STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 17-6144PL

ALEXANDER OSUNA,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge, with the Division of Administrative Hearings ("DOAH"), on February 20, 2018, by video teleconference at sites located in Miami and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Emily Moore, Esquire
Florida Education Association
213 South Adams Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent violated section 1012.795(1)(j), Florida Statutes (2017),[1/] and Florida Administrative Code

Rule 6A-10.081(2)(a)1. and 8., as alleged in the Administrative Complaint; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On August 25, 2017, Petitioner filed an Administrative Complaint against Respondent. Respondent disputed the allegations and, on September 21, 2017, timely filed an Election of Rights with Request for Voluntary Dismissal. By letter dated October 13, 2017, Petitioner rejected Respondent's Election of Rights. Thereafter, on November 2, 2017, Respondent filed an Amended Election of Rights with an attached Mitigation Statement and Renewed Request for Voluntary Dismissal. On November 8, 2017, the case was referred to DOAH and scheduled for a hearing involving disputed issues of material fact, which was held on February 20, 2018.

At the hearing, Petitioner presented the testimony of Sergeant Brad Rosh; Detective Gylmar Ochoa; and A.T., the 18-year-old female identified in the Administrative Complaint. Petitioner's Exhibits 1 through 5 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of Victoria Dobbs (principal), Pamela Shlachtman (science department head), Nicola Rousseau (parent and booster club president), and Samantha Rousseau (former student and lacrosse team leader). Respondent Exhibits 1 through 11 were admitted into evidence.

The parties filed a Joint Pre-Hearing Stipulation and proceeded to hearing on the one remaining contested issue: whether Respondent knew that A.T. was a high school student, as alleged in the Administrative Complaint.

A one-volume Transcript of the final hearing was filed on March 12, 2018. Both parties timely submitted Proposed Recommended Orders on April 16, 2018, after an Unopposed Motion for Enlargement of Time was granted, extending the due date for the proposed orders from April 2, 2018. The Proposed Recommended Orders, as well as the testimony and exhibits admitted at hearing, have been duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Uncontested Facts by the Parties

1. Respondent holds a valid Florida Educator's Certificate No. 1046827, covering the area of Biology, which is valid through June 30, 2020.

2. At all times pertinent to this matter, Respondent was employed as a Biology teacher at Miami Palmetto Senior High School ("MPHS") in the Miami-Dade County School District.

3. Respondent knew A.T. was a student at MPHS during the 2015-2016 school year and had tried out for the school's lacrosse team in late January 2016.

4. Respondent sent a text message to A.T. on December 19, 2016, stating, "How are you?"

5. Respondent sent and exchanged text messages with A.T. in March 2017.

6. Respondent met and engaged in sexual intercourse with A.T. in late March 2017.

7. Respondent resigned from his employment with Miami-Dade County Schools on May 3, 2017, citing "personal reasons."

Additional Findings of Fact

8. Petitioner, as Commissioner of Education, is responsible for investigating and prosecuting complaints against individuals who hold Florida educator certificates, and are alleged to have violated provisions of section 1012.795.

9. Respondent is a highly effective educator who, over the course of his ten-year career, has earned the respect of his former principal and science department head, as well as parents and students with whom he has come in contact.

10. The allegations of misconduct in this case have not altered the high professional regard in which Respondent is held by Principal Victoria Dobbs; Science Department Head Pamela Shlachtman; parent and lacrosse team booster club president Nicola Rousseau; and former student, lacrosse player, and the daughter of Nicola Rousseau, Samantha Rousseau.

11. Each of these witnesses testified that their knowledge, observations, and experience working with Respondent led them to believe that he never would have had any type of relationship with a woman he believed to be a high school student.

12. Each of these witnesses testified that, to the best of their knowledge, they had never seen or heard reports of any inappropriate conduct between Respondent and a student.

13. Principal Dobbs bragged in a letter about Respondent and the support of his peers in voting him Science Teacher of the Year. She testified that in her 12 years of service at MPHS, the last three of which she was principal, she had no concerns with Respondent regarding inappropriate relationships with students. To the contrary, she recalled him as a very good teacher, who participated in many school activities and field trips. He also served as coach for the girls' lacrosse team.

14. Principal Dobbs further testified that she was never informed that Respondent had been accused of having an inappropriate relationship with a student at her school. She was only made aware of a request by the school district for Respondent's computer. She testified that if she had believed Respondent had an intimate relationship with a high school student, she would not have employed him.

15. Ms. Shlachtman has been employed at MPHS since 2001 and has been a teacher since 1984. She affirmed her previously

written statement supporting Respondent, and testified she had participated in the hiring and selection of Respondent ten years previously as a marine biology teacher. She stated that he had "the soul of an educator."

16. As a member of Ms. Shlachtman's staff, Respondent had chaperoned multiple field trips, including extended travel with students and staff for the Enviro Team, and to state and national competitions in Montana and Toronto, Canada. Having seen Respondent react with both male and female students on seven- and ten-day trips, she never had a concern or received a complaint. She also knew girls on the lacrosse team and had never heard a concern reported from there. She noted that Respondent had the opportunity to be alone with students on multiple occasions, and no concerns or inappropriate behavior was ever reported. She would rehire Respondent on her staff again, if given the opportunity.

17. Ms. Rousseau, the mother of three daughters who trained with Respondent at his CrossFit gym, also served as president of the girls' lacrosse team booster club. She affirmed her previous letter of support for Respondent and testified about her commitment to Respondent as a trainer for her three daughters at his gym, which she said would continue.

18. Additionally, Samantha Rousseau, Nicola's daughter, and a full-time student at the University of Florida, confirmed her

support for Respondent. While a student at MPHS, she had served as assistant captain of the girls' lacrosse team during her senior year (2014), while Respondent was the team coach. She had known Respondent since she was a sophomore student in his Television Production class; she had traveled with Respondent to Los Angeles as part of his class; and had ridden numerous times on the team bus with Respondent. She testified that she believed Respondent would not have been involved with A.T. had he known she was a high school student.

19. Respondent first encountered A.T. during MPHS lacrosse tryouts in late January 2016. A.T. was a junior at that time. Respondent had no further contact with A.T. until he sent her a December 12, 2016, text stating, "Hi! How was your weekend? You missed out on Saturday morning [referring to a workout designed for lacrosse players at CrossFit gym]." A.T., still a student at MPHS at the time of this text message, never replied to it.

20. On March 15, 2017, Respondent sent another text message to A.T., stating, "Hey, what's up? How have you been?" The remaining text messages sent by Respondent to A.T. were undated, but were sent between March 15 and their sexual encounter in late March. The text messages were sexually graphic. The messages sent by Respondent included explicit photographs, and while those sent by A.T. had explicit photographs, they were removed to protect her privacy.

21. A.T. was a student at MPHS through December 2016. On January 12, 2017, the Miami-Dade School District conducted a conference to formulate an Individual Education Plan (IEP) for A.T. She was placed in a hospital/homebound program at that time and graduated from the virtual school in June 2017. She did not attend college during this time.

22. Respondent never denied the one-time sexual encounter he had with A.T. On the day when the encounter took place, March 19, 2017, A.T. texted Respondent and asked if she could see him that night. A.T. was driven by a friend to Briar Bay Park where she met Respondent, who was already there and waiting for her in his car. She had sexual intercourse with him in his car. After their liaison, Respondent drove her home. A.T. and Respondent had no contact after that time.

23. A great deal of testimony was elicited about whether Respondent texted or phoned A.T. and discussed her status as a student in March 2017. At different times during the investigation into the sexual encounter between A.T. and Respondent, he said he texted, instant messaged, or telephoned A.T. about her school. Respondent believed her to be taking courses at Miami Dade College ("MDC") during the spring semester of 2017. In fact, she was a student at Brucie Ball Education Center ("Brucie Ball"), a virtual school where she took online courses to complete her high school education, graduating in

June 2017. Respondent consistently believed, at the time of his interview by Detective Ochoa, during his deposition, and at hearing, that A.T. was in college and testified he was never told she was at Brucie Ball.

24. A.T.'s memory is less clear. She testified she could not recall telling Respondent she was taking college courses, but there is no doubt she was enrolled at Brucie Ball during her final semester of high school and not at MDC.

25. She remembers that she received a social media invite from Respondent to attend his CrossFit boot camp in December 2016. She recalls communicating back and forth via social media after that time, especially when Respondent texted her about missing her at boot camp. She and Respondent testified to multiple additional conversations via social media or texting, but many of those were not produced as evidence.

26. When a three-month gap between their messaging occurred, Respondent testified that A.T. told him she had been backpacking in Africa with friends and, according to what he recalled she told him, she was taking courses at MDC. She did not recall having told him she was taking courses at MDC, but "guessed he knew" she was still a high school student because the previous year she had been a junior at MPHS. "It never came up," she testified.

27. While she could not recall having told Respondent she had been to Africa and was taking courses at MDC, A.T. testified she recalled many more text messages between Respondent and her that were not printed from her phone and introduced into evidence at hearing.

28. According to A.T., she had not talked to Respondent about her upcoming 18th birthday on March 2, 2017. Yet, she invited him to the celebration at a club called "Do Not Sit on the Couch." She also shared with him that she and her friends often visited another club called "Little Hoolies," and invited Respondent to join them. Both of these clubs serve alcohol and are for adults over 21. Respondent did not join them at either club. A.T. did not recall any of these conversations at hearing.

29. A.T. declined to be interviewed by Petitioner's Professional Practices Services investigator. At hearing, she could not recall a request to be interviewed.

30. Respondent assumed A.T. was older than 18 when they met at the park for sex, since he believed her to be taking classes at MDC; she hung out with her friends at two adult clubs; and she brought alcohol, a vapor pen, and THC oils with her when they met in the park. He did not believe this to be typical high school behavior.

31. Respondent also believed A.T.'s absence from social media for three months before they had their encounter at the

park was explained by her telling him she had been backpacking in Africa where he assumed she did not have readily available access to the Internet. He also believes this supported his understanding that A.T. was in college at that point, since three months of backpacking does not usually occur as part of a high school experience.

32. Respondent consistently testified, from his statements to law enforcement to his appearance at hearing, that had he known A.T. was still a high school student, regardless of whether she was at the school where he taught, he would have never had an intimate relationship with her. Moreover, law enforcement never asked Respondent for his phone at the time of the investigation. After he learned A.T. had been a high school student in March 2017, when they had their one-time sexual relationship, on May 3 of that year he resigned his position as a teacher at MPHS for "personal reasons," based upon advice he received from union representatives and an investigator, and to spare embarrassment to his school, colleagues, and family.

33. At the time A.T. had entered into an IEP with Miami-Dade, her school was listed as South Miami Senior High School, not MPHS. This explains why Respondent never saw her again at MPHS in her final semester. There was no evidence presented that Respondent knew A.T. had not graduated from MPHS or that she had

enrolled in either South Miami High School or Brucie Ball when she did not return to MPHS for the spring semester of 2017.

34. Respondent's assertion that he was unaware of A.T., an 18-year-old, still being in high school at the time of their March 2017 encounter, along with his cooperation with the investigation and admission at all times pertinent to it that he had a sexual relationship with A.T., renders his testimony more credible than A.T.'s concerning what Respondent knew about her status as a student. No evidence was produced that Respondent ever had an improper relationship with A.T. while she was under the age of 18. A.T.'s lack of candor and lack of cooperation with Detective Ochoa, the investigator on the case, as well as her incomplete memory of the various text messages with Respondent bring into question her truth and veracity when testifying against Respondent.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

36. Sections 1012.795(1) and 1012.796(6) authorize the Commissioner of Education to file a formal complaint and prosecute that complaint against a teacher's certificate pursuant to the provisions of chapter 120.

37. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose such discipline, Petitioner must prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

38. What constitutes clear and convincing evidence was described in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1989), as follows:

> [C]lear 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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.

39. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may

be met where the evidence is in conflict . . . it seems to preclude the evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) (citations omitted), rev. denied, 599 So. 2d 1279 (Fla. 1992).

40. 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)).

41. Discipline may be imposed only on grounds specifically alleged in the Administrative Complaint. See Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

42. Respondent is charged in the Administrative Complaint with one statutory and two rule violations. Count One cites a

violation of section 1012.795(1)(j) in that Respondent has violated one or more of the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules. Petitioner has charged Respondent with two rule violations: rule 6A-10.081(2)(a)1. and 8.

43. Section 1012.795(1)(j) provides, as follows:

> **1012.795 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 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:
>
> * * *
>
> (j) Has violated the Principles of Professional Conduct for the Education

Profession prescribed by State Board of Education rules.

44. Rule 6A-10.081(2)(a)1. and 8. provides, as follows:

> (2) Florida educators shall comply with the following disciplinary principles. 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.
> (a) Obligation to the student requires that the individual:
> 1. 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.
>
> * * *
>
> 8. Shall not exploit a relationship with a student for personal gain or advantage.

45. Petitioner has argued throughout its Proposed Recommended Order that Respondent clearly knew A.T. was a high school student at the time of their sexual encounter. Many strong statements were made that Respondent "seduced" A.T., when, in fact, at best, Respondent accepted her offer to meet at Briar Bay Park. The texts between A.T. and Respondent, before they became sexual in nature, were mere invitations to work out with other students at a CrossFit boot camp. Once they became sexual, Respondent had not heard from A.T. for three months; testified that she told him she had been backpacking in Africa and was a college student; and most of the time did not even respond to his

infrequent texts. If this can be characterized as a "seduction," it was quite a subtle one.

46. The texting of nude photographs, while perhaps vulgar and distasteful to most people, was between two adults, albeit one of whom had only recently turned 18 and who had previously invited Respondent to celebrate her 18th birthday, an invitation he did not accept. Respondent's assumption that A.T. was both an adult (accurate) and a college student (inaccurate, but not unreasonable) justified his acceptance of her offer to meet at the park of her own volition. A.T. was dropped at the park by a friend and, after the encounter with Respondent, accepted a ride home with him. After that one meeting, they apparently never met again.

47. While the majority of high school students graduate after the spring semester, no evidence was presented that many do not graduate after the fall semester. Respondent's belief that A.T. had graduated, gone backpacking in Africa for three months, then returned home to take classes at MDC, was not an unreasonable conclusion on his part. Additionally, knowing fully what happened between Respondent and A.T., his colleagues, including his former principal and the science department head, stood behind him, touting his great value to MPHS and the school district and vouching for his good name and excellent behavior as a teacher over a ten-year period.

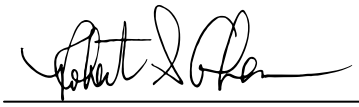
48. Respondent has presented commendable character, conduct and reputation evidence through the two school administrators, as well as through Ms. Rousseau and her daughter. Each of these witnesses believed that had Respondent known A.T. was still enrolled as a high school student, he would not have engaged in an intimate relationship with her. Respondent has maintained this position consistently throughout the investigation and these proceedings. When he learned that A.T. was enrolled in high school, rather than fighting the charges at the school district level, he chose to resign his position with MPHS, rather than bring further embarrassment on his school and its administrators.

49. Petitioner has failed to prove by clear and convincing evidence that Respondent intentionally or knowingly violated the statutory and rule provisions cited above. Accordingly, no action should be taken against his educator's certificate, and the charges against him should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order dismissing the charges against Respondent in their entirety.

DONE AND ENTERED this 23rd day of May, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 23rd day of May, 2018.

ENDNOTE

[1/] References to statutes are to Florida Statutes (2017), unless otherwise noted.

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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.