OAH 5-1304-35562

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PROFESSIONAL EDUCATOR LICENSING AND STANDARDS BOARD

In the Matter of the Teaching License of [S.K.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came before Administrative Law Judge Jim Mortenson on the parties' stipulated facts, filed February 20, 2019. The record closed on February 20, 2019.

Jennifer A. Kitchak, Assistant Attorney General, represents the Minnesota Professional Educator Licensing and Standards Board (Board). Debra M. Corhouse, Education Minnesota, represents [S.K.] (Respondent).

On January 28, 2019, the parties informed the Administrative Law Judge that they had reached a stipulation to the facts and supporting documentary evidence in this matter and that an evidentiary hearing was not required. The Judge and parties agreed to a procedure and deadline for submitting the facts, evidence, and arguments to the Judge.[1]

STATEMENT OF THE ISSUE

Did Respondent's conduct, including hugging a student and other inappropriate physical touching of a student, allegedly discussing his sex life with a student, and sending a sexually explicit text message to a student, constitute immoral conduct under Minn. Stat. § 122A.20, subd. 1(a)(1) (2018)?

SUMMARY OF RECOMMENDATION

Respondent did not engage in immoral conduct. The complaint against Respondent should be **DISMISSED**.

Based on the stipulated facts and evidence in the hearing record, the Administrative Law Judge makes the following:

[1] Second Prehearing Order (Jan. 29, 2019).

FINDINGS OF FACT[2]

I. Respondent's Background

1. Respondent holds a Minnesota teaching license to teach visual arts for grades K-12.

2. The North Saint Paul-Maplewood School District, Independent School District (ISD) 622, employed Respondent from August 30, 1999, through June 30, 2016, as an art teacher at North High School.

3. Respondent is a well-respected educator.[3] Respondent has been a track coach, chair for the National Honor Society, coordinator for Student of the Month, and department chair.[4] Respondent was a popular teacher at North High School.[5] Respondent is known for having an open door, listening to students, and communicating with parents.[6]

4. Respondent now works with students with disabilities in Intermediate School District 287.[7]

II. Inappropriate Relationship with Student

5. During the 2009-2010 school year, Respondent taught a female 12th-grade student (Student). Respondent taught a pottery class.[8] Respondent developed a personal relationship with Student that went beyond appropriate teacher-student boundaries.

6. Respondent did not have a sexual relationship with Student.[9]

A. Email Exchanges

7. Throughout the school year, Respondent and Student exchanged numerous emails almost daily, including text messages for a couple of months. Toward the end of the school year, Respondent asked Student to delete all the email messages between them.

8. ISD 622 provided the emails between Respondent and Student to the Board. The most-relevant emails were made part of the administrative record.[10]

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[2] These are stipulated facts. The parties also submitted several documents. Not all the stipulated facts were specific. Where a document supports a more specific factual finding, the document is cited.
[3] Exhibits (Exs.) 2A, 2B, 2C, 2E.
[4] Exs. 2A, 2B, 2C.
[5] Exs. 2A, 2B.
[6] Exs. 2B, 2C.
[7] Ex. 3.
[8] Ex. 1. Numerous references.
[9] Exs. 1, 2, 2E, 2F.
[10] *See* Ex. 1.

B. Discussion of Personal Sexual Matters

9. Respondent and Student discussed a book that students had been talking about.[11] The book referenced frequent sexual activity, and Respondent commented that "he and his wife were doing the opposite . . . ."[12]

10. Respondent acknowledges and agrees that it was inappropriate to discuss with Student any aspects of his sex life.

C. Text Messages

11. In or about March or April 2010, Student asked Respondent, via text message, what his sexual fantasy was.[13] Respondent replied, via text message, that it was a scene from the movie *Ghost*.[14]

12. Respondent acknowledged that it was highly inappropriate to describe or otherwise discuss sexual fantasies with Student.

D. Physical Contact

13. On at least two occasions during the 2009-2010 school year, Respondent and Student hugged.

14. In one of these instances, Respondent hugged Student from behind.[15]

III. Consequences of Relationship with Student

15. In April 2016, Student contacted Respondent, telling him their relationship had been inappropriate and that she wanted his assistance with paying for her therapy.[16]

16. Student then contacted ISD 622 and the North St. Paul Police Department and made allegations against Respondent.[17]

17. In 2016, the North St. Paul Police Department investigated Student's allegation that that Respondent hugged her from behind with an erection. The investigation did not result in charges against Respondent.

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[11] Ex. 2 at 3.
[12] *Id.*
[13] Ex. 2 at 4.
[14] *Id.*
[15] Student alleged that during this hug, she could feel Respondent's erect penis through her clothes. This allegation has not been established as a fact. [S.K.] has no memory of having an erection during this encounter and believes that if Student felt anything it would have been his flip phone that he always keeps in his front pants pocket.
[16] Ex. 2 at 4.
[17] *Id.*

18. Respondent resigned from his employment with ISD 622 on June 30, 2016, shortly after the school district commenced an investigation into his conduct during the 2009-2010 school year.

19. In October 2016, the Discipline Committee of the Minnesota Board of Teaching (Committee), now the Professional Educator Licensing and Standards Board, learned of Student's allegations and sent an inquiry to Respondent.

20. In October 2017, Respondent, through counsel, submitted a response to the Committee's inquiry, including five letters of support. The letters are from three colleagues, Respondent's principal at North High School, and Respondent's therapist.[18] The letters from colleagues and the Principal support Respondent as a moral person and teacher.[19] Three of the individuals indicate knowledge of Respondent's conduct and do not conclude it was in any way immoral.[20]

21. The Principal reported that Respondent dealt appropriately in resolving his inappropriate conduct.[21] The Principal "whole heartedly" endorsed that Respondent continues teaching.[22]

22. Respondent's therapist reports that while Respondent's conduct was inappropriate for a teacher, the Board exaggerated his behavior and that Respondent did not have a sexual relationship with Student.[23] The therapist, who has experience working with sex offenders, also stated that Respondent should be permitted to continue to teach.[24]

23. Any material fact in the memorandum below not reflected here is adopted as a finding of fact.

Based on these findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Board and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 122A.20 (2018); Minn. R. 8710.2100, subp. 3 (2017).

2. The Board has complied with all relevant procedural requirements of statute and rule.

[18] Exs. 2A, 2B, 2C, 2E, 2F (Ex. 2D is identical to Ex. 2A).
[19] Exs. 2A, 2B, 2C, 2E.
[20] Exs. 2B, 2C, 2E.
[21] Ex. 2E.
[22] *Id.*
[23] Ex. 2F.
[24] *Id.*

3. The Board may refuse to renew, may suspend, or may revoke the teaching license of a teacher for "immoral character or conduct."[25]

4. Immoral character or conduct is determined based on the standards of the particular community involved.[26]

5. The Board must show, by a preponderance of the evidence, that Respondent's conduct was immoral.[27]

6. The Board failed to meet its burden of proving that Respondent's conduct with Student, including forming a friendship with and exchanging an excessive number of emails with her, responding to an inquiry of a sexual nature via text, and hugging her twice, was immoral conduct or indicative of immoral character in ISD 622.

Based upon these conclusions of law, and for the reasons explained in the accompanying memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these conclusions of law, and for the reasons explained in the memorandum below, the Administrative Law Judge respectfully recommends that the Board **DISMISS** the complaint against Respondent.

Dated: March 4, 2019

JIM MORTENSON
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Board will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2018), the Board shall not make a final decision until this report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report, and the Board must consider the exceptions in making a final decision. Parties should contact Alex Liuzzi, Executive Director, Minnesota Professional Educator Licensing and Standards Board, 1500 Highway 36 West, Roseville, MN 55113, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and Administrative Law Judge of the date the record closes. If the

[25] Minn. Stat. § 122A.20, subd. 1(a)(1).
[26] *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 908 (Minn. 1996).
[27] Minn. R. 1400.7300, subp. 5 (2017).

Board fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2018).

Under Minn. Stat. § 14.62, subd. 1 (2018), the Board is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Law

This case presents the question of whether a teacher in ISD 622 engaged in immoral conduct, which would lead to discipline by the Board. The Board has the authority, based on a written complaint, to "refuse to issue, refuse to renew, suspend, or revoke a teacher's license to teach for . . . (1) immoral character or conduct . . . ."[28]

According to the Minnesota Supreme Court, immoral conduct is a "nebulous" triggering event for discipline and is dependent on the standards of the particular community in which the conduct occurs.[29] "Conduct which a particular community might find immoral may not be so labeled in another location in the state."[30] As a result, in a hearing about whether an educator has engaged in immoral conduct or is of immoral character, evidence of what that educator's community views as immoral must be admitted for consideration.[31] The Board carries the burden of proof.[32]

II. Arguments

The Board argues that the stipulated facts and Respondent's admission are sufficient to demonstrate Respondent engaged in immoral conduct. According to the Board, there were sexually explicit communications between Respondent and Student, including discussion of Respondent's private sexual activities. This conduct is not in conformity with accepted principles of right and wrong behavior in the community, argues the Board. This is because communications of a sexual nature between adults and children are generally understood to be wrong, given the inability of minors to fully understand and consent to sexual activity. The Board cites Minn. Stat. § 609.352, subd. 2a(2) (2018), which makes it a felony in certain circumstances for adults to send electronic communications relating to or describing sexual conduct to children 15 years of age or younger.[33]

Respondent argues that his interactions with Student did not constitute immoral conduct. Respondent admits his conduct was improper, but was not "corrupt, indecent, depraved or dissolute, or conduct which offends the morals of the community in which it

[28] Minn. Stat. § 122A.20, subd. 1.
[29] *Falgren,* 545 N.W.2d at 908.
[30] *Id.*
[31] *Id.*
[32] Minn. R. 1400.7300, subp. 5.
[33] Brief of Committee at 4-5 (Feb. 4, 2019).

occurred," as demonstrated by the letters from his former peers, his former principal, and his therapist.[34] Respondent argues that he has been forthright and accepting of responsibility for his conduct and that this does not demonstrate immoral character.[35] Respondent further argues that he has taken significant steps to address his conduct in question and that punishment for his behavior by the Board would negatively affect not only him but also his students and current employer.[36]

III. Analysis

The Board must show by a preponderance of the evidence that Respondent engaged in immoral conduct or is of immoral character.[37] The Board failed to meet the evidentiary standard.

There are two problems with the Board's case. First, the evidence does not show Respondent's specific conduct was as egregious and severe as the Board claims. Second, the evidence shows that Respondent's conduct is not considered immoral in the community, ISD 622.

A. An Inappropriate Relationship

Respondent was a popular high school art teacher who was a track coach and mentored students in the National Honor Society. Respondent was one of Student's teachers. Student became infatuated with Respondent in her junior year, and this blossomed during the following year.[38] Respondent appreciated the attention Student gave him. The two became close friends, bonding on a level that was inappropriate given Respondent's professional responsibilities as a teacher. They exchanged emails and texts and conversed on all manner of topics, including school, family, friendship, and love.[39] Respondent recognized, later, that this relationship was inappropriate. He later sought counselling to understand how he permitted the relationship to happen.[40] The evidence does not demonstrate the relationship ever became sexual.[41]

There was a student-teacher relationship that required appropriate boundaries. The Board argues that Respondent was using his relationship with Student to gratify his own need for attention and to feel good about himself. The Judge agrees. However, there is no evidence Respondent's relationship with Student was immoral in the community. All the evidence about the community's mores demonstrates that while the relationship was considered inappropriate, it was not so depraved to be immoral and warrant discipline. Letters from five different individuals, four of whom indicated they had knowledge of the allegations against Respondent, were clear that Respondent was of high moral

[34] Respondent's Brief on Stipulated Facts at 6 (Feb. 20, 2019).
[35] *Id.* at 6-8.
[36] *Id.* at 9.
[37] Minn. R. 1400.7300, subp. 5.
[38] Ex. 1.
[39] *Id.*
[40] Exs. 2, 2E, 2F, 3.
[41] Exs. 1, 2, 2E, 2F, 3.

character.[42] One letter, from Respondent's therapist, specifically stated that while Respondent's relationship with Student was inappropriate, no immoral conduct was involved.[43] The Board presented no evidence to the contrary. As a result, the evidence simply does not support a finding that Respondent's relationship with Student was immoral conduct or indicative of immoral character.

B. Hugging Student Was Not Immoral Conduct

Twice during the 2009-2010 school year, Respondent and Student hugged. There are no details about these hugs, other than at least one occurred in Respondent's classroom.[44] The parties stipulated that the hugs were "extended" but do not define exactly what that means.

The parties stipulated that Student alleged Respondent had an erection during one of the hugs. They also stipulated that Respondent denied this. Respondent explained that if Student felt anything hard pressed against her during a hug, it was likely the flip phone he kept in his pocket. The preponderance of evidence does not establish that either of the two hugs was of a sexual nature.

The evidence does not establish that Respondent's hugging of Student was immoral conduct.[45]

C. Respondent's Comment to Student concerning His Sex Life Was Not Immoral Conduct

Respondent and Student discussed a book that students at the high school were reading that concerned sex. During the discussion, Respondent alluded that he and his wife were not regularly having sex. Respondent was not explicit in his comment, but he admitted that it was not appropriate. There is no evidence that Respondent and Student discussed Respondent's relationship with his wife generally, much less their sexual relationship.

The evidence in the record demonstrates that the community viewed this conduct as inappropriate, not immoral.[46]

[42] Exs. 2A, 2B, 2C, 2E, 2F.
[43] Ex. 2F.
[44] Ex. 1 at 82.
[45] Exs. 2E, 2F.
[46] Exs. 2a, 2C, 2E, 2F.

D. Respondent's Text to Student about a Sexual Fantasy Was Not Immoral Conduct

Student and Respondent engaged in lengthy email and text conversations over the course of the 2009-2010 school year that covered many topics, often of a personal nature concerning Student.[47] In one of these exchanges, Student inquired about Respondent's sexual fantasy. Respondent responded by referring to a scene from a popular romance film. There is no evidence that his response was any more "explicit" than that.

Respondent admits that his response to Student was inappropriate. In fact, he knew it was at the time, and he realized his friendship with Student was poor judgment. Respondent immediately took steps to correct the relationship despite the negative impact on Student.[48]

As with the other conduct at issue, there is no evidence Respondent's response to Student's query was immoral conduct. He was not engaged in grooming behavior or otherwise taking advantage of Student.[49] He immediately realized that their friendship was not a healthy student-teacher relationship and took steps to correct it.[50] Further, this was not a sign of someone with immoral character.[51]

The Board's argument that all communications of a sexual nature between adults and children is immoral conduct is unavailing. The Board cites a criminal statute concerning electronic communication of a sexual nature between adults and children less than 16 years old. First, the evidence does not establish that Student was a minor. She was a senior in high school, and the text in question occurred in the later part of the year. More important, there is no evidence that the community sees the conduct in this case as more than inappropriate.[52] Thus, discipline is not warranted.

IV. Conclusion

The Board failed to establish by a preponderance of the evidence that Respondent engaged in immoral conduct or is of immoral character. Respondent's relationship with a student during the 2009-2010 school year was inappropriate, but there is no evidence the community saw it—or a relationship like it—as morally wrong. It was not a sexual relationship. Therefore, the Administrative Law Judge respectfully recommends that the Board **DISMISS** the complaint against Respondent's teaching license.

J. R. M.

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[47] Exs. 1, 3.
[48] Ex. 3.
[49] Ex. 2F.
[50] Exs. 2, 3.
[51] Ex. 2E.
[52] Exs. 2E, 2F.