

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER
OF EDUCATION,

Petitioner,

vs.

Case No. 14-3906PL

ALLAN RUBENSTEIN,

Respondent.

RECOMMENDED ORDER

On April 22 through 24, 2015, a disputed fact hearing was held in this case by video teleconference in Orlando and Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Education Practices Commission should take disciplinary action against the teacher certificate held by the Respondent, Allan Rubenstein, based on an Administrative Complaint charging him with violating Florida Administrative Code Rules 6A-10.081(3)(a) (failure to make reasonable effort to protect students from conditions harmful to learning or to students' mental or physical health or safety) and 6A-10.081(3)(e) (intentional exposure of students to unnecessary embarrassment or disparagement) and, therefore, violating section 1012.795(1)(j), Florida Statutes (2011) (for those rule violations). (The statutes and rules charged were those in effect at the time of the alleged violations.)

PRELIMINARY STATEMENT

At the final hearing, the Petitioner called Thomas Mullins, Mary Jo Bryant, Shannon Mullins, Pat Burney, Elizabeth Eskin, Cherri Samuel, John Wright, Haley Bryant, John McHale, and Yolanda Notyce to testify. Petitioner Exhibits 2 through 5, 7 through 19, 21, and 22 were admitted in evidence. (The Respondent's objection to Exhibit 2 is overruled; portions of Exhibit 16 relating to uncharged conduct have been disregarded.) The Respondent testified and called Missy Green, Stephanie Conte, Alexis Gautier, Steve Soubasis, Stephanie Feulner, Samantha Bell,

Lindsian Taylor, and Tami Yingling to testify. Respondent Exhibits A through Z were admitted in evidence.

The six-volume Transcript of the final hearing was filed on June 23, 2015. The parties' proposed recommended orders have been considered.

FINDINGS OF FACT

1. The Respondent is a high school English and journalism teacher, who also coached volleyball and acted as faculty adviser and sponsor of the yearbook. He holds Florida educator certificate 721989, which expires on June 30, 2019. He is certified in the areas of English (grades 6 through 12) and physical education (grades 6 through 12). Prior to the 2011-2012 school year, the Respondent's performance, in all aspects of his employment as a high school teacher, was exemplary and without incident of any kind.

2. The Respondent's difficulties at Timber Creek began when two female high school seniors named Haley Bryant and Shannon Mullins, who were yearbook editors, complained to the school administrators that the Respondent called them to the front of his classroom in late November 2011 and offered to give them Victoria Secret lingerie. The Respondent disputes the students' versions of what happened that day. Eleven days later, the Respondent demoted the students as yearbook editors; had them do book work, instead of yearbook work during class; and denied them

access to the yearbook. The students complained that the demotions and denials of access to the yearbook were in retaliation against them for reporting the alleged lingerie gift offer to the school administration. The Petitioner sides with the students' versions and takes the position that the facts justify teacher certificate discipline under rules 6A-10.081(3)(a) (failure to make reasonable effort to protect students from conditions harmful to learning or to students' mental or physical health or safety) and 6A-10.081(3)(e) (intentional exposure of students to unnecessary embarrassment or disparagement), which are parts of the Principles of Professional Conduct for the Education Profession in Florida (Principles of Professional Conduct), governing Florida teachers.

3. The Respondent denies retaliating against the students and explains that the demotions and access denials were not related to what they reported to the school administration. Instead, he states that he demoted them due to poor performance, as he had warned them repeatedly would happen if their performance did not improve, and that he denied them access to prevent them from sabotaging the yearbook after their demotions.

4. According to Shannon and Haley, on Monday, November 28, 2011, the Respondent called Shannon and Haley to his desk, "out-of-the-blue," during the yearbook class, and told them he had a gift for them, if they wanted it--namely, a Victoria's Secret bra

that did not fit his wife. They testified that this made them feel uncomfortable, and they did not know what to say but laughed it off and walked away. They testified that they talked it over later in the day but were afraid to tell an adult for fear of repercussions from the Respondent.

5. The Respondent testified that Shannon and Haley's version is false. He says what actually occurred on that day was that the Respondent's yearbook class was engaged in a holiday gift exchange called "Secret Santa." Each student and the Respondent picked a name randomly and were to purchase a Christmas gift for the person whose name was picked. To help the gift-giver (the "Secret Santa"), students wrote their names and a suggested gift on the board. The Respondent became concerned when he saw that the student whose name he had picked wrote "Victoria's Secret" on the board. He testified that he summoned Shannon and Haley, told them such gifts were inappropriate and asked them to have the student who wrote it on the board to erase it and write something else.

6. The Respondent's wife testified that the Respondent came home from school visibly upset one day and told her about his conversation with Shannon and Haley. She testified that he told her he tried to illustrate his discomfort by relating a story about how embarrassed he was to buy a Victoria's Secret gift for her once and later was too embarrassed to return it when his wife

did not want it. According to the Respondent's wife, the Respondent told her that Shannon and Haley then asked if they could have the gift. The Respondent's wife then admonished him and advised him to make it very clear to them the next day that such a gift to them would be inappropriate and that he was not offering the item to them. She added that there actually was no such item, as they had donated it to a charity after the Respondent declined to return it.

7. The Respondent corroborated his wife's testimony and testified that he followed her advice and, on November 29, erased all the Secret Santa's gift suggestions from the board; later reiterated and emphasized to Shannon how uncomfortable he was with their request for Victoria's Secret gifts the day before; and told her never to ask for them again.

8. According to Shannon, on Friday, December 2, she went to the Respondent's classroom to retrieve some of her belongings, and the Respondent told her he had underwear to go with the bra and asked if she wanted them. She testified that she became uncomfortable, did not respond, and left the classroom. The Respondent denied that any such conversation ever took place.

9. Shannon testified that after the alleged underwear offer, she felt it was a serious matter that made her extremely uncomfortable, and she decided to tell her parents. She testified that her parents wanted to go directly to the school

administration, but she asked them to let her handle it herself. Her father testified that he contacted the school administration anyway, but there is no record or indication that Mr. Mullins contacted the school until much later in December.

10. Shannon testified that she went to a trusted teacher, Elizabeth Eskin, on Tuesday, December 6, and told her what the Respondent had said to her and Haley. According to Ms. Eskin, Shannon was straightforward but acted upset, like it was "weighing on her and she needed a release."

11. Ms. Eskin escorted Shannon to the school administration office where Shannon reported her version of conversations with the Respondent regarding lingerie. Haley was summoned, and she corroborated Shannon's story. Both appeared to be crying, and they seemed uncomfortable and embarrassed to the adults present, who initiated an investigation.

12. The next day, December 7, the Respondent was summoned to be questioned by two administrators, Pat Burney and Jeffrey Boettner. They informed him that there had been a complaint against him, and they asked him if he had offered a gift to any student. They did not identify the students or tell him anything else about the complaint. The Respondent denied knowing what the complaint could be about. He wondered aloud if it could be about the yearbook class Secret Santa gift exchange, saying that there had been some conversation among the students

to the effect that whoever the Respondent drew would receive something nice, that someone said something about Abercrombie, that someone else said something about Victoria's Secret, and that he told the students such gifts would be inappropriate.

13. Later in the day on December 7, the Respondent emailed Messrs. Burney and Boettner his complete answer to their question. He wrote that there were numerous things over the years that could be considered gifts by him to various students, including Secret Santa gifts. None of the gifts described in the list would be considered inappropriate. He did not mention any conversations with Shannon and Haley or with his wife, which the Petitioner contends is significant, but those conversations would not have been directly responsive to the question if no such gift was offered to them.

14. By the following day, December 8, the Respondent had figured out that the complaint probably had been made by Shannon and Haley based on things he heard other students saying.

15. On Friday, December 9, the Respondent separated Shannon and Haley; had them do book work, instead of yearbook work during class; and denied them access to the yearbook. Shannon and Haley were very upset. They thought the Respondent appeared to be angry. Haley began to cry. The Respondent's action and the reaction by Shannon and Haley were very obvious to the entire class. Shannon texted her mother about what was happening and

asked two other students to go to the office between classes (Shannon and Haley had two consecutive classes with the Respondent) to tell the administration what was going on. Shannon's mother arrived at school, and Shannon was summoned to the office. Haley was summoned a short time later and was crying when she arrived. The students told the administration that the Respondent had retaliated against them for having reported the lingerie gift offers by demoting them from their positions as yearbook editors, isolating them from the rest of the class, and denying them access to the yearbook, which was humiliating and embarrassing. In response, the administration told the Respondent that he was to pack up his things and leave the school pending an investigation and until further notice.

16. The following week, the school principal, John Wright, interviewed the Respondent. The Respondent told him his version of his conversations with Shannon and Haley. He denied retaliating against them. Instead, he said he was following through on repeated warnings he had given both of them for inadequate performance as yearbook editors.

17. Based on statements initially made by Shannon and Haley, the Petitioner attempted to portray them as model, high-performing, unfailingly honest students, who gave the Respondent no reason to criticize their performance as yearbook editors, which is a position usually only offered to students

meeting that description. To the contrary, the greater weight of the evidence was that the Respondent and the representative of the yearbook publisher, who worked closely with the Respondent over the course of several years, had serious questions about how Shannon and Haley would perform as yearbook editors. During the spring of 2011, when they were juniors, they were invited as prospective yearbook editors for the following year to the headquarters of the publisher to learn and start to plan the next year's yearbook. On the trip, Shannon was obstinate in insisting on her preferred yearbook theme, which was "the end of the world," as supposedly predicted by the ancient Mayan calendar. Although a bad idea for a high school yearbook, Shannon could not be dissuaded and became sullen, uncooperative, and troublesome when the Respondent finally made it clear that she would not get her way. This reaction was not out-of-character for Shannon, who had similar reactions when she did not make varsity volleyball in either her sophomore or senior years. (She did not try out in her junior year.) Shannon also seemed more interested in shopping than the yearbook. Shannon was a negative influence on Haley, who tended to follow Shannon's lead.

18. Despite these concerns, the Respondent decided to give Shannon and Haley a chance to prove themselves as editors during their senior year, in part, because there were no other rising seniors who looked to be any better prospects. As it happened,

from the start Shannon and Haley did not perform well as editors, and the Respondent repeatedly warned them that he would have to remove them as editors if they did not improve. While first denying that she performed poorly or that the Respondent warned her about poor performance, Shannon later admitted that she was warned, but said she did not take the warnings seriously.

19. Not long before November 28, 2011, the Respondent decided that he had to do something if the yearbook for 2011-2012 was going to measure up to the high standards that had been set in prior years. Instead of removing Shannon and Haley, he named a junior as co-editor. This did not sit well with Shannon and Haley. Based on past experience, it would not be out-of-the-question for Shannon to plot to get back at the Respondent using false lingerie gift allegations and other fabrications, or for Haley to go along with it.

20. When the principal heard the Respondent's side of the story, he criticized how the Respondent handled things, even assuming he was telling the complete truth. Based on the testimony of the principal and assistant principal, John McHale, the Petitioner takes the position that the Respondent should have: just erased the blackboard with the Secret Santa gift suggestions, instead of asking Shannon and Haley to do it, and canceled Secret Santa; reported problems with the performance of Shannon and Haley to Mr. McHale, who was his direct supervisor;

had "due process" meetings with Shannon and Haley and their parents before demoting them; and notified Mr. McHale before taking action to demote them. However, there were no written school policies regarding "due process" meetings or notification to the direct supervisor. Meanwhile, the Respondent had a written contract with his yearbook students, approved by the school, stating that demotion and denial of access would be a consequence of poor performance by a yearbook editor.

21. The school referred the inappropriate gift and retaliation charges to the Orange County School District for investigation. The Respondent was placed on "relief of duty with full pay and benefits as of December 9, 2011." His principal gave him "directives" for clarification and guidance regarding expectations (which are not considered to be disciplinary in nature) and put him back to work as a teacher on January 10, 2012, except that he was replaced as yearbook sponsor. The Respondent continued to perform in an exemplary manner in all other respects for the rest of the school year.

22. During the Orange County School District's investigation, students were interviewed and were asked whether they had any knowledge of inappropriate cell phone communication with the Respondent. The students searched their phones to find texts that might be deemed inappropriate. The evidence suggests that cell phone texting was a common means of communication among

the Respondent, Shannon, and Haley. There was no convincing evidence that texting, per se, was inappropriate. The Petitioner questions the appropriateness of two text communications and takes the position that they justify teacher certificate discipline under rules 6A-10.081(3)(a) or 6A-10.081(3)(e).

23. One September 2011 text stated that the Respondent was "pissed" about the failure of the yearbook editor to meet a deadline. The Petitioner takes issue with the language used. (Incidentally, this text and others in evidence corroborated the Respondent's testimony that he was indeed upset with Shannon and Haley for their poor performance as editors and their disrespect for him as teacher and yearbook sponsor.) In an exchange in November 2011, the Respondent received a text from Shannon that included "SMH." The Respondent answered "SMFH." The Respondent testified that he is not text-savvy and was not aware that there was a commonly understood vulgar meaning of those texts. He testified that he ignorantly and naively thought they meant "something like . . . see my hand" and "see my face and hand." The Respondent's testimony on this point seemed improbable, but not completely implausible. The evidence was not clear and convincing that he knew the vulgar meanings at the time.

24. Regardless whether the Respondent knew the vulgar meanings of SMH and SMFH, the evidence was not clear and convincing that by using them and the word "pissed" one time, the

Respondent failed to make reasonable effort to protect students from conditions harmful to learning or to students' mental or physical health or safety, or intentionally exposed students to unnecessary embarrassment or disparagement.

25. On June 6, 2012, the Respondent acknowledged receipt of a written reprimand from his principal. The reprimand, dated January 10, states that it summarizes a meeting between the principal and the Respondent that took place on January 5 and refers to the directives given to the Respondent by the principal on January 10. It is unclear why the Respondent did not acknowledge receipt of the reprimand until June. The reprimand is for the inappropriate use of poor judgment in interactions with students. It cites to the following provision of the Principles of Professional Conduct: "The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity." This is not a ground for proposed discipline in this case.

26. The Respondent decided not to return to Timber Creek High School for the 2012-2013 school year. Instead, he took a job teaching, coaching volleyball, and sponsoring the yearbook at Father Lopez Catholic High School (Father Lopez High School) in

Volusia County. The evidence was that he has performed in all three roles in an exemplary manner at Father Lopez High School.

CONCLUSIONS OF LAW

27. The Education Practices Commission regulates the certification and discipline of teachers in Florida. Disciplinary proceedings like this one are considered to be penal in nature.

28. In prosecuting this disciplinary action, the Petitioner is limited to proving the charges and allegations pled in the Administrative Complaint. Cf. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990).

29. The Administrative Complaint charges the Respondent with: asking Shannon and Haley to come to his desk and offering to give them a Victoria's Secret bra he had purchased for his wife and offering to give Shannon other undergarments four days later; retaliating against them for reporting the gift offers by assigning them entry-level book work during yearbook class, while the rest of the class worked on the yearbook; and inappropriately communicating with student members of the volleyball team and the yearbook staff by texting some student members repeatedly regarding non-school matters. The Administrative Complaint

charges violations of section 1012.795(1)(j), by violating rule 6A-10.081(3)(a) (failure to make reasonable effort to protect students from conditions harmful to learning or to students' mental or physical health or safety) and 6A-10.081(3)(e) (intentional exposure of students to unnecessary embarrassment or disparagement), which are parts of the Principles of Professional Conduct governing Florida teachers.

30. The Petitioner must prove the charges against the Respondent by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

31. 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). As stated by the Florida Supreme Court, the standard:

[E]ntails 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) (citing with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

"Although this standard of proof may be met where the evidence is

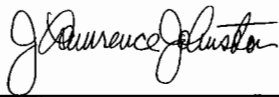
in conflict, it seems to preclude evidence that is ambiguous."
Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989
(Fla. 1991).

32. Using these standards, the charges were not proven.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission dismiss the charges.

DONE AND ENTERED this 31st day of August, 2015, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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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.