez knew or should have known that the use of his classroom computer for non-professional purposes, including the exchange of sexually explicit or suggestive e-mail, or to download pornography, was expressly prohibited by the Pinellas County school district.

11. At all times material to this case, the Pinellas County school district protected all of its computers with a so-called filter program called Net Nanny. The program's purpose is to filter out inappropriate websites, including pornographic websites. However, the Net Nanny filter is easily defeated if an Internet service provider such as America On Line (AOL) is installed on an individual computer.

12. For that reason, the Pinellas County school district properly prohibited teachers from installing AOL on their assigned classroom computers.

13. Sanchez claimed not to know of this prohibition, but the fact finder credits the testimony of Assistant Principal Cynthia Hearn (Hearn), Northeast High's technology specialist, who had a clear and precise recollection of having personally instructed Sanchez to remove AOL from his computer at least six months prior to the events giving rise to this case.

14. Sanchez freely admits that at all times relevant, AOL was on his classroom computer and frequently utilized because he considers it "an amazing resource for teachers."

15. At all times relevant to this case, AOL users have access to an "instant message" service. Sanchez claims that at relevant times, he confined his use of this service to brief messages such as "I'm on the way home" to his then-wife.

16. Sanchez also admits to using the instant message service "on a fairly regular basis" to participate in informal work-related discussion chat rooms with "several colleagues that had . . . similar set ups on their computers at work as well. . . ."

17. Sanchez' description of his use of AOL was less than forthcoming. At times relevant to this case, Sanchez established Internet accounts in names such as "FunkyLoverMan99@yahoo.com" and used these accounts to access the Internet via AOL for purposes of exchanging sexually explicit and sexually suggestive e-mail with a woman with whom he was having an extra-martial affair.

18. In addition, at times relevant to this case Sanchez downloaded a substantial amount of adult pornography to his classroom computer.

19. Some of these unauthorized uses of the classroom computer occurred during hours when students were in the classroom.

20. There is no evidence regarding what, if any, specific pornographic images or sexually inappropriate e-mail was viewed by any student.

21. Sanchez' misuse of the classroom computer came to the attention of Northeast's administration on March 6, 2001, when

two students from Sanchez' class were sent to the office of Assistant Principal Harry Brown on disciplinary referral.

22. The girls alleged to Brown that Sanchez was using his computer for personal e-mail and further claimed they had seen pictures of girls on his computer.

23. After school, Brown, accompanied by Hearn, entered Sanchez' classroom and turned on the computer assigned to Sanchez.

24. Brown noticed an AOL icon and asked Hearn to launch the program. She did so, and immediately the AOL instant messenger program opened and revealed messages directed to Sanchez.

25. Hearn reviewed the computer's records of websites which had been accessed that day. Some appeared to be teen-oriented sex sites.

26. The computer assigned to the teacher who shared Sanchez' classroom was also turned on and its content reviewed. No inappropriate websites or programs were found.

27. Brown and Hearn seized the central processing unit of Sanchez' computer and locked it in a closet in the main office. The following day, Michael Bissette (Bisette), chief investigator for the Pinellas County school district's Office of Professional Standards, reviewed the history as recorded on the

central processing unit with regard to websites which had been accessed on Sanchez' computer.

28. Finding a number of pornographic sites, Bissette turned the central processing unit over to law enforcement to determine if any crimes had been committed.

29. It is the policy of the Pinellas County school district not to conduct any administrative investigation of an employee during the pendency of a criminal investigation, nor to allow a teacher to teach while under criminal investigation. Accordingly, the Pinellas County school district made arrangements to have a substitute teacher cover Sanchez' classes indefinitely pending the outcome of the criminal investigation.

30. Sanchez was at first unaware he was under investigation because for much of March 2001, he was on leave for reasons related to the illness and subsequent death of his father.

31. Upon his return from leave on or about March 29, 2001, Sanchez went to his classroom to prepare for the day and was soon confronted by an assistant principal who told Sanchez to gather his things. Sanchez was thereafter escorted off campus.

32. Months later, law enforcement returned the case to the Pinellas County school district, having determined that there was no evidence that any crime had been committed. However, an analysis of the central processing unit revealed that thousands

of adult pornographic images had been downloaded to the computer assigned to Sanchez.

33. Pursuant to Pinellas County school district procedures, Bisette arranged a meeting with Sanchez and his union representative Betty Shields (Shields) to be held on August 8, 2001.

34. At that meeting, and on other occasions prior to the final hearing, Sanchez admitted accessing adult pornography sites. He has consistently denied accessing teen pornography.

35. This is a distinction without a difference in context of this case, because at all relevant times, the Pinellas County school district had a zero tolerance policy with reference to the use of its computers to access pornography of any kind. Employees believed to have abused computer access in this manner are in all cases offered the opportunity to resign in lieu of termination proceedings.

36. Pursuant to that policy, Sanchez was offered, and accepted, the opportunity to resign his teaching position with the Pinellas County school district.

37. At hearing, Sanchez insisted that Bisette coerced his resignation through the use of tactics which were improper and possibly illegal. Sanchez further testified that he submitted to Bisette's coercive tactics in part because he had

incompetent union representation. Shields died prior to the hearing and thus was unable to be present to defend herself.

38. The trier-of-fact carefully observed the demeanor of Bissette and Sanchez as they testified regarding all aspects of this case, including the circumstances surrounding the resignation. Under all of the circumstances, including the documentary evidence; the motivation to recall events in a particular light; and the level of detail one would reasonably expect each to be able to recall after three years and in light of the relative significance of the meeting to each man who was present, it is determined that Bissette's recollection of the circumstances surrounding the resignation is much closer to the truth than Sanchez'. In particular, it is determined that Sanchez' resignation was not coerced.

39. The fact that Sanchez resigned voluntarily is not deemed to be an admission of any nor all of the conduct alleged in the Administrative Complaint, and has not been considered with respect to the matter of whether or not the alleged violations were committed by Sanchez.

40. In addition to accusing Bissette and Shields of incompetence or worse, without corroborating evidence of any kind, Sanchez also repeatedly suggested--again without corroboration of any sort--that other individuals were

responsible for some or all of the pornography found on his computer.

41. Specifically, Sanchez attempted to cast suspicion upon student helpers, workers involved in construction projects at Northeast High, and even the teacher with whom Sanchez shared his classroom. This tactic was ill-advised and unavailing.

42. Sanchez does not contend, nor could he, that anyone but he was responsible for the e-mail exchanges between himself and his mistress.

43. With reference to the pornographic websites, it is emphatically noted that there is not a shred of evidence connecting anyone but Sanchez to such websites.

44. Sanchez appealed for sympathy for his personal problems, and made repeated efforts to draw attention to his years of exemplary teaching service. It is not necessary to decide when, if ever, a professional's personal problems would justify seeking refuge in pornography and an extramarital affair, inasmuch as Sanchez seeks exoneration, not mercy.

45. Sanchez' blanket denial that he downloaded pornography is not credited. In addition to making baseless accusations against innocent third parties, Sanchez' credibility was tainted by deceptive testimony at hearing about even inconsequential matters.

46. For example, Sanchez was asked if he visited his mistress on the way to school in the mornings. He replied, "On occasion, yes." Under follow-up questioning, he acknowledged, "It was actually a fairly regular visit."

47. To take another example, in the course of attempting to implicate others in the misuse of the computer, Sanchez intimated that former students, present in the classroom to "grade papers," had access to the computer. Asked to explain why former students would have been grading papers, Sanchez amended his testimony to say that former students would come by his class to "help out," but not to grade papers.

48. The lack of candor exhibited by Sanchez in his hearing testimony is not, of course, proof of the charges set forth in the Administrative Complaint. It does, however, provide an extra measure of confidence in the proof offered by Sanchez' colleagues who testified regarding their knowledge of and concerns regarding his trustworthiness and continued efficacy as a teacher.

49. Pursuant to the Pinellas County school district's above-described zero tolerance policy, Sanchez will not be restored to employment as a teacher in that district, regardless of the outcome of these proceedings.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Sections 120.569 and 120.57 (1).

51. Petitioner seeks to revoke Sanchez' educator's certificate. Therefore, Petitioner has the burden of proving the material allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995).

52. The clear and convincing standard

. . . requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

53. As previously noted, Petitioner contends that Sanchez used his classroom computer to download pornography and to send and receive sexually explicit e-mail and in so doing violated three provisions of Sections 1012.795(1), specifically:

(c) Has been guilty of gross immorality or an act involving moral turpitude.

* * *

(f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board.

* * *

(i) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

54. In addition, Petitioner contends that Sanchez' use of his classroom computer to download pornography and to send and receive sexually explicit e-mail constitutes a violation of Rule 6B-1.006, which provides in pertinent part:

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

* * *

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

55. Rule 6B-1.006 (4)(c) must be read in its context as a subsection of Rule 6B-1.006, the Principles of Professional Conduct for the Education Profession in Florida. This Rule provides that a violation of any of the principles embodied in the Rule shall subject the offender to revocation or suspension of his educator's certificate, or other penalties as provided by law.

56. As set forth in detail in the Findings of Fact, Petitioner has proved the material allegations of the Administrative Complaint by clear and convincing evidence.

57. Sanchez' improper use of his classroom computer was a serious and ongoing violation, over an extended period of time, of Section 1012.795(1)(f) and (i), and of Rule 6B-1.006 (4)(c). Sanchez knew or should have known that his classroom computer was provided to him for his use and benefit in performing teaching-related duties. Yet, Sanchez chose to use the computer to access pornography and to send and receive sexually explicit e-mail.

58. In furtherance of his desire to use the computer for impermissible purposes, Sanchez installed prohibited software, specifically AOL, for the purpose of bypassing computer security protocols. It is difficult to imagine a clearer case of use--indeed, abuse--of institutional privileges, specifically computer access, for personal gain or advantage in gratifying his sexual needs and in pursuing a personal relationship during working hours.

59. Sanchez sought to persuade the trier of fact that he did not download pornography on his classroom computer, and that Petitioner's evidence constituted "speculation, surmise and suspicion" and as such cannot be considered a proper basis upon which to impose discipline. See, e.g., Tenbroeck v. Castor, 640

So. 2d 164, 168 (Fla. 1st DCA 1994). In truth, it was Sanchez who sought to inject speculation into the proceeding, intimating that everybody from teaching colleagues to construction workers could have been responsible for having downloaded pornographic websites. Sanchez offered no explanation for the sexually explicit e-mail exchanges with his lover which, standing alone, constitute a serious violation of the rules governing the use of the classroom computer.

60. Clear and convincing evidence supports the conclusion that Sanchez' conduct was "so serious as to impair [Sanchez'] effectiveness in the school system." § 1012.795(1)(f).

61. The totality of the record, including the Pinellas County School Board's zero-tolerance policy with reference to the offenses proved, and the testimony of Sanchez' colleagues, demonstrates compellingly that Sanchez, by his own profound lack of judgment and self-restraint, has reduced his effectiveness as an employee of the Pinellas County school district to a level which renders him unemployable in that district, notwithstanding his excellent record as a teacher.

62. Even had such direct evidence been lacking, Sanchez' poor judgment in using the classroom computer as a personal toy, coupled with his failure to take responsibility, and his unconscionable efforts to accuse innocent bystanders, support the conclusion that Sanchez' impaired effectiveness may be

properly inferred. See, e.g., Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000), Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000).

63. With reference to Section 1012.795(1)(c), Petitioner has failed to prove by clear and convincing evidence that Sanchez "[h]as been guilty of gross immorality or an act involving moral turpitude."

64. It is noted that "gross immorality" and "an act involving moral turpitude" are not defined in Chapter 1012. Instead, Florida courts, and this forum, typically turn to Rule 6B-4.009 for guidance in interpreting Section 1012.795(1)(c), although strictly speaking the Rule applies only to dismissal actions initiated by school boards against instructional personnel.

65. Rule 6B-4.009(2) defines "immorality" as follows:

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.

66. "Gross immorality" has been defined as misconduct that is more egregious than mere "immorality":

The term "gross" in conjunction with "immorality" has heretofore been found to

mean "immorality which involves an act of misconduct that is serious, rather than minor in nature, and which constitutes a flagrant disregard of proper moral standards." Education Practices Commission v. Knox, 3 FALR 1373-A (Department of Education 1981).

Frank T. Brogan v. Eston Mansfield, DOAH Case No. 96-0286 (EPC Final Order 1996).

67. Rule 6B-4.009(6) defines "moral turpitude" as follows:

Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

68. The court in State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (1933), observed that moral turpitude

involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. . . . It has also been defined as anything done contrary to justice, honesty, principle, or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated.

69. In determining whether a teacher is guilty of gross immorality or an act involving moral turpitude in violation of Section 1012.795(1)(c), Florida Statutes, it must be remembered that "[b]y virtue of their leadership capacity, teachers are traditionally held to a high moral standard in a community."

Adams v. Professional Practices Council, 406 So. 2d 1170, 1171 (Fla. 1st DCA 1981).

70. Sanchez' abuse of his computer was deplorable, but it is not clear that his activities demonstrated gross immorality or moral turpitude as those terms are defined above and/or construed by Florida decisional law.

71. Rule 6B-11.007(3) sets forth the disciplinary guidelines to be applied in this case. Aggravating and mitigating factors are to be considered.

72. Respondent intentionally ignored policy in installing AOL on his computer for purposes of abusing his computer privileges. He knew or should have known that his conduct was impermissible, yet he repeated the offenses over an extended period of time. When confronted, he did not admit wrongdoing; rather, he sought to discredit innocent third parties.

73. At least two students were aware to some degree of his improper use of the computer; however, there is no clear and convincing evidence that they or any other students were in fact exposed to pornography or to any particular e-mail or otherwise harmed by Sanchez' activities.

74. In mitigation, it may be considered that Respondent has no previous disciplinary history and his teaching performance was exemplary over the course of a lengthy career. He has made a real difference in the lives of many students.

The loss of certification would adversely affect Respondent's livelihood.

75. It is disturbing that Sanchez is unwilling to take responsibility for his inappropriate conduct. Sanchez' unsuccessful attempt to deflect suspicion upon innocent third parties; to portray himself as a victim; and to baselessly and gratuitously accuse others of improper or incompetent job performance cannot be excused by the fact that his career is on the line. Yet, on balance, it is premature to conclude that he should not be afforded an opportunity to obtain appropriate counseling and to attempt to regain the trust of his colleagues.

76. It is accordingly recommended that Sanchez' teaching certificate be suspended retroactive to August 8, 2001, through and including the date of the entry of a Final Order by Petitioner, followed by five years of probation under conditions deemed appropriate by the Education Practices Commission. Such conditions may reasonably include evaluation by a mental health professional with training in pornography addiction to determine if Sanchez poses any risk of repeating the conduct which gave rise to this case; and denial of access to a classroom computer and/or periodic examination of any classroom computer by appropriately trained personnel.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Petitioner enter a Final Order finding Respondent not guilty of violating Subsection 1012.795(1)(c), Florida Statutes; finding Respondent guilty of violating Subsections 1012.795(1)(f) and (i), Florida Statutes, and Florida Administrative Code Rule 6B-1.006 (4)(c). It is further RECOMMENDED that Respondent's teaching certificate be suspended retroactive to August 8, 2001, through and including the date of the entry of a Final Order by Petitioner, followed by five years of probation under conditions deemed appropriate by the EPC. Such conditions may reasonably include evaluation by a mental health professional with training in pornography addiction to determine if Sanchez poses any risk of repeating the conduct which gave rise to this case; and denial of access to a classroom computer and/or periodic examination of any classroom computer by appropriately trained personnel.

DONE AND ENTERED this 29th day of October, 2004, in
Tallahassee, Leon County, Florida.

Florence Snyder Rivas

FLORENCE SNYDER RIVAS
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Filed with the Clerk of the
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this 29th day of October, 2004.

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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.