

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF  
EDUCATION,

Petitioner,

vs.

Case No. 17-4217PL

FRANK ARDO,

Respondent.

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RECOMMENDED ORDER

On November 28, 2017, Administrative Law Judge (ALJ) J. Lawrence Johnston of the Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing in this case by video teleconference at sites in Fort Myers and Tallahassee.

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire  
Charles T. Whitelock, P.A.  
300 Southeast 13th Street  
Fort Lauderdale, Florida 33316

For Respondent: Robert J. Coleman, Esquire  
Coleman and Coleman  
Post Office Box 2089  
Fort Myers, Florida 33902

STATEMENT OF THE ISSUE

Whether Respondent, a high school teacher, should be disciplined under sections 1012.795 and 1012.796, Florida Statutes (2014),<sup>1/</sup> for an inappropriate relationship and

inappropriate communications with a student; and, if so, the appropriate discipline.

PRELIMINARY STATEMENT

On March 16, 2016, the Petitioner filed an Administrative Complaint against the Respondent. The two-count Administrative Complaint charged the Respondent with violating section 1012.795(1)(g) for being guilty of personal conduct that seriously reduces effectiveness as a teacher, and section 1012.795(1)(j) for violating the Principles of Professional Conduct for the Education Profession. The charges arose from an alleged inappropriate relationship and inappropriate communications with a student.

The Respondent disputed the charges and requested a formal hearing. The Petitioner forwarded the case to DOAH for assignment to an ALJ. It was designated DOAH case 16-6534PL and scheduled for hearing on January 17, 2017. The Petitioner's witnesses, who were not under subpoena, failed to appear. The Petitioner voluntarily dismissed, and the DOAH file was closed.

On July 25, 2017, the matter was again referred to DOAH and was re-opened as DOAH case 17-4217PL. The Respondent moved to dismiss based on the voluntary dismissal of DOAH case 16-6534PL. The motion was denied. The final hearing was scheduled for October 3, but it was continued due to Hurricane Irma and rescheduled for November 28.

On September 28, the Petitioner was granted leave to file an Amended Administrative Complaint that added some allegations and restated the charges in six counts, with the specific rule violations alleged in counts 3 through 6.

At the final hearing on November 28, the Petitioner called five witnesses: Deborah Cox, assistant principal at Gulf Coast High School; Collier County Sheriff's Corporal Michael Sutton; Sheriff's Detective Matthew Usher; Valerie Wenrich, executive director of Human Resources for the Collier County School District; and Ian Dohme, a Department of Education investigator. The Petitioner's Exhibits 1 through 5 and 11 through 14 were admitted in evidence, subject to hearsay objections. The Respondent's objections to the admissibility of several exhibits were sustained.

The Respondent objected to the admissibility of the Petitioner's Exhibit 6 on several grounds, including authenticity. The exhibit appeared to consist of copies of text messages that were offered as evidence of inappropriate communications between the Respondent and one of his students, H.D. The student and her mother could have addressed the authenticity of the exhibit, but they did not appear to testify. Ruling was reserved on the Respondent's authenticity objection.

The Respondent, who also could have addressed the authenticity of the exhibit, did not testify and offered no evidence.

At the end of the hearing, the Petitioner was granted a seven-day continuance to give her time to demonstrate that H.D. and her mother were under valid subpoenas and that the Petitioner should be granted a longer continuance to allow her to enforce the subpoenas in circuit court under section 120.569(2)(k)2., Florida Statutes (2017). Instead, it was demonstrated that neither witness was under a valid subpoena, and the evidentiary record was closed.

A Transcript of the final hearing was filed on December 11. After written arguments were considered, the Petitioner's Exhibit 6 was admitted over objection without the testimony of H.D. and her mother, and deadlines were established for proposed recommended orders. The parties' proposed recommended orders have been considered.

#### FINDINGS OF FACT

1. The Respondent holds Florida Educator Certificate 946095, covering social science. The certificate is valid through June 30, 2019.

2. In the 2014/2015 school year, the Respondent was teaching social science at Gulf Coast High School in Collier County.

3. In October 2014, the Respondent began communicating with his student, H.D., by text messages. There were numerous texts sent on a regular basis over the course of about two months. Most of these messages did not relate to classroom matters, which violated school district policy. Many were highly personal and clearly inappropriate. Thirty-three times, the Respondent referred to his student as "baby." Nine times, he wrote, "miss u." Nine times, he said she was "beautiful." Five times, he said she was "cute." In one message, the Respondent asked the student to meet him at the mall during winter break for him to buy her a Christmas gift. He also texted her on Christmas Eve and on Christmas morning. In one text, he asked to take her to dinner. In one message, the Respondent asked the student if she minded if he rubbed her leg. In another, he apologized for hugging her and kissing her on the nose.

4. When these text communications came to the attention of the school's administration, an investigation was initiated. On January 15, 2015, the Respondent was informed of the investigation and was given an opportunity to explain. The Respondent declined. He was then escorted off campus.

5. The school district referred the matter to law enforcement, which also investigated. When interviewed by law enforcement, the Respondent exercised his right to remain silent. No criminal charges were brought against the Respondent because

H.D. and her mother did not want to press charges and because there was no evidence of sexual misconduct by the Respondent.

6. After the law enforcement matter was closed, the school district again confronted the Respondent about the charges, and he again declined to respond. Instead, he resigned his employment on February 9, 2015. The school superintendent accepted the resignation but specified that the Respondent resigned "Not in Good Standing." As a result, the Respondent is not eligible for rehire in any capacity by the school district. His misconduct and ineligibility for rehire clearly reduces his effectiveness as an employee of the school district.

#### CONCLUSIONS OF LAW

7. Because the Petitioner seeks to impose license discipline, she has the burden to prove the allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Davey, 645 So. 2d 398, 404 (Fla. 1994). See also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the

evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.” Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

8. Disciplinary statutes and rules “must be construed strictly, in favor of the one against whom the penalty would be imposed.” Munch v. Dep’t of Prof’l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep’t of Bus. & Prof’l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm’n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) (“[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.” (citing State v. Pattishall, 126 So. 147 (Fla. 1930))).

9. The grounds proven in support of the Petitioner’s assertion that the Respondent’s license should be disciplined must be those specifically alleged in the Amended Administrative Complaint. See e.g., Trevisani v. Dep’t of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep’t of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Dep’t of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Hunter v. Dep’t of Prof’l Reg., 458 So. 2d 842 (Fla. 2d DCA 1984). Due process prohibits the

Petitioner from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. See Shore Vill. Prop. Owners' Ass'n, Inc. v. Dep't of Env'tl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

10. Count 1 charges the Respondent with being guilty of personal conduct that seriously reduces his effectiveness as an employee of the school district, in violation of section 1012.795(1)(g), Florida Statutes. The evidence was clear and convincing that the Respondent violated this statute through his inappropriate relationship and communications with his student, H.D.

11. The Respondent contends that the standard of proof was not met as to this charge (or the others) because the student (and her mother) did not testify. In this case, the standard was met even without their testimony.

12. The Respondent also contends that this charge was not proven because of the absence of proof of a serious reduction in the Respondent's effectiveness as an employee of the school district. In this case, the evidence was sufficient. The Respondent is ineligible for employment in the school district due to his resignation "Not in Good Standing" in the face of the school district's action to terminate his employment for an



inappropriate relationship and inappropriate communications with a student.

13. Count 2 charges the Respondent with being in violation of section 1012.795(1)(j) by violating the rules setting out the Principles of Professional Conduct for the Education Profession. Count 2 is derivative of the rule violations charged in Counts 3 through 6.

14. Count 3 charges a violation of Florida Administrative Code Rule 6A-10.081(3)(a)<sup>2/</sup> for failure to "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." There was no evidence of "conditions harmful to learning and/or to the student's mental and/or physical health and/or safety." This violation was not proven.

15. Count 4 charges a violation of rule 6A-10.081(3)(e) for intentionally exposing a student to unnecessary embarrassment or disparagement. While it is clear that the Respondent's relationship with his student was inappropriate, as were his communications with her, there was no evidence that she was embarrassed or disparaged by them. This violation was not proven.

16. Count 5 charges a violation of rule 6A-10.081(3)(f) for intentionally violating or denying a student's legal right.

There was no evidence of a violation or denial of a student's legal right. This violation was not proven.

17. Count 6 charges a violation of rule 6A-10.081(3)(h) for exploiting a relationship with a student for personal gain or advantage. The Respondent's inappropriate relationship and communications with H.D. proved this violation.

18. Under section 1012.795(1), the possible discipline for violations includes suspension for up to five years, revocation for up to ten years, and permanent revocation. If a certificate is revoked for a fixed period of time, it is not automatically reinstated at the end of the period of revocation. Under section 1012.795(4), re-application is required. Under section 1012.756(2)(e), an applicant must be of good moral character.

19. In her proposed recommended order, the Petitioner states that she is seeking either permanent revocation or revocation for a fixed period of time (the length of which is not specified). If revocation is not permanent, the Petitioner would request that recertification be conditioned upon evaluation by a provider selected by the Recovery Network Program (RNP) to ensure that the Respondent would pose no threat to students, and a period of probation of not less than five years, with standard conditions.

20. Those conditions of recertification do not appear to be appropriate. First, RNP is to "assist educators who are impaired

as a result of alcohol abuse, drug abuse, or a mental condition to obtain treatment.” § 1012.798(1), Fla. Stat. (2017). There is no evidence that the Respondent is impaired as a result of any of those conditions. Second, there is no provision in section 1012.56 to certify an applicant who is of good moral character on some kind of probationary status. The applicant either demonstrates good moral character, which entitles him to an educator certificate, or he does not. (The temporary certificates described in section 1012.56(7) are something different.)

21. Under Florida Administrative Code Rule 6B-11.007(2), the penalties for the violations proven in this case range from probation to revocation. Rule 6B-11.007(3) sets out aggravating and mitigating factors for deviations from the penalty range. Consideration of the aggravating and mitigating factors does not warrant a deviation, especially given the breadth of the penalty range in the rule, but it does suggest that a stiff penalty would be appropriate, and the Respondent has offered no evidence or rationale that would support a lesser penalty.

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 the Respondent guilty on Counts 1, 2, and 6, and revoking his Educator Certificate. If the revocation

is not permanent, it should be for at least five years, after which he would be able to re-apply for certification and try to demonstrate good moral character.

DONE AND ENTERED this 12th day of January, 2018, in Tallahassee, Leon County, Florida.



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J. LAWRENCE JOHNSTON  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of January, 2018.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, the Florida Statutes cited refer to the 2014 codification, which contains the statutes that were in effect in late 2014 when the alleged violations occurred.

<sup>2/</sup> All rule citations are to the Florida Administrative Code rules that were in effect in late 2014, when the alleged violations occurred.

COPIES FURNISHED:

Gretchen Kelley Brantley, Executive Director  
Education Practices Commission  
Department of Education  
Turlington Building, Suite 316  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

Robert J. Coleman, Esquire  
Coleman and Coleman  
Post Office Box 2089  
Fort Myers, Florida 33902  
(eServed)

Charles T. Whitelock, Esquire  
Charles T. Whitelock, P.A.  
300 Southeast 13th Street  
Fort Lauderdale, Florida 33316  
(eServed)

Matthew Mears, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

Marian Lambeth, Bureau Chief  
Bureau of Professional Practices Services  
Department of Education  
Turlington Building, Suite 224-E  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

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.