

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIM HORNE, AS COMMISSIONER OF)
EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 04-1725PL
)
MICHAEL BROOKS HOLLAND,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on October 27, 2004, in West Palm Beach, Florida, and on October 28, 2004, in Boca Raton, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH). The record closed with the filing of a video deposition on January 3, 2005.

APPEARANCES

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

For Petitioner: Barry M. Silver, Esquire
1200 South Rogers Circle, Suite 8
Boca Raton, Florida 33487-5703

STATEMENT OF THE ISSUES

Whether Respondent committed the offenses alleged in the Amended Administrative Complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

Petitioner filed its Administrative Complaint against Respondent who timely requested a formal administrative hearing. The matter was referred to DOAH, and this proceeding followed. By Order entered August 27, 2004, Petitioner was authorized to amend its administrative complaint.

At all times relevant to this proceeding, Respondent was a classroom teacher at Boca Raton High School (BRHS), a public high school in Palm Beach County, Florida. The Amended Administrative Complaint contained allegations pertaining to three separate incidents. The first set of facts allegedly occurred at the end of the 1985-86 school year and involved four female students (including K.P. and B.K.) who were about to graduate from BRHS. The second set of facts also allegedly occurred during 1986 and involved another female student (L.E), who also graduated from BRHS in the class of 1986. Some of the alleged facts pertaining to L.E. occurred prior to her graduation and others occurred after her graduation. The third set of facts, which allegedly occurred at the end of the 2001-02 school year and the beginning of the 2002-03 school year,

involved another female student (K.S.) who attended BRHS.

Based on the factual allegations of the Amended Administrative Complaint, Petitioner charged that Respondent violated the following:

Count I: Section 1012.795(1)(c), Florida Statutes (2004).^[1]

Count II: Section 1012.795(1)(i), Florida Statutes.

Count III: Florida Administrative Code Rule 6B-1.006(3)(a).

Count IV: Florida Administrative Code Rule 6B-1.006(3)(e).

Count V: Florida Administrative Code Rule 6B-1.006(3)(g).

Count VI: Florida Administrative Code Rule 6B-1.006(3)(h).

Count VII: Florida Administrative Code Rule 6B-1.006(4)(c).

Count VIII: Florida Administrative Code Rule 6B-1.006(4)(e).

At the final hearing, Petitioner presented the live testimony of K.F. (the female student formerly known as K.P.); David F. (the husband of K.F.); K.S.; Kathryn Marie Kane (a data processor employed at BRHS); Christine Valentine (a former student at BRHS); Robert O'Leath (a teacher and administrator employed at BRHS); Kathleen Adams (a former supervisor at the Kmart that employed K.S.); Robert Walton (a detective with the Palm Beach County School Police); James Sapyta (an officer employed by the Palm Beach County School Police); and Paul LaChance (a former investigator with the Palm Beach County School Office of Professional Standards). Petitioner offered

pre-numbered Exhibits 1-4, 7-12, and 14-20. There were no Petitioner Exhibits numbered 5, 6, or 13. All Petitioner's exhibits were admitted into evidence, except Petitioner's Exhibit 8, which was rejected. Petitioner's Exhibit 1 is the deposition of the Respondent. Petitioner's Exhibit 2 is the deposition of L.E. Petitioner's Exhibit 3 is the deposition of Jennifer Tillison (a former student at BRHS). The video deposition of B.M. (the female student formerly known as B.K.) was filed January 3, 2005, and has been marked and admitted into evidence as Petitioner's Exhibit 21.

Respondent testified on his own behalf and presented the additional testimony of the principal of BRHS, fellow teachers at BRHS, students at BRHS, and parents of students at BRHS.

A Transcript of the proceedings was filed on November 18, 2004. At the request of the parties, the deadline for the filing of proposed recommended orders was extended to January 31, 2005. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent held Florida Educator Certificate 477777, covering Physical Education and Social Sciences. Respondent's certificate is valid through June 30, 2005.

2. At all times relevant to this proceeding, Respondent was employed by the Palm Beach County School Board and assigned to a classroom at BRHS, where he taught psychology and history. In recent years, Respondent has taught advanced placement classes. The evidence established that Respondent is well-liked by students, parents, and faculty. The present principal of BRHS, who was not at the school during the 1985-86 or 2001-2002 school years, considers Respondent to be an asset to the school.

FACTS PERTAINING TO K.P. AND B.K.

3. Prior to the end of the 1985-86 school year, Respondent invited several female senior students to join him for dinner in celebration of their upcoming graduation. Respondent was 33 years old at that time. Each of these females was either 17 or 18-years-of-age. K.P. (now known as K.F.) was 17 and B.K. (now known as B.M.) was 18. K.P. and B.K. were invited to and attended the dinner and subsequent celebration. The dinner invitations were extended by Respondent, who was their teacher, during the school year. There was a conflict in the evidence as to when this dinner engagement occurred.² That conflict is resolved by finding that the dinner engagement occurred at the Cork and Cleaver restaurant in Boca Raton prior to the graduation ceremonies for the class of 1986.

4. At least four female seniors were invited to Respondent's celebration. K.P., B.K., and two other female

students attended the dinner. All four of the students consumed alcohol at the restaurant that was purchased by Respondent. Respondent knew that the drinking age was 21 and he knew that each of the girls was under that age. Respondent also consumed alcohol at the restaurant. Following the meal, K.P. and B.K. sat on a bench outside the restaurant and continued to drink alcoholic beverages with Respondent. After approximately five bottles of champagne and/or wine had been consumed, Respondent K.P. and B.K. went from the bench outside the restaurant to Respondent's house. The three of them were alone in Respondent's house for several hours. At Respondent's house they drank four to five additional bottles of wine.

5. The quantity of alcohol consumed by Respondent, B.K., and K.P. that evening impaired their judgment. By all accounts, K.P. was inebriated and incapable of consenting to the acts that followed.

6. Both B.K. and K.P. were excellent students who had little or no experience with alcohol. During the 1985-86 school year, K.P. had been a member of BRHS's varsity teams in basketball, volleyball, and softball. During that school year, B.K. had been a member of BRHS's varsity tennis team.

7. After K.P. became inebriated, Respondent and K.P. went to Respondent's bedroom where Respondent had inappropriate sexual relations with her. There was a conflict in the evidence

as to whether Respondent had sexual intercourse with K.P. K.P. testified, credibly, that Respondent had sexual intercourse with her and that she suffered bleeding and discomfort the following day. K.P. also testified, credibly, that she had been a virgin up until that evening. Respondent admitted that K.P. was with him in his darkened bedroom with little or no clothes on, but he denied having sexual intercourse with her. Respondent admitted that he fondled K.P.'s breasts and engaged in what he described as "heavy petting." The undersigned finds Respondent's denial that he had sexual intercourse with K.P. also to be credible. In view of conflicting, credible testimony and the absence of corroborating evidence to substantiate the fact of sexual intercourse as opposed to the fact that there was the opportunity for sexual intercourse, the undersigned is constrained to conclude that Petitioner did not prove by clear and convincing evidence that Respondent engaged in sexual intercourse with K.P.

8. Petitioner established by clear and convincing evidence that K.P. did not consent to Respondent's inappropriate sexual behavior because she was too intoxicated and too young to do so. Respondent knew or should have known that K.P. was incapable of consenting to his behavior.

9. After Respondent and K.P. entered Respondent's bedroom, B.K. left Respondent's house and drove around the block in her

car for approximately 20 minutes. Because she was concerned about K.P., B.K. returned to Respondent's house. When she returned to Respondent's house, B.K. looked for K.P. She stepped into the doorway of Respondent's bedroom and saw Respondent and K.P. in bed together. K.P. was not fully clothed, and the clothes she had on were in disarray. K.P. told B.K. to come in and get in the bed with them. K.P. grabbed B.K.'s arm and pulled her toward the bed. B.K. entered the bedroom and briefly lay on the bed with Respondent and K.P.

10. Shortly thereafter, B.K. got up and left Respondent's bedroom. Because she was feeling dizzy, B.K. lay down on a mattress in another bedroom.

11. There was a conflict in the evidence as to what next occurred. It is clear that K.P. either intentionally cut herself or accidentally opened a cut on her hand. Respondent testified that K.P. accidentally opened up a cut on her finger while in his bedroom and then went to the kitchen. K.P. testified that she went from Respondent's bedroom to the kitchen and intentionally cut herself in reaction to what had happened with Respondent. How the cut occurred is not relevant. It is relevant that Respondent went in the kitchen and helped K.P. stop the bleeding.

12. After leaving the kitchen area, Respondent observed B.K. lying on the mattress in the second bedroom. He lay down

on the mattress with B.K. with his body touching hers. He tried to kiss B.K., but she resisted his efforts. Respondent engaged in inappropriate sexual behavior with B.K. by lying next to her with his body in contact with hers and trying to kiss her. Respondent was obviously attempting to sexually arouse B.K.

13. When K.P. saw Respondent and B.K. together in the second bedroom, she yelled at B.K. that they needed to get out of Respondent's house. B.K. and K.P. then exited Respondent's house and they returned to their respective homes in B.K.'s car without further incident.

14. The next day, Respondent contacted B.K. and K.P. separately and apologized to them for his conduct. Respondent also apologized to B.K. for his conduct with K.P. Respondent stated that he had been unable to resist their athletic bodies. Respondent gave each of these girls a pair of diamond earrings as a gift.

15. K.P. and B.K. did not report these events to any authority figure until 1993.³ As a result of difficulties K.P. (then known as K.F.) was having with sex in her marriage, she and her husband underwent counseling. It was during a session she and her husband had with their therapist that she revealed the events of the evening in 1986. Her husband, a teacher, felt obliged to report the incident to the Palm Beach County School District, which he did without naming K.P. and B.K. as being the

students involved. His wife became upset when she learned of the report. After further reflection, K.P. revealed to the Palm Beach County School District that she and B.K. were the students involved with Respondent on the evening in question. The Palm Beach School District investigated the allegations, but it did not report these allegations to Petitioner. Petitioner learned of these events during its investigation of the facts pertaining to K.S.

FACTS PERTAINING TO L.E.

16. L.E., a female, graduated from BRHS in 1986. Respondent met L.E. when she was a freshman at BRHS and he subsequently became attracted to her. During her senior year, Respondent offered tickets to a Miami Dolphins football game to L.E. and other students as a reward for helping him grade papers in the class they took from him. Before she graduated, Respondent told L.E. that after she graduated he wanted to take her to dinner. There was insufficient evidence to establish that Respondent engaged in an inappropriate relationship with L.E. before she graduated.

17. After she graduated, Respondent treated L.E. to dinner,⁴ gave her a pair of diamond earrings, and told her he wanted to be more than friends. Later during the summer of 1986, Respondent and L.E. went to Marathon, Florida, together

and also traveled to San Francisco, California, at Respondent's expense.

DISCIPLINE PERTAINING TO K.S.

18. K.S., a female, attended BRHS for her freshman through her senior years. She graduated in 2003. Respondent was K.S.'s history teacher in her junior year and her psychology teacher her senior year.

19. During the 2001-2002 school year, K.S. confided certain personal family matters to Respondent. Thereafter, Respondent engaged in inappropriate conduct toward K.S. On at least five occasions toward the end of the 2001-02 school year Respondent came to her place of employment (a Kmart) looking for her. On one occasion he left her a gift of a cheesecake and on another he left a bag of M & M candy as a gift. These visits upset and frightened K.S.

20. At the beginning of the 2002-03 school year, Respondent physically hugged K.S. when he first saw her in his psychology class. On several occasions Respondent put his hands on K.S.'s shoulders and massaged them. On one occasion he rubbed her hair. This type physical contact continued even after K.S. told Respondent not to touch her. On one occasion Respondent referred to K.S. in front of her classmates as being his "baby." Respondent's conduct upset and embarrassed K.S.

21. K.S. complained to Robert O'Leath, a dean of students at BRHS, about Respondent's behavior. Following an investigation of these allegations, the School Board of Palm Beach County suspended Respondent's employment without pay for a period of ten days and required him to attend diversity and sensitivity training. Respondent did not contest this discipline.

CONCLUSIONS OF LAW

22. 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).

23. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence 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 the firm belief of (sic) 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).

24. Section 1012.795(1), Florida Statutes, provides, in part, as follows:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for a period of time not to exceed 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for a period of time not to exceed 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon order of the court, of any person found to have a delinquent child support obligation; or may impose any other penalty provided by law, provided it can be shown that the person:

* * *

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

* * *

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

25. Florida Administrative Code Rule 6B-1.006 provides, in part, as follows:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

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

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

* * *

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national origin, political belief, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

(h) Shall not exploit a relationship with a student for personal gain or advantage.

* * *

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

* * *

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

* * *

(e) Shall offer no gratuity, gift, or favor to obtain special advantage.

26. The following definitions, set forth in Florida Administrative Code Rule 6B-4.009(2) and (6), pertain to grounds for dismissal of instructional personnel by a school district and can be used in the interpretation of Section 1012.795(1)(c), Florida Statutes:

(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.

* * *

(6) 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.

27. Petitioner established by clear and convincing evidence that Respondent was guilty of acts of gross immorality

and acts involving moral turpitude in violation of the provisions of Section 1012.795(1)(c), Florida Statutes, as alleged Count I of the Amended Administrative Complaint. The violations were established by Respondent's conduct with K.P. and by his conduct with B.K. At a minimum, Respondent is guilty of contributing to the delinquency of these minor students and sexual battery on K.P.

28. Petitioner also established by clear and convincing evidence that Respondent was guilty of violating the Principles of Professional Conduct for the Education Profession as alleged in Count II of the Amended Administrative Complaint. Specifically, Respondent's conduct with K.P. and B.K. violated the Principles alleged in Counts 3, 4, 6, 7, and 8 of the Amended Administrative Complaint. Respondent's conduct with K.S., while not as egregious as his conduct with K.P. and B.K., nevertheless violated the Principles alleged in Counts 3, 4, 6, 7, and 8 of the Amended Administrative Complaint.

29. Petitioner has the discretion to impose against Respondent any penalty provided by Section 1012.795(1), Florida Statutes. The penalty sought by Petitioner, the permanent revocation of Respondent's certificate, is within its discretion. Considered alone, Respondent's conduct with K.S. does not warrant the revocation of his certificate, but it does warrant the imposition of an administrative fine and a term of

probation. Considered alone, Respondent's conduct with B.K. would not warrant the revocation of his certificate, but it would warrant its suspension for a period not to exceed five years. Considered alone, Respondent's conduct with K.P. warrants the permanent revocation of his certificate. The conclusion that Respondent's educator certificate should be permanently revoked is buttressed when Respondent's conduct with K.S. and B.K. are considered in addition to his conduct with K.P.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order adopting the Findings of Fact and Conclusions of Law set forth in this Recommended Order. It is further recommended that the final order permanently revoke Respondent's educator certificate.

DONE AND ENTERED this 25th day of February, 2005, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
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 25th day of February, 2005.

ENDNOTES

1/ All references to statutes are to Florida Statutes (2004). All references to rules are to the version of the rule published in Florida Administrative Code as of the date of this Recommended Order.

2/ There were several conflicts in the evidence. This is attributed to not only the passage of time, but the quantities of alcohol consumed by the participants. The findings resolving those conflicts are based on clear and convincing evidence.

3/ K.P. and B.K. separately told close friends in broad terms what had happened. K.P. and B.K. never discussed what happened between K.P. and Respondent that evening, even though they subsequently became roommates at the University of Florida.

4/ L.E. was the only guest at this dinner, which was after the dinner attended by K.P. and B.K.

COPIES FURNISHED:

Kathleen M. Richards, Executive Director
Education Practices Commission
Department of Education
325 West Gaines Street, Room 224-E
Tallahassee, Florida 32399-0400

Charles T. Whitelock, Esquire
Whitelock & Associates, P.A.
300 Southeast 13th Street
Fort Lauderdale, Florida 33316

Barry M. Silver, Esquire
1200 South Rogers Circle, Suite 8
Boca Raton, Florida 33487-5703

Daniel J. Woodring, General Counsel
Department of Education
1244 Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399-0400

Marian Lambeth, Program Specialist
Bureau of Educator Standards
Department of Education
325 West Gaines Street, Room 224-E
Tallahassee, Florida 32399-0400

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.