STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-0952
	)	
LEROY GIBBS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on June 19, 2006, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Donna M. Ballman, Esquire
Donna M. Ballman, P.A.
4801 S. University Drive, Suite 3010
Fort Lauderdale, Florida 3328

For Respondent: Robert F. McKee, Esquire
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P.O. Box 75638
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STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Amended Administrative Complaint and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

The instant case is before the undersigned on charges filed against Respondent by Dr. Frank Till, the Broward County Superintendent of Schools. The charges are set forth in an Amended Administrative Complaint, which alleges that "just cause" exists to terminate Respondent's employment as a teacher with the Broward County School Board (School Board) inasmuch as Respondent engaged in conduct constituting "misconduct in office,"" immorality," and "acts of moral turpitude" by having a sexual relationship with a student; "resid[ing] with two different minor students while they were still students, without permission [of] or notification to the School Board"; and "engaging in corporal punishment of students, contrary to School Board policy."

Prior to the final hearing, the parties, as directed by the undersigned, filed a Joint Pre-Hearing Stipulation, which provided, in pertinent part, as follows:

> A. Nature of the controversy
>
> Whether or not the Respondent engaged in misconduct in office, immorality and/or moral turpitude by having an affair with a

student, and/or residing with two minor students without permission or notification to the School Board, and/or engaging in corporal punishment of students.

B. Statement of the parties' positions

The School Board is taking the position that Respondent engaged in the above acts, and that termination [i]s more than justified within the context of the applicable statutes, rules, and regulations.

Respondent denies having the affair with the student and, although he admits to both residing with two minor students without permission or notification and engaging in corporal punishment, submits that such misconduct was not either misconduct in office, immorality and/or moral turpitude such as to warrant termination.

* * *

E. Stipulated facts

1. The agency is the School Board of Broward County, Florida, which is located at 600 Southeast Third Avenue, Fort Lauderdale, Broward County, Florida 33301.

2. Petitioner is the Superintendent of Schools for Broward County, Florida.

3. Petitioner is statutorily obligated to recommend the placement of school personnel and to require compliance and observance with all laws, rules and regulations. Petitioner is authorized to report and enforce any violation thereof, together with recommending the appropriate disciplinary action against any instructional personnel employed by the Broward County School Board.

4. Respondent, Leroy Gibbs (Gibbs), is employed by the Broward County School Board as a teacher at Deerfield Park Elementary

School pursuant to a Professional Service[] Contract, and currently holds a Florida educational certificate No. 525309.

5. The Respondent's address is . . . .

6. The complaining girl has provided a micro-cassette in which a male voice stated, "I love you," along with a sentiment that will not be repeated in this document but which is identified in the investigative report.

7. M. Gibbs denies the voice is his on the recording.

8. The complainant also provided a love poem by Mr. Gibbs, which he admits to writing, but denies knowledge as to how the girl obtained it.

9. Mr. Gibbs admits to owning a vehicle that the girl described, but denies the affair. He admits to hugging her, but not in a sexual way. He acknowledges having the music library, and to having a video camera he used to film games. He claims that students stole the tapes and he denies having any of the tapes. He claims she knew about his tattoos from watching him play basketball. He admits to the characteristic of his private part that was identified by the girl, but could not explain how she knew.

10. Mr. Gibbs admitted that he resided with two different minor students while they were students, without permission or notification to the School Board. He has further admitted to engaging in corporal punishment of students, contrary to School Board policy.

At the final hearing (which, as noted above, was held on June 19, 2006) two witnesses testified, T. H. (the now former

student of Respondent's with whom he allegedly had a sexual relationship when she was his student) and Respondent. In addition, six exhibits (Petitioner's Exhibits 1 through 6) were offered and received into evidence. At the close of the evidentiary portion of the hearing on June 19, 2006, the undersigned established a deadline (21 days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The Transcript of the final hearing (which consists of one volume) was filed with DOAH on July 5, 2006.

The School Board and Respondent both timely filed their Proposed Recommended Orders on July 24, 2006.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

Background Information

1. The School Board is responsible for the operation, control and supervision of all public schools (grades K through 12) in Broward County, Florida (including, among others, Dillard High School, Thurgood Marshall Elementary School, and Deerfield Park Elementary School) and for otherwise providing public instruction to school-aged children in the county.

2. Respondent is employed by the School Board as a professional service contract teacher.

3. He has worked as a teacher for the School Board since 1982 (except for a year's leave of absence following the 1994-1995 school year). He has an unblemished disciplinary record as a School Board employee.

4. Respondent taught music at Dillard High School (Dillard) from 1982 until the end of the 1994-1995 school year, at Thurgood Marshall Elementary School for the 1995-1996 school year, and at Parkview Elementary School from the beginning of the 1996-1997 school year until early 2005, when he was placed on administrative reassignment pending the outcome of an investigation of an allegation of sexual misconduct made against him by a former student, T. H.

5. At Dillard, Respondent was the director of the school band and a popular teacher.

Allegations of Sexual Misconduct

6. T. H. graduated from Dillard in 1989.

7. In her ninth, tenth, eleventh and twelfth grade years at Dillard, she was in the school band and a student of Respondent's.

8. T. H., who lived in a fatherless household, looked up to Respondent and considered him to be a "father figure" and "role model."

9. A personal relationship developed between the two.

10. They began conversing with one another on a daily basis, talking "about people and about the world and different things like that." Respondent did most of the talking, with T. H. "listen[ing] to [the] the things he had to say."

11. During "summer band," before the beginning of T. H.'s tenth grade year, the conversations between T. H. and Respondent became more intimate in nature and their relationship evolved into a physical one.

12. The first physical contact they had that summer was in the music library adjacent to Respondent's office, when Respondent walked up to T. H., "embraced" her, and gave her an "[i]ntimate, on-the-mouth kiss."

13. Later that summer, Respondent started driving T. H. home (but not always straight home) in his Toyota Camry after band practice. In the car, there was intimate touching between the two, including Respondent's penetrating T' H.'s vagina with his hand.

14. Thus began the sexual relationship between T. H. and Respondent, which lasted until after she had graduated from Dillard.

15. "[N]umerous times," after school and on weekends, Respondent drove T. H. in his car to various hotels, where they had sexual relations.

16. They also had "dozens" of sexual encounters on school grounds, usually after school hours, in a "little back room," near the school auditorium, that was used as a dressing area.

17. As a result of her having been intimate with Respondent, T. H. was able to observe that Respondent's penis was uncircumcised and that he had a "branded tattoo on his chest."

18. Respondent sometimes set up a video camera to tape his sexual liaisons with T. H.

19. He would also "send [T. H.] home with the camera" on weekends, requesting that she tape herself fondling herself and "and then bring the camera back to him on Monday" (which T. H. did).

20. One day while T. H. was in Respondent's office, Respondent handed her a piece of "notebook paper" on which he had written the following poem:

> How then, can I tell you of my love?
> Strong as the eagle, soft as the dove,
> Patient as the pine tree that stands in the sun and whispers to the wind <u>you</u> <u>are</u> <u>the one</u>!!!![2]

21. On another occasion when T. H. was in Respondent's office, she had a tape recorder with her and asked Respondent to "say something" that she could record. What Respondent said in response to this request was: "I love you baby, suck my dick," and "I love you baby, sit on my face."[3]

22. T. H. ended her relationship with Respondent during her first year as a student at the International Fine Arts College in Miami.

23. It was not until 2003, approximately 14 years after she had graduated from Dillard, that T. H. decided to come forward and tell authorities about the sexual relationship she had had with Respondent when she was a student at the school. She had not come forward sooner because she did not have the courage to do so. Only after receiving "church counseling" was she able overcome her fear and become sufficiently emboldened to report what had occurred years earlier between her and Respondent.

24. T. H. first went to the Fort Lauderdale Police Department, but was told that Respondent could not be criminally prosecuted because the limitations period had expired.

25. In January 2005, the School Board's police unit was advised of the allegation that T. H. had made against Respondent and commenced an investigation into the matter, which included interviews with both T. H. and Respondent. On January 28, 2005, Respondent was placed on administrative reassignment with pay pending the outcome of the investigation.

26. T. H. has "hired an attorney to pursue a civil claim against the School Board" for damages she allegedly suffered as

a result of her relationship with Respondent when she was a student at Dillard.

Allegations of Residing with Students

27. From 1985 to 1987, Respondent resided in Dade County, Florida, with his wife[4] and two minor daughters.

28. For at least a portion of that time, two Dillard students stayed with Respondent and his family.

29. One of these students was P. R., who was in the school band. When Respondent learned that P. R. was living in a residence with "no running water [and] no mom or dad," he invited P. R. to move in with him, an invitation that P. R. accepted. "Eventually," Respondent was able to make contact with P. R.'s mother and obtain her approval to "keep" P. R. P. R. lived with Respondent and his family for a year and a half. He moved out after he graduated and joined the military.

30. The other student that stayed with Respondent and his family was C. M. Respondent's oldest daughter and C. M. both played flute in the school band and were close friends. C. M. stayed at Respondent's house on weekends and when school was not in session. C. M.'s mother never had any problem with these living arrangements.

31. Respondent did not notify the School Board that P. R. and C. M. were staying with him inasmuch as he did not know that he was required to do so.

Allegations of Corporal Punishment

32. From 1982 to 1985, Respondent administered corporal punishment to students contrary to School Board policy (hitting female students on the hand with a ruler and male students on the buttocks with a paddle). He did not "seek permission from anyone in the [school] administration before administering [this] corporal punishment," nor did he administer this corporal punishment in the presence of another School Board employee, as required by School Board policy.

CONCLUSIONS OF LAW

33. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

34. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat.

35. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See §§ 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat.

36. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida

Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat.

37. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons," provided it exercises these powers in a manner that is consistent with the requirements of law. § 447.209, Fla. Stat.

38. At all times material to the instant case, district school boards have had the right, under Section 1012.33, Florida Statutes, and its predecessor, former Section 231.36, Florida Statutes, to dismiss professional service contract teachers for "just cause."

39. At all times material to the instant case, "just cause," as used Section 1012.33, Florida Statutes, and former Section 231.36, Florida Statutes, has been legislatively defined as including, "but . . . not limited" to, "misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude." The "but . . . not limited to" language makes abundantly clear that the list of things constituting "just cause" was intended by the Legislature to be non-exclusive and that other wrongdoing may also constitute "just cause" for dismissal. See Dietz v. Lee County School Board, 647 So. 2d 217, 218-19 (Fla. 2d DCA

1994)(Blue, J., specially concurring)("We assume that drunkenness and immorality, which are not included in the non-exclusive list of sins [set forth in Section 231.36(1)(a), Florida Statutes (2001)] constituting just cause, would also be grounds for dismissal. . . . In amending section 231.36 and creating a new contract status for teachers (professional service) and by failing to further define just cause, the legislature gave school boards broad discretion to determine when a teacher may be dismissed during the contract term. . . . I agree with the majority--that the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause.'"[5]).

40. At all times material to the instant case, "misconduct in office" has been defined by rule of the State Board of Education (specifically Florida Administrative Code Rule 6B-4.009, "Criteria for Suspension and Dismissal") as follows:

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

41. The Principles of Professional Conduct for the Education Profession in Florida (set forth in Florida

Administrative Code Rule 6B-1.006), at all times material to the instant case, have required a teacher to, among other things, make a reasonable effort to protect a student from harmful conditions and to not "exploit a relationship with a student for personal gain or advantage."

42. "Misconduct in office" may be established, even in the absence of "specific" or "independent" evidence of impairment, where the conduct engaged in by the teacher is of such a nature that it "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See 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, 128-29 (Fla. 2d DCA 2000); Summers v. School Board of Marion County, 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995); Brevard County School Board v. Jones, No. 06-1033, 2006 Fla. Div. Adm. Hear. LEXIS 287 *17 (Fla. DOAH June 30, 2006)(Recommended Order)("[T]he need to demonstrate 'impaired effectiveness' is not necessary in instances where the misconduct by a teacher speaks for itself, or it can be inferred from the conduct in question."); and Miami-Dade County School Board v. Lefkowitz, No. 03-0186, 2003 Fla. Div. Adm. Hear. LEXIS 675 *23-24 (Fla. DOAH July 31, 2003)(Recommended Order)("The School Board failed to prove by a

preponderance of the direct evidence that Mr. Lefkowitz's actions were so serious that they impaired his effectiveness as a teacher. Nonetheless, based on the findings of fact herein, it may be inferred that Mr. Lefkowitz's conduct impaired his effectiveness as a teacher in the Miami-Dade County public school system.")(citation omitted). A teacher's having a sexual relationship with a student under his charge to whom he is not married[6] is an example of such conduct that "speaks for itself." See Lee County School Board v. Lewis, No. 05-1450, 2005 Fla. Div. Adm. Hear. LEXIS 1327 *25 (Fla. DOAH October 20, 2005)(Recommended Order)("In this case, the seriousness of Respondent's misconduct in inappropriately touching S.W., 'speaks for itself' because it undermines the foundation of the relationship between a teacher and his students."); Brevard County School Board v. Gary, No. 03-4052, 2004 Fla. Div. Adm. Hear. LEXIS 1731 *14-15 (Fla. DOAH June 24, 2004)(Recommended Order)("The misconduct in this case involves Gary's inappropriate comments to students, inappropriate touching of students, and betting a student money to eat an insect and to eat food chewed by Gary. The misconduct goes to the very heart of a teacher's relationship to his students. As such, it can be inferred that such conduct impairs Gary's effectiveness in the Brevard County School system."); and Miami-Dade County School Board v. Durrant, No. 98-3949, 1999 Fla. Div. Adm. Hear. LEXIS

5227 *16 n.8 (Fla. DOAH July 6, 1999))(Recommended Order) ("Here, there was direct proof that Respondent's conduct [involving sexual activity with a student] adversely affected his effectiveness in the school system. Moreover, such a conclusion may also be reasonably drawn in the absence of 'specific evidence' of impairment of the teacher's 'effectiveness as an employee,' where, as here, the 'personal conduct' in which the teacher engaged is of such nature that it 'must have impaired [the teacher's] effectiveness.'"); see also Tomerlin v. Dade County School Board, 318 So. 2d 159, 160 (Fla. 1st DCA 1975)("Although Tomerlin's immoral act [of performing cunnilingus on his stepdaughter] was done at his home and after school hours, it was indirectly related to his job. His conduct is an incident of a perverse personality which makes him a danger to school children and unfit to teach them. Mothers and fathers would question the safety of their children; children would discuss Tomerlin's conduct and morals. All of these relate to Tomerlin's job performance. . . . A school teacher holds a position of great trust. We entrust the custody of our children to the teacher. We look to the teacher to educate and to prepare ou[r] children for their adult lives. To fulfill this trust, the teacher must be of good moral character; to require less would jeopardize the future lives of our children."); and Broward County School Board v. Sapp, No. 01-

3803, 2002 Fla. Div. Adm. Hear. LEXIS 1574 *16 (Fla. DOAH September 24, 2002)(Recommended Order)("[A]s a teacher and coach, Sapp was required to be a role model for his students. To be effective in this position of trust and confidence, he needed to maintain a high degree of trustworthiness, honesty, judgment, and discretion.").

43. "Under Florida law, a [district] school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."[7] Sublett, 617 So. 2d at 377.

44. Where the employee is a professional service contract teacher, the hearing may be conducted, pursuant to Section 1012.33, Florida Statutes, either by the district school board itself or by a DOAH administrative law judge (who, following the hearing, makes a recommendation to the district school board).

45. The teacher must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, or policy] the [district school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. School Board of Dade

County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring).

46. At the hearing, the burden is on the district school board to prove the allegations contained in the notice. Unless there is collective bargaining agreement covering the bargaining unit of which the teacher is a member that provides otherwise[8] (and there is no evidence that there is such a collective bargaining agreement controlling the instant case), the district school board's proof need only meet the preponderance of the evidence standard. See McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal."); Sublett v. Sumter County School Board, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We agree with the hearing officer that for the School Board to demonstrate just cause for termination, it must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true . . . ."); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not involve the loss of a license and, therefore, Allen's losses are

adequately protected by the preponderance of the evidence standard."); and Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence to support both charges by a preponderance of the evidence standard.").

47. In determining whether the district school board has met its burden of proof, it is necessary to evaluate the district school board's evidentiary presentation in light of the specific allegation(s) made in the written notice of charges. Due process prohibits a district school board from terminating a professional service contract teacher based on matters not specifically alleged in the notice of charges, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

48. The most serious of the allegations made in the notice of charges served on Respondent in the instant case is that he had a sexual relationship with T. H. when she was a student of his at Dillard. At hearing, in support of this allegation, the School Board, through the Superintendent of Schools, presented

the testimony of T. H., who recounted her sexual encounters with Respondent. Respondent countered with his own testimony denying that these encounters had occurred. T. H. and Respondent were the only witnesses to testify, and just one of them could have been telling the truth. While they each had a possible motive to testify falsely (in T. H.'s case, to further her plan of filing a civil lawsuit for monetary damages against the School Board;[9] and in Respondent's case, to protect his job with the School Board and his reputation), the undersigned, having considered their demeanor while testifying and the content of their testimony, as well as the exhibits received into evidence, has concluded that it was T. H., not Respondent, who testified truthfully about the nature of their relationship.

49. T. H. testified with apparent candor and sincerity. Her testimony was neither implausible, incredible, nor inherently inconsistent. It is true, as Respondent points out in his Proposed Recommended Order, that T. H. was unable to describe certain details regarding the "little back room" near the school auditorium where, according to her testimony, her "on campus" sexual encounters with Respondent took place. These details, however, were relatively insignificant, and T. H.'s inability to describe them after the years that have passed since she graduated from Dillard does not cause the undersigned to disbelieve her testimony. It appears, given the totality of

the evidence, that her failure to be able to provide these details was due to a lack of recall or observation, not dishonesty or delusion. Compare with United States v. Price, No. 04-40035-SAC, 2004 U.S. Dist. LEXIS 17916 *6 (D. Kan. August 4, 2004)("The court finds that the testimony of the officers was generally consistent and persuasive. Although defendant's counsel pointed out many details which the officers did not recall, the omissions in the officers' testimony or their reports noted by the defendant involved insignificant details or innocent errors."); State v. Highman, Nos. 01-0733-CR and 01-0734-CR, 2001 WI App. 224, 2001 Wisc. App. LEXIS 860 *17 (Wis. App. August 23, 2001)("The details that the officer was not able to remember are not significant, and his inability to remember a few insignificant details does not undermine the reliability of the substance of his report and recollections."); and Carrington v. State, No. 09-96-247 CR, 1997 Tex. App. LEXIS 3381 *3 (Tex. App. June 25, 1997)("Appellant's brief challenges the officers' lack of recall of insignificant details of the events surrounding the offense, notes minor discrepancies in the testimony, and criticizes the State's failure to conduct more extensive forensic testing. We find the evidence sufficient for any rational trier of fact to have found, beyond a reasonable doubt, that appellant committed the offense of delivery of a controlled substance as alleged in the application paragraph of

the jury charge."). Of the factors that, collectively, tip the balance in favor of a finding that, despite her inability to recount these details, her testimony was not fabricated, the most compelling are her knowing that Respondent's penis was uncircumcised;[10] her having in her possession a poem, written on "notebook paper" in Respondent's handwriting, expressing feelings of love and affection (which poem is set forth in Finding of Fact 20 of this Recommended Order[11]); and her producing a tape recording of Respondent making lewd comments to her (which comments are described in Finding of Fact 21 of this Recommended Order[12]).

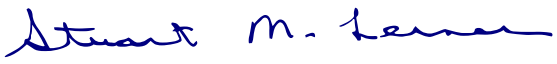
50. Having established by a preponderance of the evidence that, as alleged in the Amended Administrative Complaint, Respondent had a sexual relationship with T. H. when she was a student of his at Dillard (a violation of the Principles of Professional Conduct for the Education Profession in Florida involving a betrayal of trust so serious as to impair his effectiveness as a teacher in the school system inasmuch as it casts grave doubt on his trustworthiness, which is an essential requirement of any teaching position), the School Board has met its burden of proving that Respondent is guilty of "misconduct in office"[13] and that, therefore, there is "just cause" for the School Board to terminate his employment.[14]

RECOMMENDATION

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

RECOMMENDED that the School Board issue a final order sustaining Respondent's suspension and terminating his employment as a professional service contract teacher with the School Board for having had a sexual relationship with T. H. when she was a student of his at Dillard.

DONE AND ENTERED this 23rd day of August, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2006.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2006).

[2] A copy of this writing was offered and received into evidence as part of Petitioner's Exhibit 1.

[3] A copy of this recording was offered and received into evidence as Petitioner's Exhibit 2. Listening to the recording reveals that the voice uttering these words sounds like Respondent's. (The undersigned heard Respondent's voice when he testified.) Compare with McCone v. State, 866 P.2d 740, 756 (Wyo. 1993)("There was sufficient evidence to identify McCone as the caller in call #5 based on the tape recording made of the call and Officer Donnelly's identification of McCone as the voice on the tape. In addition, the recording of call #5 was played to the jury and the jury heard McCone's voice during his testimony.").

[4] Respondent has been married to his wife for the past 37 years.

[5] Judge Blue noted in his opinion that the Legislature provided a "separate standard for dismissal" of continuing contract teachers which authorized the taking of such action only "for conduct constituting one of the so-called 'seven deadly sins': immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude." Id. at 218.

[6] Cf. Tenbroeck v. Castor, 640 So. 2d 164, 168 (Fla. 1st DCA 1994)("Angela and appellant's marriage cannot form the basis of action against appellant's license because no policy or rule forbids a marriage between a teacher and a student. . . . Lest it be misunderstood, this opinion should not be read as restraining the EPC from taking disciplinary action against a teacher guilty of maintaining an inappropriate relationship with a student. This opinion is confined to the facts presented in this case. Nothing herein is intended to intimate that inappropriate teacher/student relationships may not form the basis for charges against a teacher.").

[7] "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

[8] Where the district school board, through the collective bargaining process, has agreed to bear a more demanding standard, it must honor, and act in accordance with, its agreement. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its

employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment . . . ."); and Palm Beach County School Board v. Auerbach, No. 96-3683, 1997 Fla. Div. Adm. Hear. LEXIS 5185 *13-14 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . . However, in this case, the district must comply with the terms of the collective bargaining agreement, which, as found in paragraph 27, above, requires the more stringent standard of proof: clear and convincing evidence.").

[9] No proof was submitted that T. H. had any other possible motive, beside a monetary one, to falsely accuse Respondent of wrongdoing. Moreover, it is not readily apparent why T. H., if she were to have fabricated a story for monetary gain, would have cast Respondent, rather than someone else, as the wrongdoer. (While it seems, from T. H.'s testimony, that she harbors personal animus against Respondent, it appears that this animus exists only because Respondent had a sexual relationship with her and thereby, in her view, "victim[ized]" her and "screwed [her] up mentally.")

[10] Respondent admitted, during his testimony, that he was not circumcised.

[11] In his testimony, Respondent conceded that the handwriting on the paper was his. He denied giving T. H. this handwritten poem, but failed to offer any possible alternative explanation for her having it.

[12] In his Proposed Recommended Order, Respondent argues that, "[e]ven if the ALJ were to find that the voice on the tape recording belonged to Respondent [contrary to Respondent's testimony at hearing], the comments made on the tape, however crude, do not, of themselves, prove the existence of a sexual relationship between the Respondent and T. H." While it may be true, as Respondent contends, that proof of his making these "crude" remarks would be insufficient, standing alone, to establish that he and T. H. had sexual relations, this proof

does not stand alone; rather, it corroborates T. H.'s testimony regarding the sexual component of the relationship she had with Respondent.

[13] Respondent's reliance on the Tenbroeck case in support of his argument to the contrary is misplaced. The facts of that case are distinguishable from those present in the instant case. Tenbroeck involved an assistant principal's appeal of a final order in which the Education Practices Commission (EPC) had taken disciplinary action against his certificate based on a finding that he had had a "personal relationship" with a female student (whom he had ultimately married when she was still a student). At the proceedings below, this female student testified "that she and appellant first became romantically involved the night they were married," and she denied that they had been involved in a "personal relationship" before then. The hearing officer rejected the student's testimony as not credible, finding "that the evidence, 'at least inferentially,' showed that appellant was engaged in a "personal relationship" with [the student] beginning in the Spring of 1990 and continuing until their marriage in December 1990," a finding the EPC, in its final order, adopted, along with the hearing officer's conclusion that, based on this "personal relationship," disciplinary action against the assistant principal's certificate was warranted. On appeal, the appellate court reversed the EPC's final order, explaining:

> In finding a personal relationship based upon the evidence presented, the hearing officer erred. The evidence was not clear and convincing that appellant and [the student] maintained an inappropriate personal relationship rather than a teacher/student relationship prior to their marriage. While the facts may raise a suspicion of wrongdoing, they do not rise above mere suspicion. Speculation, surmise and suspicion cannot form the basis of disciplinary action against a teacher's professional license. Having found no competent evidence beyond speculation, surmise and suspicion that an inappropriate relationship existed between appellant and [the student], the charges against appellant cannot be sustained.

Tenbroeck, 640 So. 2d at 167 (citation omitted). Unlike in Tenbroeck, in the instant case the preponderance of the evidence standard, not the clear and convincing standard, applies, and, more importantly, there is "competent evidence beyond speculation, surmise and suspicion" that an inappropriate relationship outside of marriage existed between Respondent and one of his students. That evidence consists primarily of the student's testimony, which the undersigned has credited.

[14] Given this conclusion, it is unnecessary to, and therefore the undersigned will not, decide whether Respondent's termination is justified on any of the other grounds set forth in the Amended Administrative Complaint. (Respondent has acknowledged that, as alleged in the Amended Administrative Complaint, he "resided with two different minor students while they were still students, without permission [of] or notification to the School Board" and "engage[ed] in corporal punishment of students, contrary to School Board policy," but he denies that his having done so gives the School Board "just cause" to terminate his employment.)

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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.