Before the Education Practices Commission of the State of Florida

PAM STEWART,
Commissioner of Education,

Petitioner,

vs.

FRANK JOSEPH ARDO,

Respondent.
_____/

EPC CASE Nº 16-0520-RT
DOAH CASE Nº 17-4217PL
PPS Nº 145-2620
CERTIFICATE Nº 946095
INDEX Nº: 18-211-FOF

Final Order

This matter was heard by a Teacher Panel of the Education Practices Commission pursuant to Sections 1012.795, 1012.796 and 120.57(1), Florida Statutes, on April 12, 2018, in Fort Lauderdale, Florida, for consideration of the Recommended Order (RO) entered in this case by J. LAWRENCE JOHNSTON, Administrative Law Judge. Respondent was not present. Petitioner was represented by Charles T. Whitelock, Esq. Attached hereto as Exhibit A is a copy of Respondent's Exceptions.

Ruling on Exceptions

Exception No. 1: Respondent filed an exception to the determination by the Administrative Law Judge on page 2 of the RO that Petitioner's voluntary dismissal was without prejudice and asks the Commission to overturn the determination. The Commission does not have authority to make that decision. The exception is rejected.

Exception No. 2: Respondent filed an exception to the admission of Petitioner's Exhibit 6 on authentication issues, citing Section 90.901, Florida Statutes. The Commission does not have substantive jurisdiction to interpret Section 90.901, Florida Statutes. The exception is rejected.

Exception No. 3: Respondent filed an exception again to the admission of Petitioner's Exhibit 6 on authentication issues, citing Section 90.901, Florida Statutes. The Commission does not have substantive jurisdiction to interpret Section 90.901, Florida Statutes. The exception is rejected.

Exception No. 4: Respondent filed an exception to conclusion of law in paragraph 10 of the RO because it is based on improper admission of evidence. The Commission does not have substantive authority to rule on admissibility of evidence. The exception is rejected.

Exception No. 5: Respondent filed an exception to conclusion of law in paragraph 11 of the RO. There is competent substantial evidence in the record to support the conclusion of law. The exception is rejected.

Exception No. 6: Respondent filed an exception to the conclusion of law in paragraphs 12 and 13 of the RO. There is competent substantial evidence in the record to support the conclusion of law. The exception is rejected.

Exception No. 7: Respondent filed an exception to the conclusion of law in paragraph 17 of the RO. There is competent substantial evidence in the record to support the conclusion of law. The exception is rejected.

Findings of Fact

1. The Panel hereby adopts the findings of fact in the Recommended Order. There is competent substantial evidence to support these findings of fact.

Conclusions of Law

1. The Education Practices Commission has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 1012, Florida Statutes.

2. The Panel hereby adopts the conclusions of law in the Recommended Order.

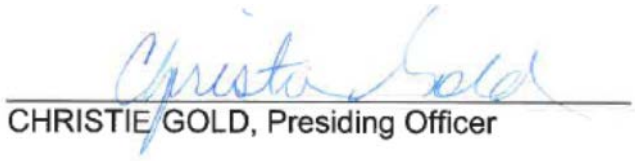
Penalty

Upon a complete review of the record in this case, it is therefore **ORDERED** that:

Respondent's Florida educator's certificate is hereby revoked for a period of 5 years from the date of this Final Order.

This Final Order takes effect upon filing with the Clerk of the Education Practices Commission.

DONE AND **ORDERED**, this 8th day of May, 2018.



CHRISTIE GOLD, Presiding Officer

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE EDUCATION PRACTICES COMMISSION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order was furnished to FRANK JOSEPH ARDO, [redacted] Naples, FL 34117 and Robert J. Coleman, Esq., Post Office Box 2089, Fort Myers, FL 33902-2089 by Certified U.S. Mail, by electronic mail to Darby Shaw, Deputy General Counsel, Suite 1232, Turlington Building, 325 West Gaines Street, Tallahassee, Florida 32399-0400 and Charles T. Whitelock, Esq., 300 Southeast 13th Street, Suite E, Fort Lauderdale, FL 33316-1924 this 8th day of May, 2018.

Lisa Forbess, Clerk
Education Practices Commission

COPIES FURNISHED TO:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Petitioner,

vs. Case No. 17-4217PL

FRANK ARDO,

Respondent.
_____/

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),[1/] 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, [redacted] 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 [redacted] 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 [redacted] 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, [redacted], 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

[redacted] 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 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).

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)[2/] 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 [redacted] 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.)

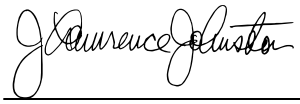
21. Under Florida Administrative Code Rule 6B-11.007(2), the penalties for the violations proven in this case range from probation to revocation. Rule 6B-11.007(3) sets out aggravating and mitigating factors for deviations from the penalty range. Consideration of the aggravating and mitigating factors 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.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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(850) 488-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2018.

ENDNOTES

[1/] 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.

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

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.

STATE OF FLORIDA
EDUCATION PRACTICES COMMISSION

PAM STEWART, as Commissioner Of Education, Petitioner, -vs- FRANK JOSEPH ARDO, Respondent.	)	EPC NO: 16-0520-RT

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, FRANK JOSEPH ARDO, pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217 of the Florida Uniform Rules of Procedure for the Division of Administrative Hearings, files this his Exceptions to the Recommended Order and states as follows:

INTRODUCTION

The Commissioner of Education filed an Administrative Complaint with the Education Practices Commission (EPC) on November 29, 2016. The Administrative Complaint alleged Respondent engaged in an inappropriate relationship and inappropriate communications with a female high school student, and charged Respondent with violating Section 1012.795(1)(g), Florida Statutes, for being guilty of personal conduct that seriously reduces effectiveness of teacher, and Section 1012.795(1)(j), Florida Statutes, for violating the Principles of Professional Conduct for the Education Profession.

Respondent disputed the charges and requested a formal hearing. The

case was forwarded to the Division of Administrative Hearings (DOAH), and assigned DOAH Case No. 16-6534PL. The hearing was convened on January 17, 2017. When one or more of Petitioner's witnesses failed to appear, Petitioner voluntarily dismissed the case. Respondent argued that the dismissal should be with prejudice and result in the entry of a recommended order of dismissal. The Administrative Law Judge (ALJ) entered an order dated January 25, 2017, rejecting Respondent's argument and ruling that Petitioner's dismissal was a voluntary dismissal without prejudice.

On July 25, 2017, the matter was again referred to DOAH and was re-opened as DOAH Cae No. 17-4217PL. Respondent moved to dismiss based on the voluntary dismissal of DOAH Case No. 16-6534PL. The motion was denied.

On September 28, 2017, 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. The DOAH hearing then was conducted on November 28, 2017.

No students, including in particular, the student with whom Respondent was alleged to have exchanged text messages, testified at the hearing. The ALJ received in evidence the text messages (Petitioner's Exhibit 6), notwithstanding Respondent objected to the admissibility of the text messages on the grounds of lack of authenticity and hearsay.

On January 12, 2018, the ALJ issued his Recommended Order. The ALJ ruled that Respondent was guilty of Count 1, personal conduct that seriously reduces his effectiveness as an employee of the school district, in violation of Section 1012.795(1)(g), Florida Statutes, Count 2, violation of the Principles of Professional

Conduct for the Education Profession as set forth in Section 1012.795(1)(j), Florida Statutes, and Count 6, exploiting a relationship with a student for personal gain or advantage in violation of Florida Administrative Code Rule 6A-10.081(3)(h). As a penalty, the ALJ recommended revoking Respondent's Educator Certificate.

Respondent takes exception to certain legal and evidentiary rulings, findings of fact, conclusions of law, and the recommended penalty made by the ALJ as detailed below. Respondent requests that the complete record in this matter be filed with the EPC as required by law for its review in conjunction with the ruling on these exceptions.

EXCEPTIONS

Exception No. 1:

The ALJ recounted on page 2 of his Recommended Order, the following:

> The Petitioner's witnesses, who were not under subpoena failed to appear [in DOAH Case No. 16-6534PL]. 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 No. 17-4217PL. The Respondent moved to dismiss based on the voluntarily dismissal of DOAH Case No. 16-6534PL. The motion was denied.

The ALJ committed material error in violation of the essential requirements of law, as required by Section 120.57(1)(l), Florida Statutes, when he ruled that Petitioner's dismissal of the original action [DOAH Case No. 16-6534PL] was without prejudice. Petitioner dismissed its Administrative Complaint after the formal hearing was convened due to Petitioner's failure to arrange for the presence of witness(es). Six months later, the ALJ permitted Petitioner to re-open the case [DOAH

Case No. 17-4217PL], with the formal hearing commencing a full ten (10) months after the dismissal of the original action in January 2017.

In *Knight v. Winn*, 910 So.2d 310 (Fla. 4th DCA 2005), the Fourth District Court of Appeal held that an administrative complaint could be dismissed without prejudice based on the Florida Administrative Code that was in effect at the time, Rule 28-106.201(4). That Rule stated:

> A petition shall be dismissed if it is not in substantial compliance with subsection (2) of this rule or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioners filing an amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

In *Knight*, the Petitioner was seeking to cure a defect in its administrative complaint by substituting Jim Horn for Charlie Crist as the Commissioner of Education in the style of the case and renumbering applicable statutes.

In the instant case, Petitioner did not contend that there was a defect in its Administrative Complaint. Rather, Petitioner was unprepared to proceed with the hearing. Petitioner, therefore, resorted to voluntarily dismissing the Administrative Complaint as a means of obtaining an unwarranted continuance. Rule 28-106.210 allows a presiding officer to grant a continuance of a hearing *for good cause shown,* and, except in cases of emergency, by a request *made at least five days prior to the hearing.*

Rule 28-106.201 has been amended since the *Knight* case so as to delete any reference to dismissal of the petition. Section 120.569(2)(c), Florida Statutes, however, contains a clause very similar to former Rule 28-106.201(4). A fair reading of this statute appears to govern petitions or requests for hearings before the matter is

referred to the Division of Administrative Hearings when the applicable agency still has jurisdiction over the matter and before relinquishing jurisdiction to the Division of Administrative Hearings.

Moreover, Rule 28-106.201 is not applicable to the present action. Since this matter concerns an agency disciplinary action, Florida Administrative Code Rule 28-106.2015 controls. Rule 28-106.2015 does not contain a provision for the dismissal of the petition and refiling of the action. Consequently, there being no right to refile the Administrative Complaint in this action, the ALJ violated the essential requirements of law when he failed to rule that the dismissal was *with prejudice*, and not subject to being re-opened.

Exception No. 2:

On pages 3 through 5 of the ALJ's Recommended Order, the ALJ committed err in admitting, over Respondent's initial objection as to authenticity, Petitioner's Exhibit 6. As the ALJ wrote on pages 3 and 4:

> The Respondent objected to the admissibility of 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 Respondent and one of his students, [redacted] The student and her mother could have addressed the authenticity of the exhibit, but they did not appear to testify . . . .
>
> After written arguments were considered, the Petitioner's Exhibit 6 was admitted over objection *without the testimony of* [redacted] *and her mother* . . . .

(emphasis supplied).

Petitioner's Exhibit 6 consisted of photocopies of downloaded cell phone text messages allegedly exchanged between Respondent and student [redacted] Since [redacted]

did not testify, there was a complete lack of competent evidence that [redacted] authored the text messages attributed to her. Petitioner further failed to present any competent evidence that Respondent authored the text messages attributed to him. The text messages were received in evidence based solely on the testimony of an assistant principal at the high school who claimed she procured the cell phone allegedly belonging to [redacted], obtained permission from [redacted]'s mother to download the text messages, and that the telephone number displayed in the text messages corresponded with a telephone number the school district had on file for Respondent.

Petitioner otherwise offered no evidence to connect the text messages to Respondent. Petitioner did not authenticate in any way that the messages were unadulterated and genuine. Nor did Petitioner establish that Respondent was the individual composing and sending the text messages.

Section 90.901, Florida Statutes, governs authentication or identification of evidence. It provides as follows:

> Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that a matter in question is what it proponent claims.

Petitioner claims Respondent composed and sent to [redacted] the subject text messages. How do we know this to be true? We do not.

It is not enough to show that a text message came from Respondent's phone number in order for it to be admitted in evidence as authentic under Section 90.901, Florida Statutes. This is because cell phones are not always exclusively used by the person whose phone number is registered to the phone, and because there is a potential for electronic communications to be fabricated or altered. *See United States*

v. Browne, 834 F.3d 403 (3d Cir. 2016).

Consider, for instance, the admissibility in evidence of a handwritten letter. A court likely would require something more than just the letter itself in order for it to be admitted as evidence. After all, the letter or the signature on the letter could be a forgery. The proponent offering the letter must prove that the letter is genuine, such as by having a witness identify the signature or handwriting as attributable to the purported author of the letter.

Authentication of electronically transmitted evidence is addressed by Charles W. Ehrhardt in 1 Fla. Prac., Evidence §901.1a (2017 ed.). Ehrhardt writes that "[t]he most common method of authenticating e-mails, text messages or Twitter is to establish the authorship of the electronic communication." Authorship is established a few different ways. The person who wrote and sent the text can testify they authored the message. In certain circumstances, the recipient of the message can testify he or she received the text message and can identify the sender by way of the recipient's reply to the message or the context of the message exchange. Circumstantial evidence of "distinctive characteristics" in the communication that identifies the author is a third way of proving authorship. See *Symonette v. State of Florida,* 100 So.3d 180 (Fla. 4th DCA 2012).

In *Symonette*, law enforcement officers recovered a cell phone from the *defendant* when he was taken into custody. Text messages on the phone were photographed and offered in evidence. A witness who had sent the text messages to the defendant testified and identified the text messages she exchanged with the defendant, and discussed the context of the messages. The Fourth District ruled:

> The extrinsic evidence offered by the State, *as well as the circumstances surrounding the procurement of the phone and pictures,* is sufficient to show that the matter in question is genuinely what the State claims – pictures of the defendant's text messages to the [witness]. (emphasis supplied).

Id. at 183.

In *Devbrow v. Gallegos,* 735 F.3d 584 (7th Cir. 2013), the court determined that Devbrow, a prisoner in a Section 1983 lawsuit, failed to authenticate an e-mail purportedly from prison official Gallegos to the law librarian supervisor. Devbrow offered the e-mail in evidence as proof that Gallegos had a retaliatory intent and destroyed Devbrow's property. The court ruled that the document was properly struck because Devbrow failed to authenticate it. As the court observed at pages 586-587:

> While circumstantial evidence – such as an e-mail's context, e-mail address, or previous correspondence between the parties – may help to authenticate an e-mail, see *United States v. Siddiqui,* 235 F.3d 1318, 1322-23 (11th Cir. 2000), the most direct method of authentication is a statement from the author or an individual who saw the author compose and send the e-mail. See *United States v. Fluker,* 698 F.3d 988, 999 (7th Cir. 2012). But Devbrow did not show that either he or anyone else saw Gallegos actually compose or transmit the e-mail, nor did he present any circumstantial evidence like that in *Siddiqui* or *Fluker* to suggest as much.

In the instant case, Petitioner did not present any evidence identifying Respondent as the author of the subject text messages. Moreover, unlike the facts in *Symonette,* the text messages were not procured from Respondent's cell phone. Again, unlike in *Symonette,* the alleged recipient of the text messages, [redacted], did not testify and verify her alleged receipt and reply to the messages, much less establish that she was the owner of the phone from which the messages were procured. The assistant principal's testimony that the cell phone was [redacted]'s is based entirely on a

hearsay statement from [redacted] apparently claiming ownership of the subject cell phone. While Petitioner perhaps could have sought to introduce the text messages without [redacted]'s testimony by having a witness identify "distinctive characteristics" in the text message exchange, such as photographs of people or events, or content, which in the context of the exchange clearly establishes the identity of the author and genuineness of the message, Petitioner did not present any such testimony.

Consequently, Petitioner failed to authenticate Petitioner's Exhibit 6. As such, Petitioner did not comply with the condition precedent to its admissibility, as required under Section 90.901, Florida Statutes. Since the ALJ failed to comply with the essential requirements of law by admitting in evidence Petitioner's Exhibit 6, and by then relying on the exhibit in his Findings of Fact Number 3 on page 5 of the Recommended Order, there is no competent substantial evidence proving that Respondent is guilty of any misconduct.

Exception No. 3:

The ALJ failed to comply with the essential requirements of the law in admitting Petitioner's Exhibit 6 (the text messages) and based his Findings of Fact Number 3, on page 5 of the Recommended Order, on less than competent substantial evidence, when the ALJ admitted Petitioner's Exhibit 6 in evidence over Respondent's hearsay objection. Petitioner failed to establish a non-hearsay predicate for the admissibility of the text messages.

The predicate Petitioner presented for receiving the text messages in evidence consisted of the testimony of the assistant principal. The assistant principal testified that she spoke with [redacted] who allegedly told the assistant principal that she had

text messages on her cell phone that she received from Respondent. The assistant principal testified the messages were received from [redacted]'s cell phone. Because [redacted] did not testify, the assistant principal's assertion that the cell phone belonged to [redacted] is hearsay that is not sufficient in itself to support a finding of fact. *See*, *Durrell v. Unemployment Appeals Commission,* 743 So.2d 166, 168 (Fla. 4th DCA 1999) (holding that the appeals referee's decision was not based on competent substantial evidence, because no testimony was presented at the hearing which could establish the predicate necessary to admit a transcript as an exception to the hearsay rule).

Moreover, the messages attributed to [redacted] were offered to prove the truth of the matter asserted, and not just as evidence supplementing or explaining other evidence. Petitioner offered [redacted]'s texts, and the ALJ received them in evidence, as proof that [redacted] received inappropriate messages from Respondent that the ALJ ultimately concluded established an inappropriate relationship and communications with his student. (*See* Conclusions of Law Number 10). Without [redacted]'s alleged text messages in evidence, and because [redacted] did not testify, the evidence is insufficient to establish that [redacted] ever received the text messages from Respondent, or that Respondent was seeking to engage in an inappropriate relationship with [redacted]

In *Winters v. Florida Board of Regents,* 834 So.2d 243 (Fla. 2d DCA 2002), the Second District Court of Appeal ruled an investigative report containing unsworn statements made to the investigator by witnesses who did not testify at the hearing was properly excluded from evidence by the ALJ when determining whether the University of South Florida had good cause to terminate the University's women's basketball coach. The appellate court affirmed the ALJ's exclusion of the report since it

consisted almost entirely of inadmissible hearsay and its purpose was not to prove that the University followed proper protocol, but, rather, to establish the coach engaged in allegedly impermissible retaliatory behavior.

Similarly, the messages attributed to student [redacted] are complete hearsay. They were not being offered simply to supplement or explain Respondent's text messages, but rather as proof of an inappropriate relationship. There is no way of knowing whether [redacted] indeed received Respondent's messages and, in turn, responded to them without testimony from [redacted]

The ALJ thus erred in determining that Respondent was guilty of an inappropriate relationship and communications with [redacted]

Exception No. 4:

The ALJ concluded at Conclusion of Law Number 10, on page 8 of the Recommended Order, that:

> . . . The evidence was clear and convincing that the Respondent violated [Flordia Statutes Section 1012.795(1)(g)] through his inappropriate relationship and communications with his student, [redacted]

For the reasons stated above, the ALJ failed to comply with the essential requirements of the law in reaching this conclusion. Had the ALJ correctly applied the law and excluded from evidence Petitioner's Exhibit 6 (the text messages), the record would have been devoid of any competent substantial evidence of an inappropriate relationship and communications. The ALJ then would have been required to dismiss the charges against Respondent for insufficient evidence.

Exception No. 5:

The ALJ concluded at Conclusions of Law Number 11, on page 8 of the

Recommended Order, that:

> 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.

This Conclusion is not supported by competent substantial evidence and fails to comply with the essential requirements of law for all of the reasons set forth above.

Exception No. 6:

The ALJ concluded at Conclusions of Law Numbers 12 and 13, on pages 8 and 9, of the Recommended Order, that:

> . . . the evidence was sufficient [to prove Respondent's loss of effectiveness as an employee of the school district, and violation of the Principles of Professional Conduct for the Education Profession] . . . in the face of the school district's action to terminate his employment for an inappropriate relationship and inappropriate communications with a student.

These Conclusions are not supported by competent substantial evidence and fail to comply with the essential requirements of law for all of the reasons set forth above.

Exception No. 7:

The ALJ concluded at Conclusions of Law Number 17, on page 10 of the Recommended Order, that:

> 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 [redacted] proved this violation.

This Conclusion is not supported by competent substantial evidence and

fails to comply with the essential requirements of law for the reasons stated above. But for the text messages having been improperly received in evidence, there was no proof of an inappropriate relationship and communications.

EXCEPTION TO RECOMMENDATION

Based on his Findings of Fact and Conclusions of Law, the ALJ recommended that the EPC enter a final order finding Respondent guilty on Counts 1, 2, and 6, and revoking his Educator Certificate. Respondent takes exception to the Recommendation for all of the reasons advanced in these Exceptions. The ALJ's Recommendation should be rejected, and the charges against Respondent be dismissed for lack of clear and convincing evidence that Respondent engaged in an inappropriate relationship and inappropriate communications with a female high school student.

Respectfully submitted,

COLEMAN & COLEMAN

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Exceptions to the Recommended Order has been sent via regular U. S. Mail to Lisa Forbess, Clerk of the Education Practices Commission, 325 W. Gaines Street, Suite 316, Tallahassee, Florida 32399-0400 and via e-mail to epc@fldoe.org; and via e-mail to Charles T. Whitelock, Esquire, at charles@ctwpalaw.com on this the 29th day of January, 2018.

ROBERT J. COLEMAN
Attorney for Respondent

STATE OF FLORIDA
EDUCATION PRACTICES COMMISISON

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Petitioner,

v.

FRANK ARDO,

Respondent.
_____/

EPC Case No: 16-0520RT
DOAH Case No: 17-4217PL

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS

Petitioner, PAM STEWART, as Commissioner of Education, by and through her undersigned counsel, Charles T. Whitelock, P.A., hereby files this Response to the Respondent's Exceptions to the Recommended Order in the following manner:

STANDARD OF REVIEW FOR EXCEPTIONS

An agency may not reject or modify a presiding officer's findings of fact set forth in a Recommended Order unless the agency first determines, from a review of the entire record, and states with particularity, that (1) the findings of fact were not based upon competent, substantial evidence, or (2) the proceedings on which the findings were based did not comply with essential requirements of law. See Section 120.57(1)(l) Florida Statutes. Agencies are bound to honor a hearing officer's findings of fact if supported by competent substantial evidence. City of Winter Springs v. Winter Springs Professional, 885 So.2d 494 (Fla. 1st DCA). An agency is legally prohibited from reviewing both sides of a fact issue and selecting the position that appears more credible in its own judgment. Koltay v. Division of General Regulation, Department of Business Regulation, 374 So.2d 1386 (Fla. 2nd DCA 1979).

In ruling on the findings of fact set forth in a recommended order, an agency may not re-weigh the evidence presented, judge the credibility of witnesses or otherwise interpret the evidence to fit its desired ultimate conclusion. Instead, the agency's decision is limited to determining whether some competent substantial evidence was presented that would support the presiding officer's findings. Bay County School Board v. Bryan, 679 So.2d 1246 (Fla. 1st DCA 1996); Dunham v. Highland County School Board, 652 So.2d 894 (Fla. 2nd DCA 1995); Gordon v. State Commission on Ethics, 609 So.2d 125 (Fla. 4th DCA 1992). Where the question is the weight or credibility of testimony of witnesses, or where the factual issues are otherwise susceptible of ordinary methods of proof, the presiding officer's findings of fact must prevail if any competent, substantial evidence supports them. S.A. v. Department of Children and Family Services, 728 So.2d 1228 (Fla. 3rd DCA 1999); Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 495 So.2d 790 (Fla. 1st DCA 1986).

In addition, an agency's rejection or modification of a conclusion of law set forth in a presiding officer's recommended order may not form the basis for rejection or modification of findings of fact, Section 120.57(1)(1), Fla. Stat. McMillian v. Broward County School Board, 834 So.2d 903(Fla. 4th DCA 2003).

PRELIMINARY STATEMENT

The Respondent requested a formal hearing to dispute the material allegations and administrative charges in the Petitioner's Amended Administrative Complaint, dated September 28th, 2017. The AC had actually been amended in the earlier case, DOAH CASE NO:16-6543 on November 16th, 2016 and refilled without objection in the current case. That case was

voluntarily dismissed at the formal hearing by the Petitioner and later refilled on July 25th, 2017.

The following symbols and designations will be used in the Petitioner's Response:

(FOF)	=	Finding of Fact
(COL)	=	Conclusion of Law
(Px.#)	=	Petitioner's exhibit/page number
(T. #/)	=	Hearing Transcript page number/line number
(NAME)	=	Witnesses surname
(R)	=	Exhibit page number (bottom right)
(AC)	=	Amended Administrative Complaint
(ALJ)	=	administrative law judge
(DOAH)	=	Division of Administrative Hearings
(EPC)	=	Educational Practices Commission

EXCEPTION#1 (PRELIMINARY STATEMENT)

Section 120.57(1)(k) Florida Statutes requires the presiding officer, here the ALJ, to issue a recommended order **consisting of findings of fact, conclusions of law, and a recommended penalty** (emphasis added). In conformity with the statute, F.A.C. 28-106.217 permits a party to file exceptions to **findings of fact and conclusions of law contained in the recommended order** (emphasis added). The Respondent's exception does not address any FOF or COL, but rather the ALJ's Preliminary Statement. There is no legal authority to address any portion of a recommended order other than the FOF and COL.

Further, Respondent failed to point out that the ALJ issued an order entitled ORDER CLOSING AND RELINQUISHING JURISDICTION in DOAH CASE # 16-6534. There, the ALJ pointed out that the Respondent failed to cite the appropriate case law in his motion in opposition to the voluntary dismissal, citing the correct case law and Rule of Civil Procedure in making his ruling. In any event, the ALJ ruled the Petitioner's dismissal was without prejudice. Respondent took no appeal of the ruling.

In the present case, the original AC was refilled by the EPC, which was filed at DOAH. Petitioner thereafter filed a motion to include the Amended AC in the new case. The original AC had been amended in the previous case but wasn't included in the subsequent filing at DOAH. The Respondent made no objection. The Joint Stipulation filed by the parties in the present case made no mention of the ALJ's previous ruling, either in the contested issues of fact or law.

There is no legal basis authorizing this exception. It should be denied.

EXCEPTION#2 (PRELIMINARY STATEMENT)

The Petitioner, for brevity's sake, adopts by reference those legal authorities listed in the Petitioner's previous response. Once again, the Respondent doesn't address a FOF or COL, but provides a re-argument of the evidence rejected by the ALJ in his order dated December12th, 2017. The Petitioner will address the Respondent's legal points in a later response to another exception, but there is no legal basis authorizing this exception. The exception should be denied.

EXCEPTION#3 (FOF#3)

Respondent's argument is confusing. It commences with an argument over the admission of Px.#6, and concludes with a request you determine that the ALJ erred finding Respondent

guilty of an inappropriate relationship and communications with [redacted] Nowhere in the FOF did the ALJ make mention that Respondent was guilty of any charge. To the contrary, the ALJ merely characterized the nature of the communications between a teacher and a student.

The Respondent is requesting you to reject the exhibit based on a factual finding. In reality, Respondent isn't addressing the finding by the judge that these texts were highly personal and clearly inappropriate. Instead, Respondent proffers a legal argument to exclude the evidence and exhibit that had been rejected by the ALJ in his December 12th Order Admitting Petitioner's Exhibit 6. The exception should be denied on that basis.

The Respondent further argues that Dr. Cox was the sole witness to establish the text messages. This assertion is erroneous. Dr. Cox did testify to the events leading to her downloading the text messages. She verified the Respondent's cell phone number from the school district's records as the one noted in the left hand margin of the text messages. (T. #14/2-14). Afterwards, Dr. Cox contacted the Collier County Sheriff, who conducted a criminal inquiry. After they deemed there was no basis for a criminal charge, the district commenced its investigation. The Respondent never appeared for his interview, or denied the text messages were his. Instead, he chose to resign.

Later, the texts were sent to the Department of Education for their investigation. Their investigator, Dohme, met and took a written statement from [redacted] (Px.#5/R.36-37). He also had her identify, initial and date the text messages (T. #79/18-24). She, like Dr. Cox, verified the text messages, its content and identified the Respondent's cell phone number in the left hand margin with hers on the right margin.

Respondent argues this evidence is hearsay and less than competent substantial evidence. Petitioner, Respondent argues, failed to establish a non-hearsay predicate for the admissibility of the text messages. Respondent's argument is misplaced. The ALJ in his order admitting the exhibits noted:

"The Respondent also contends that the text messages are hearsay and that they cannot be used as a finding. See: Section 120.57(1)(c), Fla. Stat. (2017). The messages are not hearsay if offered to prove that the communications occurred, as opposed to the truth of the matters asserted in the messages. See: Section 90.801 (1) Fla. Stat. Even if offered to prove the truth of the matters asserted, **the messages from the Respondent (but not from [redacted]) would be party admissions, which are admissible over objection in civil court and can be used for any purpose.** See Section 90.803(18) Fla. Stat."

The ALJ also noted that the Respondent's objection to authenticity was denied, noting, "Evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." ITT REAL ESTATES, INC. v. CHANDLER INS. AG. INC. 617 So.2d 750 (Fla. 4th DCA 1993). Evidence is authenticated when *prima facia* evidence is introduced to prove that the proffered evidence is genuine. The finding of authenticity doesn't establish its genuineness; it only determines that prima facia evidence of genuineness exists. Once the evidence has been admitted, the opposing party can challenge its genuineness. Respondent never called any witnesses, put on any evidence or even cross-examined the Petitioner's witnesses to challenge the genuineness of the text messages, or their credibility. The testimony of Dr. Cox and Dohme establish the Respondent's

cell phone number, which appears on the text messages. This evidence, not only establishes the authenticity, but also creates an inference that the Respondent was the one who communicated them. During the district's investigation, Respondent was scheduled for an interview to address the "allegations of inappropriate communications and conduct with students"(Px.#2). Rather than appearing to provide his explanation for the allegations, or to challenge the authenticity of the text messages in question, Respondent chose to resign from his employment with the district on February 9th, 2015 (Px. #12; T. #69).

In administrative proceedings, the weight or credibility of witness testimony is a factual finding made by the ALJ based on the testimony offered by a party. (See: KJS v. Department of Children and Family Services 974 So.2d 1106 (Fla.1st DCA 2008). There is competent substantial evidence to support the FOF. The exception should be denied.

EXCEPTION#4 (COL#10)

The Respondent misses the point. This conclusion must be read in conjunction with COL# 11 and 12. They were established by the FOF in paragraphs# 4, 5, and 6 of the RO. No exception was filed against any of these findings. The evidence clearly establishes that the Respondent failed to appear for his interview to address these allegations, choosing instead to resign from his employment. The resignation was accepted as Not In Good Standing (Px.#13), which **renders him unqualified for any position as an employee in the school district** (T. #72/16-25;T. #73/1-5). This evidence by itself was sufficient to support Count 1, as noted by the ALJ in COL #11 and 12. The argument regarding the exclusion of the Px.#6 has been previously addressed. The exception should be denied.

EXCEPTIONON#5 (COL#11)

Petitioner would rely upon the previous arguments presented on this issue. The exception should be denied.

EXCEPTION#6 (COL#12)

Petitioner would rely upon the previous arguments presented on this issue. The exception should be denied.

EXCEPTION#7 (COL#17)

Respondent repeats the exclusion of Px.#6. Petitioner relies upon the previous arguments presented herein.

EXCEPTION (RECOMMENED PENALTY)

Respondent requests the EPC to reject the ALJ's recommendation and dismiss the charges. The ALJ recommended permanent revocation, or a revocation period of not less than five years. The ALJ noted that if a period of revocation is imposed that the Respondent must be able to demonstrate good moral character. Petitioner would request the Respondent's Educator's certificate be permanently revoked, and that he be permanently barred from re-application. The Respondent has offered no mitigating circumstance that would warrant a lesser penalty.

Respectfully submitted,

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Counsel for Petitioner
/s/Charles T. Whitelock
CHARLES T. WHITELOCK
Florida Bar No. 166020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via e-mail to: Robert J. Coleman, Esq., Coleman & Coleman, 2080 McGregor Blvd., Suite 202, Ft. Myers, FL 33902-2089, e-mail: inform@colemanattys.com and pam@colemanattys.com and Education Practices Commission, e-mail: epc@fldoe.org, this 9th day of February, 2018.

/s/Charles T. Whitelock
CHARLES T. WHITELOCK