SCHOOL DISTRICT OF MANATEE COUNTY

May 26, 2011

State of Florida
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32301

Re: **SBMC vs. Charles E. Willis—DOAH Case No. 10-10087**
SBMC Case No. 10-0019

Dear Clerk:

Pursuant to section 120.57(1)(m), Florida Statutes (2010), enclosed please find a copy of the Final Order entered by the Board on May 25, 2011 and filed with .the agency clerk on May 25, 2011. Also enclosed are the Petitioner's Exceptions to Recommended Order and Respondent's Response to Petitioner's Exceptions.

Sincerely,

Lyn Lego
Agency Clerk
School Board of Manatee County

/me

Encl.
cc: Scott A. Martin, Esq.
Melissa Mihok, Esq.

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BEFORE THE SCHOOL BOARD
OF MANATEE COUNTY, FLORIDA

SCHOOL BOARD OF MANATEE COUNTY, FLORIDA,

Petitioner/Employer,

vs.

CHARLES E. WILLIS,

Respondent/Employee.

_____/

DOAH CASE NO. 10-10087
SBMC CASE NO. 10-0019

FINAL ORDER APPROVING PETITIONER'S EXCEPTIONS AND ADOPTING RECOMMENDED ORDER SUBJECT TO THOSE EXCEPTIONS

THIS CAUSE, having come before the School Board of Manatee County, Florida, on **May 23, 2011**, for final action on the RECOMMENDED ORDER of the Administrative Law Judge ("ALJ"), **William F. Quattlebaum**, dated **March 31, 2011**, and the School Board, having heard the positions of the parties, and considered the entire record, hereby approves the Petitioner's Exceptions as stated below and otherwise adopts the RECOMMENDED ORDER, subject to the Petitioner's Exceptions approved herein, as the School Board's Final Order.

CONSIDERATION OF THE ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT

The School Board hereby adopts the findings of fact made by the ALJ in his Recommended Order, subject to the following exceptions:

1. As to the Finding of Fact #8, the School Board approves Petitioner's exception. The Board has reviewed the entire record and hereby finds that there is no competent substantial evidence to support the ALJ's finding of fact #8 insofar as it states that "At all times material to this case, the Petitioner had no policy, written or otherwise, that . . . regulated the use of any

social networking website by an employee." While the competent substantial evidence established that the Board had no policy specifically directed toward use of social networking sites, the ALJ's language goes too far in that it states that no Board policy regulated the Respondent's conduct on social networking websites. The Board finds that the record conclusively establishes, and the ALJ's Conclusion of Law #44 reflects, that during times material to this case School Board Policy 6.11 was in effect. School Board Policy 6.11 states, in part, that a violation of the Code of Ethics or Principles of Professional Conduct of the Education Profession in Florida will subject an employee to discipline up to and including termination. Thus, the Board in fact had a policy that regulated employees' use of social networking websites to the extent that usage might constitute a violation of the Code of Ethics or Principles of Professional Conduct of the Education Profession in Florida. Any contrary finding cannot be supported by the record.

2. As to Finding of Fact #14, the School Board approves Petitioner's exception. The School Board has reviewed the entire record and hereby finds that there is no competent substantial evidence to support the ALJ's finding of fact insofar as it states that "the image [Pet. Ex. 2] was perceived by some viewers as depicting the broadcaster holding his penis in a sexually-suggestive position." (emphasis added). The ALJ's use of the word "some" in this factual finding suggests that the record contains evidence that some persons did not so interpret the image. A full and complete review of the record shows that every witness testifying as to what Petitioner's Exhibit Two represented, including the Respondent, stated that it represented a penis being held in a sexually suggestive manner. (T. 51, 55, 91, 136, 147, 174, 219, 245). As there was no evidence in the record as to any alternative interpretation of the image, use of the word "some" in the ALJ's finding of fact #14 is not supported by competent substantial evidence in the record.

3. As to Finding of Fact #24, the School Board approves Petitioner's exception. The School Board has reviewed the entire record and hereby finds that there is no competent substantial evidence to support the ALJ's finding of fact insofar as it states that, "Upon the initiation of this disciplinary action, the Respondent altered his privacy settings on the social networking sites to limit access of personal content to adults." The evidence in the record does not support this factual finding in several respects.

Disciplinary actions brought before the School Board are initiated by the filing of an Administrative Complaint by the Superintendent. Respondent clearly states in the record that it was the investigation of this matter and a recommendation from Bruce Proud of the Manatee Education Association ("MEA") that drove him to modify his social networking website content – actions that took place well before the filing of the Administrative Complaint. (T. 43-45). As Respondent testified, "The items that [Mr. Proud] thought were going to be brought up, I deleted. And after the investigation, if there was anything that he did not mention that Ms. Horne mentioned in her investigation, I went back and took that off as well." (T. 45). No testimony, other than Respondent's, was presented on this matter. Thus, there is no competent substantial evidence in the record to support a different finding.

Second, the record does not support a finding that Respondent "altered his privacy settings on the social networking sites to limit access of personal content to adults." Rather, as stated above, the record shows that Respondent deleted the allegedly inappropriate content from his Facebook page at the urging of the MEA representative. (T. 44). His motivation was not, as the ALJ's finding states, to "limit access of personal content to adults." Thus, there is no competent substantial evidence in the record to support a different finding.

Third, the ALJ's finding states that Respondent "altered his privacy settings" on the Facebook page to which students of the District had been added as friends. The record does not

support this finding. Respondent's testimony – the only evidence offered on the subject – establishes that upon deletion of the inappropriate content from his Facebook page, Respondent created a second Facebook page and in regard to that second page refrained from adding students as friends. (T. 43-44). Thus, there is no competent substantial evidence in the record to support a different finding.

Fourth, there is no competent substantial evidence in the record to support the ALJ's finding that Respondent restricted his newly created second Facebook page to adults only. Rather, Respondent's testimony – again, the only evidence presented on the matter – established that his newly created second Facebook page limited access by students only in that Respondent has "not accepted [students] as friends" and that the new page was restricted such that "only friends can see what I post." There is no indication in the record that Respondent's second Facebook page is accessible by "adults only" as found by the ALJ, i.e., that access to Respondent's page is somehow limited by the age of the viewer. Indeed, there is no evidence in the record that Facebook settings may be set based on the majority or minority age of the viewer.

4. As to Finding of Fact #31, the School Board approves Petitioner's exception. The School Board has reviewed the entire record and hereby finds that there is no competent substantial evidence to support the ALJ's finding of fact insofar as it states that, "there was no evidence that there was any adverse consequence to the Respondent's failure to seek permission to hold the organizational meeting in the previously-approved play rehearsal space." The School Board notes that the ALJ did not find there was "no credible evidence" on this issue; rather the ALJ found that there was an absence of evidence, i.e., "no evidence" whatsoever, on this issue. Contrary to this finding, a full and complete review of the record shows that witness Jim Pauley, Principal of BRHS, testified that Respondent's breach of proper protocol for holding a private meeting on school grounds resulted in increased costs of utilities that would otherwise be passed

on to the private group holding the meeting (T. 207) and also resulted in increased potential liability should one of the participants be injured. (T. 207-08). The Board also finds that there was evidence of an "adverse consequence" in that that Principal – the person relied primarily upon by this Board to effectively govern the school – was by Respondent's actions denied the basic information he would need to decide whether this particular meeting should be held on school grounds. (T. 207). Further, even in the absence of direct evidence, an "adverse consequence" may be inferred from Respondent's actions in that they denied the Principal the opportunity to make a decision regarding the appropriateness of the private meeting and thereby created a situation involving the school beyond the Principal's governance and control.

CONSIDERATION OF THE ADMINISTRATIVE LAW JUDGE'S CONCLUSIONS OF LAW

The School Board hereby adopts the conclusions of law made by the ALJ in his Recommended Order, subject to the following exceptions:

5. In Conclusion of Law #48, the ALJ concluded "The evidence established that the Respondent failed to exercise the best professional judgment in his use of social networking websites. This evidence failed to establish that the violation of the Code of Ethics was so serious as to impair the Respondent's effectiveness in the school system." The School Board concurs with and adopts that portion of the ALJ's conclusion that states that Respondent violated Rule 6B-1.001(2) of the Florida Administrative Code, a/k/a the Code of Ethics of the Education Profession of Florida, which requires Respondent to "seek to exercise the best professional judgment and integrity." However, the School Board grants Petitioner's exception to that portion of the ALJ's Conclusion of Law #48 that states that Respondent's violation of the Code of Ethics was not "so serious as to impair the Respondent's effectiveness in the school system"

which precludes a finding of "misconduct in office" as defined in Rule 4.009(3), Florida Administrative Code.

6. The findings of fact made by the ALJ establish that Respondent exposed over 100 students of the school district (Finding of Fact #8) to sexual imagery (the "Accidental Porn" image described in Finding of Fact #14); references to bribery via oral sex (the "It's not who you know, it's who you blow" posting described in Finding of Fact #12); explicit profanity (the "F*ck the Man" and "It's a great day to whoop somebody's a*s" postings described in Finding of Fact #13 and #15 respectively); implied profanity ("WTF," "OMFG," "F'n," ROTFLMFAO" and others described in Finding of Fact #9); and two descriptions of Respondent's self-intoxication (Finding of Fact #16). Every student who testified on the subject identified the acronyms used by Respondent as conveying profanity, (Pet. Ex. 7a, p. 22; Pet. Ex. 7c, p. 14; Pet. Ex. 7d, p. 17; Pet. Ex. 7g, p. 21; Pet. Ex. 7h, p. 12; Pet. Ex. 7i, p. 20; T. 438; T. 447), and the ALJ so found, (Finding of Fact #11). Throughout his testimony, Respondent repeatedly admitted that the content of these social network postings were inappropriate to share with students, that they were not appropriate for the classroom, and that he would never have shared these images or statements with a parent of one of his students. (T. 40-82).

7. There was significant testimony that the sexual imagery, sexual commentary, self-description of intoxication, and profanities that Respondent posted such that students could access it impaired Respondent's effectiveness in the school system. Testimony established that Respondent's acts impaired his effectiveness in the school system in the form of diminished respect of both peer teachers and parents. Multiple witnesses – teachers and parents – testified in this regard. (T. 98, 136, 139, 224-25, 250-51). Based upon the ALJ's findings of fact and the evidence contained in the record, we find it to be a far more reasonable construction of Rule 4.009(3), Florida Administrative Code, to conclude that misconduct in office was adequately

proven where Respondent's violation of the Code of Ethics, (i.e., his extreme lack of good judgment), results in diminished respect of peers or parents.

8. We further find that even in the absence of direct evidence of such diminished respect, Respondent's impaired effectiveness in the school system can be inferred from the facts. See Purvis v. Marion County Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands County Sch. Bd., 752 So. 2d 127 (Fla. 2d DCA 2000); Summers v. School Bd. of Marion County, 666 So. 2d 175 (Fla. 5th DCA 1995). Based upon the facts as found by the ALJ, and the evidence in the record, we so find. Some types of conduct are inherently detrimental to the teacher-student relationship and justify discipline. See Dietz v. Lee County Sch. Bd., 647 So. 2d 217, 218 (Fla. 2d DCA 1994) (Blue, J., specially concurring) (stating in regard to allegation that teacher used racial slurs, profanity in classroom, and sexually harassed female students, "No one could argue that, if proven, such charges would not constitute grounds for dismissal."). Respondent himself repeatedly admitted at hearing that the Facebook postings he made were inappropriate interactions with students; that he would not have exposed students to them in a classroom setting; and that he would not have engaged in that conduct in the presence of the students' parents. (T. 40-82). The only reasonable inference that can be drawn from Respondent's admissions in this regard is that Respondent realized – as would any reasonable teacher – that use of these inappropriate expressions in the classroom, in front of students, or elsewhere in front of parents would tend to impair his effectiveness in the school system. The fact that Respondent's admitted inappropriate commentary was made on the internet rather than the classroom makes no difference to this School Board. The ALJ found that over 100 students were voluntarily made "friends" of Respondent on Facebook and those students had unfettered access to his Facebook content, (Finding of Fact #7 and #17), and Respondent admitted as much, (T. 42-43). The students of Manatee County must be protected from inappropriate interactions

with teachers, whether they are in the classroom, on a field trip, at the mall, or on the internet. Respondent, as a teacher, was ethically required to engage in appropriate interaction with students anywhere, anytime. (T. 39, 138, 234, 303). He failed in that regard.

9. While there was direct evidence in the record of impairment of Respondent's effectiveness, we find no reason on these facts to require the "parading the competing opinions of students, parents, and co-workers" at a hearing to establish that Respondent's effectiveness was impaired. Purvis v. Marion County Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000). Put another way, it does not stand to reason that a teacher's course of conduct cannot constitute "misconduct in office" until some critical mass of parent or student eyewitnesses has coalesced. To hold otherwise would promote the idea that teachers who are adept at hiding their acts from broad disclosure to parents or the media can successfully evade a charge of misconduct in office. Perhaps worse, it suggests that a school district might evade having to bring a charge of misconduct in office against a teacher by suppressing evidence of the teacher's conduct. We find such a construction to be at odds with the district's mission to promote our students' best interests and the Florida legislature's expectations of the district as set out in recent legislation. See generally Fla. s. Bill 1712, Ethics in Education Act (2008). Respondent's violation of the Code of Ethics constitutes misconduct in office because his acts necessarily impaired his effectiveness in the school system.

10. Section 1012.33(1)(a), Florida Statutes (2010) provides a non-exclusive list of factors that may constitute "just cause" for termination. However, the School Board has discretion in setting standards which constitute just cause to discipline employees. See Dietz v. Lee County Sch. Bd., 647 So. 2d 217 (Fla. 2d DCA 1994); see also § 1012.23(1), Fla. Stat. (2010) (authorizing district school boards to adopt rules governing personnel matters except as otherwise provided by law or the State Constitution).

11. We have, by virtue of School Board Policy 6.11(1), expanded the definition of "just cause" to include, among other things, any violation of School Board Policy, Florida law, the Code of Ethics, or the Principles of Professional Conduct for the Education Profession in Florida constitutes just cause to discipline Respondent. (Pet. Ex. 5, p. 6-41). There is no requirement under School Board Policy 6.11 that the Superintendent specifically prove misconduct in office to justify discipline of an employee up to an including termination. Thus, while the School Board finds that misconduct in office has been established as set out above, the School Board has just cause to discipline Respondent even absent that finding. If not otherwise evident from this Order, we specifically find that discipline of Respondent was justified under School Board Policy 6.11 based solely upon Respondent's violation of the Code of Ethics, i.e., his lack of good judgment, as found by the ALJ in Conclusion of Law #48. Respondent's violation of the Code of Ethics by failing to demonstrate good judgment is independent grounds for discipline exclusive of the charge of misconduct in office. We find this to be a more reasonable interpretation of our Policy 6.11 than that utilized by the ALJ.

12. In Conclusion of Law #51, the ALJ concluded "The evidence established that when the Respondent became aware of the issue, he altered the privacy settings to limit student access to the content on his pages." Petitioner has taken exception to this Conclusion insofar as it is necessarily dependent on Finding of Fact #24 above. Because we have approved Petitioner's exception to Finding of Fact #24 above, we agree there is no basis for this conclusion and approve Petitioner's exception.

EVALUATION OF THE RECOMMENDED PENALTY

13. Petitioner has taken exception to the penalty recommended by the ALJ. Pursuant to School Board Policy 2.21(2)(e)(7)(e), "The School Board is not bound by the ALJ's or the

Superintendent's recommended penalty and may impose a less severe or a more severe penalty in its sole discretion . . . ." Also, under section 120.57(1)(*l*), Florida Statutes (2010), an agency may reduce or increase an ALJ's recommended penalty so long as it reviews the complete record and states with particularity in its order, by citing to the record, its reasons justifying the departure. The School Board has reviewed the complete record and hereby approves the Petitioner's exception and hereby states with particularity, and with direct citation to the record, its reasons for departing from the ALJ's recommended penalty.

14. The School Board finds significant that in this case that the ALJ did not enter factual findings indicating that Respondent did nothing wrong or that Respondent did not engage in the acts alleged. To the contrary, the ALJ specifically found that Respondent violated the Code of Ethics in regard to the content posted on his Facebook page (Conclusion of Law #48), that Respondent left campus without administrative approval in violation of school rules (Finding of Fact #36), and that Respondent violated school procedure in holding a private meeting on campus without permission (Conclusion of Law #30). Indeed, these facts were largely uncontested by the Respondent who readily admitted throughout his testimony to having committed the acts giving rise to the ALJ's findings. (T. 40-82). The ALJ's ultimate conclusion was that the evidence failed to establish "that the Respondent's employment should be terminated based on the allegations set forth in the Administrative Complaint." (Conclusion of Law #43 (emphasis added)). Put another way, the ALJ ruled that even though the Superintendent proved that Respondent did commit the acts alleged, the violations were not severe enough to warrant the most severe method of discipline available: termination of employment. We agree. However, we conclude that some measure of discipline is appropriate. We have reviewed the complete record and hereby state with particularity, and by citation to the record, our reasons for departing from the ALJ's recommended penalty.

15. There was ample evidence to support imposition of a significant penalty short of termination. Respondent has been twice formally disciplined in the past, one instance of which was for making an inappropriate statement (the profane phrase "my c*nt") in the classroom, in many ways substantially similar to the charges at bar. (Pet. Ex. 1, p. 75). Testimony from the Superintendent emphasized the egregiousness of the Respondent's online acts, (T. 303-08), and we agree these acts were egregious. Significant to our determination in this regard is that the record conclusively established that Respondent voluntarily added students as his Facebook friends, (T. 42-43, 46), and that Respondent knew students had unrestricted access to the content he posted on his Facebook page, (T. 48-49). Thus, this was not a case of mistake or lack of understanding on Respondent's part that might offer some basis for excuse or mitigation. Our conclusion is further supported by the fact that Respondent was warned in advance by a teacher within his department at BRHS that his online postings were inappropriate. (T. 133, 140), yet he took no corrective action.

16. Also significant is that at no point throughout the process did Respondent acknowledge the impropriety of his online activity. Instead, Respondent tried to "rationalize" his conduct and offer excuses rather than take responsibility. (T. 307-08). As the Superintendent put it, Respondent consistently demonstrated that "he just didn't get it" in regard to the bounds of appropriate student-teacher interactions. (T. 306). Respondent's past discipline involved inappropriate interaction with students, and Respondent chose to continue that practice. (T. 303). The Superintendent also pointed out Respondent's attempt to shift blame to his student "friends" by reflection to Respondent's written comment that, "Students could or could not look at my page that was their choice," (T. 305), which we find to be particularly troubling. In sum, we believe that the above cited portions of the record demonstrate that imposition of a penalty is quite appropriate.

17. Respondent's other offenses, i.e., leaving campus without permission and using school facilities without permission, further serve to justify imposition of a penalty. Again, the School Board takes note that the ALJ found that Respondent engaged in the acts alleged by the Superintendent, yet the ALJ concluded that commission of those acts did not justify his termination. While either of these additional violations might not in isolation justify a significant penalty, the cumulative effect of all of Respondent's violations described herein is significant. The very reason for the rules Respondent violated is to ensure the efficient and safe operation of the school. Respondent's violations of those rules further demonstrate Respondent's willingness to flout rules and directives put in place by those in authority.

18. The School Board has searched for and has found little by way of mitigation. That the School Board did not have a policy specifically addressing teacher/student online communications itself does little to mitigate this matter in Respondent's favor. The School Board, for example, does not have a policy specifically prohibiting sexual acts between students and teachers. However, there can be no reasonable argument that the absence of such a policy would serve to mitigate the inappropriateness of such an act. Mitigation might be appropriate where the School Board utilizes a standard of conduct that is so far outside of that ordinarily expected of teachers in the ordinary performance of their duties that Respondent could not reasonably be expected to conform. That is not the case here. Respondent's own testimony stands as conclusive evidence that he realized these postings were wholly inappropriate for the eyes of students.

19. We are also unmoved by the idea that Respondent's conduct is mitigated by the fact that students engage in online acts similar to those of Respondent. The ALJ, for example, suggests that Respondent's use of acronyms to represent profane phrases was mitigated by the fact that "students commonly use the same acronyms as the Respondent." (Conclusion of Law

#49). We disagree. The boundaries of appropriate teacher/student interactions should not be defined by the outer limits of conduct engaged in by school-age children. Our teachers are, and rightfully should be, held to a higher standard.

ACCORDINGLY, the School Board hereby approves Petitioner's Exceptions as set out herein; adopts the ALJ's Recommended Order subject to those Exceptions; and hereby enters the following penalty, based upon the reasons and citations stated herein, effective May 24, 2011:

1. Respondent's professional services contract is terminated, and he will hereafter be on annual contract.

2. Respondent is suspended without pay for the period beginning October 26, 2010 (that being the date the School Board entered an order suspending Respondent without pay pending the outcome of this hearing) through the date of entry of this Final Order.

3. Respondent is suspended for an additional five (5) days without pay during the 2010-2011 school year, those dates to be determined by the Superintendent.

DONE AND ENTERED this 25th day of May, 2011, in Bradenton, Manatee County, Florida.

Robert Gause, Chairman

ATTEST:

Tim McGonegal, Superintendent

COPIES FURNISHED:
Scott Martin, Esq.
Melissa C. Mihok, Esq.
Payroll Department
Personnel Department
Risk Management
Technology Service Desk
Computer Information Specialist

NOTICE

All parties have the right of judicial review of this Order in accordance with section 120.68, Florida Statutes. In order to appeal, a party must file a notice of appeal with Lyn Lego, the Agency Clerk of the School Board of Manatee County, Florida, at 215 Manatee Avenue West, Bradenton, Florida 34205, within thirty (30) days of the rendition of this order and must also file a copy of the notice, accompanied by filing fees, with the Clerk of the Second District Court of Appeal, 1005 East Memorial Blvd., Lakeland, Florida 33801, telephone number (863)499-2290. Review proceedings shall be conducted in accordance with the Florida Appellate Rules, and specifically, Rule 9.110 of such Florida Appellate Rules.