STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TONY BENNETT, AS COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 13-0740PL

ALEXANDER ROY,

Respondent.
_____/

RECOMMENDED ORDER

On July 2, 2013, a duly-noticed hearing was conducted in Tallahassee, Florida, with arrangements for Respondent to appear by telephone, by Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. David Holder, Esquire
387 Lakeside Drive
Defuniak Springs, Florida 32435

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent, Alexander Roy, is guilty of violating section 1012.795(1)(d), (f), (g) and (n), Florida Statutes (2011). If violations are found, the appropriate penalty must be determined.

PRELIMINARY STATEMENT

On October 24, 2012, Petitioner, as Commissioner of Education, filed an Administrative Complaint against Respondent, alleging violations of section 1012.795(1)(d), (f), (g) and (n), Florida Statutes. The factual allegations forming the basis for the charges against Respondent are that he was convicted of one count of Enticing and Attempting to Entice a Minor to Engage in Sexual Activity in violation of 18 U.S.C. section 2422(b) and four counts of Possession of Child Pornography in violation of 18 U.S.C. section 2252(a)(4)(B). Respondent filed an Election of Rights form disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On February 27, 2013, the case was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

Respondent is currently incarcerated in Arizona. He apparently has no access to Florida legal documents, and argued repeatedly that this lack of access required a continuance of this case until no sooner than 30 days after his appeal to the Eleventh Circuit Court of Appeals is complete. Respondent's request for a continuance on this basis was denied; however, copies of the relevant statutes identified in the Administrative Complaint as well as the Uniform Rules and Florida Rules of Civil Procedure related to discovery were provided to him.

Motion practice in this case was extensive. The motions, responses, and rulings related to these motions are readily available on the docket.

The case was originally scheduled for hearing May 9, 2013. However, on May 1, 2013, the case was continued and on May 16, 2013, it was rescheduled for July 2, 2013, with arrangements for Respondent to participate by telephone.

On June 24, 2013, Petitioner filed a Motion to Amend Administrative Complaint to Update Caption and Correct Scrivener's Error, which was granted by Order dated June 24, 2013. The Amended Administrative Complaint was filed with the Division on June 25, 2013. The style of the case is amended to reflect Tony Bennett as Commissioner of Education.

On July 2, 2013, the hearing commenced as scheduled. Prior arrangements were made for Respondent to call in to a "meet-me" teleconference number; however, he did not do so. A recess was taken to inquire of prison officials whether Respondent was still available. While trying to reach Counselor Pino, Respondent's classification officer at the facility, Division staff received a phone call from the classification officer stating that Respondent had declined to participate in the hearing. A second telephone call was placed to the facility from the hearing room, and Counselor Pino confirmed that he had spoken with Respondent that morning and that Respondent indicated that he did not intend

to participate in the proceeding. The undersigned inquired whether there was any impediment to Respondent's participation caused by his incarceration and was informed that there was not.

Notwithstanding Respondent's decision, Petitioner elected to present his case. No witnesses were called to testify, however, Petitioner's Exhibits 1-3 were admitted into evidence. Petitioner's Exhibits 2 and 3 are the depositions of Detective Charlie Longson and Maurice Bonner, respectively. Respondent did not appear for either deposition. The depositions were noticed on April 8, 2013, and took place April 18 and 19.

On April 29, 2013, Respondent requested copies of the depositions, and Petitioner supplied the depositions to Respondent on April 30, 2013. No motion for protective order was filed prior to the taking of the depositions, and no objection was entered with respect to their admissibility before, during, or after the hearing. Accordingly, both depositions have been admitted and have been considered in the preparation of this Recommended Order.

The Transcript of the hearing was filed with the Division July 19, 2013, making the deadline for filing proposed recommended orders July 29, 2013. Petitioner filed his Proposed Recommended Order on July 23, 2013. To date, no post-hearing submission has been filed by Respondent.

All references are to the 2011 version of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. Respondent holds Florida Educator Certificate 1035877, covering the areas of mathematics, middle grades integrated curriculum, and social studies, which is valid through June 2015.

2. At all times material to the allegations in the Administrative Complaint, Respondent was employed by the St. Lucie County School Board (SLCSB) as a mathematics teacher at Manatee Elementary School, also known as Manatee K-8 School.

3. On or about January 13, 2012, Respondent was arrested in Osceola County, Florida, as the result of allegations that Respondent used an internet provider and "knowingly persuaded, induced, enticed and coerced an individual who had not attained the age of eighteen years, to engage in sexual activity."

4. The allegations were based on the probable cause affidavit of Kevin Kulp, Special Agent for the Florida Department of Law Enforcement, who worked on the undercover operation giving rise to Respondent's arrest, which stated that Respondent contacted a person on-line that he believed to be the mother of a 13-year-old girl in order to have sex with both the mother and the daughter. The "mother" and the "daughter" were undercover police officers.

5. As a result of Respondent's arrest, a search warrant was executed to search Respondent's residence in St. Lucie County, Florida. According to Detective Longson, the search revealed that Respondent possessed approximately 75-100 images of minors engaged in explicit sexual conduct. The analysis of the information seized at Respondent's home also included photos and videos of a teenage girl, approximately 16 years old, engaged in explicit sexual acts with Respondent.

6. On January 17, 2012, as a result of his arrest, Respondent was placed on temporary duty assignment at his home.

7. On or about March 5, 2012, Respondent was charged by indictment with one count of Enticing and Attempting to Entice a Minor to Engage in Sexual Activity in violation of 18 U.S.C. § 2422(b), and four counts of Possession of Child Pornography in violation of 18 U.S.C. § 2252(a)(4)(B). A Superseding Indictment containing the same charges was filed May 31, 2012.

8. On March 27, 2012, he was suspended without pay by the SLCSB because of the federal criminal charges against him. On April 10, 2012, Respondent was terminated from his employment by the SLCSB, based upon his inability to report for work because of his imprisonment.

9. On or about June 15, 2012, Respondent was tried in federal court before a jury. He was found guilty of all five counts.

10. On September 12, 2012, United States District Court Judge K. Michael Moore adjudicated Respondent guilty on all five counts, and sentenced him to life in prison as to Count 1, and 120 months of incarceration as to each of Counts 2 through 5, with the penalty for all five counts to be served concurrently. Upon release, Respondent is to be placed on probation for life, a condition of which is to comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901. et seq.), as directed by the probation officer, the Bureau of Prisons, or any state sex offender agency in a state in which he resides, works, is a student, or was convicted of a qualifying offense.

11. Also included in the Special Conditions of Supervision are that Respondent may not possess or use any computer, with the exception of pre-approved use in connection with authorized employment; that Respondent shall not have personal, mail, telephone, or computer contact with children under the age of 18; that Respondent shall not be involved in any children's or youth organization; and that Respondent shall participate in a sex offender program.

12. Respondent's arrest, prosecution, and conviction were covered by the media, in the newspaper and on the radio, television, and internet.

13. Respondent's conviction significantly impairs Respondent's effectiveness as a teacher in the community. Respondent's certification is for middle school grades. The prohibition from having contact with children under the age of 18 makes it impossible for him to hold employment as a teacher in the public school system. As stated by Maurice Bonner, the Director of Personnel for St. Lucie County Schools, "[t]here is absolutely no way that the students and the parents and the community would have any faith in him being alone in a classroom with kids even for one minute. And he would not be able to effectively be in a classroom. Or be on campus, period, where there are children present." His testimony is credited.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.57(1), Florida Statutes (2012).

15. This is a proceeding in which Petitioner seeks to revoke Respondent's educator certification. Because disciplinary proceedings are considered penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

16. As stated by the Florida Supreme Court:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

17. The Amended Administrative Complaint makes the following allegations in support of Petitioner's decision to take disciplinary action against Respondent's educator's certificate:

> 2. At all times pertinent hereto, the Respondent was employed as a Mathematics Teacher at Manatee Elementary School in the St. Lucie County School District.
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> 3. On or about January 13, 2012, the Respondent was arrested in Osceola County, Florida, as the result of allegations that Respondent attempted to contact a minor online and arrange for sexual activity with the minor.
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> 4. As a result of the Respondent's arrest, a search warrant was executed on the Respondent's residence in St. Lucie County, Florida. The Respondent was found to be in possession of images depicting minors engaged in explicit sexual conduct. On or about March 7, 2012, the Respondent was arrested and charged with one count of Enticing and Attempting to Entice a Minor to Engage in Sexual Activity in violation of 18 U.S.C. § 2422(b) and four counts of Possession of Child Pornography in violation

> of 18 U.S.C. § 2252(a)(4)(B). On or about September 12, 2012, the Respondent was adjudicated guilty on all five counts.
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> 5. Pursuant to Section 1012.795(2), Florida Statutes, the plea of guilty in any court or the decision of guilty by any court is prima facie proof of grounds for the revocation or other sanction of a teaching certificate.
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> 6. The Respondent's convictions under 18 U.S.C. § 2422(b), and 18 U.S.C. § 2252 (a)(4)(B) disqualify the Respondent from certification pursuant to Sections 1012.315(1)(oo) and 1012.315(3), Florida Statutes, in that the Respondent has been convicted of acts that constitute a violation of Chapter 847, Florida Statutes.

18. Petitioner has proven the factual allegations in paragraphs two, three, and four by clear and convincing evidence.

19. Based upon these factual allegations, Petitioner asserts in Counts One through Four that Respondent has violated section 1012.795(1)(d)(gross immorality or an act involving moral turpitude as defined by rule); section 1012.795(1)(f)(convicted or found guilty of a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation); section 1012.795(1)(g)(conduct that seriously reduces his effectiveness as an employee of the school board); and section 1012.795(1)(n)(disqualification from educator certification under section 1012.315).

20. Section 1012.795 authorizes the Education Practices Commission to take action against the certifications of

instructors under certain enumerated circumstances. It provides in pertinent part:

> (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:
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> (d) Has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.
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> * * *
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> (f) Has been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation.

> (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.
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> * * *
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> (n) Has been disqualified from educator certification under s. 1012.315.
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> (2) The plea of guilty in any court, the decision of guilty by any court, the forfeiture by the teaching certificateholder of a bond in any court of law, or the written acknowledgment, duly witnessed, of offenses listed in subsection (1) to the district school superintendent or a duly appointed representative of such superintendent or to the district school board shall be prima facie proof of grounds for revocation of the certificate as listed in subsection (1) in the absence of proof by the certificateholder that the plea of guilty, forfeiture of bond, or admission of guilt was caused by threats, coercion, or fraudulent means.

21. Section 1012.315, Florida Statutes (2012), the version of the statute in effect at the time of Respondent's conviction, provided in pertinent part:

> 1012.315 Disqualification from employment.—A person is ineligible for educator certification, and instructional personnel and school administrators, as defined in s. 1012.01, are ineligible for employment in any position that requires direct contact with students in a district school system, charter school, or private school that accepts scholarship students under s. 1002.39 or s. 1002.395, if the person, instructional personnel, or school administrator has been convicted of:
> (1) Any felony offense prohibited under any of the following statutes:

* * *

(oo) Chapter 847, relating to obscenity.

* * *

(3) Any criminal act committed in another state or under federal law which, if committed in this state, constitutes an offense prohibited under any statute listed in subsection (1) or subsection (2).

22. Count One of the Amended Administrative Complaint charges Respondent with violation of section 1012.795(1)(d), which makes it a basis for discipline when a certificate holder has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.

23. The Education Practices Commission has not defined "gross immorality" or "moral turpitude" for the purpose of discipline to be imposed pursuant to section 1012.795. However, the Commission has defined "immorality" and "moral turpitude" for use by school districts when taking action against instructional personnel in Florida Administrative Code Rule 6A-5.056 (previously numbered as rule 6A-4.009). Rule 6A-5.056 defines these terms as follows:

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

* * *

> (6) Moral turpitude is a crime that is evidenced 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.

24. In Florida Board of Bar Examiners, Re: G.W.L., 364 So. 2d 454 (Fla. 1978), the Supreme Court of Florida examined the requirement of good moral character in considering a Florida Bar applicant who had voluntarily discharged his student debts in bankruptcy before they were actually due. The Court noted that previously it had defined moral turpitude in State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 611, 146 So. 660, 661 (1933) by saying, "[m]oral turpitude 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 . . . ." In addressing what constitutes a lack of good moral character, the Court stated:

> In our view, a finding of a lack of "good moral character" should not be restricted to those acts that reflect moral turpitude. A more appropriate definition of the phrase requires an inclusion of acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation.

364 So. 2d at 458.

25. Petitioner has proven a violation as charged in Count One by clear and convincing evidence, which requires a finding of "gross immorality," implicating even more egregious conduct. There is no doubt that Respondent's actions cause "substantial doubts about [Respondent's] honesty, fairness, and respect for the rights of others and for the law of the state and nation." The children in the videos have been no doubt victimized in a manner that will affect them for the rest of their lives, and are of similar ages as those children entrusted to his care in the classroom. As stated in Department of Professional Regulation v. Rosenberg, Case No. 89-5858, ¶ 14 (DOAH May 7, 1990; FREC June 19, 1990):

> If individuals to not attempt to procure [motion pictures containing sexual conduct by children], it is reasonable to conclude that fewer children will be subjected to such exploitation and mistreatment. Adults owe a duty to children not to debauch them by placing them in pornographic films. The support of the child pornography market is morally despicable or abhorrent, and meets Florida's definition of "moral turpitude."

See also Gallagher v. Rosenthall, DOAH Case No. 00-3888PL (DOAH Jan. 10, 2001; EPC Apr. 23, 2001).

26. Count Two charges Respondent with violating section 1012.795(f), quoted in paragraph 20. Petitioner has proven this Count by clear and convincing evidence, in that Respondent has

been convicted of five felonies in violation of 18 U.S.C. sections 2422(b) and 2252(a)(4)(B).

27. Count Three charges Respondent with violating section 1012.795(1)(g), by being found guilty of personal conduct which seriously reduces his effectiveness as an employee of the School Board. Petitioner has proven this Count by clear and convincing evidence. The media provided substantial coverage of his arrest and conviction. There was credible testimony that his effectiveness would be significantly impaired. Moreover, the terms of his probation, should he ever be released from prison, forbid him from having contact with children under 18. This prohibition by definition makes it impossible for him to work as a middle-school teacher.

28. Count Four charges Respondent with violating section 1012.795(1)(n), alleging that Respondent has been disqualified from educator certification pursuant to section 1012.315. Subsection 1012.315(3) provides that a person is ineligible for educator certification if, among other prohibitions, the person has been convicted of any criminal act committed in another state or under federal law which, if committed in Florida, constitutes a violation of a Florida offense listed in the statute.

29. Respondent was convicted of violating section 18 U.S.C. 2422(b). This section provides:

> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime or territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

30. Within chapter 847, Florida Statutes, referenced in section 1012.315(1)(oo), is section 847.0135(3), which provides:

> (3) CERTAIN USES OF COMPUTER SERVICES OR DEVICES PROHIBITED.—Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
> (a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or
> (b) Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct,
>
> commits a felony of the third degree, . . .

31. The allegations forming the basis for Respondent's conviction under 18 U.S.C. § 2422(b) would also form a basis for prosecution under section 847.0135, and is thus a disqualifying offense under section 1012.315(3)(oo).

32. Petitioner asserts that Respondent's conviction of four counts of violating 18 U.S.C. § 2252(a)(4)(B) corresponds with a violation of section 827.071(5), Florida Statutes, which is a disqualifying offense under section 1012.315(1)(m). While Petitioner's analysis is correct, the only disqualifying offenses alleged in the Amended Administrative Complaint are any offenses in chapter 847, identified in section 1012.315(1)(oo). Respondent was not charged with committing a disqualifying offense under section 1012.315(1)(m). Respondent cannot be found guilty of violations for which he was not charged. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); and Willner v. Dep't of Prof. Reg., 563 So. 2d 805 (Fla. 1st DCA 1990).

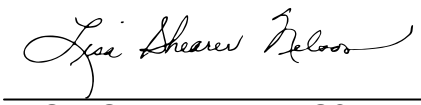
33. In this event, however, the ultimate result is the same. Petitioner proved the violations in Counts One through Four by clear and convincing evidence. Respondent's convictions disqualify him from holding a teaching certificate in Florida. The Disciplinary Guidelines located at Florida Administrative Code Rule 6B-11.007 provide for penalties ranging from probation to revocation for those violations that do not expressly disqualify

him from holding a teaching certificate. In this instance, the only appropriate penalty is permanent revocation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a Final Order finding Respondent guilty of all four Counts in the Amended Administrative Complaint and permanently revoking his certification.

DONE AND ENTERED this 2nd day of August, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.