

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ERIC J. SMITH, AS)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 09-6781PL
)
TERRENCE THOMAS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 24, 2010, in Daytona Beach, Florida, before J. D. Parrish, an Administrative Law Judge, of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ron Weaver, Esquire
Post Office Box 5675
Douglasville, Georgia 30154

For Respondent: Joan Stewart, Esquire
Florida Education Association
300 East Park Avenue
Tallahassee, Florida 32301-1514

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated Subsections 1012.795(1)(d), 1012.795(1)(g), and 1012.795(1)(j), Florida Statutes (2006), and Florida Administrative Code Rules

6B-1.006(3)(a), 6B-1.006(3)(e), and 6B-1.006(3)(h), and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On August 26, 2009, Dr. Eric J. Smith, as Commissioner of Education (Petitioner), filed a six-count Administrative Complaint against Terrence Thomas (Respondent), alleging that he violated the provisions of Florida law noted above. The Respondent timely disputed the factual allegations of the complaint and executed an Election of Rights that chose the "Settlement Option" with "Formal Hearing" if settlement could not be reached. The parties were unable to reach a settlement.

On December 16, 2009, the matter was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings. A Notice of Hearing with an Order of Pre-Hearing Instructions was entered on January 7, 2010, and the case was scheduled for hearing for February 24, 2010.

At the outset of the hearing Petitioner entered an ore tenus Motion in Limine to exclude evidence related to the school district's disciplinary decision against Respondent. Petitioner maintained that the school district's decision is irrelevant to the instant matter. It is concluded that while the disciplinary decision of the school district does not control the outcome of this case, such action may be considered in reaching the

ultimate findings and conclusions of this cause. Accordingly, the Motion in Limine is denied.

At the final hearing the Petitioner presented testimony from six witnesses. Petitioner's Exhibits 1-5 were admitted into evidence. Respondent testified on his own behalf and adopted the cross-examination of Petitioner's witnesses. Respondent offered Exhibits 1-3 that were also received in evidence.

The Transcript of the hearing was filed with DOAH on March 11, 2010. The parties were granted ten days' leave within which to file their proposed recommended orders. On March 19, 2010, Petitioner filed a Joint Motion for Extension of Time to File Proposed Recommended Orders that was granted. The parties were then given until March 26, 2010, to file their proposed orders. Both timely filed proposals that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, on behalf of the Education Practices Commission, is charged with the responsibility of certifying and regulating public school teachers in Florida.

2. In accordance with the Order of Pre-hearing Instruction entered in this cause the parties submitted a Joint Pre-hearing Stipulation. Included in that document were the following stipulations of fact:

1. Respondent holds Florida Educator's Certificate 798852, covering the area of Athletic Coaching, which is valid through June 30, 2012.

2. At all times pertinent to the allegations in the Administrative Complaint in this case, Respondent was employed as an Exceptional Student Education Teacher at Atlantic High School in the Volusia County School District.

3. C. W. was a sixteen-year-old female student at Atlantic High School. On or about December 2, 2008, while C. W. was in another teacher's geometry class, Respondent sat next to C. W. at a table toward the rear of the class. Respondent initiated an exchange of notes (sic) between himself and C. W. The note stated:

Respondent: What's your boyfriend's name?

Student: Don't have one why?

Respondent: I don't believe that!!

Student: Why not????

Respondent: Because you look like you should have one!

Student: Why do I need one LOL no guys are attractive here . . . why do I look like I should have one?

Respondent: I never said you needed one!! You just have that look and I can't say why.

Student: ooo so there's a look that people have when they have a b/f or g/f. Why can't you say why?

Respondent: You are too sexy not to have a ton of guys chasing after you and one of the (sic) should have caught

you. If I was in high school I would most definitely be one of them.

Student: haha well its not like that at all. They are all UGLY

Respondent: So what are you looking for? A super model?

4. The above-referenced note between Respondent and C. W. was inappropriate. C. W. put the note away and did not respond to Respondent's last inquiry. Respondent attempted to retrieve the note from C. W. C. W. kept the note and turned it in to school administration and reported the Respondent's conduct.

3. As a result of the foregoing exchange, the student, C. W., was very uncomfortable. She began to think that Respondent had been "coming on" to her. Although Respondent denied that assumption, he acknowledges that the exchange was inappropriate and in poor judgment. Further he acknowledged that the exchange had left C. W. uncomfortable.

4. At no time has Respondent ever denied that the exchange took place and he has not attempted to avoid punishment for the incident. After the exchange and becoming aware of C. W.'s unease, Respondent made every effort to avoid C. W. so that neither would be uncomfortable.

5. To that end the school administration moved Respondent from the classroom where C. W. was assigned, to another classroom.

6. Respondent was disciplined by the school district and remained at Atlantic High School for the remainder of the school year.

7. C. W.'s mother believes Respondent should have been removed from the school. When he was not, ultimately C. W. transferred to another school to complete her senior year. C. W. believes that she was treated unfavorably by students who endorsed Respondent and did not support her decision to report the note-writing incident.

8. Respondent was previously disciplined by another school district for whom he worked. The prior disciplinary event also led to action by the Education Practices Commission. The prior act was dissimilar in facts to the instant case.

9. Respondent is a well-educated and experienced teacher. He holds bachelor and master degrees. Respondent became a teacher in 1998 and has been continuously employed by various school districts since that time. Additionally, he taught at a detention center for youthful offenders for approximately one year. In short, Respondent should have known better than to engage in note writing with C. W., and should not have initiated the note.

10. In addition to distracting C. W. during a class when she should have been allowed to engage in learning, Respondent's

conduct in continuing the note writing was immature and contrary to meaningful teaching practices.

11. Respondent has always achieved acceptable performance evaluations. Despite the unrelated lapses in judgment resulting in disciplinary actions, Respondent has continued in employment with the school district.

12. At no time has Respondent ever attempted to touch C. W. inappropriately. At no time did Respondent actually verbally speak to C. W. The entire inappropriate exchange consisted of note writing.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

14. Subsection 1012.795, Florida Statutes (2008) (the version of the statute in effect at the times relevant to this case), gives the Education Practices Commission the authority to suspend or revoke the teaching certificate of any person, or to impose any penalty provided by law, if the person is guilty of certain specified acts. Pertinent to this proceeding are the following provisions of that law:

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for up to 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 up to 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 an order of the court or notice by the Department of Revenue relating to the payment of child support; or may impose any other penalty provided by law, if the person:

* * *

(d) Has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.

* * *

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

* * *

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

15. Petitioner alleged that Respondent violated the foregoing provisions. Additionally, Petitioner maintains that

Respondent's conduct also constitutes a violation of administrative rules governing the actions of educators in Florida. More specifically, Petitioner has alleged that Respondent violated Florida Administrative Code Rules 6B-1.006(3)(a), 6B-1.006(3)(e), and 6B-1.006(3)(h). Florida Administrative Code Rule 6B-1.006 provides, in pertinent part:

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

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

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

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

* * *

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

* * *

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

16. Florida Administrative Code Rule 6B-4.009(2) defines "immorality" 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.

17. "Moral turpitude" although not specifically defined involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. It has also been defined as anything done contrary to justice, honesty, principle, or good morals. Further, moral turpitude often involves the question of intent as when an act is unintentionally committed through error of judgment when moral wrong was not contemplated. See State ex rel Tullidge v. Hollingsworth, 146 So. 660 (Fla. 1933).

18. Courts have not determined that writing a note to a student would or should constitute moral turpitude or gross immorality. To evaluate an act to determine whether it constitutes an act of moral turpitude, courts consider whether the act reflects on the honesty, integrity, and good morals of the offender. See Cambas v. Department of Business and Professional Regulation, 6 So. 3d 668 (Fla. 5th DCA 2009).

19. In this regard, Petitioner has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. Petitioner demonstrated that Respondent wrote an inappropriate note to a student. The content of the note made the student uncomfortable and resulted in unnecessary embarrassment. It is concluded that Respondent did not intend to cause such a result. It is further concluded that Respondent did not do anything after writing the note to foster or encourage the discomfort the student felt subsequent to the incident.

21. In evaluating the content of the note and Respondent's subsequent behavior to assess Respondent's honesty and integrity, it should be noted that Respondent took full responsibility for his inappropriate conduct. Respondent acknowledged the poor judgment when confronted by school officials and continues to exhibit remorse for his behavior. By attempting to retrieve the note, he demonstrated that he knew it was wrong to pass the note with the student, that the content of the note was also inappropriate, and that he did all he could to avoid the student to lessen the discomfort caused by the note. Respondent's claim that he did not intend a sexual advance toward the student has been deemed credible. Thus, it is concluded Respondent did not commit an act of moral turpitude or gross immorality.

22. Next, as to whether Respondent's personal conduct has seriously reduced his effectiveness as an employee of the

district school, it is concluded that the acts complained of have not resulted in reduced effectiveness. Respondent remained at the school for the remainder of the school year without further incident. Although the student and her mother were troubled by Respondent's remaining at the school, there is no evidence that he or anyone on his behalf did anything to further foster the student's discomfort. Respondent never inappropriately touched or spoke to the student. Respondent avoided any contact with the student and took measures to avoid being in sight of the student. Since other students did not express concerns regarding the single incident complained of in this matter, it is concluded that Respondent's effectiveness as a teacher was not reduced.

23. Nevertheless, Petitioner has established by clear and convincing evidence that Respondent's action in the note-writing exchange violated the Principles of Professional Conduct for the Education Profession as prescribed by the State Board of Education rules. More specifically, it is found that Respondent failed to 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. Further, the student was subjected to embarrassment as a result of the incident. Despite Respondent's admission of guilt and confession of error of judgment, the student did not escape the incident without

adverse consequences. Although Respondent did not attempt to exploit a relationship for any personal motive or gain, he did subject the student to unnecessary consequences that could have been avoided had he simply refrained from note writing.

24. Thus, having determined that Respondent violated the rules of Principles of Professional Conduct for the Education Profession in Florida, an appropriate penalty must be determined. Petitioner has proposed that Respondent's educator certificate be permanently revoked. Even taking into consideration Respondent's prior disciplinary action, permanent revocation of the certificate is deemed too harsh. Further, suspension of Respondent's certificate under the circumstances of this case is also deemed too harsh.

25. Section 1012.796, Florida Statutes, provides, in part:

(7) A panel of the commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:

(a) Denial of an application for a teaching certificate or for an administrative or supervisory endorsement on a teaching certificate. The denial may provide that the applicant may not reapply for certification, and that the department may refuse to consider that applicant's application, for a specified period of time or permanently.

(b) Revocation or suspension of a certificate.

(c) Imposition of an administrative fine not to exceed \$2,000 for each count or separate offense.

(d) Placement of the teacher, administrator, or supervisor on probation for a period of time and subject to such conditions as the commission may specify, including requiring the certified teacher, administrator, or supervisor to complete additional appropriate college courses or work with another certified educator, with the administrative costs of monitoring the probation assessed to the educator placed on probation. An educator who has been placed on probation shall, at a minimum:

1. Immediately notify the investigative office in the Department of Education upon employment or termination of employment in the state in any public or private position requiring a Florida educator's certificate.

2. Have his or her immediate supervisor submit annual performance reports to the investigative office in the Department of Education.

3. Pay to the commission within the first 6 months of each probation year the administrative costs of monitoring probation assessed to the educator.

4. Violate no law and shall fully comply with all district school board policies, school rules, and State Board of Education rules.

5. Satisfactorily perform his or her assigned duties in a competent, professional manner.

6. Bear all costs of complying with the terms of a final order entered by the commission.

(e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.

(f) Reprimand of the teacher, administrator, or supervisor in writing, with a copy to be placed in the certification file of such person.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a panel of the Education Practices Commission enter a final order finding Respondent guilty of violating the standards of conduct applicable to educators in Florida, found in Florida Administrative Code Rules 6B-1.006(3)(a), and 6B-1.006(3)(e), imposing an administrative fine in the amount of \$2,000.00, and requiring a period of probation not less than one year under the terms and conditions deemed most appropriate by the panel.

DONE AND ENTERED this 28th day of April, 2010 in Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
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this 28th day of April, 2010.

COPIES FURNISHED:

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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.