

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.) Case No. 04-3835
)
DAVID MENKE,)
)
Respondent.)
_____)
JOHN L. WINN, AS COMMISSIONER OF)
EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 05-4189PL
)
DAVID MENKE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted on October 30 and 31, 2006, in Fort Lauderdale, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner Broward County School Board:

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For Respondent David H. Menke:

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STATEMENT OF THE ISSUES

As to DOAH Case No. 04-3835, whether Respondent engaged in immoral acts and misconduct as alleged by the Broward County School Board ("School Board") and, if so, whether those immoral acts and misconduct provided grounds to suspend Respondent's employment without pay and to initiate this termination proceeding.

As to DOAH Case No. 05-4189PL, whether Respondent committed the offenses alleged in the Administrative Complaint filed August 4, 2005, and, if so, the appropriate penalty that should be imposed against his educator certificate.

PRELIMINARY STATEMENT

On August 24, 2004, School Board filed an Administrative Complaint pursuant to Florida Administrative Code Rules 60Q-2.004 and 28-5.241, alleging Misconduct in Office and Immorality

in violation of Section 1012.33, Florida Statutes (2003)¹, and Florida Administrative Code Rules 6B-1.006 and 6B-4.009.² The allegations pertained to inappropriate, immoral, and sexually explicit communications with minor students. On or about September 21, 2004, Respondent requested a formal administrative hearing to challenge the School Board's proposed action, and the matter was referred to DOAH, where it was assigned DOAH Case No. 04-3835.

Subsequent thereto, the Commissioner of Education (Commissioner) filed the Administrative Complaint that underpins DOAH Case No. 05-4189PL. After Respondent requested a formal administrative hearing to challenge the allegations of the Administrative Complaint, the matter was referred to DOAH and, on January 26, 2006, the two cases were consolidated.

The Commissioner's allegations pertaining to Respondent's conduct in Broward County mirror those of the School Board. In addition, the Commissioner's Administrative Complaint contains allegations pertaining to Respondent's employment with the School Board of Palm Beach County during the 2001-2002 school year.

Respondent invoked his Fifth Amendment privilege against self-incrimination at the outset of the investigation that led to DOAH Case No. 04-3835 and throughout that proceeding, including at disposition and in response to other discovery.

Respondent also invoked his Fifth Amendment privilege at all times subsequent to the filing of the Administrative Complaint in DOAH Case No. 05-4189PL.

Petitioners alleged that while employed by the School Board, Respondent engaged in inappropriate, immoral, and/or sexually explicit communications with female students. Many of these communications were in the form of instant messaging (IM) to the students, each of whom had an account with America Online (AOL) using AOL software and AOL screen names. There can be no meaningful debate as to whether these online communications with the minor females were inappropriate, immoral, and/or sexually explicit; they clearly were. The dispute focused on whether the admissible evidence presented by Petitioners proved that Respondent was communicating online with the female students under his screen name of FamAstro. Respondent correctly argued that there was no direct evidence to establish the identity of FamAstro, and Respondent objected to much of the evidence offered by Petitioners. The rulings on Respondent's objections have been preserved for the record. Petitioners assert that the identity of FamAstro can and has been established by circumstantial evidence.

The allegations also encompass inappropriate, sexually charged, and profane communications to students in person. Respondent argued that those direct communications were not

encompassed by the pleadings. The ruling against Respondent's position on that issue has also been preserved for the record.

At Final Hearing, School Board called the following witnesses: Gretchen Walker (investigator with the Office of Professional Standards & Special Investigative Unit for the School Board); Samantha Stransky, (former student of Respondent at Coral Springs High); Anne Lynch (principal at Coral Springs High School); and Dr. Joseph Melita (Executive Director of the Office of Professional Standards and Special Investigative Unit for the School Board). The School Board filed deposition transcripts of the following individuals in support of its case-in-chief: Amy Winston (mother of Sarah Winston), Mark Winston (father of Sarah Winston), Gregory Hutchinson (guidance counselor at Coral Springs High at the time of the alleged incidents), Carrie Davis (America Online contract specialist and records custodian), the direct examination of Gail Menke (wife of Respondent), and the Respondent. The School Board also filed video depositions and transcripts of three former students of Respondent at Coral Springs High School: Sarah Winston, Juliana Mosquera, and Christie Farah.

The Commissioner of Education called the following witnesses to testify live at Final Hearing: Karen Whetsell, (Principal of Poinciana Elementary School), Raymond Miller (Investigator for Palm Beach County School District's Department

of Professional Standards), Terri Rouse (a para-professional employed by Palm Beach County School District), and Van Lundy (Palm Beach County School Board Director of Labor Relations).

Petitioners filed "Petitioners' Joint Exhibit List" on April 11, 2007, that set forth the exhibits each Petitioner filed. As reflected on the exhibit list, the School Board adopted certain exhibits designated as COE Exhibits and COE adopted certain exhibits designated as School Board Exhibits. The following pre-marked School Board Exhibits were admitted into evidence, either as a separate exhibit or as an attached exhibit to one or more depositions: Composite SB1 - SB7, SB8e, SB9 - SB12, SB18 - SB23. Each of the foregoing Exhibits was adopted as an Exhibit by the Commissioner of Education (COE). The following COE Exhibits were admitted into evidence: COE1 - COE5, COE7, COE9 - COE13, COE16, COE18 - COE21, COE23 - COE26, and COE30. The School Board adopted the following COE Exhibits: COE1 - COE3, COE5, COE12, COE13, COE18 - COE21, COE23 - COE26, and COE30.

Respondent called no witnesses, but offered two Exhibits, both of which were admitted into evidence at the Final Hearing. Respondent proposed to offer a portion of what was subsequently marked and admitted into evidence as COE30, which is the entire transcript (as opposed to the portion Respondent was planning to offer) of a pre-disciplinary proceeding.

The hearing in DOAH Case No. 04-3835 was initially scheduled for January 2005. That hearing was rescheduled on the School Board's motion and showing of good cause. Thereafter, a discovery dispute resulted in an interlocutory appeal to the Fourth District Court of Appeal. The undersigned abated DOAH Case No. 04-3835 pending resolution of the appeal. The issue on appeal was resolved in favor of Respondent's position by order entered September 30, 2005. In November 2005, the Commissioner filed DOAH Case No. 05-4189PL against Respondent. In the interest of judicial economy, the two cases were consolidated in January 2006. After discovery as to both cases was completed, the hearing in these consolidated cases was conducted on October 30 and 31, 2006.

As ordered prior to the hearing, Petitioners were allowed to take three depositions of witnesses who became unexpectedly unavailable for the formal hearing.

Also as ordered prior to the hearing, Respondent was afforded the opportunity following the hearing to make page and line objections to the depositions entered into evidence by Petitioners at the formal hearing, including the late-filed depositions. Petitioners were afforded the opportunity to respond to Respondent's objections. The foregoing process took longer to complete than any of the parties (or the undersigned) anticipated. After the undersigned ruled on Respondent's

objections and on Respondent's motion for clarification, the deadline for the filing of proposed recommended orders was established. On June 26, 2007, Respondent filed a motion to dismiss these proceedings on the grounds stated therein. On June 28, 2007, the undersigned denied the motion to dismiss and extended the deadline for the filing of proposed recommended orders.

Both Petitioners filed Proposed Recommended Orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order. Respondent did not submit a proposed recommended order.

FINDINGS OF FACT

Background Information

1. During the 2001-2002 school year, Respondent was employed as a teacher by the Palm Beach County School Board. Respondent served as the planetarium director for Poinsettia Elementary School. Respondent's contract was not renewed at the end of that school year.

2. Respondent began employment as a physics teacher with the School Board at the beginning of the 2002-2003 school year. The School Board assigned Respondent to teach at Coral Springs High School (CSHS), which is a public high school located in Broward County, Florida. During the 2003-2004 school year,

Respondent's assignments included teaching a class entitled Honors Physics.

3. At all times relevant to these proceedings, Respondent had an account with AOL with the following screen names: FamAstro, DrDHMenke, and CSHSPHysics. The use of these screen names was password protected. Respondent frequently changed his passwords to protect the security of his accounts. Respondent's wife also used the AOL account, but under the screen name of GailShots.

4. At all times relevant to these proceedings, Respondent maintained a homepage on AOL under his FamAstro screen name.

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5. On August 30, 2001, Respondent had the responsibility to supervise a class of third grade students during the class visit to the school planetarium. While the class was lined up to enter the planetarium, Respondent instructed the students to ". . . push the child in front of you." The children followed Respondent's instruction and, as a result, a female student was pushed to the ground and suffered an injury (the injured girl). Ms. Rouse, a paraprofessional who witnessed the event, took the child to the clinic for treatment.

6. When Ms. Rouse returned with the injured girl from the clinic, she observed three boys in the foyer of the planetarium who were supposedly under Respondent's supervision engaged in

unsupervised wrestling. The three students told Ms. Rouse that Respondent had placed them in the foyer because they had been disruptive inside the planetarium. The door to the planetarium had been closed so that Respondent could not observe them.

Ms. Rouse entered the planetarium with the injured girl.

Ms. Rouse left the door to the planetarium open so she could observe the three boys in the foyer. After Respondent asked her to close the door to the planetarium, Ms. Rouse brought the boys inside of the planetarium and closed the door to the planetarium.

7. Ms. Rouse also observed Respondent inappropriately discipline two third grade students during the planetarium show. Respondent poured water on the head of a female student who had fallen asleep. When she awakened, the other students laughed at her. Thereafter Respondent observed a male student who had fallen asleep. Again, Respondent poured water on the student's head until the student awakened; his classmates laughed at him. Both students were visibly upset by Respondent's conduct.

8. Respondent announced to the class that pouring water on a student's head is what he does to students who fall asleep in his class.

9. Following its investigation into Respondent's conduct pertaining to the students at the planetarium, the Palm Beach

County School District suspended his employment without pay for five days.

10. During the course of the investigation, Respondent communicated with employees of the Palm Beach County School Board using his AOL screen name FamAstro.

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11. Respondent taught Honors Physics at CSHS from the beginning of the 2002 - 2003 school year until he was removed from the classroom on October 13, 2003, which is part of the 2003 - 2004 school year.

12. Samantha Stransky ("Stransky") was a student at CSHS during the 2002 - 2003 and 2003 - 2004 school years. She was not a student in any of Respondent's class.

13. Sarah Winston ("Winston"), Christie Farah ("Farah"), and Juliana Mosquera ("Mosquera") were all registered students in Respondent's Honors Physics class at CSHS during the 2003 - 2004 school year. The Honors Physics class is only available to a student with an exemplary academic record. A student must obtain recommendations from a teacher and guidance counselor prior to being permitted to enroll in an honors class.

14. During the first week of his Honors Physics class in the 2003 - 2004 school year, Respondent requested each student in the class to provide his or her e-mail address, which created

the opportunity for Respondent to contact each of his students via e-mail.

15. In addition to e-mail accounts, AOL has Instant Messenger software that enables one AOL user to chat "real-time" with another AOL user by using IM. The "real-time" chat over IM allows for a conversation between two AOL IM users using a screen name. An IM session is analogous to a telephone conversation, but uses text-based, rather than voice-based, communication. Each user has the ability in real-time to type a string of text and send it to the other user, creating a back-and-forth conversation instantly displayed. During an ongoing IM session, an individual can make a record of the conversation as it appears on the computer screen by copying the text and thereafter pasting the copied text into a format that can be saved, such as a Microsoft Word document or an e-mail. Unless specifically saved, the text of an IM conversation is lost when the session is ended.

16. Once a user signs up and opens an account with AOL, the user's AOL screen name for instant messaging is the same as the user's AOL e-mail address, minus the "@aol.com." In other words, if you have an AOL user's e-mail address, you also have the user's IM screen name, because they are one and the same, with the minor alteration. For example, Respondent's AOL e-mail address of "FamAstro@aol.com" automatically registers with AOL

the instant message screen name of "FamAstro" so that the person receiving the IM will be notified that the IM is from "FamAstro."

17. Because he had the e-mail for each student in his Honors Physics class, Respondent had the ability to IM each student with an AOL e-mail address by using the AOL Instant Messenger software.

18. At all times relevant to these proceedings, Winston, Farah, Mosquera, and Stransky had accounts with AOL. As will be discussed further, each of these students received IM communications from the AOL user with the screen name FamAstro.

FamAstro's Communications With Student Juliana Mosquera

19. FAmAstro initiated IM communications with Mosquera on at least two occasions during the first part of the 2003 - 2004 school year. Mosquera did not save any of these IM communications, but she did testify, credibly, as to their contents.

20. Mosquera believed at the time of the IM communications that Respondent was FamAstro. She formed that belief because Respondent had told Mosquera and his other students in his Honors Physics class that "FamAstro" was a screen name he used, because of the contents of the IMs (which will be discussed below), and because of events that happened in the classroom after the communications (which will also be discussed below).

21. At the times relevant to this proceeding Mosquera utilized the AOL screen name of "xxJewel621xx."

22. During Mosquera's online communications with FamAstro, the topic of conversation included issues related to ongoing matters in the Honors Physic's class that only Respondent would have known. During the school year, Respondent allowed his students to complete extra credit assignments. Mosquera participated in online communications with FamAstro regarding instructions for faxing-in extra credit assignments for Respondent's class. She thereafter faxed those assignments to Respondent at the number provided by Respondent to students. FamAstro confirmed receipt of that extra credit work. Respondent gave Mosquera credit for that extra credit work.

23. On more than one occasion, FamAstro asked Mosquera online whether she wanted a bagel, or some other types of food, at school the following day. Following those online communications, Respondent fulfilled FamAstro's promise and provided the food to Mosquera the next day. The offer of food was not extended to the entire class, but, rather, was a unique offer to Mosquera. For example, Respondent would bring a bagel to class for her as opposed to bringing bagels for the whole class.

24. FamAstro sent IMS to Mosquera mocking other students in his class in an inappropriate and derogatory manner.

Specifically, in an online communication with Mosquera, FamAstro called Winston a "prostitute" and a "streetwalker," and made regular references to the size of Winston's breasts.

25. During the online communications with Mosquera, FamAstro used vulgarities such as "fuck" and "shit" and made inappropriate, sexually charged, statements.

26. During one of the IM online conversations between Mosquera and FamAstro, FamAstro inquired whether Mosquera had ever experienced an orgasm. Following that inquiry, Mosquera ignored FamAstro. Mosquera thereafter received an e-mail from FamAstro that apologized for making her feel uncomfortable. The following day at CSHS, Mosquera spoke directly with Respondent, who asked if Mosquera had received his e-mail, referencing the apology the student received from FamAstro. When Mosquera spoke with Respondent in person, Respondent indicated he was sorry for offending Mosquera during the online communications.³

27. Petitioners proved by the requisite evidentiary standards, to be discussed in the conclusions of law section of this Recommended Order, that at the times relevant to the allegations pertaining to Winston, Respondent acted as FamAstro in communicating with Mosquera.

Communications With Student Sarah Winston

28. FamAstro began sending Winston IMs on a regular basis, beginning the first or second week of the 2003 - 2004 school

year. Winston knew that FamAstro was Respondent's screen name and believed that she was communicating with Respondent during her IM communications with FamAstro.

29. Winston testified, credibly, that when she was originally contacted by "FamAstro" via IM communication, he expressly identified himself as Menke. Winston did not save that initial IM communication.

30. Thereafter, Winston saved several IM communication transcripts between herself and FamAstro by the process of copying a particular IM and then pasting the copied material into the body of an e-mail. Winston saved copies of the IMs with FamAstro because she was concerned as to the content of the communications she had received from FamAstro. Winston testified, credibly, that the communications as documented in Exhibit SB4 represent a true and accurate transcript of the saved communications between Sarah Winston as xo3Sarah30x and FamAstro. School Board Exhibit SB4 is incorporated herein by reference.

31. There were additional IM communications between Sarah Winston and FamAstro, including the initial IM communication, which were not saved, and therefore not included in School Board Exhibit SB4.

32. FamAstro's IM communications with Winston contained profane language and were replete with inappropriate sexual statements.

33. As detailed on page 6 of School Board Ex. SB4, Winston initiates a conversation with FamAstro, asking why e-mails she had sent to FamAstro@AOL.com were blocked. After FamAstro indicates that he blocks all e-mail, he provides Winston with the e-mail address DrDHMenke@aol.com as an alternate.

34. Within the communications documented in School Board Exhibit SB4, FamAstro referred to the CSHS assistant principal, Dr. Kadlacek in derogatory terms, stating that Dr. Kadlacek was upset "because his dick is smaller."

35. FamAstro followed up the comment regarding Dr. Kadlacek by stating to Winston, "maybe if I gave him a blow job he'd back off." That was a reference to performing oral sex on the assistant principal.

36. Winston testified that she started ignoring FamAstro online and her grades in Respondent's class began to go down. While she maintained these communications with FamAstro, she was able to choose any answer on her assignments and have it marked correct. In some situations, when students would do a group project or assignment and all had the same answers, Winston would receive a higher grade than others. When, Winston began to ignore FamAstro's online communications, her grades dropped

from one of the highest in the class to one of the lowest. Winston discussed the situation with FamAstro on instant messenger, asking why her grades dropped from an "A" to a "F." FamAstro responded that she could "come in before school or after class." While that comment was interpreted by Winston to mean that if she engaged in sexual acts with her teacher, her grades would go back up, there was no other evidence to support that interpretation of the communication.

37. Petitioners proved by the requisite evidentiary standards, to be discussed in the conclusions of law section of this Recommended Order, that at the times relevant to the allegations pertaining to Winston, Respondent acted as FamAstro in communicating with Winston.

38. FamAstro's conduct had an adverse impact on Winston. Her parents observed a significant change in their daughter following the incidents described above.

39. As a result of the complaints to Mr. Hutchinson, Respondent was removed from his classroom. After that removal, some students blamed Winston. Some students harassed her to the point that she had to be reassigned to another class for her own well-being.

Communications With Student Christie Farah

40. FamAstro began sending IMs to Farah at the beginning of the 2003 - 2004 school year. Farah's e-mail address was

Finsfan9954@aol.com, and she communicated online with FamAstro via IM utilizing the screen name Finsfan9954.

41. At the times she was communicating with FamAstro, Farah believed that she was communicating with Respondent. Farah formed that belief because she knew that FamAstro was a screen name Respondent used and because of the contents of the IM communications. Farah testified that FamAstro identified himself as Respondent during the first time she and FamAstro communicated online. Farah did not save the initial IM communications she received from FamAstro.

42. After Farah learned that her classmate, Mosquera, had received IMs from FamAstro, Farah saved an IM communication from FamAstro. Exhibit SB5 is the IM communication saved by Farah and is incorporated herein by reference. It is in e-mail form because Farah copied and pasted the content of her online communications with FamAstro into an e-mail and sent the content to Mosquera. Farah testified, credibly, that Exhibit SB5 is a true and accurate copy of an IM communication between FamAstro and Farah. School Board Exhibit SB5 is incorporated herein by reference.

43. School Board Exhibit SB5 reflects that Farah repeatedly referred to FamAstro as "Menke" or "Dr. Menke" and FamAstro referred to his class and to his students. FamAstro refers to himself as being a physics teacher.

44. School Board Exhibit SB5 reflects that FamAstro's online communications with Farah were sexually explicit, and intimately inappropriate. Many of FamAstros's replies to Farah's communications were sexually charged.

45. Within Farah's communications with FamAstro, FamAstro references Sarah Winston as being a "street walker" or a "prostitute." Reference is also made to a dark-skinned Hispanic student in Respondent's class named Mike, as being Sarah's "black slave."

46. Other disparaging and inappropriate references made by FamAstro within his communications with Farah include, but are not limited to, the following:

"Any man would be very, very 'lucky' to have you as a companion or wife".

"Maybe I can just drop by the house some time . . ."

"If I were your 'guy' I'd fall all over myself to make your family happy"

"you are too precious to just fuck around with"

"with your fair skin and blue eyes . . . you don't look AT ALL Arab"

"yet, you seem to understand about sex, penis, etc. "

"don't tell anyone, but I really love you, Miss Farah . . ."

"I am happy to get whatever you ask for"

"You could easily pass for 25..; you're mature, beautiful, a "lady" in the good sense, feminine, intelligent..; what more can a man want?; if I were younger..; I'd still get arrested; since you're under 18"

Communications With Student Samantha Stransky

47. Although Stransky was not a student in Respondent's class, she did have occasion to enter his classroom and participate in conversations with Respondent. The conversations began during finals week at the end of the 2002 - 2003 school year. Stransky entered Respondent's classroom because she was intrigued by the music Respondent was playing. This occurred after classes, but with Respondent present. On one specific occasion, while other students, Ashley Arendt and Brandon Schmula were present, Respondent made references to the students regarding how he could sneak vodka into the school by injecting the alcohol inside of oranges. The conversation continued, and Respondent discussed having sex in Jell-O. During this face to face conversation, Respondent asked Stransky and Arendt if they were virgins. Respondent's comments made Stransky feel uncomfortable because she considered that Respondent had spoken to her in a personal and sexual manner.

48. During the first part of the 2003 - 2004 school year, Stransky received IMs from FamAstro. FamAstro did not identify himself to Stransky as being Respondent. However, Stransky believed that the IMs were from Respondent because she had

previously reviewed another student's weblog (i.e. "blog"), on which that student stated she had received a "weird IM" from Respondent using the screen name FamAstro. She also believed that Respondent was communicating as FamAstro because she had been told by her friend Ashley Arendt that Ashley had given Respondent Stransky's AOL e-mail address.

49. In order to save the content in her e-mail archives, following the conclusion of the conversation, Stransky separately copied two online communications and pasted each in e-mails that she sent to herself. Stransky saved the content of the communication because she knew at the time it was inappropriate. Stransky testified, credibly, that School Board Exhibit SB6 is a true and accurate "word-for-word" copy of the two saved IM communications Stransky participated in with FamAstro in September 2003. In these communications, Stransky communicates under her screen name "D O L C E 4 L." School Board Exhibit SB6 is incorporated herein by reference.

50. Within the conversation documented in School Board Exhibit SB6, the following dialogue occurs between "D O L C E 4 L" and "FamAstro":

. . . .
FamAstro: want a map?
FamAstro: or a shot of Vodka?
FamAstro: what do you like to drink?
D O L C E 4 L: water
FamAstro: get out
FamAstro: you can't get high on water

FamAstro: or a buzz
FamAstro: I can't bring you oranges with shots of water inside
D O L C E 4 L: you cant bring me oranges with shots of anything in it lol
FamAstro: sorry . . . I thought you wanted them. . . .
FamAstro: Isn't this Samantha, the friend of Ashley Arendt?
D O L C E 4 L: lol yes it is
FamAstro: last year you were all excited about that sh . . . stuff . . . now you are into water instead?
D O L C E 4 L: no i like to drink
FamAstro: kewl
FamAstro: but what's the deal? Of course, probably not in school . . . but at parties, dances, etc.,?
D O L C E 4 L: oohhh . . . pretty much anything i guess
FamAstro: I can and will get you what you'd like . . . if you want me to . . . just let me know
FamAstro: hello? You don't want stuff?
D O L C E 4 L: sorry . . . i was away
. . .

51. Later in the same conversation, the topic changes from providing the minor student with alcohol, to getting arrested for engaging in intimate acts:

FamAstro: hey, Sam . . . if I were younger . . . I'd still get arrested
D O L C E 4 L: arrested for what?
FamAstro: if I were "intimate" with you, geekette
D O L C E 4 L: but why would you think of something like that
FamAstro: gee . . . I dunno . . . maybe 'cause you are a very sexy woman . . .
FamAstro: don't you know that?
FamAstro: then you say . . .
FamAstro: . . . really? But I'm just a little girl
. . .
FamAstro: then I say . . .
FamAstro: etc.
FamAstro: hmm . . . maybe she's blind
FamAstro: hmmm
FamAstro: Earth to Sam . . . Earth to Sam . . .
FamAstro: Houston . . . we've lost Sam . . .

FamAstro: zzzz. . . . Boom . . . crash and burn . . .
D O L C E 4 L: dude you're a cool teacher and all but
this is definitely not something you talk about with
students

. . .

52. Stransky correctly interpreted these "inappropriate gestures" of a sexual connotation to mean that Respondent wanted to be intimate with her.

53. In the second saved e-mail, the following communications occurred between Respondent and Stransky:

. . .
D O L C E 4 L: sorry i'm reading mail
FamAstro: you can read?
D O L C E 4 L: surprisingly yes
FamAstro: LOL
FamAstro: when did they teach women that?
FamAstro: Don't tell anyone, but I thought about you over the summer
D O L C E 4 L: lol
FamAstro: I got to know you only at the end of last school year,
FamAstro: and I enjoyed your free spirit,
FamAstro: love of adventure., etc.
D O L C E 4 L: well thank you
FamAstro: no problemo
FamAstro: If I were a senior man this year, I'd want to spend time with you, since you are fun, and very enjoyable to be around
D O L C E 4 L: yeah everyone loves me haha
FamAstro: everyone has made love to you?
D O L C E 4 L: no thats not what I said
FamAstro: LOL . . . I know, geekette . . . I joke a lot . . . can you tell?
FamAstro: and I'm a sarcastic son of a bitch
D O L C E 4 L: lol i can see that
FamAstro: I'm only serious when I am joking
FamAstro: LOL
FamAstro: Anyway, I miss you
FamAstro: meaning, I enjoyed getting to know you, and since there is only one YOU, I'd like more of that character

FamAstro: just me
FamAstro: I can recognize talent when I see it
D O L C E 4 L: talent?
FamAstro: fun loving, funny, sexy, intelligent, etc.
FamAstro: then you say. . . .
FamAstro: . . . maybe she died . . .

Students Report Violations To Mr. Hutchinson

54. Mosquera was offended by the instant message communications with FamAstro, and was unsure what to do, if anything, in response. Mosquera spoke with her classmates, Farah and Winston, and discovered those students also had experienced online communications with FamAstro. Winston was afraid to report these communications to a school official.

55. For several years, Mosquera had known Gregory Hutchinson ("Hutchinson"), one of CSHS's guidance counselors. On the Friday, October 10, 2003, Mosquera told Hutchinson that she needed to speak with him regarding an issue. Mosquera told Hutchinson that Respondent was going to get himself into trouble due to inappropriate e-mails and other contact with herself and other students. Hutchinson advised the student that should she have any proof of the allegations, she should bring it to his office the following Monday.

56. Prior to this incident, Mosquera had never filed a complaint against a teacher. Mosquera testified, credibly, that she came forward and spoke to Mr. Hutchinson about Respondent's communications because she felt that he should not be teaching.

Mosquera understood that Winston was not going to report the incidents to the administration because she was fearful of retribution from Respondent. Winston had been afraid of coming forward, and therefore Mosquera believed it was her responsibility to report this behavior to Hutchinson.

57. The following Monday (October 13, 2003) Mosquera and Winston came to Hutchinson's office and told them in greater detail about the online communications that had been having with FamAstro. Hutchinson thereafter allowed Winston to use his computer to log in to her AOL account. Winston then printed a copy of School Board Exhibit SB4 in Hutchinson's presence.

58. Winston was visibly upset as she discussed the Respondent's communications with Hutchinson. Hutchinson was immediately concerned after hearing of the allegations of inappropriate sexual communications between Respondent and his students.

59. Although Mosquera did not retain any copies of the IM communications she had with FamAstro, Hutchinson understood that sexually inappropriate conversations had occurred.

60. After Winston's e-mails documenting her communications with FamAstro (SB4) were printed from Hutchinson's computer, Hutchinson reviewed the content and provided it to the guidance director, Connie Hohulin, following the appropriate chain of command. Together, Hutchinson and Hohulin brought the situation

to the attention of the principal, Lynch, at which point Hutchinson offered his understanding of the inappropriate communications.

61. Following the complaints of Mosquera and Winston, on October 14, 2003, Hutchinson was approached by another student, Farah, who reported communications with Respondent, similar to that of Mosquera and Winston. In Hutchinson's presence, Farah logged onto her AOL account and printed for Hutchinson the communications Farah saved between her and FamAstro, which are identified as School Board Exhibit SB5.

62. Stransky, along with her parents, also brought in the printouts of the two saved IMs she had with FamAstro.

Mr. Hutchinson Reports Complaints To Principal

63. As the principal of CSHS, Lynch's duties include, but are not limited to dealing with complaints regarding her staff. She is also responsible for disciplining staff following complaints of any type.

64. Hutchinson relayed to Lynch that several students had complained about inappropriate e-mails and IMs from Respondent, and provided the principal with a copy of the documents which detailed the nature of the conversations. Lynch ordered Respondent to be removed from the classroom following complaints received on October 13, 2003, and initiated a larger investigation. School Board Exhibit SB1 contains a true and

accurate copy of the complaint Lynch signed after Hutchinson reported complaints made by Mosquera, Winston, and Farah, on October 13, 2003.

RESPONDENT IS FAMASTRO

65. The parties dispute whether Petitioners proved that Respondent acted as FamAstro at the times relevant to this proceeding. Based on the considerations that follow, the undersigned concludes that Petitioners established by clear and convincing evidence that Respondent engaged in the communications described above with Mosquera, Winston, Farah, and Stransky using the screen name FamAstro.⁴

66. Respondent has been the owner and holder of AOL Account No. 105-1005-879 since August 29, 1997. Respondent pays for this account with a credit card that is in his name. The AOL account information listed Respondent's address in Plantation, Florida, as the account address and the AOL account information contained Respondent's home telephone number.

67. The following screen names are listed for Respondent's AOL account: FamAstro, drdhmenke, cshsphysics, and GailShots. These screen names are password protected. Respondent frequently changes the passwords for his screen names to protect the security of the accounts. There was no credible evidence to support the theory that someone had hacked into Respondent's AOL

account and created the IMs that are the subject of these proceedings using Respondent's screen name of FamAstro.

68. Respondent's wife also uses Respondent's AOL account, but under her screen name of GailShots. Mrs. Menke testified, credibly, that she did not send the subject IMs. Respondent's son, the only other resident of the Menke house, is five-years old and incapable of sending the subject IMs.

69. Respondent provided his students with a web page URL where they were encouraged to check for assignments and other class updates. There were several screen names connected to the website that were utilized to ask Respondent about assignments, one of which was FamAstro.

70. The class syllabus for Respondent's Honors Physics class at CSHS informed his students that FamAstro was one of Respondent's screen names.

71. The content of the IM communications discuss events that occurred in Respondent's classroom, made reference to students in the class, discussed grades and extra credit work assignments, and offered food to students, which Respondent provided the following day. The IM communications discussed face to face conversations Respondent had had with Stransky. Students in Respondent's class were permitted to complete extra credit assignments to raise their grade. During an online communication with FamAstro, Winston inquired whether she could

"send" the extra credit assignment. FamAstro requested Winston fax the completed assignment to Respondent's home, which Respondent must have received, because Winston was provided the extra credit by Respondent. The fact that Winston sent her extra credit assignment only to Respondent's home fax machine, after invited to do so by the individual communicating as FamAstro, provides a direct link between the Respondent and the communications of FamAstro. FamAstro displayed significant knowledge of classroom activities, including specific knowledge of grades given to students in his class that only the teacher would know. When asked how she could pull up her grade, Respondent, as FamAstro, told Winston she could meet with him before or after class.

72. Farah repeatedly referred to FamAstro as Menke or Dr. Menke. FamAstro referred to himself as a physics teacher and made repeated reference to his class.

73. FamAstro asked Mosquera online whether she ever experienced an orgasm. Following the inquiry, Mosquera left her home to go to the movies, and upon her return, discovered receipt of an e-mail from FamAstro apologizing for making her feel uncomfortable. The next day in school, Mosquera encountered Respondent in the hallway, who asked if she had received the e-mail. In person, Respondent Menke said he was

sorry if he offended Mosquera during their online communications.

74. On more than one occasion, while speaking online, FamAstro offered to bring food to class for Winston, Farah, and Mosquera. On the following day, consistent with the online discussions between FamAstro (Menke) and the students, Respondent would bring food from the teacher planning area for these three students to eat.

Respondent Made Inappropriate Comments In Class

75. Respondent made derogatory statements about Dr. Kadlacek, the assistant principal, to the entire class, including calling him a "dick."

76. Respondent made offensive, inappropriate sexual jokes in class regularly. Respondent repeatedly used inappropriate terms such as "fuck" and "dick."

77. Respondent asked two female students (Stransky and Arendt) whether they were virgins and discussed with them having sex in jello.

Website Material

78. The AOL Hometown webpage registered to FamAstro is titled, "Dr. Dave Menke's Homepage" and contains a profile of Respondent, a picture of him with his two sons, as well as "Preferences and Interests" available at <http://www.hometown/aol.com/famastro>.

79. School Board Exhibit SB2 is a copy of Respondent's personal AOL Hometown webpage.⁵ The identity of the author of the website material is clear because the printouts contained in Exhibit SB2 are rife with photographs of Respondent and comments about Respondent. School Board Exhibit SB2 contains a degrading drawing and degrading comments pertaining to Winston. The drawing was taken from a photograph Respondent took of Winston and was easily recognized by the student witnesses in this proceeding. Petitioners established that a great deal of the material posted on the Respondent's AOL Hometown webpage was used to intentionally and maliciously retaliate against Winston and the other students involved in these proceedings for reporting Respondent's inappropriate conduct to the school administration.

80. The School Board complied with all applicable rules in investigating the allegations against Respondent and in the process that led to the vote to suspend Respondent's employment without pay and to terminate that employment, subject to his right to this due process hearing before DOAH.

CONCLUSIONS OF LAW

81. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Sections 120.569, 120.57(1), and 1012.796 (6), Florida Statutes (2007).

82. Because DOAH Case No. 04-3835 is a proceeding to terminate Respondent'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 its Administrative Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing 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).

83. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

84. Section 1012.33(1)(a), Florida Statutes, provides that any member of the instructional staff may be suspended or dismissed at any time by a School Board for just cause, and further provides

. . . Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful

neglect of duty, or conviction of a crime involving moral turpitude.

85. In DOAH Case No. 05-41889PL, the Commissioner of Education seeks to revoke Respondent's educator's certification. Consequently, the Commissioner 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).

86. Section 1012.795, Florida Statutes (2007), provides, in pertinent part, as follows:

1) The Education Practices Commission may . . . 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 . . .

* * *

(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.

87. Section 120.569(2)(g), Florida Statutes (2007), applies to this administrative proceeding and provides, in relevant part, as follows:

(g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. . . .

88. Both Petitioners in these consolidated proceedings met their respective burdens of proof. The evidence, both direct and circumstantial, clearly and convincingly established that Respondent committed the acts set forth in the foregoing findings of fact section of this Recommended Order.

89. The Principles of Professional Conduct for the Educational Profession in the State of Florida and the Standards of Competent Professional Performance for the Education Profession in the State of Florida are set forth in Florida Administrative Code Rule 6B-1.006, which provides, in relevant part, as follows:

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

(a) Shall make a 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 disparagements;

90. Respondent's communications with students face to face in his classroom constitute misconduct in office which seriously reduced his effectiveness as an employee of the district school board. He used profane language in class, told dirty jokes in class, referred to an assistant principal as a "dick," asked two female students if they were virgins, and discussed having sex in jello with those two students. Those communications justify the termination of his employment and the revocation of his educator's certification.

91. Florida Administrative Code Rule 6B-4.009(2) contains the following definition of the term immorality:

(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.

92. Respondent's online communications with these minor female students constituted gross immorality and acts involving moral turpitude within the meaning of Section 1012.795(1)(c), Florida Statutes.

93. In making the recommendations that follow, the undersigned has considered the recommended disposition set forth in the respective Proposed Recommended Orders filed by Petitioners.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED:

As to DOAH Case No. 04-3835, it is RECOMMENDED that the School Board enter a final order adopting the findings of fact and conclusions of law set forth herein. The School Board's final order should terminate Respondent's employment.

As to DOAH Case No. 04-4189PL, it is RECOMMENDED that the Education Practices Commission enter a final order adopting the findings of fact and conclusions of law set forth herein. The

final order should permanently revoke Respondent's educator certification.

DONE AND ENTERED this 13th day of August, 2007, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of August, 2007.

ENDNOTES

- ^{1/} Unless otherwise noted, all statutory references are to Florida Statutes (2003).
- ^{2/} Unless otherwise noted, all references to rules are to the version of the rule in existence at the time of the alleged offenses.
- ^{3/} Winston was present when Respondent acknowledged FamAstro's online apology to Mosquera. Winston's testimony corroborated Mosquera's.
- ^{4/} Petitioners relied on circumstantial evidence to establish that Respondent acted as FamAstro in sending the IMs that are at issue in this proceeding. The following excerpt, from 24 Fla. Jur. 2d Evidence and Witnesses 484, accurately states the general rule as to the sufficiency of circumstantial evidence in a civil or administrative proceeding:

The proper test for the sufficiency of circumstantial evidence in civil [or administrative] cases is that circumstantial evidence need not exclude every other reasonable hypothesis than the one contended for, but must outweigh all contrary inferences to such extent as to amount to a preponderance of all reasonable inferences that might be drawn from the same circumstances. . .

The following excerpt, from 24 Fla. Jur. 2d Evidence and Witnesses 485, accurately states the more stringent rule that applies in a criminal proceeding:

When circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt, but must be inconsistent with any reasonable hypothesis of his or her innocence. (Citations omitted).

* * *

The undersigned has applied the civil rule in the School Board's Case (DOAH Case No. 04-3835). Because the Commissioner's case (DOAH Case No. 05-4189PL) is penal in nature, the undersigned has applied in that case the more stringent criminal rule. The findings that are reflected in this portion of the Recommended Order do not turn on whether the civil or criminal standard is applied. The direct and circumstantial evidence clearly and convincingly established that Respondent acted as FamAstro in sending the IMs at issue in this proceeding.

^{5/} These materials were posted to Respondent's web page after he was removed from his classroom, but before either of the two Administrative Complaints that underpin these proceedings were prepared.

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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.