

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 067

REGISTERED TEACHER: Benjamin Andrew TOY

PANEL MEMBERS: Terry Hayes, Chairperson
Jeanette Barclay, Registered Teacher
Polly Flanagan, Registered Teacher

ATTENDANCE: The teacher attended the formal hearing and was not represented
Mr Eugene White Counsel Assisting with Ms C Sherman, instructing

DATE OF HEARING: 15 September 2008

DETERMINATION UNDER SECTION 2.6.46(2) OF THE *EDUCATION TRAINING AND REFORM ACT 2006*:

On 15th September 2008 the Panel decided to suspend the registration of the teacher from that date until at least 31st December 2008 and impose the following conditions:

1. That the teacher undertake counselling with a registered psychologist and provide the Panel with a report from his treating psychologist before 31 December 2008 which indicates that he has successfully addressed emotional issues related to his serious misconduct which impedes his effectiveness as a teacher.
2. That the teacher provide the Panel with an undertaking that states that he has a clear and comprehensive understanding of the conduct and behaviour required of a teacher as outlined in the Victorian Institute of Teaching's Code of Ethics and Code of Conduct. That understanding is to be provided in writing.

REASONS

BACKGROUND

The teacher has been a registered teacher with the Victorian Institute of Teaching (the Institute) since 31 December 2002.

By letter dated 21 September 2007, the employer notified the Institute that it had taken action in response to allegations of serious misconduct and/or unfitness to teach of the teacher. The teacher resigned from his employment at the school with effect from 14 September 2007.

The matter was referred to the Disciplinary Proceedings Committee (the Committee) on 14 November 2007 and the Committee decided to refer the matter for investigation.

On 14 May 2008, the Committee considered the investigation report and recommendation and decided to refer the matter to a formal hearing.

The Notice of Formal Hearing dated 15 August 2008 was served upon the teacher by registered post on 18 August 2008.

DOCUMENTS CONSIDERED

The Panel was provided with the following documentary evidence:

1. Letter manager 1 to the Institute dated 21 September 2008, with enclosed letter dated 5 September 2007 (3 pages) **001-003**
2. The teacher - Registration Details (4 pages) **004-007**
3. Document entitled 'Chronology of Events' (2 pages) **008-009**
4. Notice of Investigation letter the Institute to the teacher dated 11 December 2007 (2 pages) **010-011**
5. Witness statement of manager 1 dated 14 December 2007 (3 pages) **012-014**
 - o Attachment 1 – File note dated 8 September 2004 (2 pages) **015-016**
 - o Attachment 2 – Notes of Mediation session (2 pages) **017-018**
 - o Attachment 3 – File note (undated) (1 page) **019**
 - o Attachment 4 – File note (undated) (1 page) **020**
 - o Attachment 5 – File note (undated) (1 page) **021**
 - o Attachment 6 – Letter principal 1 to the teacher dated October 2006 (3 pages) **022-024**
 - o Attachment 7 – Letter of appointment principal 2 to the teacher dated 23 May 2007, with enclosures (27 pages) **025-051**
 - o Attachment 8 – Audit material (24 pages) **052-075**

- Attachment 9 – Document entitled ‘Attachment 9’ enclosing two DVDs (1 page) **076**
 - Attachment 10 – Letter manager 1 to the teacher dated 5 September 2007 (2 pages) **077 - 078**
6. Witness statement of principal 2 dated 11 February 2008 (4 pages) **079 - 082**
- Attachment 1 – Incident Report deputy principal dated 28 August 2007 (1 page) **083**
 - Attachment 2 – Incident Report principal 2 with various dates (2 pages) **084 – 085**
7. Witness statement of witness 1 dated 26 July 2008 (2 pages) **086-087**
- Witness statement of witness 1 dated 14 December 2007 with attachments: (3 pages) **088 - 090**
 - Attachment 1 – Handwritten notes of teacher 1 (undated) (2 pages) **091 – 092**
 - Attachment 2 – List of files (1 page) **093**
 - Attachment 3 – List of files (1 page) **094**
 - Attachment 4 – List of files (1 page) **095**
 - Attachment 5 – List of files (1 page) **096**
 - Attachment 6 – Audit notes (1 page) **097**
 - Attachment 7 – Document entitled ‘Data Transfer Date’ (1 page) **098**
 - Attachment 8 – Audit material (10 pages) **099 - 108**
 - Attachment 9 – List of files (1 page) **109**
 - Attachment 10 – Document entitled ‘Attachment 9’ enclosing two DVD’s (removed – see Hearing Book page 076 attachment 9) (1 page) **110**
8. Witness Statement of witness 2 dated 15 August 2008 (2 pages) **111 - 112**
- Attachment 1 – Document entitled ‘Data DVD’ (3pages) **113 – 114a**
9. Witness Statement the teacher dated 14 December 2007 (3 pages) **115 - 117**
10. Notice of Formal Hearing dated 15 August 2008.

The following exhibits were tendered at the hearing

- A. Document entitled: ‘Application pursuant to section 2.6.45(f)’
- B. Written submissions on behalf of the Institute entitled ‘Victorian Institute of Teaching and the teacher’
- C. Victorian Teaching Profession Code of Ethics
- D. Victorian Teaching Profession Code of Conduct
- E. Document entitled ‘Aide memoir re movies contained on the Movie DVD’
- F. Written submissions on behalf of the teacher entitled ‘Victorian Institute of Teaching and the teacher’
- G. Witness statement of principal 2 dated 11 February 2008
- H. Witness statement of witness 1 dated 26 July 2008

- I. Paragraph 7, 8, 9 of Witness statement of witness 2 dated 15 August 2008.

THE EVIDENCE

The allegations of serious misconduct and/or lack of fitness to teach as set out in the Notice of Formal Hearing are:

In 2007, whilst employed as a registered teacher at the school, the teacher:

1. Engaged in inappropriate use of his laptop computer in that:

- 1.1 Having the movies set out in 1.1(a) and 1.1(b) below on his laptop computer, took his laptop computer to school in circumstances where students and staff could access the movies:

- a. Movies in a Lime Wire Folder entitled:
- i. 'BB.mpeg'
 - ii. 'RS.mpeg'
 - iii. 'CSS7.mpg'
 - iv. 'Jenna Jameson & Stacey Valentine ...'
 - v. 'Best 18yo Petite Blond Lolita blowjob....'
 - vi. 'Screaming orgasm – Chick squirts cum....'
 - vii. 'This hot college chick is a super wild fuck....'
 - viii. 'College invasion extract....'
- b. Movies in the hard drive entitled:
- i. VTS_01_2.VOB
 - ii. VTS_01_3.VOB
 - iii. VTS_01_4.VOB

- 1.2 Having the movie/file titles set out in 1.2(a) below on his laptop computer, took his laptop computer to school in circumstances where students and staff could read the titles:

- a. Movies titles on the hard drive, as follows

<u>Name</u>	<u>Date Modified</u>
i. 'Adult movies...'	23 August 2008 3.53PM
ii. 'Blonde teen lesbian...'	23 August 2008 3.47PM
iii. 'Hot girls masturbation...'	23 August 2008 3.53PM
iv. 'Some for jenny...'	22 August 2007 3.39PM
v. 'Female ejaculation...'	23 August 2007 1.16PM
vi. 'Female ejaculation...'	23 August 2007 1.17PM
vii. '5 Young student...'	22 August 2007 3.38PM
viii. '69 Lolitas lesbians...'	22 August 2007 3.35PM
ix. 'Brianna Banks...'	23 August 2007 4.12PM
x. 'Lesbian Lesbian...'	22 August 2007 3.35PM
xi. 'Lesbian – Sap....'	22 August 2007 3.35PM

xii. '2CD Girls lesbian...'	22 August 2007 3.35PM
xiii. 'Sex training - S...'	23 August 2007 1.16PM
xiv. 'Cum swallowing...'	23 August 2007 4.17PM

1.3 Used his laptop computer at school, and during times when students and staff could reasonably be expected to be at school:

- a. To download the movies/files set out in 1.2(a) above.

The Panel heard evidence under oath from the following witnesses:

Principal 2
 Witness 1
 The teacher

At the commencement of the hearing the teacher made an application pursuant to s2.6.45(f) of the *Education and Training Reform Act 2006* (the Act) that his identity not be published. He also made an application pursuant to s2.6.45(d) of the Act that the formal hearing be closed as it would be taking evidence of intimate, personal or financial matters.

Counsel Assisting opposed both applications. Regarding the application that the hearing be closed Counsel Assisting argued that the Panel should proceed on the assumption that open democracy and open justice required an open hearing. Furthermore, Counsel Assisting argued that whilst the teacher may be subject to some embarrassment by the allegations made against him, the allegations are not of such an intimate or personal matter so as to justify the closure of the hearing and that the publication of the teacher's name and any final decision would not prejudice the administration of justice. After considering the argument the Panel ruled that it was not within its power to close a formal hearing. The Panel informed the teacher that he could make application to have the evidence of particular witnesses heard in a closed hearing if he so wished. Regarding the publication of the teacher's identity the Panel ruled that his potential embarrassment was not sufficient grounds for closing the hearing and that that the public interest would not be served by granting his application.

Principal 2 is the principal of the school where the alleged offences occurred. In his written statement he provided the Panel with the context and circumstances which led to the allegations and the subsequent investigation. The teacher had been employed by the school in January 2007 at the request of manager 1 as an opportunity to improve his teaching skills. The teacher had worked in an open classroom team teaching situation with two other teachers. The offending materials had been discovered on 28 August 2007 by the school's deputy principal. While assisting a class to add sound to their computer presentations the deputy principal had been informed by the students that the teacher had a folder of music in I Tune. On accessing the folder she was concerned by the appropriateness of the titles of some of the tunes and had proceeded to check them. On clicking on one of the titles a film which she believed to be pornographic began to download. Along with the school's coordinator she had checked another title to similar effect. Together they informed principal 2 and all three checked video files in the teacher's

folder entitled 'The Teacher's Limewire Tunes'. They believed the files to contain pornographic materials.

In his statement Principal 2 expressed concern that the materials observed on the teacher's computer file were perhaps sitting on the school server from which it could be accessed by pupils in the school. He then contacted a consultant at the employer who informed manager 1. On the consultant's advice, principal 2 contacted teacher 1 and requested he check to see if the offensive materials were on the school server. Teacher 1 had done so but found no such materials on the server.

Principal 2 stated that on 29 August 2007 he was advised by the consultant that the teacher would be stood down pending an investigation. In a subsequent discussion that day the teacher had denied having a folder entitled 'The Teacher Tunes'. The teacher had offered to bring his laptop computer to school and went home to get it, arriving back at school some 20-30 minutes later. When he checked iTunes on the teacher's laptop the teacher's Lime Wire folder came up and the teacher had remarked words to the effect 'Oh! This doesn't look good.' When principal 2 opened the folder all he could see were the songs and no video files. He had declined the teacher's offer to keep his laptop computer.

Principal 2 then stated that on 30 August 2007 teacher 1 had requested him to obtain the teacher's laptop computer to check to see if files had been deleted. The check had subsequently been undertaken by witness 1. Teacher 1 subsequently reported to principal 2 that all the files containing the offensive materials had been located. They had been deleted from the teacher's laptop computer and an attempt had been made to cover up the deletion. Principal 2 stated that teacher 1 informed him that a check of the school's internet usage had shown huge spikes in the download history. Teacher 1 had stated that while it was not possible to ascertain which computers had made the huge downloads the log showed that the downloads had occurred during the school term. Principal 2 said he was informed that the downloads equaled one year's usage by 400 students and staff.

Principal 2 stated that at a meeting in the first week of September 2007 between him, the consultant, manager 1 and the teacher, the teacher had been informed of the results of the investigation; that is that the files had been located on his laptop computer and that someone had attempted to cover up their deletion. Principal 2 said that manager 1 had stated that it was his informed decision that the teacher was responsible for pornographic files appearing on the school's network. Principal 2 recalled the teacher denying the allegations. The teacher had said that the downloads had occurred around 3.00am-5.00am and that would have required him leaving his laptop computer at school. Manager 1 had stated he would seek clarification of times when the downloads occurred and had also informed the teacher that he was taking over the process of investigation. Principal 2 said that two teachers whom the teacher said could verify he took his laptop computer home informed him that they believed the teacher usually took it home but would not really know if he had left it overnight at school. Principal 2 stated that he had had no further contact with the teacher until the last week of term. By that stage manager 1 had informed him that the investigation process conducted by the employer had been concluded, and based on the available evidence

the teacher had been dismissed. Principal 2 said that he had then contacted the teacher to arrange for him to collect his belongings from school and that the teacher had texted back saying he would prefer to do so during the September holidays when no one was around. This had subsequently occurred.

Witness 1 is currently a computer technician with the employer. Witness 1 in his written statement confirmed that he made two DVDS which he provided to the Institute as attachments to his witness statement. The first DVD entitled 'CEData' contains all of the data retained from the teacher's laptop computer. The second entitled 'Movies' contains two folders entitled 'Audio TS' and 'Video TS'. The movies listed in Allegation 1.1(a) were those Principal 2 had informed witness 1 he had seen on the teacher's laptop computer. Witness 1 stated the movies had been deleted but had been recovered though he was unable to ascertain if the files had been deleted from the teacher's Limewire folder. Witness 1 said it was unclear as to whether the teacher used the school server to download any of the movies though there had been an increase in the type of traffic in the school which Lime Wire would have used had it been running. Witness 1 stated that Lime Wire was not the only application that used these protocols for downloading.

Witness 1 stated that in the course of locating the list of movies provided by principal 2 he had located further movies on the teacher's laptop computer which he considered to be pornographic. These movies are listed in Allegation 1.2(a). Witness 1 confirmed that these movies were not located in the teacher's Limewire folder and would most likely have been saved in his personal documents. Witness 1 stated that it was unlikely that these movies would have been accessible by other staff and students at the school. Witness 1 said that he understood that manager 1 was still concerned about these movies because he had formed the view that they had been accessed during school hours.

The teacher provided written and oral evidence to the Panel. In his opening statement to the Panel the teacher fully admitted to all the allegations against him and that they were evidence of his serious misconduct. He also stated that he believed they represented an occasional lapse of judgment rather than offences committed over a long period of time.

The teacher described his decision to become a teacher after first commencing study in a course Human Movement. He completed a three year Bachelor of Teaching course and in his honours year had completed a thesis on 'The self concept of gifted children and their understanding of competence', for him 'a massive achievement' of which he is very proud.

The teacher stated he then worked at school 1 for five years as a generalist and PE teacher and was also Sports Coordinator. He stated that his teaching at school 1 had not been without 'a few negative incidents' but he loved teaching. He loved 'seeing the children learn and grow' and 'knowing that I made a difference in their lives.'

The teacher stated that, after five years at school 1 he felt he needed the experience of working in a larger school and had approached manager 1 to assist him in doing so. The teacher stated that manager 1 had 'always been very supportive of me, and encouraging in his belief of me as a teacher and person. I knew he respected and believed in me.'

The teacher indicated that manager 1 was instrumental in obtaining him a year's appointment in a mentoring position at the school and he could not thank him and principal 2 enough for the opportunity. The teacher stated he enjoyed teaching at the school where he had been welcomed warmly. He stated 'I felt part of the whole school, part of the teaching staff, and feel that I learned and developed more as a teacher than I thought I would.'

The teacher stated that the allegations made him feel 'distraught, absolutely hollowed' and he was 'not ashamed to admit it nearly broke me down entirely.' He felt he had let so many people down: 'I had let my two colleagues in the classroom down, I had let the students who I had grown to care for as my class down.' The teacher stated 'It hurts to know I might have lost (manager 1's) respect and belief in me due to this case as it really meant a lot.' and 'I feel gutted that I let (principal 2) down as well.'

The teacher stated that 'the whole situation sent me into depression.' In an attempt to pull himself out of his downward spiral he undertook the Personal Training Course. On completion of the course he had registered his own personal training business.

In response to questions from Counsel Assisting the teacher stated that in March 2007 his marriage broke down. Because of this he had simply gone through his work in a day to day fashion. He had been supported by his parents but had declined counselling services offered by manager 1 because of a previous unsatisfactory experience with counselling. The teacher said, however, he would be willing to attend counselling to ensure his continuing registration as a teacher. Since leaving teaching employment the teacher said he had not sought casual relief teaching work but instead started his personal training business. Even though this business had proved successful to date he still wished to keep his options open to return to teaching.

DISCUSSION OF THE EVIDENCE

The Panel welcomed the fact that the teacher, after initially challenging the allegations, admitted the truth of all three. The Panel commends him for his forthrightness. Similarly the Panel welcomed the clarity and comprehensiveness of the statements of the two witnesses, principal 2 and witness 1 which assisted the Panel in understanding the narrative of events in discovering the teacher's behaviour and the subsequent investigation undertaken by the school and the employer. Their accounts enabled the Panel to understand clearly the following facts. One, that the movies set out in paragraph 1.1(a) were on the teacher's laptop computer. Two, that the teacher took his laptop computer to school. Three, that the teacher did so in circumstances where students and staff could access the movies contained on his laptop computer. The teacher's admission to the allegations confirmed these facts. His admission also made clear that he knew that the materials were on his laptop computer and that he used his laptop computer at school and during times when students and staff could reasonably be expected to be at school to download the movies/files set out in 1.2(a).

The Panel considered the degree of seriousness in the allegations. The teacher argued that his behaviour was a temporary lapse of judgment. The Panel declined to agree and

instead accepted Counsel Assisting's arguments that his behaviour was not of 'a fleeting or transitory nature'. The downloading of the offensive files occurred frequently over a sustained period of time in ways which showed a cavalier and careless attitude to the consequences of them being accessed by students and staff.

The Panel accepted the fact that the teacher displayed genuine contrition and remorse for his behaviour. He recognised that he had seriously abused the trust placed in him by his colleagues, the school and senior personnel who had actively supported his employment at the school and had consequently forfeited their respect. He understood that his behaviour seriously compromised his relationships with his students and that if students had accessed the offensive materials it would have been detrimental to their well being and have lost him their respect. The Panel believed that the teacher had judged himself severely and had, to some extent, been traumatised by the consequences of his behaviour. The Panel agreed with Counsel Assisting that if the teacher wished to return to teaching he should undertake counselling of a personal rather than professional nature to enable him to better cope with the emotional consequences of his behaviour.

FINDINGS UNDER SECTION 2.6.46(1) OF THE ACT

The Panel found all allegations proved on the teacher's admission.

The Panel determined that the teacher is guilty of serious misconduct and is unfit to teach for the term of his suspension.

In making its determination of serious misconduct the Panel was mindful of the ruling in Kellam J in *Parr v Nurses Board of Victoria VCAT (2 December 1998)*:

In my view the question of whether or not a nurse has engaged in unprofessional conduct of serious nature must depend on the facts of each case. Clearly such conduct would not be serious if it was trivial, or of momentary effect only at the time of the commission or omission by which the conduct was so defined. It must be a departure, in a substantial manner, from the standards which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure.

The teacher displayed a gross failure of professional judgment regarding his responsibilities as a teacher in knowingly bringing offensive pornographic materials to school on his laptop computer, using the school's technology resources to access and download the materials and, in the process, potentially exposing students and staff to these materials. By his own admission his behaviour undermined his own capacity to be an appropriate role model as an educator. To that the Panel adds that the teacher's behaviour undermined the standing of teaching and ran the risk of bringing the status of the profession into disrepute.

In determining to suspend with conditions rather than exact the more serious penalty of cancellation of registration the Panel was mindful of the following:

- the teacher expressed genuine remorse and contrition for his behaviour.

- the teacher's actions showed a cavalier and careless attitude to his responsibilities as a teacher rather than a deliberate attempt to circumvent or undermine those responsibilities.
- the teacher needed to gain a realistic perspective on his behaviour and its consequences in order to be an effective teacher.
- the teacher's competence as a teacher was not in question.
- the teacher had made a genuine effort to understand the degree to which he had transgressed from the principles articulated in the Institute's Code of Ethics and Code of Conduct.



TERRY HAYES, CHAIRPERSON



**per:
JEANETTE BARCLAY, REGISTERED TEACHER**



**per:
POLLY FLANAGAN, REGISTERED TEACHER**