

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF  
EDUCATION,

Petitioner,

vs.

Case No. 15-7091PL

MARK OSTERMEIER,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice on May 5, 2016, in Viera, Florida, a hearing was conducted before J. D. Parrish, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Ron Weaver, Esquire  
Post Office Box 770088  
Ocala, Florida 34477-0088

For Respondent: Robert Charles McClain, Esquire  
4910 Flora Drive  
Melbourne, Florida 32934

STATEMENT OF THE ISSUES

Whether Respondent, Mark Ostermeier, violated Sections 1012.795(1)(c), (1)(g), and/or (1)(j), Florida Statutes (2011), and/or Florida Administrative Code Rule 6A-10.081(3)(a), as alleged by the Administrative Complaint dated October 14, 2014; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The instant case was referred to DOAH for formal proceedings on December 16, 2015. The factual allegations of the case mirror the allegations of a matter that emanated from Brevard County, Florida. Respondent's employment with the Brevard County School District was terminated in 2012. Subsequent to a two-day administrative hearing and consideration of the Recommended Order (DOAH Case No. 11-4310TTS) issued in that proceeding, the Brevard County School Board terminated Respondent's employment with the school district. In this action Petitioner, Pam Stewart, as the Commissioner of Education, issued an Administrative Complaint and alleged Respondent violated Florida law and is thereby subject to disciplinary action imposed by the Florida Educational Practices Commission. Petitioner seeks the revocation of Respondent's teaching certificate.

The Administrative Complaint alleged:

Statute Violations

COUNT 1: The Respondent is in violation of section 1012.795 (1) (c), Florida Statutes, in that Respondent has proved to be incompetent to teach or to perform duties as an employee of the public school system or to teach in or to operate a private school.

COUNT 2: The Respondent is in violation of section 1012.795 (1) (g), Florida Statutes, in that Respondent has been found guilty of personal conduct which seriously reduces effectiveness as an employee of the school board.

COUNT 3: The Respondent is in violation of section 1012.795(1)(j), Florida Statutes, in that Respondent has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

Rule Violations

COUNT 4: The allegations of misconduct set forth herein are in violation of Rule 6A-10.081(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.

Respondent maintains he did not act inappropriately in his tenure with the Brevard County School District and that his teaching certificate should not be revoked. Respondent timely sought an administrative hearing to challenge the proposed action and the matter was scheduled for trial.

After requests for continuances were granted, the case was ultimately scheduled for hearing for May 5-6, 2016. The parties' Joint Pre-hearing Stipulation was filed on April 25, 2016. The stipulation provided, in part:

3. Petitioner and Respondent agree to the admission of the hearing transcript, including admitted exhibits, in Brevard County School Board vs. Mark Ostermeier, DOAH Case No. 11-4310TT (the "school district case"). Petitioner and Respondent agree and request that the Administrative Law Judge make findings of fact and conclusions of law based upon the testimony of the witnesses and the admitted exhibits in the school district case, and any testimony given and exhibits admitted at the hearing in this case.

4. On or about June 25, 2012, the Division of Administrative Hearings entered a

Recommended Order, recommending that the Brevard County School Board enter a Final Order terminating the Respondent's employment.

5. On or about July 10, 2012, the Brevard County School Board entered a Final Order adopting the recommendation of the Administrative Law Judge and terminated the Respondent from employment as a teacher with the Brevard County School District, effective August 9, 2011.

The case was transferred to the undersigned on April 26, 2016, and the case was heard on May 5, 2016. As listed in the Transcript of the underlying case (DOAH Case No. 11-4310TTS), Petitioner presented the testimony of the following witnesses: Mark Ostermeier, G.K., Robin Novelli, Susan Santell, Joseph Capalbo, Diane Butler, Jasmine DeLaughter, Jennifer Sullivan, John Small, Janice Frye, Margaret O'Connor, Norma Hostetler, and Joy Salamone. Petitioner's Exhibits 1 through 45, 48 through 64, and 66 were admitted. Petitioner's Exhibit 68 was admitted as a joint exhibit for the parties. Respondent testified on his own behalf and offered testimony from J.M., John Hays, and John Tuttle. Mr. Tuttle also testified during the school board case. Respondent's Exhibits 1 and 2 were admitted into evidence.

The Transcript of the case was filed with DOAH on May 18, 2016. Thereafter the parties requested and were given one extension of the time within which to file their proposed recommended orders. The parties timely filed proposed orders

that have been fully considered in the preparation of this Order.

On June 8, 2016, Respondent also filed a Motion to Reopen Respondent's Cause Based Upon Newly Discovered Evidence Subpoenaed but Not Produced at Final Hearing. The motion failed to identify when, what, or who failed to produce the "newly discovered" evidence. The documents attached to the motion did not represent new evidence that was not readily available to Respondent prior to the hearing. Moreover, Respondent's Exhibit 3 (marked and attached to the motion for identification) would be cumulative and offers no probative factual information not already in the record. It is undisputed Respondent holds a valid teaching certificate effective through June 30, 2016. The parties previously stipulated to that fact. Adding a copy of Respondent's teaching certificate (Respondent's Exhibit 3 attached to the motion) adds no new information. Similarly, all attachments to the motion were available to Respondent in advance of the hearing and provide no new or unknown information. The record already details the referrals to the Employee Assistance Program (EAP) referenced by other attachments to Respondent's motion. The referrals were documented and addressed in the school board case, as well as the Respondent's testimony in the instant matter. Respondent's claim that he was targeted for disciplinary action by his

principal is fully addressed by the record. Accordingly, Respondent's motion to reopen the case is denied.

#### FINDINGS OF FACT

1. Petitioner, Pam Stewart, as Commissioner of Education, on behalf of the Florida Educational Practices Commission, is authorized by Florida law to investigate and prosecute cases against teachers with Florida teaching certificates. See §§ 1012.315, 1012.795, and 1012.796, Fla. Stat.

2. Respondent, Mark A. Ostermeier (Respondent), holds a Florida educator's certificate, Certificate No. 662488, covering the subject area of art, grades kindergarten through 12. Respondent's teaching certificate is valid through June 30, 2016.

3. At all times material to the allegations of this case, Respondent was employed by the Brevard County School District (District) and worked as an art teacher at the high school and elementary school levels.

4. Except for the school year ending 2002, the District issued acceptable evaluations to Respondent. From the time Respondent was assigned to Bayside High School (Bayside) until the 2008/2009 school year Respondent received acceptable evaluations.

5. For the school years 2008/2009 and 2009/2010 Respondent was assigned to Bayside. The principal at Bayside during the relevant time span was Robin Novelli.

6. While at Bayside, Respondent was responsible for instructing students in grades 9 through 12 in the area of art. During the 2008/2009 school year, Mr. Novelli became concerned regarding Respondent's classroom management, planning, and instruction. Although he signed off on the evaluation for that year (performed by another school administrator), Mr. Novelli decided he would assume the role of evaluator for Respondent for the following school year.

7. Before 2008/2009, Respondent received acceptable evaluations. The principal at Bayside during those years was John Tuttle, who signed off on all of Respondent's evaluations, but did not personally evaluate Respondent. Mr. Tuttle believed Respondent to be a competent instructor.

8. In May 2009, Respondent exhibited unacceptable behavior and Mr. Novelli received complaints from a parent and student that Respondent had refused to return the student's artwork. The student withdrew or did not re-enroll in Respondent's art class, and Respondent took one of the student's paintings to his home. When the student and parent demanded the return of the painting, Respondent refused to return it. When Mr. Novelli intervened, Respondent relented and eventually returned the

student's painting. The student believed Respondent was refusing to return the painting in an effort to get the student to re-enroll in Respondent's class. Respondent denied the allegation but did not have a valid reason for not returning the student's art.

9. Bayside did not have an advanced placement (AP) art program. Respondent was desirous of establishing such a program and sought to do so. One of the activities that would enhance an AP art program was a field trip Respondent proposed for students to attend a National Portfolio Day conference. Respondent attempted to pitch the field trip for his art students, but did not follow directives in order to get the trip approved. Mr. Novelli did not approve the trip. Respondent did not have art students who met the requisite level of proficiency to warrant an AP level class. Nevertheless, Respondent continued to fuel the students' desire to attend the conference.

10. When Respondent failed to meet the prerequisite criteria to have the field trip approved, he blamed Mr. Novelli.

11. In October 2009, Mr. Novelli observed Respondent and gave him an interim evaluation that marked him as overall unsatisfactory. Five categories were unsatisfactory and one category needed improvement. Thereafter, Mr. Novelli gave Respondent prescriptive plans for improvement. The Professional Development Assistance Plans (PDAPs) itemized what Respondent



needed to do to improve his performance. The plans provided specific strategies and acts for Respondent to do to improve. Respondent did not follow the PDAP. Trying to communicate with Respondent proved difficult, as his interpretation of what was needed to improve differed from the directives of the PDAP.

12. Respondent did not improve, and it became Mr. Novelli's opinion that students in Respondent's art classes had been deprived a minimum educational experience. Mr. Novelli's expectations of Respondent were based upon his years as a trained administrator to evaluate teachers in all courses. Because Respondent continued to provide deficient classroom management, planning, and instruction, Mr. Novelli evaluated Respondent as unsatisfactory.

13. As the end of the school year approached, Respondent's performance did not improve to any significant degree. Rather than continue at Bayside, Respondent's union representative, acting on his behalf, sought a transfer for Respondent to another school. That transfer was granted by the District.

14. Respondent made several false accusations against Mr. Novelli and/or other school administrators. At one time or another Respondent stated he had been recorded with a USB recording pen; had been falsely arrested because of a false claim made by a District employee; had been poisoned due to an environmental hazard that Respondent was forced to endure; lost

a child because of District treatment; and had his car vandalized by a school administrator. None of the accusations were accurate.

15. Respondent started the 2010/2011 school year with a PDAP at Lockmar Elementary School (Lockmar). While at Lockmar, Respondent was supervised by the principal, Ms. Hostetler. Respondent respected Ms. Hostetler and acknowledged she had worked to assist him.

16. Nevertheless, despite her efforts to give Respondent constructive help to meet the criteria and to improve deficiencies, Ms. Hostetler evaluated Respondent as unsatisfactory. The issues with planning, classroom management, and ability to provide effective instruction to students continued.

17. In October 2010, Ms. Hostetler gave Respondent an interim evaluation that scored him as unsatisfactory in four categories and needs improvement in one. Ms. Hostetler noted that (as in the past) Respondent failed to have adequate lesson plans, failed to provide meaningful instructions to students in an organized, efficient manner, and failed to manage his classroom to assure that all students were appropriately engaged in the lesson. Additionally, Ms. Hostetler noted that Respondent did not have his classroom ready for instruction when students arrived for class and did not timely release the

students back to their teachers at the conclusion of the art session. This was a problem because the classroom teachers were delayed or inconvenienced by Respondent's behavior. Despite counseling for this issue, Respondent's deficiencies at the beginning and conclusion of class continued.

18. It came to Ms. Hostetler's attention that Respondent was sending disruptive students outside his classroom to "look for dinosaurs." His belief that this technique for behavior management was acceptable was erroneous. Ms. Hostetler did not approve the practice and opined that it placed students at risk. Respondent did not accept Ms. Hostetler's authority as definitive on the issue. Respondent maintained that his technique was an acceptable strategy that should have been allowed.

19. Ms. Hostetler next evaluated Respondent in February of 2011. Noting little improvement, the February evaluation found the Respondent's teaching practices remained unsatisfactory. Respondent failed to use 21st Century equipment as Ms. Hostetler had requested. Additionally, he did not use art materials appropriately, did not control the classroom, and did not differentiate course work by age and grade. Nevertheless, Ms. Hostetler gave Respondent more time to improve and again issued a PDAP that was designed to give Respondent specific directives.

20. At the conclusion of the school year, Ms. Hostetler evaluated Respondent's performance as unsatisfactory. He was given a contract for the following school year in error. The District eventually caught the mistake and notified Respondent that his employment with the schools would be terminated.

21. Subsequent to a two-day administrative hearing, the DOAH Administrative Law Judge issued a Recommended Order that found the District's action was supported by the weight of the evidence presented.

22. Respondent's teaching was unacceptable during the 2010/2011 school year and failed to provide students with a meaningful educational opportunity. Respondent was incompetent to comply with directives, which were reasonable and tailored to help Respondent meet the mandates of the PDAPs. Respondent's art students were deprived a minimum educational experience.

#### CONCLUSIONS OF LAW

23. Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015), DOAH has jurisdiction over the subject matter of and the parties to this proceeding.

24. Section 1012.795, Florida Statutes, 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:

\* \* \*

(c) Has proved to be incompetent to teach or to perform duties as an employee of the public school system or to teach in or to operate a private school.

\* \* \*

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

\* \* \*

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

25. In order to take action against the Respondent's teaching certificate, Petitioner must establish by clear and

convincing evidence that Respondent committed the acts complained of in the Administrative Complaint. Petitioner bears the burden of proof as to all allegations. See Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Dep't of Ins. & Treasurer, 707 So. 2d 941 (Fla. 3rd DCA 1998).

26. "Clear and convincing evidence" as described in Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989):

requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the 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).

27. During the 2009/2010 and 2010/2011 school years, while employed with the District, Respondent failed to competently perform his duties as an art teacher. He received multiple unsatisfactory performance evaluations and failed to comply with the performance improvement options provided to him. Two principals worked to assist Respondent with the remediation of his deficient areas of performance. Respondent was given PDAPs

for all areas shown to be deficient. When Respondent's union representative sought a school transfer to give Respondent a fresh start at another school, the District accommodated the request.

28. Respondent was asked to draft or improve lesson plans but failed to follow them when drafted. Respondent was asked to use 21st Century technology available in his classroom, but failed to do so. Respondent was asked to impart discernible, age-appropriate lessons to his classes. Respondent routinely presented the same lesson to all his elementary classes. Respondent was asked to be mindful of his peers, yet continued to disturb his neighboring classroom. Respondent was asked to keep his class time limited to the minutes he was afforded, but routinely caused other teachers to be inconvenienced by not having his classroom ready for the students' arrival or ready for departure at the end of class. Respondent was counseled in this regard several times, yet he failed or refused to conform to the schedule all teachers were required to keep.

29. Also troubling, Respondent disregarded the safety of elementary students by sending them outside "to look for dinosaurs." Respondent used an unapproved behavioral strategy not authorized by his school principal to give disruptive students a time-out while they perused the outside area for dinosaurs. Respondent was unaware that such isolation could,

and did, cause students to be subjected to peer disparagement. Telling in this instance is Respondent's lack of candor in acknowledging the error. Respondent maintained he was following an appropriate strategy and placed his opinion of how he handled the behavioral problems exhibited by disruptive children above the guidance provided by others.

30. Respondent has an abundance of confidence in his abilities and manner of performance of his teaching duties and failed, or otherwise refused, to conform to the dictates of his principals. Based upon the record in this case, when presented with a "battle of the wills," it is unlikely Respondent would submit to authority and comply with improvement directives no matter how accurately or inaccurately perceived by Respondent. While quick to suggest his issue at Bayside stemmed from the principal there and their personal conflicts, there was no such conflict at the elementary school. Ms. Hostetler gave Respondent every opportunity to improve and extended his time to improve in an abundance of fairness. Respondent had no conflict with Ms. Hostetler yet failed to comply with her suggestions.

31. Respondent made inaccurate and unprofessional statements regarding Principal Novelli and other administrators to others. Many of Respondent's statements to others were unsubstantiated by the reality of the situations. For example, Mr. Novelli did not use a USB pen recording device at any time



and did not attempt to record Respondent using one. Mr. Novelli did not attempt to have Respondent arrested on false or trumped-up charges. Mr. Novelli did not damage Respondent's motor vehicle. No District employee "killed his baby" as Respondent claimed. And finally and perhaps most telling is the closing statement Respondent made to the undersigned. Respondent asked to make a statement at the conclusion of the case and, over Petitioner's objection, was allowed to do so. Respondent wanted the undersigned to know:

Okay. For the record with fact, when I was young the same people that went after Mr. Walsh's son came after me. They were a terrorist group called The Hand of Death. While teaching at the Brevard County School System I had a female teacher come up to me and pull her hair back and show me a bone that said The Hand of Death. She said that I had to watch out for my job. I'm informing you that I have informed the FBI to the best of my ability about those facts and those findings. Therefore, I appreciate you being here. But with fact and with a good heart and good soul, I am the only living witness, the only one who can testify that those terrorists are out there, those child-snatchers are out there. I have given the FBI to the best of my ability all that knowledge, all that fact, all that information. One of the reasons for me not pursuing going back into teaching was to find out one hundred percent factually who those people are, where they were, and what they were doing.

32. Petitioner has established by clear and convincing evidence that Respondent lacked fitness to discharge the duties of his job to provide his art classes with a minimum educational


experience. As such, Respondent is subject to discipline in accordance with law. Respondent repeatedly failed to perform duties prescribed by his evaluators. Respondent's evaluations document the areas needing remediation. Respondent's PDAPs document the efforts made by the District to assist Respondent. Respondent failed or otherwise refused to improve his performance.

33. As to each count of the Administrative Complaint, Petitioner has established by clear and convincing evidence Respondent violated provisions of law and/or rule.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is recommended that the Educational Practices Commission enter a final order revoking Respondent's teaching certificate.

DONE AND ENTERED this 30th day of June, 2016, in Tallahassee, Leon County, Florida.

  
\_\_\_\_\_  
J. D. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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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.