

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEANINE BLOMBERG, AS)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 12-0797PL
)
JOHN MARK POMAR,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on August 16, 2012, before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings, by video teleconference at sites in Port St. Lucie and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Joan Stewart, Esquire
Florida Education Association
213 South Adams Street
Tallahassee, Florida 32301-1720

STATEMENT OF ISSUES

The issues in this case are whether Respondent violated subsections 1012.795(1)(c), (f), and (i), Florida Statutes,

Florida Administrative Code Rules 6B-1.006(3)(a), (e), (g) and 6B-1.006(4)(c), and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On or about June 27, 2007, Petitioner, Jeanine Blomberg, as Commissioner of Education, issued an Administrative Complaint charging Respondent with violations of subsections 1012.795(1)(c), (f), and (i), Florida Statutes, as well as violations of Florida Administrative Code Rules 6B-1.006(3)(a), (e), (g) and 6B-1.006(4)(c). On or about July 26, 2007, Respondent filed an election of rights disputing the material facts alleged in the Administrative Complaint and requesting an administrative hearing.

On June 15, 2009, the case was placed in abeyance per an order issued by the Education Practices Commission (EPC). On or about February 22, 2012, the EPC issued an order lifting the abeyance. The matter was referred to the Division of Administrative Hearings ("DOAH") on February 29, 2012, and assigned to Administrative Law Judge John G. VanLaningham.

The final hearing initially was set for May 10, 2012. Pursuant to Petitioner's Motion to Continue, filed on May 2, 2012, the final hearing was rescheduled for June 20, 2012. On June 13, 2012, Respondent filed a Motion to Hold Proceeding in Abeyance. Based on the Stipulation of the Parties Regarding Abeyance filed on June 15, 2012, the final hearing was again

rescheduled for August 16, 2012. On August 10, this case was transferred to the undersigned for all further proceedings.

The final hearing was held on August 16, 2012. Petitioner presented the testimony of Ralph Starr, Ashley Kidd, Heather Keefe, Stephanie Pooley, Patrick Kehoe, and J.K., and offered Petitioner's Exhibits 1 through 11 into evidence. Exhibits 1 through 11 were admitted without objection.^{1/}

Respondent offered the deposition transcripts of Stephanie Pooley (Respondent's Exhibit 2), Lynn Hailey (Respondent's Exhibit 3), Marsha Pomar (Respondent's Exhibit 4), Patrick Kehoe (Respondent's Exhibit 5), and J.K. (Respondent's Exhibit 6), pursuant to the Stipulation of the Parties Regarding Abeyance. Respondent's Exhibits 2 through 4 were admitted without objection. Respondent's Exhibits 5 and 6 were admitted, over objection, pursuant to the undersigned's Order dated August 31, 2012. Respondent offered a document purporting to be Respondent's resume; however, same was rejected based on Petitioner's objection. Respondent offered Exhibits 7 and 8 and same were admitted over objection.

The Transcript of the final hearing was filed with DOAH on August 31, 2012. Pursuant to a Joint Motion for Extension of Time to File Proposed Recommended Order, filed on September 9, 2012, the undersigned issued an Order Granting Extension of Time until September 24, 2012, for the parties to file their proposed

recommended orders. The parties timely filed their Proposed Recommended Orders. Both were considered in preparing this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

FINDINGS OF FACT

1. Petitioner is the head of the Florida Department of Education, the state agency charged with the responsibility of investigating and prosecuting complaints of violations of section 1012.795, Florida Statutes, against teachers holding Florida educator's certificates.

2. John Mark Pomar, Respondent in this proceeding, holds Florida Educator's Certificate 386817, covering the area of physical education, which was valid through June 30, 2008.

3. At all times material to the allegations of this case, Respondent was employed as an agriculture teacher at Vero Beach High School in the Indian River County School District.

4. During the 2004-2005 school year, J.K.^{2/} was a tenth-grade student in Respondent's Agriculture Tech I class. In addition, J.K. was a member of Future Farmers of America ("FFA").

5. J.K. was actively engaged in Respondent's agriculture classroom and would assist Respondent in a variety of practical

duties and assignments including hatching chicks, cleaning pens, harness training of bulls and cows, and feeding and cleaning animals.^{3/} J.K. was considered Respondent's aide and "right-hand man."

6. Over the course of the tenth-grade year, J.K. and Respondent had almost daily contact and developed a close relationship, both in and outside of the classroom. Respondent invited J.K. to assist him with duties outside of the school environment such as purchasing seed. On at least one occasion, she accompanied him to Punta Gorda, Florida, to acquire game birds to be raised at the school.

7. At the conclusion of the 2004-2005 school year, during the summer break, J.K. and several other students continued to care for the agriculture class animals. The students were paid for their time.

8. J.K. enrolled in Respondent's Agriculture II class for the 2005-2006 school year. J.K. remained actively involved in Respondent's class and the FFA. Likewise, her close relationship with Respondent continued.

9. On March 15, 2006, members of the agriculture class and FFA, including J.K., were present at the Indian River County Firefighter's Fair. During this annual fair, the students would participate in the showing of various animals. On that date, J.K. had a disagreement with her younger sibling. Consequently,

her father informed J.K. that she was not allowed to attend the fair. J.K.'s parents were divorced, and, therefore, she contacted her mother and requested that she drive her to the fair. J.K.'s mother acquiesced and ultimately dropped J.K. off at the agriculture pavilion section of the fairgrounds. While en route, Respondent called J.K. on her cellular phone to determine if she was going to attend the fair.

10. Once at the fair, J.K. congregated with several of her friends in an area set apart from the general public for those participating in the showing of animals. J.K. was still visibly upset from the domestic quarrel and was venting.

11. On the same date, Respondent consumed several alcoholic beverages before and/or during dinner at home with his wife and family. Thereafter, Respondent and his family went to the fair. On this occasion, Respondent was not attending the fair in a teaching or chaperon capacity.

12. Shortly after arriving at the fair, Respondent approached J.K., who was still with her group of friends. J.K. had not yet gained her composure and had been recently crying. Respondent asked to speak with J.K. alone and she followed him to a separate area behind the "show animal" pens. As they were walking, Respondent inquired as to whether J.K. was upset, and she advised him of the disagreement with her family.

13. Once apart from the group, Respondent advised J.K. that he was concerned about her. He then gave J.K. a hug that she reciprocated.

14. Thereafter, while J.K. was standing directly in front of Respondent, he grabbed her with both of his hands on either side of her shoulders, pulled her to him and held her there as he kissed her on the lips.^{4/} J.K. observed the odor of alcohol on Respondent's breath.

15. Prior to this occurrence, Respondent had never kissed J.K. on the lips or even the cheek. J.K. conceded that they had probably hugged on a few limited occasions; however, even these embraces were characterized as a "one-hand kind of good job" hug.

16. When Respondent released J.K. from the embrace, she immediately returned, by herself, to her friends. Witness A.K., who was J.K.'s best friend at the time, was among the group.

17. A.K. observed J.K. return from her private encounter with Respondent at a fast pace, crying and very upset. According to A.K., J.K. was hyperventilating, advised A.K. that she was going to vomit, and that Respondent had kissed her on the lips. J.K. then proceeded to the bathroom where she became ill.

18. As a result of the kiss and embrace, J.K. felt shocked, confused, disgusted, betrayed, and uncomfortable.

Aside from her best friend, A.K., however, she did not immediately tell anyone about the incident.

19. When J.K. returned to school the following week, she remained uncomfortable and there was clearly a rift in the formerly close relationship. J.K. no longer desired to speak or be in close proximity to Respondent and attempted to avoid him. Respondent advised J.K. that, if she did not want to attend the agriculture class, she could come between classes and pick up an excuse pass that would be available on his desk. J.K. utilized that option.^{5/}

20. On one such occasion, in addition to the pass, J.K. observed on Respondent's desk an envelope with her name handwritten in blue ink.^{6/} The envelope contained an unsigned, undated, computer generated letter addressed to J.K.

21. The contents of the subject letter are set out, in full, as follows:

[J.K.],

Friday and Saturday a week ago were two of the best days I have had in a while, it began by taking you to your mother's where we talked about your being unhappy and why you were unhappy, and what I could (wanted to) do to help. That day I came away with, "she is not going to Montana, she will be here for another 3 years. No!!! It was no coincidence I was in Sebastian Saturday and brought you b'fast—I drove up there made an excuse to see if the twinkle was still there---it was.

Then all hell broke loose on Sunday—problem after problem—all personal with-in my family. When things that are near and dear to me are not right I sometimes can not handle it. I have a problem when I am angered, not irritated—not just mad, but angry. When angry I sometimes can not see the forest for the trees. Wednesday was the hell day to try and forget and over-come, 2 drinks did not help. Although most was vivid some was a blur—that blur must have been when I did whatever it was to hurt you, I remember the hug/kiss/and you not wanting to talk about it anymore. No excuse for the drinks I am not presenting that as a defense nor justification; just how it did not help—not drunk just a combination when alcohol, anger meets my body chemistry something is not cool. Although, I can not turn back the hand of time I want you to know "I wish I could".

I know this for sure I would never hurt you in any way intentionally or otherwise. My actions and feelings for you are true and sincere—not like a father—not like a boyfriend's passion—not like a friend—different all together but true and sincere—Some kinda special Luv.

You bring out the "best and the worst in me—when you hurt I want to hurt—when the twinkle is there, there is no mountain to high I cant climb, you make me want to be the best I can be!!!

I will honor my arrangement for A-2, if needed there will be a pass filled out and signed all you have to do is fill in where you are going, if not you are welcome to stay out here do your work or chill and expect very little, if any, contact from me—the same applies for B-3. This I hope will minimize the pain for both of us.

My old Bud I have revealed to you some weaknesses, faults, chinks in my armor none

of which I am ashamed or proud of—just
chinks I must fight to control. Although I
have no problem owning up to you for them—it
is hard to swallow to know I have to fight
to control them and sometimes lose the
battle.

Regardless of how you take this, laugh at
it, choke on it or other as King Preamm told
Achilles "there is respect between enemies"
(you are/never will be an enemy just a
saying). I will never reveal or betray the
times we talked about our lives, friends,
and family—those conversations will never be
shared with anyone no matter what—in return
I ask that you do the same and destroy this
note it is for you eyes and thoughts only.
If this became known to the wrong people my
children could feel the shame and hurt—they
do not deserve that, plus you are the only
one who knows what is being said.

[J.K.], I am not offering this as an excuse,
explanation or apology just merely the
"truth".

I am at peace with myself—now—knowing you
know the truth.

Closing—always know our fondest times and
memories, my prayers and my heart will
always travel with you.

Bye, Bud

22. During the pertinent period, several school district
computers were located in Respondent's agriculture classroom.
One of the computers was issued solely for the educator's use.
To log on to the school district's network computer, Respondent
was required to enter a unique user name and password. All
documents saved by Respondent while using said computer were

automatically routed to his "home folder" on the District server. When not in use, Respondent was to log off or lock the computer to prevent others from accessing the same.

23. In August 2006, Ralph Starr, a network analyst for the Indian River County School District, was requested to search Respondent's assigned computer for any documents addressed to, or referring to J.K. or "Dear Friend." The computer was delivered to Mr. Starr. Mr. Starr's analysis revealed that no such correspondence was located physically on Respondent's C-drive (the hard drive); however, the above-referenced correspondence was found saved on the school district's server, in Respondent's home folder.^{7/}

24. Respondent's computer was located on a desk in the classroom. Conceivably, another individual who possessed Respondent's user name and password could access his computer in his absence. Alternatively, if Respondent failed to follow the procedure of logging off or locking the computer, another could utilize the computer.^{8/}

25. J.K. credibly testified, however, that she had never used Respondent's computer for any reason and that the style of writing contained in the subject correspondence was not hers. J.K.'s testimony was bolstered by that of A.K.

26. J.K. showed the correspondence to A.K. and advised her that same was from Respondent. At the time A.K. reviewed the

letter, she was J.K.'s best friend and they had been friends since sixth grade. In the course of their friendship, A.K. had an opportunity to review J.K.'s writings. She confirmed that the subject correspondence was not J.K.'s words or writing style.

27. The undersigned finds that the above-referenced correspondence is genuine, and in light of the circumstances, logically indicates the correspondence was drafted by Respondent with J.K. as the intended recipient.

28. Respondent's admissions to alcohol usage and kissing J.K., the request for secrecy, coupled with phrases such as "[s]ome kinda special Luv," "to see if the twinkle was still there," and "my heart will always travel with you," support J.K.'s credible testimony that the embrace and kiss on the lips were romantic and transcends the competing interpretation that the same was merely of a consoling nature.

29. A few weeks after the incident and receiving the letter from Respondent, J.K. finally confided to her mother the events of March 15, 2006. Her decision was prompted by several factors: Respondent informing A.K. that he had lost respect for J.K.; Respondent informing other students that J.K. was not welcome at agriculture; and Respondent informing fellow students that J.K. had changed her interests and had "blown all of them off."

30. The incident of March 15, 2006, and Respondent's subsequent conduct, which J.K. internalized, negatively affected her mood, behavior, and relationship with her father. A few days after school recessed, J.K. finally advised her father that Respondent had kissed her.

31. J.K.'s father subsequently sought legal counsel, and upon the advice of counsel, notified the school board attorney.

32. Facing an investigation concerning the allegations forming the basis of the Administrative Complaint, on or about August 8, 2006, Respondent resigned from his teaching position.

33. J.K. returned to Vero Beach High School for her senior year. While J.K. desired to remain in the agriculture program, she perceived resentment from certain classmates in retaliation for the allegations against Respondent that had become public over the summer break.

34. Consequently, school administrators encouraged J.K. to remain in the program albeit with different classmates. J.K. remained in the agriculture curriculum and enrolled in a class entitled Advanced Placement Environmental Science. J.K. graduated from Vero Beach High School in 2007, with honors.

35. Prior to the incident that is the subject matter of this case, Respondent consistently obtained "highly effective" or "exemplary" performance appraisals. For Respondent's last

appraisal, concerning the 2005-2006 school year, he was given an exemplary rating, with a score of 50 out of 52.

36. Respondent was instrumental in the development and execution of a successful agriculture program and agribusiness opportunities for those students enrolled in the program.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to section 120.569 and subsection 120.57(1), Florida Statutes.

38. Subsection 1012.796(6), Florida Statutes, authorizes the Commissioner of Education to file a formal complaint and prosecute the complaint against a teacher's certificate pursuant to the provisions of chapter 120, Florida Statutes.

39. Petitioner seeks to take penal disciplinary action against Respondent's teaching certification, and, therefore, must prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987). Clear and convincing evidence requires that:

[t]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or

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).

40. Disciplinary statutes are penal in nature, and must be construed against the authorization of discipline and in favor of the individual sought to be penalized. Munch v. Dep't of Bus. & Prof'l Reg., 592 So. 2d 1136 (Fla. 1st DCA 1992). A statute imposing a penalty is never to be construed in a manner that expands the statute. Hotel & Rest. Comm'n v. Sunny Seas No. One, 103 So. 2d 570, 571 (1958).

41. The Administrative Complaint alleges that Respondent violated subsections 1012.795(1)(c), (f), and (i), Florida Statutes, and Florida Administrative Code Rule subsections 6B-1.006(3)(a), (e), (g), and 6B-1.006(4)(c).

42. Section 1012.795 provides in pertinent part:

Education Practices Commission; authority to discipline.-

(1) The Education Practices Commission may suspend the educator certificate of any person as defined in s. 1012.01(2) or (3) for a period of time not to exceed 5 years, thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students for that period of time, after which the holder may return to teaching as provided in subsection (4); may revoke the educator certificate of any person, thereby denying that person the right to teach or otherwise be employed by a district school

board or public school in any capacity requiring direct contact with students for a period of time not to exceed 10 years, with reinstatement subject to the provisions of subsection (4); may revoke permanently the educator certificate of any person thereby denying that person the right to teach or otherwise be employed by a district school board or public school in any capacity requiring direct contact with students; may suspend the educator certificate, upon order of the court, of any person found to have a delinquent child support obligation; or may impose any other penalty provided by law, provided it can be shown that the person:

* * *

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

* * *

(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.

* * *

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

43. Rule 6B-1.006 contains the Principles of Professional Conduct and provides, in pertinent part:

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

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

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

* * *

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

* * *

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

* * *

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

* * *

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

44. The seven-count Administrative Complaint tracks the language of the above-recited statutes and rules. It first sets forth the following material allegations in paragraph 3 of the Administrative Complaint:

3. During March 2006, Respondent, while attending an event where several of his students exhibited projects and after consuming several alcoholic beverages, inappropriately kissed J.K., a seventeen-year-old, female student, on the lips. Subsequent to this incident, Respondent sent

J.K. a letter of apology in which he stated, "My actions and feelings for you are true and sincere-not like a father-not like a boyfriend's passion-not like a friend-different all together but true and sincere-Some kinda special Luv." On or about August 8, 2006, Respondent retired in lieu of termination from his teaching position with the district.

45. As demonstrated in the Findings of Fact, above, Petitioner proved the material allegations recited in the Administrative Complaint. All of the findings were based upon clear and convincing evidence.

Count 1

46. Count 1 of the Administrative Complaint alleges:

The respondent is in violation of Section 1012.795(1)(c), Florida Statutes, in that Respondent has been guilty of gross immorality or an act involving moral turpitude.

47. The EPC has not defined "gross immorality" for purposes of section 1012.795(1)(c). However, Florida Administrative Code Rule 6A-5.056 (formerly rule 6B-4.009) contains definitions of the terms "immorality" and "moral turpitude" for use by school districts in disciplining instructional staff, and these definitions have been used in agency precedent interpreting section 1012.795. See, e.g., Smith v. Malvar, Case No. 10-2784 (Fla. DOAH Sept. 13, 2010; Fla. EPC Jan. 11, 2011). Rule 6A-5.056(2) defines "immorality" as follows:

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.

48. "Gross immorality" has been described in agency precedent to mean an act of misconduct that is serious, rather than minor in nature; it is a flagrant disregard of proper moral standards. Robinson v. Davenport, Case No. 12-0270 (Fla. DOAH June 27, 2012); Smith v. Malvar, Case No. 10-2784 (DOAH Sept. 13, 2010); EPC Jan. 13, 2011) (citing Education Practices Comm'n v. Knox, 3 FALR 1373-A (Fla. Dep't of Education 1981)); Brogan v. Mansfield, Case No. 96-0286 (Fla. DOAH Aug. 1, 2006; Fla. EPC Oct. 18, 1996).

49. Rule 6A-5.056(6) defines "moral turpitude" as follows:

Moral turpitude is a crime that is evidence by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

50. Moral turpitude has also been defined by the Supreme Court of Florida as "anything done contrary to justice, honesty, principle, or good morals, although it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated." State ex

rel. Tullidge v. Hollingsworth, 108 Fla. 607, 146 So. 660, 661 (1933).

51. Teachers are traditionally held to a high moral standard in the community. Adams v. Prof'l Practices Council, 406 So. 2d 1170, 1172 (Fla. 1st DCA 1981). As a teacher, it is not necessary that Respondent be charged or convicted of a crime in order to be disciplined for conduct involving moral turpitude. Walton v. Turlington, 444 So. 2d 1082, 1084 (Fla. 1st DCA 1984).

52. Considering the material allegations which have been proven against Respondent in light of the definition of moral turpitude, it is found that Respondent is guilty of acts involving moral turpitude. Respondent's conduct towards J.K. violated accepted standards of society, as well as the higher moral standards expected of teachers. His actions were wrong and Respondent knew it, as demonstrated by his subsequent correspondence to J.K. attempting to explain or mitigate the event.

53. Respondent's actions, which were proven by clear and convincing evidence, violated section 1012.795(1)(c).

Count 2

54. Count 2 of the Administrative Complaint alleges:

The respondent is in violation of Section 1012.795(1)(f), Florida Statutes, in that Respondent has been found guilty of personal

conduct which seriously reduces his effectiveness as an employee of the school board.

55. Petitioner has demonstrated by clear and convincing evidence a violation of subsection 1012.795(1)(f). Respondent, facing an investigation concerning his alleged conduct, resigned and thereby reduced his effectiveness as an employee of the school board. See Winn v. Hernandez, Case No. 08-1843 (Fla. DOAH Aug. 8, 2008).

Count 3

56. Count 3 of the Administrative Complaint alleges:

The Respondent is in violation of Section 1012.795(1)(i), Florida Statutes, in that Respondent has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

57. As discussed under Count 4 through 6 below, Respondent violated Principles of Professional Conduct for the Education Profession set forth in Florida Administrative Rule 6B-1006(3)(a). Therefore, Respondent violated section 1012.795(1)(i), as alleged in Count 3 of the Administrative Complaint.

Count 4

58. Count 4 of the Administrative Complaint alleges:

The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(3)(a), Florida Administrative Code, in that Respondent has failed to make

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

59. Rule 6B-1.006(3)(a) imposes on teachers the affirmative duty to protect students from harmful conditions. The standard against which a teacher's performance of this duty is measured is an objective one: he must make a "reasonable effort." Rolle v. Crist, Case No. 01-2644 (Fla. DOAH Dec. 14, 2001; Fla. EPC Feb. 28, 2002). A violation of the above-referenced rule does not require evidence that Respondent actually harmed J.K.'s health or safety. Rather, it requires a showing that Respondent failed to make reasonable efforts to protect the student from such harm. Robinson v. Aydelott, Case No. 12-0621 (Fla. DOAH Aug. 29, 2012).

60. The clear and convincing evidence demonstrated that Respondent's inappropriate conduct created conditions that were unambiguously harmful and his conduct was patently unreasonable. As noted above, J.K. testified that she was shocked, confused, disgusted, and uncomfortable following the subject incident. As a result of Respondent's inappropriate conduct, J.K.'s relationship with her family members became strained; she failed to regularly attend her agriculture class (with Respondent's endorsement); and she felt ostracized by fellow students.

Petitioner established that Respondent violated rule 6B-1.006(3)(a).

Count 5

61. Count 5 of the Administrative Complaint alleges:

The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(3)(e), Florida Administrative Code, in that Respondent has intentionally exposed a student to unnecessary embarrassment or disparagement.

62. The First District Court of Appeal has described Florida Administrative Code Rule 6B-1.006(3)(e)--which proscribes the intentional infliction of unnecessary embarrassment or disparagement--as an "aspirational" rule, the "violation of which could only justify [a severe penalty] if there was factual evidence that the violation was so serious as to impair the teacher's effectiveness in the school system." Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995); Macmillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226, 228 (Fla. 1st DCA 1993).

63. Moreover, to be prohibited by rule 6B-1.006(3)(e), the offending conduct must be committed with a specific intent to disobey the rule. Accordingly, "[t]here can be no violation in the absence of evidence that the teacher made a conscious decision not to comply with the rule." Langston, 653 So. 2d at 491. But see, Robinson v. Aydelott, Case No. 12-0621 (Fla. DOAH

Aug. 29, 2012) (concluding specific intent to embarrass is not required where "a general intent to act in a way which one could expect to result in embarrassment or disparagement"); accord Crist v. Setter, Case No. 03-0182 (Fla. DOAH July 2, 2003).

64. As discussed concerning Count 4, Respondent failed to protect J.K. from harmful conditions; however, the undersigned concludes that Petitioner failed to prove by clear and convincing evidence that Respondent's conduct met the requisite level of intent required for a violation of rule 6B-1.006(3) (e). Therefore, the offense was not established and Count 5 is due to be dismissed.

Count 6

65. Count 6 of the Administrative Complaint alleges:

The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(3) (g), Florida Administrative Code, in that Respondent has harassed or discriminated against a student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping conditions, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

66. No credible evidence was presented to demonstrate that Respondent violated rule 6B-1.006(3) (g), by harassing or discriminating against a student on the basis of race, color, religion, sex, age, national or ethnic origin, political

beliefs, marital status, handicapping condition, sexual orientation or social and family background. Because no credible evidence of discrimination or harassment on these bases was demonstrated, Respondent likewise did not fail to make a reasonable effort to protect J.K. from such harassment or discrimination. Therefore, Petitioner has failed to prove that Respondent violated Rule 6B-1.006(3)(g), Florida Administrative Code. Count 6 is due to be dismissed.

Count 7

67. Count 7 of the Administrative Complaint alleges:

The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(4)(c), Florida Administrative Code, in that Respondent has used institutional privileges for personal gain or advantage.

68. While the evidence presented at final hearing established that Respondent utilized the school district computer, at a minimum, to save the subject correspondence on his home folder, Petitioner never pleaded facts that constituted a violation of Rule 6B-1.006(4)(c). Indeed, Count 3 of the Administrative Complaint merely alleges that, "Respondent sent J.K. a letter of apology. . . ."

69. A teacher may not be disciplined for an offense not charged in the complaint. The facts, as pled in the Administrative Complaint, were insufficient to place Respondent on notice of a violation of rule 6B-1.006(4)(c). Trevisani v.

Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005) (reversing final order of Department imposing an administrative fine and special conditions of probation where administrative complaint failed to sufficiently put physician on notice of charges); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996) (party reversing Department's final order and remanding for reconsideration of penalty, where administrative complaint merely cited statutes but failed to allege any act or omission in violation of statutes allegedly violated by licensee, thereby denying licensee reasonable notice of facts or of conduct warranting disciplinary action). As such, Count 7 is due to be dismissed.

Penalties

70. The Education Practices Commission has adopted guidelines for the imposition of penalties for violations under 1012.795, Florida Statutes, and Florida Administrative Code Rule 6B-1.006. Rule 6B-11.007, entitled "Disciplinary Guidelines" provides for discipline ranging from probation to revocation for the statutory and rule violations for which Respondent is charged in this proceeding. Rule 6B-11.007(3), provides a number of aggravating and mitigating factors that can be considered in determining the appropriate penalties.

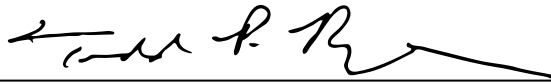
71. The undersigned has carefully considered the above-factors in crafting an appropriate recommended penalty.

RECOMMENDATION

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

RECOMMENDED that a Final Order be issued finding that Respondent, John Mark Pomar, violated the provisions of subsections 1012.795(1)(c), (f) and (i), Florida Statutes, and Florida Administrative Code Rule 6B-1.006(3)(a), suspending Respondent's Florida educator's certificate for a period of two years.

DONE AND ENTERED this 24th day of October, 2012, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of October, 2012.

ENDNOTES

^{1/} Exhibit 1 was jointly submitted by the parties.

^{2/} J.K. was a minor during all times material to the allegations in Administrative Complaint. J.K. was twenty-three years old at the time of the final hearing.

3/ The agriculture class encompassed classroom instruction and work on the agriculture farm.

4/ It is undisputed that Respondent kissed J.K.; however, the nature of the kiss is the heart of the controversy. Respondent's wife, Marsha Pomar, testified at deposition that she observed Respondent reach out, hug, and gently kiss J.K., as he had his own daughters, on the lips. Mrs. Pomar thought nothing of the encounter. Similarly, witness Stephanie Pooley testified at deposition that she observed Respondent with one arm around J.K. Her recollection was that Respondent then gave J.K. a peck on the cheek. Ms. Pooley admitted she was neither close enough to hear the conversation between Respondent and J.K., nor observe Respondent's mouth. When queried concerning specific details of the incident, Ms. Pooley conceded that, "I don't remember the whole incident to be honest to you. You know." Respondent disputed the allegations of the Administrative Complaint by executing an Election of Rights form; however, he was neither deposed nor present at the final hearing. J.K.'s testimony, as one of the two participants to the embrace, is credited over that of the above-referenced witnesses.

5/ The record is silent as to the frequency or duration that J.K. obtained passes to excuse herself from Respondent's agriculture class following the incident of March 15, 2006.

6/ J.K. discarded the envelope prior to leaving school for the day.

7/ The subject correspondence was printed directly from a tape backup copy of Respondent's home folder. No evidence was presented concerning when the document was originally saved to Respondent's home folder.

8/ On one occasion, a fellow student was observed playing a music video on YouTube from Respondent's computer when Respondent was not present.

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.