BEFORE THE ALASKA PROFESSIONAL TEACHING PRACTICES COMMISSION

In the Matter of PTPC Case No. 16-52	)	OAH No. 17-0918-PTP

ORDER DISMISSING ACCUSATION

The Executive Director filed a one-count accusation in this matter on August 16, 2017. The respondent timely filed a notice of defense requesting a hearing, and the matter was referred to the Office of Administrative Hearings.

In the course of the administrative appeal process, respondent, through counsel, moved for summary adjudication of the claim against him. On March 5, 2018, Administrative Law Judge Cheryl Mandala issued an order granting summary adjudication. A redacted copy of that order is attached hereto and incorporated into this order.

On April 26, 2018, the Commission heard oral argument from the parties as to whether it should accept the Administrative Law Judge's order and dismiss the accusation. Upon due consideration of the parties' arguments, the Commission hereby adopts the March 5, 2018 Order Granting Summary Adjudication, and dismisses Accusation No. 16-52 for the reasons stated therein.

DATED: April 27, 2018.

By: *Signed*
Melody Mann, Chair
Professional Teaching Practices Commission

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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ORDER GRANTING SUMMARY ADJUDICATION

I. Introduction

The staff of the Professional Teaching Practices Commission filed an Accusation seeking discipline against John Doe's teacher certification after learning that Doe had a sexual encounter with an 18-year-old former student six weeks after her graduation. The Accusation seeks discipline under 20 AAC 10.020(b)(7), which prohibits an educator from using a professional relationship with a student "for private advantage or gain."

Doe has moved for summary adjudication of the claims against him, arguing that, as a matter of law, the conduct at issue did not fall within the range of conduct prohibited by 20 AAC 10.020(b)(7). The Executive Director opposes summary judgment, but has failed to advance any substantive response to Doe's legal argument that the conduct alleged in the Accusation is outside the scope of the regulation. This decision concludes that Doe's conduct, however distasteful and ill-advised, was not within the scope of conduct prohibited by 20 AAC 10.020(b)(7). The Accusation therefore fails as a matter of law, and he is entitled to summary adjudication.

II. Facts

A. Background

John Doe holds Alaska Professional Teacher Certificate 0000000, with endorsements in high school History and Social Studies.[1] From August 2012 through February 2016, Doe taught at No Name Middle High School (NNMHS).[2]

Doe was a young, generally well-liked teacher. Interviews with his former colleagues well after the events in question became known are nearly uniform in describing a hard-working and likable teacher and coach. Alaska State Mentor Program mentor C W described Doe as effective with students and a team player with colleagues.[3] Mentor D B described him as

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1 R. 6.
2 R. 6.
3 R. 15.

"absolutely receptive and open to suggestions," "communicative," "doing what he needed to do to be an effective teacher."[4] He "seemed to 'fit in' to the school and community," and raised no concerns "about inappropriate teacher-student boundary issues."[5] Virtually all NNMHS teachers interviewed during the investigation denied having or hearing about any concerns about boundary issues or inappropriate conduct involving Doe.[6] Indeed, numerous colleagues and mentors indicated that, notwithstanding the events giving rise to this Accusation, they would not hesitate to have Doe teach their own children.[7]

At the time of the events in question, Doe was 23 years old.

B. Facts set out in the Accusation

The events described in the Accusation occurred shortly after the end of the 2013-2014 school year.[8] During the 2013-2014 school year, a student named M.A. was an 18-year-old senior at NNMHS. In the spring semester, M.A. was enrolled in two face-to-face classes with Doe, as well as two online learning correspondence classes for which he was the NNMHS teacher responsible.[9]

M.A. graduated from NNMHS on May 10, 2014.[10] In early June 2014, she began sending text messages to Doe. Over the course of two weeks, these increased from 3-5 "innocuous" messages per day in the first week of June, to 10-15 messages – some of which were "flirtatious" – per day during the second week in June.[11]

The flirtatious messages in the second week in June included M.A. telling Doe she thought he was "sexy" or "cute," and that she wanted to develop a relationship with him. Doe, in turn, told M.A. he thought she was "kind of cute," and asked how old she was.[12] (M.A. responded that she was "almost 19.")[13]

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4 R. 17.
5 R. 17.
6 See R. 22, 23, 25, 27. The only two exceptions involved conduct that is dissimilar to the allegations here: (1) a teacher who questioned Doe's "boundaries" in once making – and keeping – a deal with students to be "made up with makeup" if they got their work done (R. 19), and (2) a school counselor who viewed some of Mr. Doe's Facebook posts about "drinking parties" to be "inappropriate or borderline" (R. 29).
7 *See* R. 17 (ASMP mentor D B), 19 (NNMHS teacher (4 years) C B); R. 23 (NNMHS teacher (15 years) and parent S A); R. 25 (NNMHS teacher (17 years) D W); R. 28 (NNMHS teacher (12 years) G P).
8 R. 6-7.
9 R. 6-7.
10 R. 7, 83.
11 R. 7.
12 R. 7.
13 R. 10.

On June 14, 2014, M.A. texted Doe, asking if he wanted to have sex. He responded by inviting her over to his apartment, where they engaged in sexual intercourse.[14]

The above-described events make up the totality of the Executive Director's factual allegations of misconduct in this case. Of note, the Accusation does not allege that anything improper occurred between Doe and M.A. while she was his student or before she graduated from high school.[15]

C. Investigation by PTPC staff

These events first came to the attention of PTPC staff in February 2016, when the No Name School District filed a PTP complaint against Doe relating to his relationship with M.A., and alleging his conduct constituted an act of moral turpitude.

Executive Director Jim Seitz began an investigation, during which he interviewed Doe, a number of other district employees, M.A., and a friend of hers. The evidence gathered in the investigation uniformly supported that Doe and M.A. had had sexual relations only after she graduated, and that they did not have sexual relations or any other extracurricular contact while she was enrolled as a student.[16]

On June 28, 2016, the District withdrew its PTP complaint against Doe.[17] The following day, the Executive Director advised Doe that he would be filing a new complaint against him based on the same allegations.[18]

The Executive Director's June 29, 2016 correspondence argued that Doe's conduct had violated 20 AAC 10.020(b)(7), which prohibits an educator from using a professional relationship with a student "for private advantage or gain."[19] Doe, through counsel, responded that the conduct alleged did not fall within the conduct prohibited by 20 AAC 10.020(b)(7), and that attempting to stretch that regulation to cover this situation was unconstitutional.[20]

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14 R. 7.

15 *See* R. 6-7.

16 *See* R. 41, 44 (police report); R. 42 (police interview with M.A.); R. 43 (police interview with Doe); R. 31 (Seitz interview with M.A.); R. 34 (Seitz interview with M K); R. 22, 23, 25, 17 (staff statements denying any signs of inappropriate conduct); R. 54-55 (Doe 4/8/16 written statement); R. 73 (District interview with M.A.).

17 R. 79, 81.

18 R. 86.

19 Doe Aff., ¶ 4.

20 Doe Aff., ¶ 5.

D. Revisions to regulations

During this same period, Executive Director Seitz was preparing a packet of proposed regulation changes for the Commission's consideration at its October 2016 meeting. On August 31, 2016, the Executive Director transmitted proposed regulation changes that included modifying two regulations in ways that would specifically address teachers having sex with former students after graduation. The Executive Director's correspondence with the Commission about this issue did not mention Doe or the specific allegations against him, but rather said that the proposed changes were to address recent unidentified concerns.[21]

The Executive Director's first proposed change aimed at this issue was a revision to 20 AAC 10.020(b)(4), the provision addressing sexual conduct with students. The proposed change broadened the prohibition on "sexual conduct with a student" to extend to two years after the student's graduation or withdrawal from school.[22] The other proposal was a revision to 20 AAC 10.020(b)(7), the "for personal gain" regulation at issue in this case. The Executive Director proposed to add language to this regulation (1) broadening the scope from "professional relationship with students" to also include any "position of authority over students," and (2) extending the prohibition on using such position or relationship for personal gain to two years after the student graduated or withdrew from school.[23] At its October 3, 2016 meeting, the Commission approved the proposed changes to the sexual conduct regulation, but rejected the proposed changes to the "for personal gain" regulation.[24]

E. Accusation and motion for summary adjudication

Although the Executive Director had written to Doe in July 2016 that he intended to pursue a complaint against him, no further action occurred for more than a year. In August 2017, the Executive Director filed the Accusation at issue in this case.

The Accusation sets out the factual allegations described in section B, above: that approximately one month after graduation, Doe and his adult former student M.A. engaged in sexual contact. The Accusation then alleges that Doe's actions as described "violated 20 AAC 10.020(b)(7)" – the prohibition on using one's professional relationship with a student for personal gain – and were thus grounds for discipline.

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21 Doe Ex. A, pp. 5, 18.
22 Ex. A, p. 5.
23 Ex. A, p. 5.
24 Doe Ex. C, p. 5.

Executive Director Seitz notified Doe of the Accusation on August 17, 2017.[25] Doe timely submitted a notice of defense, requesting a hearing on the matters set forth in the allegation.[26] At a case planning conference in September 2017, the parties tentatively agreed on an April 2018 hearing date. However, Doe's counsel also indicated that she intended to file a dispositive motion prior to the hearing date, and a briefing schedule was set with the hopes of addressing the motion without jeopardizing the April hearing date, should a hearing prove necessary. Pursuant to that schedule, Doe filed a motion for summary adjudication on October 31, 2017. After Doe filed his motion, the parties stipulated to attempt to resolve their dispute through mediation. It was only in mid-February 2018, after those attempts proved unsuccessful, that the Executive Director filed his opposition to Doe's motion. Doe filed his Reply on February 26, 2018.

III. Discussion

A. Motion and applicable legal standard

Under 2 AAC 64.250, a party to an administrative appeal may request summary adjudication of one or more of the issues on appeal "if a genuine dispute does not exist between the parties on an issue of material fact."[27] Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[28] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts, obviating the need for an evidentiary hearing.[29]

Summary adjudication is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[30] Where the moving party has met its initial burden of proof, the party opposing the motion must offer more than "mere denials."

> If a motion for summary adjudication is supported by an affidavit or other documents establishing that a genuine dispute does not exist on an issue of material fact, to defeat the motion a party may not rely on mere denial but must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required.[31]

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25 R. 4.
26 R. 2.
27 2 AAC 64.250(a).
28 *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).
29 *Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Pierce, *Administrative Law Treatise* § 9.5 at 813 (5th ed. 2010).
30 *Martinez v. Ha*, 12 P.3d 1159, 1162 (Alaska 2000).
31 2 AAC 64.250(b).

Doe's motion argues that, as a matter of law, the conduct alleged in the Accusation does not violate 20 AAC 10.020(b)(7), and that applying that section to prohibit the conduct alleged would violate his right to procedural due process. Doe also argues that the Commission has predetermined the issues in this case and cannot be the final decisionmaker.

The Executive Director's opposition does not address Doe's primary argument that the conduct alleged is outside the scope of the regulation relied upon. The Executive Director instead argues that summary adjudication is improper because Doe might have engaged in "grooming behaviors" during the time that M.A. was his student, so an evidentiary hearing is necessary to determine whether Doe may have violated section 020(b)(7) while M.A. was his student. Doe's Reply counters that the Accusation is self-limiting to events after graduation, and does not allege or seek discipline for conduct while M.A. was a student. Given the actual allegations set forth in the Accusation, Doe argues, summary judgment is warranted.

B. Has the Commission impermissibly predetermined the issues in this case? (No.)

As a preliminary matter, Doe argues that the Commission cannot properly hear this case because it has "pre-determined" the issues by "categorically condemning certain conduct as unethical."[32] Specifically, Doe argues that, having amended the Code of Ethics to expressly prohibit the conduct at issue in this case, the Commission cannot be an impartial decisionmaker in this matter.

This argument is too speculative to carry weight. That the Commission has decided prospectively that the Code should prohibit certain conduct does not mean that it has prejudged whether the Code in effect at the time did, in fact, prohibit such conduct. On the contrary, it could well suggest that the Commission felt the existing Code did not address the conduct at issue, because surely the Commission would not amend the Code if no amendment were necessary.[33] In any event, public officials are presumed to act in good faith, and as an adjudicative body the Commission must be assumed able to appreciate the distinction between laws in effect at the time of an event and laws in effect at a later date.

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[32] Motion, pp. 1-2.

[33] Indeed, and somewhat paradoxically, Doe separately argues that the Commission's decision *not* to amend section 020(b)(7) to encompass the conduct at issue prohibits the Executive Director from arguing that the conduct is barred by that regulation. It is not necessary to reach this question because, as addressed below, the conduct is simply not prohibited by the existing regulation.

C. Do factual disputes about pre-graduation contacts bar summary adjudication? (No.)

The Executive Director's opposition to Doe's motion argues that summary adjudication is improper because there are disputed issues of fact "related to contacts between the two prior to graduation."[34] The Executive Director claims that Doe's motion is fatally flawed because it fails to address whether grooming behavior may have occurred "between Doe and MA during their student-teacher relationship that lead (sic) to a sexual relationship shortly after M.A. graduated from high school."[35]

This argument fails for two reasons. First, the Accusation does not allege any misconduct prior to graduation. Under the Administrative Procedure Act, the only matter before the Commission is what is presented in the Accusation. The case the Executive Director has brought is expressly limited to conduct after graduation, and the Executive Director has not moved to amend the Accusation. Doe is not required to disprove new, theoretical unpled claims in order to obtain summary adjudication on the only claim that has been pled.[36]

Second, the Executive Director's opposition points to no actual evidence to support a claim of grooming behavior during the school year. The opposition relies solely on speculation, saying only that *if* it could be proved that Doe gave M.A. his cell phone number – a proposition for which no evidence is cited and for which no evidence appears to exist in the agency record – such action *could* be interpreted as grooming behavior.[37] But the opposition does not even suggest that such evidence exists. Even if contact between M.A. and Doe prior to graduation were at issue in this case, this type of unsupported speculation is insufficient to create a genuine dispute of material fact as is necessary to defeat Doe's motion for summary adjudication.

It is well established under Alaska law that "unsupported assumptions and speculation" are insufficient to defeat a proper motion for summary judgment (under the civil rules) or its administrative law analog, a motion for summary adjudication.[38] Where, as here, a moving party makes a prima facie showing of being "entitled to judgment on the established facts as a matter of law," the party opposing the motion then "must demonstrate that a genuine issue of fact exists to be litigated by showing that it can produce admissible evidence reasonably tending to dispute

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34 Opp., p. 3.
35 Opp., p. 4.
36 *See Jones v. Wal-Mart Store*s, 893 S.W.2d 144 (Tex. App. 1995).
37 Opp., p. 4.
38 *French v. Jadon, Inc*., 911 P.2d 20, 23 (Alaska 1996).

the movant's evidence."[39] "[T]he non-movant is required, in order to prevent summary judgment, to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact[ ] exists."[40] A non-moving party's failure to deny or rebut sworn statements by the moving party – such as Doe's sworn statement that he has no idea how M.A. obtained his cell phone number – can properly support summary adjudication.[41] And it is well established that "[m]ere assertions of fact in pleadings and memoranda are insufficient for denial of a motion for summary judgment."[42]

The opposition also claims, without citation, that "there were co-workers of Doe that expressed concerns about boundary issues with Doe in classroom (sic) and in his dealings with M.A."[43] But the opposition again makes no attempt to provide or point to admissible evidence in the record to support these statements. First, as noted, speculation and vague, unsupported allegations are not enough to defeat a properly pleaded motion for summary adjudication.[44] Further, as described above, these vague generalizations do not fairly characterize the record.[45] The only colleague to have raised concerns about "boundary issues in the classroom" didn't think it was a good idea for Doe to have made a deal with students under which he would let himself be "made up with makeup" if they worked hard. This lone incident during a different school year is not fairly characterized as "concerns about boundary issues in the classroom." More significantly, no evidence in the record appears to support the claim about boundary-issue concerns during the school year in Doe's dealings with M.A. While on summary adjudication the evidence is viewed in the light most favorable to the non-moving party, (1) that party must support its position with evidence, not mere accusations, and (2) the duty to construe the record favorably is not license to ignore or misconstrue the record.

Most fundamentally, however, and as noted above, the Executive Director's speculative and unsupported allegations about pre-graduation contacts are insufficient to defeat summary

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39 *Id*.

40 *State, Dep't of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978).

41 *See Alaska–Canadian Corp. v. Ancow Corp*., 434 P.2d 534, 536–38 (Alaska 1967).

42 *Green*, 586 P.2d at 607, n. 32.

43 Opp., p. 4.

44 *French*, 911 P.2d at 23.

45 *See Ctensen v. Alaska Sales & Service*, 335 P.3d 514, 516 (Alaska 2016) ([A] non-moving party does not need to prove anything to defeat summary judgment. But a non-moving party cannot create a genuine issue of material fact merely by offering admissible evidence—the offered evidence must not be too conclusory, too speculative, or too incredible to be believed, and it must directly contradict the moving party's evidence").

adjudication because they are not the allegations on which the Executive Director seeks to sanction Doe under the Accusation. Rather, the Accusation is expressly limited to a single claim under 20 AAC 10.020(b)(7) that the post-graduation sexual encounter was an improper use of Doe's "professional relationship with a student" for personal gain. The Executive Director cannot overcome summary adjudication on that claim through unsupported allegations about claims he has not pled.

D. Was the conduct alleged prohibited by 20 AAC 10.020(b)(7)? (No.)

Doe seeks summary adjudication because "the accusation fails to allege a violation of professional standards upon which [the] PTPC may seek sanctions."[46] Doe rejects the attempt to shoehorn a post-graduation sexual encounter with an adult former student into the regulation prohibiting misuse of professional relationships with students for personal gain, particularly where there is no allegation of inappropriate conduct during the teacher-student relationship (i.e. while the former student was enrolled in school). Because the conduct at issue in the Accusation occurred after the teacher-student relationship ended, Doe avers, it cannot form the grounds for discipline under 20 AAC 10.020(b)(7).

Puzzlingly, the Executive Director's opposition simply does not respond to Doe's argument that on its face, 20 AAC 10.020(b)(7) does not apply to the situation described in the Accusation. On this ground, the motion is essentially unopposed. Both because the opposition advances no argument supporting the interpretation of the regulation that would be required to sustain the Accusation, and because the regulation cannot reasonably be read to encompass the conduct at issue, Doe is entitled to summary adjudication of the claim against him.

Although a separate regulation – 20 AAC 10.020(b)(4) – addresses in detail the prohibition on sexual contact with students, the Accusation does not attempt to state a claim against Doe under that regulation. Instead, it relies solely on 20 AAC 10.020(b)(7)'s direction that, "in fulfilling obligations to students, an educator may not use professional relationships with students for personal gain." But there are multiple reasons to conclude that the regulation relied on in the Accusation does not apply to this situation.

There is nothing in the plain language of (b)(7) that hints at regulation of sexual conduct. The plain language, and the fact that a separate regulation addresses sexual contact, suggests that (b)(7) is targeted to pecuniary gain or other concrete benefits. Stretching the concept of an

[46] Motion, p. 8.

educator's "personal gain" to mean their sexual enjoyment is a difficult sell, particularly since a separate regulation already addresses sexual relationships in detail. Both the language used and that another regulation addresses sexual contact in detail are indications that (b)(7) is intended to address different conduct. Further, that (b)(7) focuses, specifically, on an educator's obligations to and relationships with "students" is an indication that it does not encompass relationships with former students after the educator-student relationship has ended. For all of these reasons, a reasonable reading of (b)(7) does not support its application to these facts.

E. Would applying 20 AAC 10.020(b)(7) to the facts of this case run afoul of procedural due process? (Yes.)

Doe argues that disciplining him under 20 AAC 10.020(b)(7) for a post-graduation sexual encounter with a former student would violate his rights to procedural due process. Although the opposition does not respond on the merits to the argument that (b)(7) is inapplicable to these facts, it responds, somewhat, to Doe's due process argument. That response, however, is misguided.

The response is limited to a discussion of the principle that administrative law judges may not declare laws unconstitutional.[47] But Doe is not arguing that the law is unconstitutional. Rather, he is arguing that the law cannot be applied in the way sought by the Executive Director (an argument that the opposition wholly ignores), and that doing so would impermissibly infringe on his right to procedural due process. While the Commission may not declare laws unconstitutional, it (and by extension, the administrative law judges acting on its behalf) absolutely may and should ensure that proceedings are conducted in a manner that comports with procedural due process.

The staff's constitutional argument also fails because it is the Commission, not the administrative law judge, who is the final decisionmaker in this case. The Commission has both the ability and the obligation to ensure that it is interpreting and applying its regulations in a manner that comports with due process. This is what Doe is seeking – not a declaration that the law is unconstitutional, but a commitment by the Commission to carry out its obligations in a manner consistent with due process. The suggestion that addressing these concerns is beyond the purview of OAH or the Commission is flatly mistaken.

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[47] *See* Opp. 7-8.

As to Doe's underlying argument – that applying (b)(7) to the facts of this case would run afoul of due process – he is correct for the reasons described in Section C, above. 20 AAC 10.020(b)(7), the lone regulation relied on in the Accusation, cannot reasonably be interpreted to extend to the facts of this case. Attempting to discipline Doe under that regulation would run afoul of his due process rights because constitutional principles of fairness require that certificate holders have fair notice of the standards to which they will be held. The Code exists for that purpose – to inform certificate holders of their duties and obligations. Because constitutional due process guarantees require that regulations provide reasonable notice of what conduct is prohibited, the Commission cannot discipline a certificate holder under a regulation that gives no notice that the targeted behavior is within the regulation's scope.

IV. Conclusion

In an action under the Alaska Administrative Procedure Act, the respondent is entitled to notice of the claims against him, and the Commission may only impose discipline based on the provisions of law relied on in the Accusation. The conduct described in the allegation, however remarkably ill-advised, was not prohibited by the regulation under which the Executive Director seeks to impose discipline in this case. Because the Commission cannot discipline Doe for conduct that was not prohibited by the regulation relied on, he is entitled to summary adjudication.

Dated: March 5, 2018

Signed
Cheryl Mandala
Administrative Law Judge

Certificate of Service I certify that on March 5, 2018, this Order was sent to: Kim Dunn, Esq. (by email); Erin Egan, AAG (by email); Jim Seitz (by email).

By: *Signed*
Office of Administrative Hearings

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