

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANNY DIAZ, JR., AS COMMISSIONER OF
EDUCATION,

Petitioner,

vs.

Case No. 22-0626PL

MARSHALL GERALD PETTWAY,

Respondent.

RECOMMENDED ORDER

On July 15, 2022, Administrative Law Judge Robert J. Telfer III, of the Division of Administrative Hearings (DOAH), conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes (2019), via Zoom.

APPEARANCES

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

For Respondent: Mark Herdman, Esquire
 U.S. Highway 19 North, Suite 110
 Clearwater, Florida 33761

STATEMENT OF THE ISSUES

The issues are whether Respondent, Marshall Gerald Pettway, violated section 1012.795(1), Florida Statutes, and Florida Administrative Code Rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5. as alleged in the June 28, 2021, Administrative Complaint; and, if so, what disciplinary penalty should be imposed.

PRELIMINARY STATEMENT

On June 28, 2021, Petitioner, Richard Corcoran, as Commissioner of Education (Petitioner or Commissioner),¹ filed an Administrative Complaint against Dr. Pettway, alleging violations of section 1012.795(1)(j), and rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5. Dr. Pettway timely filed an Election of Rights form, disputing the allegations and requesting a hearing. On February 25, 2022, Petitioner referred this matter to DOAH for assignment of an administrative law judge.

On March 9, 2022, the undersigned noticed this matter for final hearing on May 25, 2022, in Ocala, Florida. On May 12, 2022, Petitioner filed an Unopposed Motion to Continue Final Hearing; on May 13, 2022, the undersigned entered an Order Granting Continuance and Rescheduling Final Hearing, which rescheduled the final hearing to July 15, 2022, in Ocala, Florida. After a telephonic status conference on July 13, 2022, in which Petitioner disclosed that all of its witnesses would appear remotely via Zoom, the undersigned entered an Amended Notice of Hearing by Zoom Conference, in which the final hearing remained scheduled for July 15, 2022.

On July 15, 2022, the undersigned conducted the final hearing via Zoom. Petitioner presented the testimony of: Ginger Cruze, the principal of West Port High School (West Port); Renee Johnson, who was the student services manager at West Port; S.C., the mother of student L.W.; L.W., a student in a class that Dr. Pettway taught at West Port who is the subject of one of the allegations in the Administrative Complaint; B.G., a former student in a class that Mr. Pettway taught at West Port; L.G., a former student in a class that

¹ Mr. Corcoran, the former Commissioner of Education, filed the June 28, 2021, Administrative Complaint. Mr. Corcoran subsequently stepped down from his position as Commissioner, and the Governor appointed Manny Diaz, Jr., as Commissioner, whereupon the style of this case was amended accordingly.

Dr. Pettway taught at West Port; and Laraine Mancuso, a registered nurse who formerly worked at West Port. The undersigned admitted Petitioner's Exhibits P1, 3 through 5, 7, and 9 through 12 into evidence, noting Respondent's hearsay objections to Exhibits P3, 7, and 9 through 11.

The undersigned also notes that the student who was the subject of the other allegation in the Administrative Complaint, J.R., did not appear to testify at the final hearing. As the undersigned conducted the final hearing via Zoom, J.R.'s electronic device appeared in the Zoom waiting room, but once admitted to the final hearing, J.R. did not activate the electronic device or attempt to communicate in any way at the final hearing, after multiple delays and opportunities to do so.

Dr. Pettway testified on his own behalf, and did not call any additional witnesses. The undersigned admitted Exhibits R1 through 4 into evidence without objection.

The one-volume Transcript was filed with DOAH on August 9, 2022. Petitioner and Respondent, thereafter, timely submitted proposed recommended orders.

Except where otherwise indicated, all references to the Florida Statutes in this Recommended Order are to the 2019 edition, as the Administrative Complaint contains allegations from the 2018-19 school year. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441, 444 (Fla. 5th DCA 2013) (holding that statutes and rules in effect at the time of the allegations apply, unless otherwise specified).

FINDINGS OF FACT

1. The Commissioner is the agency head of the Florida Department of Education (Department). The Commissioner is responsible for investigating allegations of misconduct against persons holding Florida educator certificates. Upon a finding of probable cause, Petitioner is responsible for filing an administrative complaint, and if the educator disputes its allegations, prosecuting the administrative complaint pursuant to chapter 120.

2. At the time of the allegations contained in the Administrative Complaint, Dr. Pettway held Florida Educator's Certificate 540678, which covered the area of art, and is valid through June 30, 2024.

3. At the time of the allegations contained in the Administrative Complaint, the Marion County School District (MCSD) employed Dr. Pettway as an art teacher at West Port.

Alleged Incident with J.R.

4. The Administrative Complaint alleges the following:

On or about October 16, 2018, Respondent failed to exercise due care in dealing with a disruptive student. JR, an eleventh-grade male student, tried to force his way into the classroom after being told by Respondent that he was not allowed to return without a pass. Respondent pushed back forcefully on the door that JR was attempting to enter through resulting in JR's hand being slammed in the door and injured.

5. In the Joint Pre-hearing Stipulation, the parties stipulated:

On October 16, 2018, JR, an eleventh-grade male student, tried to force his way into Respondent's classroom after being told by Respondent that he was not allowed to return to class without a pass. JR was attempting to enter through the classroom door by putting his hand on the door. JR's hand was injured.

6. The Joint Pre-hearing Stipulation also contains, in its “Statement of Contested Facts,” the following contested issue:

Whether Respondent pushed back forcefully on the door while J.R. was attempting to enter, resulting in J.R.’s hand being slammed in the door and injured.

7. At the final hearing, Petitioner presented the testimony of Ms. Mancuso, who testified that she was the school nurse on the date of this incident, and that J.R. came to the clinic with some cuts on his left middle finger and between his fingers, along with some bleeding.

8. However, as noted in the Preliminary Statement above, J.R. did not testify at the final hearing (despite “appearing” as a participant in the zoom waiting room, the undersigned then admitting J.R.’s electronic device to the final hearing, and after numerous unsuccessful attempts by the undersigned and Petitioner’s counsel to prompt J.R. to start his device and testify). Petitioner did not present any additional testimony or evidence concerning this 2018 incident.

Alleged Incident with L.W.

9. The Administrative Complaint alleges the following:

In or around January of 2019, Respondent made inappropriate statements to LW, a ninth-grade female student. Examples include but may not be limited to telling LW, “you have beautiful lips” or words to that effect and telling LW, “You are beautiful! You are glorious!” or words to that effect. Respondent’s comments made LW feel uncomfortable and embarrassed.

10. During the 2018-19 school year, Dr. Pettway was an art teacher at West Port. One of his students was L.W., a female who was then a 14-year-old high school freshman. At the time of the final hearing, she was a 17-year-old high school senior.

11. L.W. testified that during the second quarter of the 2018-19 school year (between October and December 2018), and during art class, Dr. Pettway:

[T]old me that my lips were beautiful in an erotic, flirty tone, which made me uncomfortable because it was weird for a teacher to comment on my lips in any sort of fashion or form.

12. L.W. testified that Dr. Pettway made this comment in front of her fellow classmates, which made her feel embarrassed. She also testified that Dr. Pettway's "body language, the way he leaned over the desk and was staring at me[,]” made her uncomfortable.

13. L.W. told her mother about what Dr. Pettway said, but her mother, according to L.W., "kind of brushed it off." S.C., L.W.'s mother, confirmed that she did not take Dr. Pettway's comment seriously at the time L.W. reported it to her.

14. L.W. admitted that approximately one year before this comment, she had been diagnosed with anxiety and depression. She testified that her symptoms caused her to be "shaky," "really quiet," and "overly emotional." She also testified that she was not suffering from either anxiety or depression when Dr. Pettway made the comments that are alleged in the Administrative Complaint.

15. L.W. also admitted that Dr. Pettway made the comment about her lips during a time that the entire class was drawing, and receiving instruction on, portraits. She testified that drawing lips was part of the process of drawing a portrait.

16. L.W. also testified that in early January 2019, she arrived early to Dr. Pettway's class, and asked for permission to get a drink of water. She

stated that Dr. Pettway said “you can have anything you want in that same erotic tone.”² Later in class that same day, L.W. testified:

I do believe it was the same day ... during the time the other students were in the class. We were working on a project at one of the desks – science-type desks in the corner of the classroom and he came up to me and he was like, you are so beautiful, you are so glorious in that same tone, but more exaggerated for, like, my peers and I to hear.

17. L.W. thereafter told her mother and some of her peers about Dr. Pettway’s comments. She also spoke to Ms. Johnson about how Dr. Pettway’s comments made her feel, and Ms. Johnson asked her to prepare a written statement, and to provide witnesses to Dr. Pettway’s comments. Those student witnesses were B.G. and L.G.

18. Soon after reporting these comments to Ms. Johnson, L.W. testified that Dr. Pettway was removed from the art class. She also testified that Dr. Pettway has never attempted to contact her outside of class.

19. Ms. Johnson testified she spoke with L.W. about her concerns, and also testified:

Throughout my interactions with her, she had referenced specific comments. And the comments, in and of themselves, you know, if you just read it on a sheet of paper it seems like a compliment. However, she emphasized that it was Dr. Pettway’s tone and the look on his face and the way he would make the comments that made her feel most uncomfortable. She described it as creepy, as perverted and as sexual in nature.

20. B.G. testified that she was a student with L.W. in Dr. Pettway’s art class during the 2018-19 school year. B.G. testified, consistent with her

² Petitioner did not include in the Administrative Complaint an allegation that Dr. Pettway made this comment, and, therefore, the undersigned did not consider this alleged comment in making a legal conclusion in this matter. *See Trevisani v. Dep’t of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) (holding that the allegations set forth in an Administrative Complaint are those upon which a proceeding is predicated).

written statement provided to Ms. Johnson, that Dr. Pettway, with regard to L.W.:

From what I remember, he would comment on how she looked or her hair or her outfit or her lips and when that would happen, she would get uncomfortable, she would stop talking, distance herself from, you know, the friend group that she had in that class.

21. B.G. also testified that Dr. Pettway regularly used “flowery” language, such as “glorious” and “luscious,” but that he never used such language when he spoke to her.

22. L.G., who was also a fellow student with L.W. in Dr. Pettway’s art class during the 2018-19 school year, testified that Dr. Pettway “complimented [L.W.’s] lips and he would call her glorious.” She said that “[i]t felt like it was very lustful.” However, in the witness statement provided to Ms. Johnson, L.G. made no reference to Dr. Pettway commenting about L.W.’s lips. L.G. admitted that Dr. Pettway made the comment about L.W.’s lips while he was instructing the class on drawing portraits.

23. During cross-examination of L.G., Dr. Pettway’s counsel revealed L.G.’s belief concerning L.W.’s interactions with Dr. Pettway:

Q. So, as I understand it, the totality of your position—statement here is, he used the word—glorious once toward her and said something about lips during the painting of a portrait and from that you all concluded that he was sexually interested in her?

A. Yes.

Dr. Pettway’s Testimony and Evidence

24. Dr. Pettway has been an art teacher for nearly thirty years. He began teaching art in the MCSD in 2004. Throughout his career, Dr. Pettway has enjoyed great success as an art teacher, having won various awards.

Dr. Pettway is also a portrait artist; some of his portraits hang in the Alabama Archives and History Building.

25. Dr. Pettway testified that he uses words like “beautiful,” “handsome,” “gorgeous,” and “lovely” to motivate and encourage his students, to make them feel good about themselves, and to get them to have a good time in art.

26. Dr. Pettway testified that he normally stands at his classroom door to greet his students. Upon the students’ return from winter break in January 2019, he testified that he did not initially recognize L.W. when she walked through the door. Dr. Pettway believed she was a new student when, according to Dr. Pettway, she had actually changed her appearance significantly. He stated that he normally does something “special” for new students, and was prepared to do something special for L.W. until he determined that it was a regular student.

27. Dr. Pettway testified that once he figured out the student he saw was L.W., “I was just astounded. She looked completely different. And I – I think I said, you – you look beautiful.”

28. With respect to his comments about L.W.’s lips, Dr. Pettway testified that he made the comment when instructing on the drawing of portraits in class. He said that he also commented on another student’s long neck, for example, and that “I give descriptions of the things that I’m trying to get them to understand about the human head.” He further testified:

So, LW, with her different look she had on some very high intensity lipstick. It was matte. It wasn’t shiny. It was very bright reddish, pinkish, orange-ish looking. And when I – as I, you know, walked around the class observing the work and things, I noticed her again. And I, like, you got some beautiful lips.

And the way that I was trying to express it that, you know, her whole total makeup, her whole new—new look was—was out—was the fashion statement of the day of the class. And it was only a

compliment, trying to make her smile and feel good about herself when I gave her the compliment.

29. The undersigned notes that Dr. Pettway's testimony on his comments about L.W.'s lips appears to contradict the testimony of L.W. concerning when he made this comment; L.W. testified that it happened in the second quarter of the 2018-19 class year, while Dr. Pettway testified that it happened soon after the winter break in early 2019 (when he allegedly also made the "beautiful" comment). However, both L.W. and Dr. Pettway, as well as B.G. and L.G., testified that Dr. Pettway made the comment about L.W.'s lips on a day that he was instructing the class on drawing portraits.

30. Dr. Pettway also testified that, during the course of the school year in his art class, he taught his class various elements of art, which often included phrases in foreign languages. He recalled that one of his students, who was from China, knew how to write the elements of art in Chinese. When this happened, L.W. volunteered that she could read the elements of art in Chinese. He testified that he was "just in awe" about her ability to do that. L.W. did not raise this issue with Ms. Johnson or anyone else with the MCSD when she complained about Dr. Pettway's behavior when she volunteered that she could read Chinese, despite Dr. Pettway drawing attention to L.W. in front of the entire class on that occasion as well.

31. Dr. Pettway testified that he referred to L.W. as beautiful or glorious when she was lined up at his classroom door, a day after winter break, when he did not recognize her. He further testified:

I was so overwhelmed at the change I saw in my student. I was excited. I was, like, wow. I couldn't believe that I didn't recognize her.

* * *

I gave her a compliment with no other point intended, except for to make her smile and have a good time in art.

32. Dr. Pettway testified that when he commented about L.W.'s lips, he was not attempting to express a sexual interest in L.W. He further stated that he did not have an erotic or lustful interest in L.W. He stated that he was "proud" of her efforts to learn new languages and "was completely caught off guard" by her new appearance.

33. Dr. Pettway testified that when he learned that L.W. had issues with his comments, he wanted to discuss these issues with L.W. and her mother, but was not permitted to do so.

34. Dr. Pettway also testified that he never had any contact with L.W. outside of the classroom. Dr. Pettway has never called, texted, or messaged L.W. on any social media platform, or otherwise approached L.W. outside of the art class.

35. It is clear from the testimony and evidence presented that Dr. Pettway made a comment to L.W., during an art class in which Dr. Pettway was instructing his class on drawing portraits that L.W. had beautiful lips. It is also clear from the testimony and evidence that on one occasion Dr. Pettway also made a comment to L.W., during an art class, that she was beautiful.

36. However, the testimony and evidence was neither clear nor convincing to establish that Dr. Pettway, through his comments or tone, failed to protect L.W. from harmful conditions, or that his comments or tone was intended to expose L.W. to unnecessary embarrassment or disparagement. As Dr. Pettway testified, and as Ms. Johnson's testimony supports, Dr. Pettway's words were intended to be a "compliment," and were in part made in the context of instructing his class on the drawing of human portraits. Dr. Pettway, a career art teacher and artist, testified that he used words like beautiful, glorious, and the like to compliment students and to assist in the artistic process. Dr. Pettway credibly testified that his intention in making these comments was not to be "erotic" or "flirty" towards L.W.

37. As J.R. failed to appear to testify concerning the facts and circumstances surrounding the allegations of the Administrative Complaint

concerning J.R., there is no clear and convincing evidence to base a finding of a violation.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to sections 120.569 and 120.57(1).

39. The Education Practices Commission is the state agency charged with the certification and regulation of Florida educators, pursuant to chapter 1012.

40. This is a disciplinary proceeding in which Petitioner seeks to discipline Dr. Pettway's educator certificate. Because disciplinary proceedings are considered to be 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., Inc.*, 60 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

41. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997).

The Florida Supreme Court further enunciated the standard:

This intermediate level of proof 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.

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 Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting *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.*, 590 So. 2d 989 (Fla. 1st DCA 1991).

42. Section 1012.795 and rule 6A-10.081 are penal in nature and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. *Beckett v. Dep’t of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008); *Latham v. Fla. Comm’n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1997).

43. Whether particular conduct constitutes a violation of the applicable statutes and rules is a factual question to be decided in the context of the alleged violation. *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). Whether specific conduct constitutes a deviation from the required standard is an ultimate finding of fact within the realm of the administrative law judge’s fact-finding discretion. *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985).

Allegations in Administrative Complaint

44. The allegations set forth in the Administrative Complaint are those upon which this proceeding is predicated. *Trevisani v. Dep’t of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); *Cottrill v. Dep’t of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits 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. Owner’s Ass’n v. Dep’t of Envtl. 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).

45. Count 1 of the Administrative Complaint seeks to discipline

Dr. Pettway on charges that he violated section 1012.795(1)(j), which states:

(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.

Count 1 cannot constitute an independent violation, but rather is dependent upon a corresponding violation of the rules constituting the Principles of Professional Conduct.

46. Counts 2 and 3 of the Administrative Complaint seek to discipline Dr. Pettway on charges that he violated rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5., which state:

(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.

* * *

5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

47. Based on the Findings of Fact, Petitioner failed to establish, by clear and convincing evidence, that Respondent violated rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5., with respect to the allegations concerning J.R., as J.R. failed to appear to testify, concerning those facts and circumstances surrounding the allegations of the Administrative Complaint.

48. Based on the Findings of fact, Petitioner failed to establish, by clear and convincing evidence, that Respondent violated rules 6A-10.081(2)(a)1. and 6A-10.081(2)(a)5., in that the comments, including tone and manner, made by Dr. Pettway to L.W. on the two occasions alleged in the Administrative Complaint, did not result in Dr. Pettway failing to make reasonable effort to protect L.W. from conditions harmful to learning and/or to L.W.'s mental health and/or physical health and/or safety, and did not intentionally expose L.W. to unnecessary embarrassment or disparagement.

49. The undersigned concludes that Petitioner failed to prove, by clear and convincing evidence, that Dr. Pettway committed the violations alleged in Counts 1, 2, and 3 of the Administrative Complaint.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that Petitioner enter a final order dismissing the Administrative Complaint against Dr. Marshall Gerald Pettway.

DONE AND ENTERED this 2nd day of September, 2022, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of September, 2022.

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.