

tenured classroom teacher with a professional services contract (PSC) within the meaning of Section 1012.33(1)(a), Florida Statutes (2007), for alleged misconduct in office.

PRELIMINARY STATEMENT

This cause arose upon the issuance of a letter to the Respondent, of June 19, 2008, by Chief Human Resources Officer Michael Foxworthy (Foxworthy), notifying the Respondent that he would recommend to the Superintendent, Alexis Tibbetts, (Superintendent), that the Respondent be dismissed from his teaching and coaching positions with the Petitioner. The dismissal was based upon the Respondent's alleged creation of an inappropriate "dating website entry called 'Adult Friend Finder' (AFF), that included a partially naked photograph of the Respondent." It was alleged that the photograph became accessible to some area residents through an unknown series of events, not attributable to the Respondent, and that the Respondent misled Board officials when the Respondent was questioned about his involvement in creating the website in question. The June 19, 2008, letter also accuses the Respondent of visiting websites that were inappropriate for access by a school district employee, using a district computer during the work day, after having been warned previously about misusing technology.

The Superintendent adopted Mr. Foxworthy's recommendation and recommended it to the Board. The Board subsequently voted to suspend the Respondent's employment without pay, pending the termination process, at a June 23, 2008, meeting. The Respondent has denied creating the AFF website or lying to Board officials about the matter. The Respondent contends that allegations about the AFF website should not be considered in this proceeding because it is a completely private, non-criminal matter, that is not subject to the oversight or jurisdiction of the Board, and that the website and its content were made known by someone other than himself. The Respondent contends that under the totality of evidence surrounding the use of a school computer, in conjunction with the District's computer-use policies, that he did not engage in any misconduct with regard to internet site access.

In due course the dispute was referred to the Division of Administrative Hearings and to the undersigned Administrative Law Judge. A hearing was duly noticed for December 17 and 18, 2008, and was conducted on those dates. The hearing was held in Shalimar, Florida. The parties presented oral argument upon a recently-filed Amended Motion in Limine, concerning the Respondent's contention that Board personnel, using a "flyer" with password information, distributed by a person or persons unknown had accessed the AFF website in question, such that all

information so obtained by the Board was illegally obtained and cannot be an evidential basis for termination of the Respondent. See 18 U.S.C. §§ 2701 through 2712, the "Stored Communication Act" (hereinafter referred to as SCA). This act specifically prohibits under pain of fines, imprisonment, or civil action the intentional, unauthorized access to a facility through which an electronic communication service is provided, thereby obtaining access to a wire or electronic communication while it is in electronic storage. Ruling was reserved on the Motion and the parties were given an opportunity to brief the issue in their post-hearing submittals, which they have done.

During the hearing the Petitioner presented the testimony of three witnesses and had 12 exhibits admitted into evidence. The Respondent presented the testimony of 10 witnesses and also had 12 exhibits admitted into evidence, including the transcript of a deposition taken to preserve the testimony of a witness unavailable for hearing.

A Transcript of the final hearing was filed and the parties were given an extended briefing schedule of 30 days by stipulation, to submit proposed recommended orders. The Proposed Recommended Orders were timely submitted on February 23, 2009, and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Respondent, Jerome McIntosh, is a 41-year-old divorced father of one. He obtained his entire education, prior to college, in the Okaloosa County School District. He played football and basketball at Niceville High School and subsequently attended and played football at Tulane University, obtaining degrees in sociology and physical education. Thereafter, the Respondent played professional football for a time and then subsequently worked in middle management positions with firms in the Seattle, Washington, area. He returned to Okaloosa County in 2003, to pursue a Florida Teaching Certificate, which he obtained, and embarked on a public school teaching and coaching career.

2. The Respondent was hired as a teacher at Lewis Middle School (Lewis), by the principal, Dr. Linda Smith, for the 2003-2004 school year. He continued to teach and coach at Lewis through the end of the 2007-2008 school year. During five years at Lewis he taught Eighth Grade Reading, Sixth Grade Honors World Cultures, and Sixth Grade Language Arts, as well as serving as the school's head basketball coach for five years, as assistant football coach for four years and as head football coach during the last year. Mr. Billy Mikel became principal at Lewis in January 2007. The Respondent attained a professional

services contract status (tenure) and received a promotion to head football coach by Mr. Mikel.

3. The Respondent's performance evaluations showed that he met expectations in every subject area, including the 2007-2008 school year evaluation, prepared by Mr. Mikel. He has been very successful as a basketball and football coach. His two teams have won four county championships. He has been asked to continue to be basketball and football coach each year and for the 2008-2009 school year, Mr. Mikel asked him to be head coach of both teams. He was working with both teams through early June 2008, up until the time of his suspension.

4. The District has had an electronic resources use policy in effect for approximately the last five years. That policy does not prohibit the personal use of school computers by instructional personnel, and does not have objective internet use guidelines or prohibitions. Rather, it requires any use to "honor the ethical norms associated with the highest standards of professional conduct." See Petitioner's Exhibit 10 in evidence. The Respondent maintains he never saw that policy prior to the termination episode. He did learn that there was an Internet access filter in place by the District, because when he made some computer research inquiries that were teaching-related, he found that certain inquiries were blocked. The District maintains, District wide, a content filter (Websense)

that prevents all District computers from visiting websites inappropriate for teacher and student access. The District also has a general personnel policy, 6-9, which requires the destruction of any anonymous written communication addressed to its employees when they receive such a communication. That policy was in effect, and applicable, according to the Respondent, to the AFF anonymous website flyer, when it was obtained by Mr. Mikel and his staff. It is also true that the anonymous website flyer was not addressed to any School Board employee; it was merely created and then distributed, apparently mostly on mailboxes, in neighborhoods of students and parents associated with Lewis.

5. The Respondent had an intermittent romantic relationship with a fellow teacher by the name of Joni Shaw. This was when both were sixth grade language art teachers, with the same work schedules, during the 2007-2008 school year. The two had dated each other intermittently since approximately the end of 2006, and through the greater part of the 2007-2008 school year. Ms. Shaw tended to be emotional and extremely jealous and the relationship was intermittent for these reasons. She was jealous of the Respondent's time, and virtually any woman who communicated with the Respondent outside her presence. She became particularly upset by his pre-existing friendship

with a mutual teaching colleague, Cindy Janazzo. This issue extended over the entire course of their dating relationship.

6. Both the Respondent and Ms. Shaw had access to each other and to each other's classrooms during the work day. Ms. Shaw had access to the Respondent's school computer in his room and knew his computer password or log-on information. Ms. Shaw used the Respondent's computer occasionally, with his permission and/or in his presence.

7. Sometime in August 2007, the Respondent discovered that Ms. Shaw had begun an email message, addressed to a teaching colleague at Lewis whom he knew, and another District employee he did not know. Ms. Shaw left the draft email message on the Respondent's computer. The Respondent did not notice the name of the employee he did not know (Arant Sutsko) on the address line of the draft message. He was, however, upset that Ms. Shaw had used his school computer without his knowledge when he saw the draft email message that already included the text; "if I were smart, I would have left it at that," referring to another document she sent him about why they should "break up." Mr. McIntosh then added several sentences to that draft message in which he chastised Ms. Shaw for using his computer without his knowledge and made a brief comment about the need for trust for a relationship to survive. After adding a short paragraph so criticizing Ms. Shaw for using his computer in this way, he

simply added Ms. Shaw's name on the cc line and sent the resulting document. This created the erroneous impression that he had authored the entire document and consciously decided to send it to Sutsko.

8. All the remaining emails in that sequence on the school system computer, which were found objectionable by the District, were sent by Ms. Shaw. Each of these emails was sent out by her very late at night or early in the morning and each included inappropriate, personal, and sexually-charged references. She made inflammatory remarks about the Respondent in the emails and threatened to harm his reputation and career.

9. Upon receiving a complaint from Ms. Sutsko, Superintendent Tibbets asked Assistant Superintendent Rodney Nobles to look into the matter. Ms. Sutsko raised the concern some five months after the dates of the emails she received. Mr. Nobles spoke separately to Ms. Shaw and to Mr. McIntosh about the subject of the emails sometime in January 2008. Mr. Nobles informed the Respondent that he needed to refrain from sending out emails like that one from his school computer. He did not indicate to the Respondent that this was a formal disciplinary action or a particularly serious matter and the admonition was only verbal.

10. The concern expressed by Mr. Nobles was only to the effect that the Respondent had sent an email of a personal

nature on the school computer to someone he did not know. He only showed the Respondent the one email that was sent in error to Sustko, in cautioning the Respondent to be careful about how he used the District's email system in the future. The Respondent never again sent such an email.

11. Ms. Shaw often spent time at the Respondent's house. She often stayed-over one or two nights per week at the Respondent's home. She sometimes stayed there by herself while he was running an errand or at athletic practice or some other event which kept him away from home for a time. At other times she would arrive before he did, as both traveled to his home from separate locations. She sometime used his home computer while he was at home doing other things.

12. Mr. McIntosh and Ms. Shaw sometimes went shopping together and she was aware of his Visa cards, which he usually used as debit cards, although they could be used for credit purposes as well. He generally carried one of the debit cards in his wallet, leaving the other one at his home. The Visa cards were used to debit bills and purchases to the Respondent's checking account and Ms. Shaw had access to the card numbers and expiration dates due to her relationship with the Respondent, and her frequent presence in his home, sometimes when he was absent. She also knew his personal information such as age, birth date, height, weight, etc.

13. Sabrina Hupp, at times pertinent hereto, was an 18-year-old student who knew Ms. Shaw because she dated Ms. Shaw's son, Tyler, during 2007-2008. Ms. Hupp was acquainted with the Respondent through her interactions with the Respondent and Ms. Shaw in the context of Ms. Hupp's dating relationship with Tyler and the Respondent's dating relationship with Joni Shaw during that year.

14. On one day in April 2008, Sabrina was at the Shaw's home with Tyler when she observed Ms. Shaw viewing an AFF website entry that included a semi-nude picture of a man. Ms. Shaw stated that it was a picture of the Respondent. In her testimony, in evidence by deposition, as Respondent's Exhibit 26, she noted that Ms. Shaw had the user name/password to enter the website (the user name was "eatmyass2008"). She watched as Ms. Shaw responded to women who had sent messages expressing an interest in meeting the Respondent, based upon the AFF profile of him on the site. The only messages Sabrina Hupp observed on the website were incoming messages from women. She observed no messages emanating from the Respondent. Ms. Hupp was aware of the intermittent nature of the dating relationship between the Respondent and Ms. Shaw. Ms. Shaw was apparently a friend of the Hupp family. On May 27, 2008, Sabrina's brother passed away, and Ms. Shaw attended the visitation and the funeral after Sabrina's brother's death.

15. The visitation for Sabrina's brother was held on the evening of May 30, 2008. The Respondent had planned to meet Ms. Shaw at his home after she returned from the visitation. In the meantime, the Respondent was at the district football jamboree while Ms. Shaw was at the visitation. The Respondent was delayed leaving the jamboree and Ms. Shaw arrived at his house well before he did. A neighbor, David Mains, observed Ms. Shaw's arrival and observed that while she was waiting for the Respondent to arrive Ms. Shaw became extremely agitated and repeatedly paced between the house and her car, angrily slamming her car doors and the Respondent's gate and garage door as she did so. Mr. McIntosh returned home later that evening and they spent the night together at his home.

16. At one point during that evening, during a phone conversation, Ms. Shaw informed the Respondent that she had already left his home (apparently impatient due to his non-arrival there). She told him she was already some 15 miles away on the Mid-Bay Bridge. At that time the Respondent was only two to three miles from his house. The essence of their phone conversation was to the effect that Ms. Shaw would return to his home, and meet him there. However, when he traveled the two or three miles distance to his home, from the point where he had the phone conversation, upon his arrival he found Ms. Shaw already there and emerging from his shower. It is thus inferred

that Ms. Shaw misled the Respondent about leaving his home before the Respondent arrived, and, implicitly, concerning how much time she had spent alone at his home that evening.

17. After spending the night together at the Respondent's home Ms. Shaw was departing to attend the funeral on the morning of May 31, 2008, when she discovered that her car would not start. The Respondent and the neighbor, David Mains, helped to start her car, so she could get to the funeral. Mr. Mains is the neighbor who saw the activity of Ms. Shaw at the Respondent's home the evening before. When Mr. Main saw the Respondent working on Ms. Shaw's car in the driveway he inquired about the argument that he believed Ms. Shaw and the Respondent had the prior evening. The Respondent told him that there had been no argument and the Respondent had no knowledge of any angry outburst by Ms. Shaw.

18. In any event, the Respondent and Ms. Shaw spent that weekend together and attended a cookout the next day, Sunday, June 1, 2008, at the home of friends. Cindy Janazzo is a teaching colleague of both the Respondent and Ms. Shaw. She sent a text message to the Respondent during the cookout which aroused suspicion in Ms. Shaw. Ms. Shaw apparently felt that the text message was indicative of some private relationship between Ms. Janazzo and the Respondent, or was "code" for some understanding between them and she confronted the Respondent in

an angry way about it at the cookout. In the text message Ms. Janazzo had told the Respondent "not to eat too much" even though, supposedly, she was unaware that the Respondent was at a cookout at the time. In any event, Ms. Shaw confronted the Respondent about the message in a loud hostile manner in front of the Respondent and his daughter. The Respondent became very upset at Ms. Shaw's hostile behavior in front of his daughter and friends and so he abruptly left the party, further infuriating Ms. Shaw.

19. A day or two after the Sunday afternoon argument between the Respondent and Ms. Shaw, either on Monday, June 2 or Tuesday, June 3, someone other than the Respondent distributed a flyer in neighborhoods near Lewis Middle School, that alerted residents to the existence of an AFF website profile entry that purportedly presented a danger to the school students. The flyer encouraged those who received it to open that website and find the entry with the password and the user ID information provided in the flyer. The flyer included a fully clothed picture of the Respondent standing on a football field. The semi-nude photograph of the Respondent that had been stored in his home computer could be viewed on the AFF website entry referenced in the flyer as well. A resident who came into possession of one of the flyers purportedly notified school officials of it on the morning of Wednesday, June 4, 2008. Upon

being alerted to the existence of the flyers, the school officials gathered as many of the flyers as they could to try to prevent their circulation in the community.

20. The principal, Mr. Mikel, immediately used the secure information (password and user name identification), depicted on the flyer concerning the AFF website, to see what was on the site that involved the Respondent. He thereafter called the Respondent to his office to ask him if the semi-nude photograph that appeared on the site was his photograph. The photograph depicted a man from the neck down to the legs (no facial view) seated, unclothed, but holding his hands over his genital area. Both Mr. Mikel and later Mr. Foxworthy gave the Respondent several opportunities to tell them that the picture was not a picture of him, because it seemed to them that the picture depicted a white man. The Respondent, however, in all candor, told them a number of times that it actually was his picture. The Respondent, however, consistently denied that he was responsible for the website entry.

21. The District officials who viewed the website did not ask for or obtain permission from the Respondent or anyone else to use the password and user ID to gain access to the private, secure website entry which was attributed to the Respondent. They did not get his permission to access private, secure

billing information associated with the creation of that website (credit card or debit card information).

22. When Mr. Mikel asked the Respondent about his credit cards in the meeting on June 4, he did so because he had already accessed the billing information associated with the website entry's creation and thus learned about the credit card and card number which had been used to pay the bill for the site. In response to that question, the Respondent told Mr. Mikel that he only had a debit card, because he used his Visa card for debit purposes primarily. The Respondent then showed the Visa card he normally carried in his wallet telling Mr. Mikel that it was a debit card. The Respondent maintains that he did not think at the time about the other card that he normally kept at his home, also using it primarily as a debit card. The Respondent was then asked by Mr. Mikel to stay home for the rest of that week, which was during part of the post-planning period.

23. The Respondent was busy that week grading exams and entering grades on the computer. He returned for the rest of the post-planning session the following week (June 9-11, 2008). He states therefore, in essence, that he did not give further consideration to the earlier question by Mr. Mikel concerning his credit card. He maintains that he did not intentionally deceive Mr. Mikel about the debit and credit card questions and answers, but rather had simply not thought about the other card,

which he normally kept at home, nor the fact that both cards could either be used as credit or debit cards.

24. The school administrators in question informed the Respondent, the morning of June 4, 2008, of the Aff website entry. He professes not to have known of it before that time and stated that he never saw the website entry until he asked for and was provided a copy of the flyer by Mr. Mikel a day or so later, so he could close down/delete the AFF profile in question.

25. Ms. Shaw, however, as shown by Sabrina Hupp's testimony, knew of the AFF website more than a month before the flyer was distributed in the community. As Ms. Hupp testified, sometime in April 2008, Ms. Shaw entered the website in question, was perusing it and even responded to some of the comments of women who had responded to the website.

26. Ms. Shaw had ready access to the Respondent's home computer during times pertinent to this case in the Spring of 2008, where the semi-nude photo of the Respondent was stored. Ms. Shaw knew of the existence of the website entry long before the flyers were distributed and she knew of and had access to the Respondent's Visa debit/credit cards, as shown by the above-found facts, concerning her frequent sojourns at the Respondent's home and their shopping together. She had detailed personal information about the Respondent and possessed all

information necessary to have created the website and the flyers.

27. Moreover, Ms. Shaw had threatened to cause harm to the Respondent's professional standing previously, in an email. The flyers were publicly distributed, and the related website made public, only one or two days after the hostile argument situation arose at the cookout on Sunday afternoon, June 1, 2008. Ms. Shaw and the Respondent had a stormy, intermittent dating relationship through 2007 and the first half of 2008. She had a history of becoming quite jealous and upset regarding contacts of any nature by other women with the Respondent. She seems to be a person possessed of a hot temper and dramatic personality.

28. On balance, the preponderant, persuasive evidence underlying the above Findings of Fact does not, in light of all the above-found circumstances, establish that the Respondent created the AFF website entry. The proven circumstances of the above Findings of Fact show that there is a substantial likelihood that Ms. Shaw created the AFF website entry and distributed the flyers in question. The above Findings of Fact show significant motive and opportunity in that regard on her part.

29. The Respondent had a duty-free lunch period between 10:45 and 11:10 on each day at Lewis. He sometimes ate lunch

alone in his classroom and on some of those occasions explored internet Sports Illustrated and Fox Sports websites seeking sports-related and general information of interest to him on the school computer. On some occasions he "clicked" on items or stories of interest that took him indirectly to other websites, including the website "Bugehoobs" on one occasion. In the course of intermittent internet browsing the Respondent viewed many images of women in swim suits or otherwise scantily clad over a period of several months. There were 1000 or more other images, not of that nature, that appeared on web pages he accessed over the several month period.

30. The District had an Internet filtering system to block particular sites or images considered to be inappropriate to be viewed on school computer systems. The Respondent was not proven to have ever attempted to by-pass the District's Internet filtering system. The images he did view on the computer system were not blocked by the filtering system, there was no restriction of access to the sites and images he viewed. The Respondent never viewed any nude or pornographic images on any occasion on the school's computer. This is undisputed.

31. Temporary Internet File (TIF) images are created automatically as to any image appearing on an access page, regardless of the reason the page was accessed. They are not permanent files created or monitored by a computer user and can

be deleted by anyone who knows how to do so. The School District's computer technician, Mr. Mitchell, was unable to obtain the "websense report," which could be generated by the District's computer system, because of time, space, and server constraints. It would be the best source of information about the Respondent's school computer, including the sites he had accessed with that computer. Because of this Mr. Mitchell drew erroneous conclusions, based upon assumptions from his TIF review, to the effect that the Respondent had tried to bypass the District's web access filter.

32. Mr. Mitchell informed Mr. Foxworthy and Mr. Mikel that many TIF images he found on the school computer in the Respondent's custody were pornographic in nature. Foxworthy thereupon informed the Respondent that he could either resign or be terminated for viewing pornographic images, before Foxworthy had even seen the images, later described by himself as "old-fashioned cheesecake."

33. Mr. Foxworthy first met with the Respondent on Thursday, June 12, 2008, after the end of the school year. This was before Mr. McIntosh had been informed about anything concerning alleged inappropriate website access concerns with regard to the school computer. Mr. Foxworthy told the Respondent he could resign or be terminated, but not because of the private AFF website issue, but rather for accessing

pornography on his school computer. Mr. McIntosh knew that was not true and asked to see the alleged pornographic images. A meeting for that purpose was scheduled and took place on Monday, June 16, 2008.

34. With disciplinary action in the offing, the Respondent sought the assistance of a union representative regarding the proposed termination, after that June 12, 2008, meeting with Mr. Foxworthy. He attended the subsequent scheduled meeting on June 16, 2008, accompanied by union Executive Director Greg Butler. Also in attendance at the meeting were Mr. Mitchell, the District's computer technician and Mr. Mikel. Mr. Mitchell showed the Respondent and Mr. Butler a substantial number of randomly selected, purportedly objectionable swim suit images at that meeting, which were among a larger number of non-objectionable images. Mr. Butler and Mr. Mitchell confirmed that the remaining objectionable images were of a similar nature to those Butler had already viewed and all were considered non-pornographic.

35. After leaving the meeting Mr. Butler called Mr. Foxworthy to find out if he had seen the objectionable images and learned that he had not. During their phone conversation Mr. Foxworthy acknowledged that he should view the images before terminating the Respondent.

36. In fact, around the time of these events a swim suit competition was being conducted by the Northwest Florida News Herald, a newspaper of general circulation in Okaloosa County. The swimsuit competition included images of many women in swimsuits which were similar in nature to the allegedly objectionable images Mr. Butler was shown by Mr. Mitchell at the meeting of June 16, 2008.

37. None of the websites the Respondent occasionally accessed, such as the Sports Illustrated or Fox Sports websites nor even the Bugehoobs website he accessed one time, indirectly, (by clicking on a news item concerning Tiger Woods) was blocked by the District's internet filtering system at the time the Respondent accessed them. None of the images he accessed could be deemed to be any image of pornography.

38. Ms. Alexis Tibbetts, the Superintendent, formerly was the principal at Ft. Walton Beach High School. While she was the principal there she supervised a high school teacher by the name of Michelle McVay. During the approximate time the events happened leading up to the proposed termination of the Respondent, in the Spring of 2008, Ms. McVay voluntarily entered herself in the area daily newspaper's on-line swimsuit competition, by submitting a suggestive swimsuit photo or image of herself to the newspaper, through its website. Ms. Tibbetts and the District took no disciplinary action against Ms. McVay,

although it was suggested that she remove the photograph from the newspaper's website. The images entered in the swimsuit contest, including Ms. McVay's, were similar in nature to those the Respondent is charged with viewing on the school computer during his duty-free lunch hour (his own time).

39. Ms. Tibbets has also known Ms. Shaw personally for some 15 years. As superintendent she once helped Ms. Shaw out of a serious legal problem involving potential prosecution for writing bad checks to the District. In contrast, Ms. Tibbets had never met the Respondent before the events in question.

40. The events that triggered the investigation, the distribution of the flyers, happened within two days of the end of the school year. It generated very limited public awareness, as most of the flyers were retrieved. Newspaper coverage of these matters was limited to a period of only a few days after the Board's action in July 2008, and TV coverage was minimal or non-existent. Seven months elapsed between the events in question and the hearing.

41. The Respondent has performed both his teaching and coaching duties well, over the five years he has been employed by the District. He was and remains well-liked and respected in his school community and there are no written records of any parent or student complaints or student removal requests received by the District concerning the Respondent in the

aftermath of these events. The Respondent has demonstrated by preponderant, persuasive evidence that he can still be an effective teacher and coach employed by the Petitioner.

42. The Respondent has not been accused of any criminal violation in conjunction with the matters in question. There has been no arrest on criminal charges and no activity he is accused of committing, with regard to the issues in this case, involves students in any way.

43. The Respondent did not engage in misconduct in office in the context of his use of the internet on his personal school computer or school laptop. He did not violate school or District policies in the context of the allegation that he created a profile on a private, secure, adult website, as no student was involved, no school computer or resources were used and it was purely a private matter that happened to be made known by someone other than Mr. McIntosh. None of the Respondent's actions alleged to have been improper, individually or collectively rise to the level of misconduct in office or immorality, if such a charge were allowed to survive the Respondent's objection on due process grounds.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

45. The Petitioner bears the burden to prove by a preponderance of evidence that it has just cause to terminate the Respondent's employment as a tenured classroom teacher. In order to make a showing that the Respondent engaged in misconduct in office, it must be proven by a preponderance of the evidence that he engaged in acts of misconduct that were so serious as to impair his effectiveness as an employee. Tenbroeck v. Castor, 640 So. 2d 164, 168 (Fla. 1st DCA 1994); McMillan v. Nassau County School Board, 629 So. 2d 226, 230 (Fla. 1st DCA 1993).

46. When considering the Respondent's use of the school computer under the circumstances outlined in the above Findings of Fact, and when those circumstances are applied to the Okaloosa County School District's Electronic Resources Acceptable Use Guidelines, it becomes apparent that the use of the school computer did not constitute misconduct. This is especially so since the Respondent was on his on time on a non-duty lunch hour. In any event, the conduct is not so serious, if it was misconduct, as to impair his effectiveness as an employee.

47. The AFF website entry at issue involves conduct which was not subject to the investigative or disciplinary authority of the School District and thus does not constitute misconduct in office. It was a completely private matter. However

distasteful the Respondent's involvement might be, whether he created the website entry or not, its disclosure, to the extent that it was publicly disclosed, was not shown to be of his volition or responsibility. Based upon the totality of the circumstances delineated by the preponderant, persuasive evidence, it cannot be deemed that his involvement constitutes misconduct in office sufficient to impair his effectiveness as an employee of the School District.

48. The Petitioner contends that the Respondent's employment should be terminated for a combination of acts that fall under the category of misconduct in office. The charging document which is the June 19, 2008, termination letter from Mr. Foxworthy to the Respondent references only issues of misconduct and lost effectiveness. Misconduct in office is defined in the Florida Administrative Code Rule 6B-4.009(7)(a) as:

(a) A violation of the code of ethics of the education profession as adopted in rule 6B-1.001 F.A.C., and the principles of professional conduct for the education profession in Florida as adopted in rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

This definition of misconduct has generally been held to require proof, not only of serious misconduct, but also of a resulting, meaningful impairment in the individual's level of classroom

effectiveness. McKinney v. Castor, 667 So. 2d 387, 389-390 (Fla. 1st DCA 1995); Tenbroeck v. Castor, 640 So. 2d 164, 168 (Fla. 1st DCA 1994); McMillan v. Nassau County School Board, 629 So. 2d 226, 230 (Fla. 1st DCA 1993); Braddock v. School Board of Nassau County, 455 So. 2d 394, 396 (Fla. 1st DCA 1984).

49. The evidence shows that the Respondent sent one personal email of a rather innocuous nature to his former girlfriend, Ms. Shaw, that was inadvertently transmitted to a person he did not know. That person complained about it, resulting in a verbal admonition to the Respondent.

50. The evidence also shows that the Respondent accessed images of women in skimpy swimsuits during his duty-free lunch period on several occasions, from generally appropriate websites that were not filtered by the District's computer system filter or blocking system, at the times he accessed them. These incidents are not demonstrated to be sufficiently related to warrant progressively more severe discipline and do not constitute serious misconduct either individually or taken together, under the circumstances referenced above.

51. Further, concerning the allegations about the AFF website entry, nothing the Respondent admitted to doing, nor anything he was accused of, with respect to the creation of the website would constitute work-related misconduct. There was no proof that students were involved in any way, and there was no

proof that the Respondent acted to inform the school community in any way of what was obviously a very private matter. The Respondent consistently maintained that he had not created the AFF website entry at issue and also that he did not intentionally mislead District officials about his role in that matter, specifically with regard to their questions about his credit/debit cards, as related to paying for the website entry.

52. The Petitioner did not present a single parent, student or community resident, nor any written statement of complaint by any such person, which would support a claim that any misconduct was so serious as to impair his effectiveness as an employee for the District. Rather, the Petitioner relied solely upon vague, undocumented references, of a hearsay nature, concerning a few critical parent calls, and conclusory testimony concerning lost effectiveness by witnesses Foxworthy and Mikel.

53. Moreover, the mere fact that some rather minimal, short-lived publicity occurred concerning the allegations is insufficient to prove lost effectiveness. This is particularly so in the context of the volume of competent, persuasive evidence presented by the Respondent concerning his good character, his continued good standing in the school community, and in the community at large, and his record of competent performance in the classroom and as a coach over the course of his five-year tenure. Further, even if it could be determined

that the press coverage of the allegations might have eroded the Respondent's classroom effectiveness, the record does not contain adequate proof that he engaged in any acts of serious misconduct that caused a significant decline sufficient to warrant termination.

54. In summary, the greater weight of the persuasive evidence supports conclusions that the Respondent had a record as an effective teacher and coach for the District, that he did not engage in serious misconduct and that he still has the trust of the majority of students, parents, and colleagues of the Lewis Middle School community.

Proof Concerning the Elements of Misconduct in Office

55. There is no dispute in the evidence that the District electronic media policy does not prohibit personal use of school computer equipment. It does not define its subjective directive to adhere to the "high standards of professional conduct." While it is certainly not unreasonable for the District to prohibit employees from viewing images of attractive women in swimsuits on a school computer, no such limitation can be inferred from the pertinent policy language. Even if the language was more objective, there is no dispute that the Respondent never signed any acknowledgement form to the effect that he had seen the electronic media policy, and, in fact, he

had never received a copy of the policy to review before termination.

56. In the termination notice, the second charging document dated June 19, 2008, the Respondent is accused of visiting "sites which were inappropriate for a school district employee on school district time, using a school district computer." The evidence shows, however, that the questionable images viewed by the Respondent were at times when he had no duty assignment and was alone in his classroom. Moreover, the preponderant, persuasive evidence establishes that the "objectionable" images he accessed came from websites that were not blocked or filtered by the District's content screening system, they involved no nudity or sexual activity, and were ultimately conceded by the District to be non-pornographic in nature.

57. The District's Technology Supervisor, Eric Mitchell, maintained that the Respondent purposely by-passed the District's filtering system by initiating Google searches for terms such as "hottest girls" and/or "bugehoobs." Mr. Mitchell, however, was unable to determine how or what the Respondent's path in reaching the bugehoobs site (once) was, so he assumed that the Respondent went to that site intentionally, hoping to avoid the filter and to be able to view nude or pornographic images there. Mr. Mitchell also assumed that bugehoobs was a

"bad" site because of its name alone. His testimony was refuted by the more expert testimony provided by Stewart Vernon for the Respondent. Mr. Vernon is a contract Technology Analyst for the Florida Department of Law Enforcement and has significant experience in the sort of computer usage investigation involved herein. Mr. Vernon's testimony about his more thorough review of the temporary internet file and Guardware materials used by Mr. Mitchell demonstrated that the Respondent actually got to the bugehoobs site on only one occasion and that was when he clicked on a link from a Sports Illustrated site to an item about Tiger Woods that happened to take him to the bugehoobs site. It was thus not even shown that he intentionally accessed that site.

58. Upon actually examining the bugehoobs site, during his review of the materials, Mr. Vernon found no nudity or pornographic materials there, contrary to Mr. Mitchell's assumption about the site. Mr. Vernon also demonstrated that the Respondent did not perform the objectionable "hot girls/hottest girl" Google searches concerning which Mr. Mitchell had testified.

59. The Petitioner did not establish that the Respondent committed any serious misconduct or nefarious acts by accessing the Sports Illustrated and Fox Sports sites in viewing some images there of attractive women in swimsuits. The record

demonstrates only that he viewed the images over the course of several months, but outside the presence of students, in the context of a school computer use policy that did not prohibit personal use, and included no objective statement of prohibited use. There is no doubt, based upon the preponderant evidence, that the website filter used by the District did not block any of the allegedly objectionable websites or images on these commonly used and otherwise appropriate sites. Even Mr. Foxworthy, once he viewed the images, later testified that he considered them to be what he called "old fashioned cheesecake" but not pornographic in nature, and that, standing alone, viewing them would not have prompted a termination action, but for the other matter of the AFF website. He also acknowledged that making disciplinary decisions based upon the meaning of the standard "highest ethical standards" is subjective.

60. The relationship between the seriousness of a teacher's offense or conduct and the requirement of proof of lost effectiveness, versus merely inferring loss of effectiveness for certain kinds of conduct of a serious nature, has been the subject of divergent views by Florida's District Courts. The longer-standing, analytical approach requires proof of each element of the definition of misconduct in office, that is, serious misconduct and a resulting meaningful impairment in

classroom effectiveness. Proof of each element of the definition of misconduct in office, without relying upon inferences of lost effectiveness, is the better reasoned approach and is the approach taken in decisions of the First District Court of Appeal, the jurisdiction applicable to Okaloosa County. Therefore, that court's case precedent should be given primary consideration. See McMillan v. Nassau County School Board, 629 So. 2d 226, 230 (Fla. 1st DCA 1993); Braddock v. School Board of Nassau County, 455 So. 2d 394 (Fla. 1st DCA 1984). See also McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2nd DCA 1996).

61. In Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000), the Fifth District Court of Appeal held that, at least in some cases, impaired effectiveness can be presumed from the nature or the severity of the misconduct proven to have occurred. In that same year, the Second District Court of Appeal held in Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2nd DCA 2000) that proof of a teacher's in-classroom failure to enforce disciplinary policies and rules that results in chaos in the classroom doubles as proof of lost effectiveness, so as to render moot the separate effectiveness issues. The Walker court carefully distinguished its holding from the Second District's prior holding in McNeill, 678 So. 2d 476, which involved allegations of private, non-classroom

misconduct that did not support an inference of lost effectiveness without separate proof of that element.

62. Even upon application of the holding of the Walker case to the facts of this case, lost effectiveness cannot be inferred because none of the alleged misconduct by the Respondent had any bearing on his work with students or his ability to competently teach and coach students. Similarly, under the approach set forth in Purvis, it would be unreasonable to conclude that the allegations of this case create an inference of lost effectiveness. Purvis involved a teacher's alleged commission of a serious crime, an arrest for that conduct, and an administrative employment proceeding factual finding creating an inference that the teacher committed perjury during his criminal trial. That series of events occurred over a long period of time in full public view. In the instant case, however, no crime was committed, no criminal trial was held, and the coverage of the matter in the media was neither intense nor long-lasting.

63. Absent an assumption that the Respondent's conduct automatically created a loss of effectiveness, neither the nature of his allegedly improper actions, nor the record evidence about his ability to return as an effective teacher, reasonably support a conclusion that a few parental complaints of misgivings about the Respondent can prove loss of

effectiveness, in the face of the Respondent's excellent reputation in teaching and coaching. Hearsay references were made to the effect that a few parents may have expressed concern about the allegations against the Respondent, at the time of the events, and the Respondent himself acknowledges that he may have to re-establish himself with some doubters, but such circumstances do not show by preponderant, persuasive evidence that the Respondent would be unable to quickly regain his prior standing as a well-liked and well-respected teacher and coach. Indeed, if lost effectiveness can routinely be demonstrated by mere assertions that a few parents, students, colleagues, or administrators have misgivings, because of publicly-alleged past misconduct by a teacher, then that element of the definition of misconduct in office is essentially meaningless.

64. There was no parent or student witness testimony adduced by the Petitioner and only the oblique hearsay reference made of alleged concerns by a few parents at the time these matters came to public attention. Even as to those hearsay references, the Petitioner's witnesses testified that they had no documentation, not even a telephone call record of any complaints submitted by anyone in the community. They could not identify, by name, anyone who may have expressed a concern.

65. Further, the testimony of Mr. Mikel and Mr. Foxworthy, who believed that the Respondent would have difficulty re-

establishing himself in the school system, is not sufficiently persuasive and substantial as to overcome the significant evidence presented by the Respondent, through multiple witnesses, concerning the Respondent's good character, competence, good reputation in the community, in the school system, and in his particular school. See *McMillan v. Nassau County School Board*, 629 So. 2d 226, 230 (Fla. 1st DCA 1993) (conclusory testimony of the superintendent about a teacher's lost effectiveness is insufficient to prove that fact).

66. The Petitioner, through its evidence, simply did not prove that the Respondent engaged in any acts that could be deemed serious misconduct. The preponderant, persuasive evidence of record supports the conclusion that the Respondent's effectiveness in the school system has not been impaired.

67. The District acknowledges the creation of a website like the AFF website entry is ordinarily a private matter, about which the District would have no particular interest. District officials consistently state they do not believe Mr. McIntosh created or distributed the flyers in question. The Petitioner nonetheless seeks to turn the disclosure of this very private matter into a misconduct in office charge by claiming that once the existence of the website entry became known to anyone in the general public, its mere existence became fair game as a basis for severe disciplinary action because "the teacher assumed the

risk of having the website entry discovered and becoming notorious."

68. The Petitioner must prove that the private use of an otherwise legal, secure, adult website constitutes misconduct under some pertinent District rule or other law applicable to Mr. McIntosh, irrespective of proof that the notoriety of the embarrassing conduct might cause a degree of discomfort among some members of the community. Serious misconduct must always be demonstrated by a preponderance of the evidence to sustain any charge of misconduct in office. Sublett v. Sumter County School Board, 664 So. 2d 1178 (Fla. 5th DCA 1995); Baker v. School Board of Marion County, 450 So. 2d 1194 (Fla. 5th DCA 1984).

69. Even if the Respondent did create the AFF website entry (not definitively proven), an allegation which he denies, there is no nexus between that private lawful conduct (however distasteful) and a violation of any employment-related obligations that might reasonably be called employment misconduct at all, much less serious misconduct that impairs his effectiveness in the classroom.

Immorality Issue

70. The charging document at issue in this case, the June 19, 2008, letter from Mr. Foxworthy announcing the Respondent's termination does not allege just cause to terminate

the Respondent based upon immorality. Florida Administrative Code Rule 6B-4.009(2) defines immorality as:

[C]onduct that is inconsistent with the standards of public conscious and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

This issue was first raised in the Pre-hearing Stipulation filed approximately a week prior to the hearing. The Respondent thus contends that the allegation concerning immorality should not be considered in this proceeding because the Respondent has not had timely and proper notice of it and a reasonable opportunity to adduce evidence in defense of it. See Pilla v. School Board of Dade County, 655 So. 2d 1312, 1314 (Fla. 3rd DCA 1995) (in consolidated employment termination/licensure case, hearing officer acted within his discretion to deny, on due process grounds, school district's request at hearing to amend its pleading to include two additional charges brought by licensure authority); MacMillan v. Nassau County School Board, 629 So. 2d 226, 229 (Fla. 1st DCA 1993) (board violated teacher's due process rights when, in taking final agency action, it expanded the scope/time frame of its review beyond the parameters of conduct charged originally and contested during the hearing); Clark v. School Board of Lake County, 596 So. 2d 735, 738 (Fla. 5th DCA 1992) (due process requirements entitle a teacher to

clear and timely notice of the specific, alleged conduct upon which the board ultimately based its immorality charge when it took final action). Thus, in a due process context, the Respondent has not had an opportunity to properly prepare and present evidence to refute any charge of immorality, to dispute that his conduct was inconsistent with standards of public conscious or that his conduct brought him or colleagues into public disgrace or that his service to the community was impaired.

71. Aside from the Respondent's due process defense to any charge of immorality, which is accepted, the Petitioner did not offer preponderant, persuasive evidence that the conduct alleged was immoral. Substantial and persuasive testimony was offered by the Respondent concerning his good reputation among parents of students and among his teacher colleagues, both as a teacher and a coach. Contrasting this evidence with the limited testimony, partially hearsay, concerning lost effectiveness presented by the Petitioner, it is apparent, as found above, that the Respondent has not lost effectiveness nor that he is held in public disregard or has lost the ability to provide service to the community.

72. Concerning the issue of notoriety, the record reflects an absence of television coverage and only a limited number of newspaper articles, all published within a week or so of the

Board action on the disciplinary recommendation, in mid-July 2008, some seven months prior to the hearing. Further, all of those articles only resulted from the District choosing to terminate the Respondent on the grounds indicated in the charging letter of June 19, 2008. Prior to the decision by the Superintendent to seek termination, no one in the community was aware about the "women in swimsuit" computer-use allegations, and, at most, only a handful of residents in a neighborhood near Lewis Middle School had learned of the AFF website, upon seeing the flyers alerting them to its existence. No one from that community who actually received a flyer testified at hearing and the two school personnel sent by Mr. Mikel to retrieve the flyers did not testify. Most of the flyers were retrieved before being seen by members of the public or students and the impact of those that were received and seen was minimized because the events occurred only one or two days before students went home for the Summer. The preponderant, persuasive evidence shows that the Respondent's conduct never became sufficiently notorious to substantially impair his effectiveness or his ability to serve the community, and the District did not establish preponderant proof of either issue, based upon media coverage brought about solely by its own disciplinary action. See McMillan v. Nassau County School Board, supra.

73. In concluding that the conduct was not inconsistent with standards of public conscious and good morals, especially in light of the above Findings of Fact concerning the creation of the website and the Respondent's lack of involvement in the distribution of the related flyer, it is significant to note that "immorality" cases arise for the most part from instances of overtly illegal conduct, drug-related conduct, and/or conduct involving public sex acts by teachers that bring about arrest and subsequent criminal prosecution. The ongoing media coverage of such events is what truly makes the perpetrators or actors involved notorious, independent of subsequent school district disciplinary actions. See e.g. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2nd DCA 1996) (teacher arrested for allegedly touching an undercover officer in a sexually suggestive way in a public place); Baker v. School Board of Marion County, 450 So. 2d 1194 (Fla. 5th DCA 1984) (teacher arrested for alleged possession of marijuana and illegal liquor in night club he managed); Adams v. State Professional Practices Council, 406 So. 2d 1170 (Fla. 1st DCA 1981) (teacher who maintained a greenhouse containing marijuana plants that were seized by police, had engaged in acts of gross immorality under the existing certification ethics law). In contrast, the Respondent did not commit a crime in the instance involved in this case, was not accused of committing a crime and

was not arrested or charged with any type of criminal conduct.

74. In the instant situation the Respondent did not engage in any intentional public conduct or misconduct, and the facts concerning the AFF website entry (whoever created it) were not widely publicized. It involved a lawful password-secure adult website, never apparently intended to be public, at least as originally conceived. There are no arrests or criminal charges against the Respondent as to the matters concerned with the website, nor as to the matters concerned with his looking at pictures on the school computer during his duty-free lunch hour. The record also does not show any statements of complaints by members of the public (other than vague hearsay references) no log of complaints maintained by the Petitioner, no evidence of any public outcry against the Respondent continuing to be employed as a teacher and coach. c.f. Escambia County School Board v. Tadlock, DOAH Case No. 95-1864 (RO: Mar. 29, 1996; Final Order: April 23, 1996) (comparative case in which the teacher was terminated for misconduct in office and immorality by engaging in public, deviant sexual behavior-solicitation and indecent exposure in a public park coupled with an intense amount of publicity arising from the arrest, before any employment action occurred, and because of the great public outcry of complaints regarding his continued employment as a teacher). The preponderant, persuasive evidence simply shows

that the Respondent's alleged misconduct is not sufficiently severe or notorious to warrant termination of employment on immorality grounds. There was no testimony from anyone in the community in opposition to his future employment and no persuasive evidence of his inability to serve in the community in the future.

Amended Motion in Limine

75. The Petitioner has a policy, General Personnel Policy 6-9, which requires that all anonymous written communications addressed to an employee of the Board shall be destroyed by that employee at the time of receipt. The Respondent contends that the flyer purporting to alert members of the Lewis Middle School community to the existence of the AFF website was an anonymous written communication, bearing no information about the identity of its sender. Therefore, the Respondent contends that the Petitioner violated its own policy by receiving and then acting on the information to conduct its investigation. The Petitioner, however, asserted that the District had an obligation to act upon the information in the flyer in order to determine whether the concerns it referenced had any impact on the safety of students.

76. Additionally, the Respondent cites the Stored Communication Act, 18 U.S.C. Sections 2701-2712 (SCA), which prohibits, under penalty of fines, imprisonment, and/or civil

suit, the intentional, unauthorized access to a facility through which an electronic communication service like AFF is provided, thereby obtaining access to a wire or electronic communication while it is in electronic storage. See 18 U.S.C. § 2701. The Respondent then contends that when Mr. Mikel and Mr. Mitchell gained access to the password/secure AFF website entry and the billing information, without permission from anyone who could have granted them legitimate access (either the Respondent who they believed was the owner of the information or perhaps the author of the flyer who might have been an authorized user) that they clearly violated the provisions of the SCA. The Petitioner contends that the Respondent has no standing to raise the SCA-related issues because he denied even being the creator or owner of the AFF website entry, concerning which the Petitioner sought the stored, secure information without prior authorization.

77. Citing Knop v. Hawaiian Airlines, Inc., 302 F.3d 1868, 1879-1880 (9th Cir. 2002) cert. denied 123 S. Ct. 1291 and Quon v. Arch Wireless Operating Company, Inc., 309 F. Supp. 2nd 1204, 1209-1210 (C.D. Cal. 2004), the Respondent asserts in the Motion that the Petitioner had no authority to access private, secure AFF information the Petitioner assumed to be about the Respondent, without the Respondent's permission, that therefore, Mr. Mikel and Mr. Mitchell violated the SCA. The Respondent argues that fundamental fairness and the "unclean hands"

doctrine dictates that the District should not be allowed to rely upon the results of an unlawful investigatory activity in order to prove misconduct by the Respondent.

78. In this context, one is constrained to point out that this forum does not possess equitable jurisdiction and the ability to fashion an equitable remedy. Moreover, the question of illegal activities in violation of the referenced federal act is an issue more properly raised in another proceeding in a different forum. More to the point, however, is the fact that the preponderant, persuasive evidence presented, which underpins the above Findings of Fact and the conclusions drawn therefrom, demonstrates that the charges brought against the Respondent have not been proven, for the reasons delineated above. Therefore, the exercise of delving into the question of the District's violation of the above-referenced policy concerning anonymous communications, and concerning the purported violation of the SCA, is largely an immaterial exercise, and, under the circumstances, the issues raised by the Amended Motion in Limine are essentially moot. Consequently, the motion is denied.

79. In summary, in light of the Findings of Fact and Conclusions of Law delineated above, just cause for sustaining any charges against the Respondent, has not been established. Accordingly, the charges should be dismissed and the Respondent reinstated with all appropriate back pay and lost benefits

restored to him so that he will be "made whole." This should include wages, leave and retirement credit, as well as supplemental pay for the two coaching positions for which he had been selected, in the Spring of 2008, to perform the following school year.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered dismissing the subject charges and reinstating the Respondent with back pay and related benefits, retirement credits, supplemental coaching pay, as described above, and that he be reimbursed for all categories of lost benefits that come within the proper scope of a "make whole" remedy.

DONE AND ENTERED this 1st day of April, 2009, in
Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2009.

COPIES FURNISHED:

Joseph L. Hammons, Esquire
Hammons, Longoria & Whittaker, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125

Anthony D. Demma, Esquire
Meyer and Brooks, P.A.
Post Office Box 1547
Tallahassee, Florida 32302

Dr. Alexis Tibbetts
Superintendent
Okaloosa County School Board
Administrative Complex
120 Lowery Place Southeast
Ft. Walton Beach, Florida 32548

Michael E. Foxworthy
Chief Officer, Human Relations
Okaloosa County School Board
Administrative Complex
120 Lowery Place Southeast
Ft. Walton Beach, Florida 32548

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.

SCHOOL DISTRICT OF OKALOOSA COUNTY

SUPERINTENDENT OF SCHOOLS
ALEXIS TIBBETTS, Ed.D.

ATTORNEY TO THE BOARD
C. JEFFREY McINNIS



BOARD MEMBERS
CINDY FRAKES
HOWARD HILL
CHUCK KELLEY
CATHY THIGPEN
RODNEY L. WALKER

CERTIFIED MAIL

June 17, 2008

Mr. Jerome A. McIntosh
604 Pinecone Cove
Niceville, Florida 32578

Dear Mr. McIntosh:

I am recommending to the Superintendent that your employment be terminated due to inappropriate use of District computers.

This recommendation will be presented to the School Board on June 23, 2008 at the meeting in Ft. Walton Beach at 4:00 p.m.

Sincerely,

Michael E. Foxworthy
Chief Officer, Human Resources

MEF/bjh

cc: School Board Members
Jeff McInnis
Billy Mikel
Alexis Tibbetts, Ed.D.
Greg Butler

ADMINISTRATIVE COMPLEX-120 LOWERY PLACE S.E.-FORT WALTON BEACH, FLORIDA 32548
TELEPHONE (850) 833-3100 FAX (850) 833-3436

CARVER HILL-461 W. SCHOOL AVE.-CRESTVIEW, FLORIDA 32536
TELEPHONE (850) 689-7300 FAX (850) 683-7696

MEYER AND BROOKS, P.A.
ATTORNEYS AT LAW

2544 BLAIRSTONE PINEY DRIVE
TALLAHASSEE, FLORIDA 32301
850/874-3212
www.meyerandbrooks.com

MAILING ADDRESS:
POST OFFICE BOX 1347
TALLAHASSEE, FLORIDA 32302
FAX: 850/656-6750
EMAIL: ldumma@meyerandbrooks.com

RONALD G. MEYER
THOMAS W. BROOKS
ANTHONY D. DEMMA
MARY F. ASPROS
JENNIFER S. BLOHM
JANISIA R. DANIELS

ELIZABETH A. RICHMOND, PRP
PARALEGAL

July 16, 2008

VIA FACSIMILE -- (850) 862-1138

Jeff McInnis, Esquire
909 Mar Walt Drive, Suite 1014
Fort Walton Beach, Florida 32547

Re: Jerome McIntosh v. Okaloosa County School District

Dear Jeff:

I was very disappointed to read in yesterday's Daily News that Superintendent Tibbetts called the temporary internet files in question in the above-referenced matter "soft pornography." Having reviewed those pictures myself, and having looked at Wikipedia's definition of that term, I have concluded that the Superintendent's reference to the reporter (Rachel Kyler) was inaccurate and needlessly inflammatory, bordering on defamatory. In his own comments about the matter to the Board, Human Resources Director Mike Foxworthy specifically stated that "there is no smoking gun here," and indicated that the decision to terminate Mr. McIntosh was based upon an alleged pattern of bad judgment and inappropriate behavior rather than upon the morally offensive nature of particular images. In light of these factors, I believe it would be appropriate for the Superintendent to provide Ms. Kyler with a statement correcting the unfortunate comment she made Monday night. I look forward to learning that such action will be taken.

Should you feel a discussion of my concerns would be helpful, I would welcome an opportunity to speak with you further about them. On a separate note, I enjoyed finally getting the chance to meet you after the many telephonic discussions and written communications we have had over the years.

Sincerely,


Anthony D. Demma

ADD/er

cc: Mr. Jerome McIntosh
Mr. Greg Butler, GCSU