

The University of the State of New York
Education  Department

In the matter of a proceeding held pursuant to 8 NYCRR Part 83, to determine whether

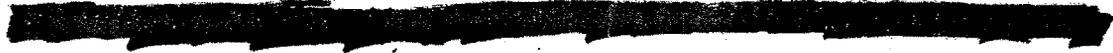
RANDY A. MUDGE

has the requisite good moral character to teach in the public schools of the State of New York

**NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER**

RANDY A. MUDGE, hereinafter referred to as "certificate holder", presently holds the following permanent New York State certificates; as a teacher of Physical Education, effective September 1, 1991; and as a School District Administrator, effective February 1, 2001. Both certificates bear the number 

Information has been received by the New York State Education Department that during the 1988-89 school year, certificate holder engaged in an inappropriate physical, intimate and/or sexual relationship with a female student (Student A) that included offering and/or providing the student an alcoholic beverage, improper communications and giving the student a ride in his car.





Information has been received by the New York State Education Department that during the 1991-92 school year, certificate holder engaged in an inappropriate physical, intimate and/or sexual relationship with a female student (Student C) that included offering and/or providing the student an alcoholic beverage, improper communications and giving the student a ride in his car.

[REDACTED]

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83 and the Plain Language Summary of Hearing and Appeal Procedures, shall be mailed to the certificate holder by certified mail, return receipt requested and the certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificate(s) should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure

of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificate(s).



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 15th day of January, 2006

Richard P. Mills
Commissioner of Education

IN THE MATTER OF THE APPLICATION
OF RANDY MUDGE TO TEACH
IN THE PUBLIC SCHOOLS IN THE STATE OF
NEW YORK

REPORT AND
RECOMMENDATION OF
HEARING PANEL

Appearances: Daniel Harder, Esq.
Office of School Personnel Review and Accountability of the
New York State Education Department

Richard Mott, Esq. for Randy Mudge, *Respondent*
Randy Mudge

Panel Members: Catherine Cifaratta- Brayton
Joseph Colistra
Neil Howard

Hearing Officer: Cynthia E. Preiser, Esq.

PROCEDURAL HISTORY

This proceeding was initiated by the issuance of a Notice of Substantial Question of Moral Character dated December 15, 2006 (Dept. Exhibit 1) which was properly served upon Randy Mudge by certified mail, return receipt requested at his residence in accordance with Part 83 of the Regulations of the Commissioner of Education and further pursuant to the "Notice of Substantial Question of Moral Character" (Dept. Exhibits 2 and 3). Respondent requested a panel hearing be held with respect to this matter (Dept. Exhibit 4).

By Order dated February 14, 2007, the Honorable Richard P. Mills, Commissioner of Education of the State of New York, designated the undersigned to conduct a hearing pursuant to the provisions of Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83) concerning the appropriateness of permitting Randy Mudge to teach in the public schools of the State of New York (H.O. Exhibit 1).

The hearing commenced on September 26, 2007 and continued for seven additional days at the Education Building on Washington Avenue, Albany, New York. Randy Mudge was present and represented by counsel at all proceedings.

The Notice of Substantial Question of Moral Character alleges that Randy Mudge, a holder of New York State Certificates as a Physical Education Teacher and a School District Administrator, engaged in an inappropriate physical, intimate and/ or sexual relationship with two students. The Notice alleged conduct with respect to other students but the Department withdrew those charges.

Both parties called numerous witnesses and introduced a number of exhibits to support their position.

DISCUSSION AND FINDINGS OF FACT

The Department has addressed a number of charges against the Respondent. The purpose of this hearing was to determine if Randy Mudge possesses the requisite moral character obtain certificates to teach in the Public Schools of New York.

The statutory guidelines for the hearing and determination are set forth in Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83). This section provides for a hearing to be held when an individual holding a teaching certificate has committed an act which raises a reasonable question as to the individual's moral character.

In any such hearing, the burden of proof rests solely on the New York State Education Department to prove by a preponderance of the competent evidence that the certificate holder lacks good moral character.

We find that the Department has established that Randy Mudge presently holds permanent New York State Certificates as a teacher of Physical Education and as a School District Administrator.

The Department's charges allege in part, that respondent had inappropriate conduct with two students, C. ██████████ in the spring of 1989 and A. ██████████ in the spring of 1992, while both girls were seniors at the Hunter Tannersville High School at which respondent was a teacher and a coach. The Department further asserted that respondent's interactions with these two students involved grooming so that they would be more likely to inappropriately interact with him both inside and outside the school setting.

Both the Department and the Respondent presented witnesses to testify as to the events that occurred in 1989 and again in 1992, while we found inconsistencies in all of the testimony, the testimony that Randy Mudge had sexual relations with C. ██████████ and A. ██████████ was uncontroverted. Most compelling was that respondent admitted in his testimony to having sexual relations with both of these women but he contends that the conduct occurred in early July, after both women had graduated from high school.

We credit the testimony of C [REDACTED] that the sexual contact she had with respondent took place in June 1989. We further find that the Department has shown that there was grooming involved with respect to both of these young women.

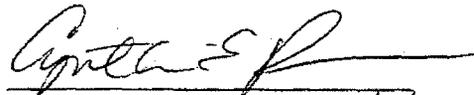
We acknowledge that respondent produced a plethora of witnesses to testify as to his achievements in the Hunter Tannersville School District and the impact that he has had on the student body. We further note that this issue has divided the community and pitted residents against each other. But this cannot erase the fact that respondent had sexual relations with two young women that were still attached to his school district and to date does not show any remorse for his actions or even admit that engaging in sexual relations with students, even recently graduated students, may show a lack of good judgment.

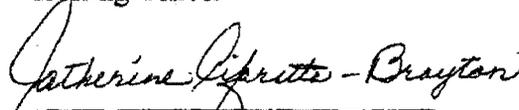
In this case we find that the Department has sustained its burden and proven that the applicant, Randy Mudge, lacks the good moral character to be a teacher in the State of New York.

RECOMMENDATION

After careful consideration and weighing of all of the testimony and exhibits, we find that both of the certificates held by Randy Mudge to teach in the Public Schools of the State of New York should be suspended for a period of one year.

Dated: July 25, 2008


Cynthia E. Preiser 8/4/08
Hearing Officer


Catherine Cifaratta-Brayton
Panel Member


Joseph Colistra
Panel Member

DISSENT

I must respectfully dissent from the majority's decision to suspend Mr. Mudge's New York State teaching certificates for the following reasons:

The NYS Education Department (OSPRA Division) owes the Hunter-Tannersville Central School District community a profound apology for pursuing this mythical 18-year-old case. This issue must be terminated immediately to let the community go on with their lives. We the Hearing Panel are not the moral gatekeepers of this community checking on events that supposedly occurred 18 years ago. It is impossible to know the real truth, yet all may believe they speak the truth. However, time (18 years) is the over-riding factor that blurs much of the testimony presented here.

The OSPRA ex-police investigator appears to have been determined to build a case. Police type interrogation is not what you should expect in these matters. As much as two years after the charges were filed teachers were summoned to the Superintendent's office on Friday afternoons, homes were visited, some without notice, computers were confiscated, cars were stopped on the street, much of it in a frantic last minute effort to bolster a very weak case. And all this supposedly because the Superintendent received an anonymous phone call on a Sunday morning while he was in church, which he " must have accidentally erased." Quite out of character for this meticulous memo writing Superintendent.

The then Superintendent asked OSPRA for advice on June 2, 2006. Neither he nor the Board of Education initiated a complaint. And here we are today trying to sift out the facts? Incidentally, Mr. Mudge was notified about the charges on December 18 of that year. Must have been a nice holiday season for that family.

In determining " good moral character " a report must be developed by the professional conduct officer of the department for a review by the State Professional Standards and Practices Boards or a sub-committee to determine that a substantial question exists. The Hearing Panel was not presented with any of these information- comments, vote or whatever.

The current Superintendent, a former Superintendent, former Board Members, parents, etc., all gave glowing reports about Mr. Mudge. Many, many positive letters were in his personnel file. However, we were asked to believe that a past Board President and member thought less of Mr. Mudge. Yet, in all her 13 years, she did not, according to her testimony, ever bring her concerns to the Board of Education.

Clearly, a substantial question of moral character does not exist about Mr. Midge in the Hunter-Tannersville School District. OSPRA does not realize that in this small community, they are fostering animosity, slashing reputations, digging up old hatreds and slights and bringing serious harm to the community. A tragic example was a young

woman felt she was forced to tell her Father about a spicy story involving her (probably not true) " because all the community will be talking about it".

This case against Mr. Mudge is pitifully weak my doubts are almost too numerous to list. Since the task here is to judge moral fitness, perhaps we can apply the Rotary four way test of the things we think, say or do:

1. Is it the truth ?
2. Is it fair to all concerned ?
3. Will it build goodwill and better friendships ?
4. Will it be beneficial to all concerned ?

Based upon the foregoing, it is my opinion that the Department did not prove its charges against Randy Mudge.


Neil Howard
Panel Member

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificates of RANDY MUDGE to
teach in the public schools of
the State of New York.

Petitioner appeals the findings and recommendations of a hearing panel that he lacks the requisite moral character to teach in the public schools of the State of New York and the imposition of a one year suspension of his certificates. The appeal must be dismissed.

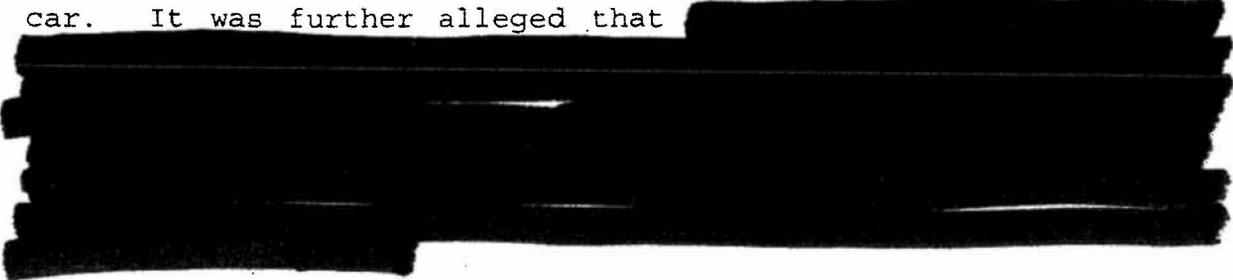
Petitioner holds a permanent certificate as a teacher of Physical Education, effective September 1, 1991. He also holds a permanent certificate as a School District Administrator, effective February 1, 2001. Petitioner has been employed with the Hunter-Tannersville Central School District ("Hunter-Tannersville") since September 1, 1987 as a physical education teacher and coach.

By letter dated June 2, 2006, the then-superintendent of Hunter-Tannersville ("superintendent") submitted a complaint regarding petitioner to the State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") pursuant to Part 83 of the Commissioner's regulations (8 NYCRR Part 83).

In the complaint, the superintendent stated that three incidents prompted him to contact the district's attorney and OSPRA. First, during the beginning of April 2006, he retrieved a voice mail from his office that had been left at 1:00 a.m. on a Sunday alleging that petitioner had had inappropriate conduct with three named females. Subsequently, during the week of May 22, 2006, the district's director of special services mentioned to him that a parent was inquiring about petitioner's previous

behavior with girls at the middle/high school, although petitioner had been assigned to the elementary school since 2002. Finally, on June 1, 2006, after a meeting with petitioner on an unrelated subject, petitioner inquired whether there were any issues pending because he had received telephone calls from parents asking why he had been suspended and was being paid to remain at home, neither of which was true. Following the submission of the complaint, OSPRA commenced an investigation.

On December 15, 2006, I issued a Notice of Substantial Question of Moral Character ("Notice") pursuant to Part 83. The Notice alleged that the Department had received information relating to inappropriate conduct by petitioner with four female students in three different school years. Specifically, it was alleged that during both the 1988-1989 and 1991-1992 school years, petitioner had engaged in an inappropriate physical, intimate and/or sexual relationship with Students A and C, respectively, including improper communications and offering and/or providing each an alcoholic beverage and a ride in his car. It was further alleged that



By letter dated January 8, 2007, petitioner requested a hearing before a hearing officer and a three-member hearing panel. He also requested disclosure of the names of Students A, B, C, and D, and the specific nature of the conduct alleged to have occurred in the respective incidents. By letter dated September 17, 2007, OSPRA's counsel responded and disclosed, among other things, that regarding Student C, the sexual relationship occurred after graduation.

By order dated February 14, 2007, I designated a hearing officer to conduct a hearing on the charges. The hearing was held over eight days on September 26 and November 20, 2007; April 28, May 12, 13, 28 and 30, and July 9, 2008, and resulted in 1,490 pages of testimony. During the course of the hearing, OSPRA withdrew the charges relating to Students B and D.

At the hearing, the Department introduced 22 exhibits and called four witnesses in support of the charges: an OSPRA investigator, Students A and C, and Student C's aunt. The

Department also called four rebuttal witnesses. Petitioner testified on his own behalf, introduced eleven exhibits and called eleven witnesses and five sur-rebuttal witnesses (two of whom had already testified for petitioner).

In a decision dated July 25, 2008 ("Decision"), the panel majority found that petitioner lacks good moral character and recommended that both his teaching and administrative certificates be suspended for one year. One panel member dissented.

On September 8, 2008, petitioner initiated an appeal from the panel majority's findings and recommendations pursuant to §83.5 of the Commissioner's regulations. Petitioner asserts that he was wrongly precluded from cross-examining witnesses and maintains that the hearing officer's evidentiary rulings and the decision violate the State Administrative Procedures Act ("SAPA"). Petitioner requests that I vacate the panel majority's decision as not supported by substantial evidence. Alternatively, he argues that the sanction be reduced to a monetary penalty because in light of the evidence adduced, the penalty imposed is grossly disproportionate. He further proposes the option of remanding the matter to the panel to expand upon the decision in accordance with SAPA.

On October 6, 2008, OSPRA submitted a letter in opposition to petitioner's appeal. OSPRA contends that I should uphold the panel majority's determination that petitioner lacks the moral character to teach because it is supported by the record. OSPRA requests, however, that I modify the penalty imposed and revoke petitioner's certificates.

I will first address petitioner's procedural objections. Petitioner asserts that his right to cross examine Student A about

[REDACTED] was unduly restricted by the hearing officer's rulings in violation of SAPA §306(3).¹ The record shows that petitioner's counsel was given wide latitude in questioning the witness, was able to avail himself of numerous sidebars with the hearing officer to argue his position, and was able to elicit much of the witness's history [REDACTED]

[REDACTED] Counsel was also able to fully question the witness about whom she allegedly told about the incident,

¹ SAPA §306(3) provides: "A party shall have the right of cross-examination."

and when she allegedly told them. Counsel voluntarily declined to pursue questioning Student A about [REDACTED]

[REDACTED] I find that the record demonstrates that petitioner's right to cross examination, and consequently his right to due process, was not unduly restricted or denied and there is no cause for reversal on this point.

Petitioner also asserts that the hearing officer's evidentiary rulings violated SAPA §306(1)² and resulted in the admission of irrelevant evidence. Specifically, petitioner objects to the testimony of OSPRA's investigator regarding his investigation and of two Department rebuttal witnesses. He also claims that the panel was prejudiced by exposure to the Notice, which originally contained charges concerning two other students; that the investigator used the term "pedophile"; and that a rebuttal witness referred to petitioner as a "predator."

I find no merit to petitioner's claims. First, I find no prejudice to petitioner by virtue of having the original Notice as part of the record. Indeed, it could be argued that petitioner benefited by the eventual diminution of charges. Regarding the investigator, petitioner claims that certain parts of his testimony were prejudicial. The investigator testified that in the spring of 2006, he was in Hunter-Tannersville conducting an unrelated investigation when the superintendent approached him about the April voice mail he had received concerning petitioner. The investigator advised the superintendent to file a Part 83 complaint. Once the complaint was made, the investigator conducted an investigation. He interviewed two of the three females named on the voice mail: one was never located, one denied the information, and the third was Student C. He interviewed Student C, who admitted having sexual intercourse with petitioner in his car after a Mets baseball game. In the course of his investigation, the name of Student A arose and he interviewed her as well. I find no prejudice to petitioner or a violation of SAPA; petitioner had ample opportunity to cross examine the investigator, both students, and later, the superintendent who approached the investigator about the voice mail. Moreover, petitioner's objection to the investigator's use of the word "pedophile" was sustained at the time. Similarly, to the extent a rebuttal witness referred to petitioner as "a predator," petitioner's objection was sustained at the time and that word was stricken.

² SAPA §306(1) provides in pertinent part: "Irrelevant . . . evidence or cross examination may be excluded."

The hearing officer similarly disallowed certain testimony of OSPRA rebuttal witness Gail Hummel ("Hummel"), a former Hunter-Tannersville board member, cheerleader advisor and employee, where Hummel would not identify the sources of her information about petitioner. With respect to the testimony of OSPRA rebuttal witness Ralph Marino ("Marino"), the former superintendent who submitted the Part 83 complaint, I find no issue with the hearing officer's rulings. In each case, petitioner was given ample opportunity to cross examine the witnesses. Moreover, hearsay evidence is admissible in administrative hearings and hearsay alone may constitute competent and substantial evidence (see Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Educ., et al., 91 NY2d 133; Gray v. Adduci, 73 NY2d 741; Appeal of a Student with a Disability, 45 Ed Dept Rep 396, Decision No. 15,364).

Petitioner maintains that the decision is not supported by the evidence and thus violates SAPA §§306(1) and 307(1).³ Part 83 specifically indicates that the Department carries the burden of proof to establish the certificate holder's lack of good moral character (8 NYCRR §83.4[c]). Upon my review of the testimony and evidence, and as discussed more fully below, I agree with the panel majority's decision that the Department met its burden of proving that petitioner lacks good moral character. The evidence is uncontroverted, indeed, petitioner admitted, that he had sexual intercourse with two 18-year-old females whom he had taught and coached, behavior for which he demonstrated little or no remorse. There are nonetheless two important issues to consider: did the incidents take place before or after graduation, and did petitioner groom the girls for the eventual sexual encounters while they were students.

Regarding Student C, there is no dispute that petitioner had intercourse with her within weeks after graduation.⁴ Student C testified that in the spring of 1992, her senior year, she attended two Mets games with petitioner. The first was a weekend game during the school year with her then-boyfriend,

³ SAPA §306(1) provides in pertinent part: "No decision, determination or order shall be made except upon consideration of the record as a whole . . . as supported by and in accordance with substantial evidence."

SAPA §307(1) provides in pertinent part: "A final decision, determination or order . . . shall include findings of fact and conclusions of law or reasons for the decision, determination or order."

⁴ In its September 17, 2007 letter, counsel for OSPRA disclosed this fact, even though the December 15, 2006 Notice did not so state, and the Notice and Charges were amended at the hearing.

petitioner, and petitioner's friend. The second was attended by just petitioner and herself. She testified that prior to the second game, petitioner offered her a wine cooler, which she declined. After leaving the game early, petitioner drove to a secluded area and they eventually engaged in sexual intercourse in his car. Student C testified that the second Mets game and sexual intercourse occurred in July after graduation, and she had turned 18 on June 23.

However, regarding Student A, there is a dispute as to the date of the sexual encounter with petitioner. With respect to findings of fact in matters involving the credibility of witnesses, I will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the determination of credibility is inconsistent with the facts (Appeal of L.Z., 46 Ed Dept Rep 518, Decision No. 15,581; Appeal of L.F. and J.F., 46 id. 414, Decision No. 15,550; Appeal of P.D., 46 id. 50, Decision No. 14,438).

While the panel acknowledged inconsistencies in all of the testimony, it credited, without discussion, Student A's testimony that the sexual contact with respondent took place in June 1989. Student A testified that in the spring of 1989, her senior year, she was a statistician for the school baseball team, which petitioner coached, and she attended two Mets games with him. The first was in April, which she attended with her friend, ██████ S█████ ("S█████"), petitioner and his friend. S█████'s car broke down on the Tappan Zee Bridge on the way back from the game, so they disembarked to petitioner's vehicle. Student A testified that, while in the vehicle, she and S█████ drank wine coolers that had come from either petitioner or his friend. S█████ also testified that that they consumed alcohol in petitioner's car after her car broke down, but she did not know where the alcohol came from.

Student A further testified that she attended the second Mets game with petitioner and two male students, sitting in the same seats as the first game. After the game, petitioner dropped off the two males, then drove to a secluded back road where she and petitioner eventually had sexual intercourse in his car. She testified that the second game occurred before graduation because she remembered petitioner telling her she could never tell anyone what happened, even if she went to college, and he could lose his teaching certificate. She said she did not return to visit the high school often after graduation, so the conversation must have been before graduation. She also recalled telling a former boyfriend about

the incident before graduation; telling two high school girlfriends, although the record is unclear whether they were told before graduation; and telling a college friend. On cross examination, she stated that she had told several other individuals about the incident, later in life.

The panel majority, however, neglected to discuss any contrary testimony regarding the timing of the second Mets game. Petitioner's first witness, James Yaeger ("Yaeger"), testified that he attended only one professional baseball game in his life, and it was in July 1989 after graduation, and he attended with Student A, petitioner and another student. He remembered specifically because the game was against the Cincinnati Reds, Dwight Gooden was supposed to pitch but did not, he almost caught a foul ball but it was caught by the person in the seat in front of him, and they gave away a pack of baseball cards, which were moved into evidence. A Mets schedule was also introduced, which showed a Mets-Cincinnati game on July 6, 1989.

Petitioner's introduction of Mets memorabilia, including copies of two Mets tickets from a June 4, 1989 game showing the same seat location as the July 6, 1989 game, appears to confirm Yaeger's testimony. While I generally defer to the panel on matters of credibility, I find that Yaeger's testimony, and the accompanying exhibits, constitute clear and convincing evidence that the panel majority's credibility findings with respect to the date of Student A's encounter are inconsistent with the facts. My conclusion is based solely on Student A's testimony and those exhibits; it is not influenced by petitioner's attempts to sully her abilities to recount or recall events based on other factors that petitioner's counsel attempted to elicit regarding [REDACTED]

With regard to grooming, the panel majority merely states that the Department had shown that there was grooming involved with respect to both Students A and C. Although the decision does not state the basis for this finding with respect to either student, upon my review of the testimony and evidence as a whole, I find that the hearing record supports the panel majority's conclusion.

Grooming typically involves a pattern of behavior over time rather than a single act or incident. In this case, the record reveals that petitioner exploited his position as a teacher, athletic director and coach, cultivating personal relationships with both students by inviting them to coveted activities such as professional sporting events and transporting them in his

personal vehicle. Petitioner invited both students to baseball games prior to graduation, so that this activity could easily continue after graduation.⁵ In addition, Student C and petitioner both testified about an incident where petitioner placed his hand on her bare knee while she was seated on a chair and they were alone in his office. It was undisputed that Student C was still a student when this occurred. This physical act during school is further evidence that petitioner was cultivating a relationship with this young woman.⁶

Despite what petitioner refers to as the "unassailable testimony" of his many character witnesses, and what the dissent recognized as the "glowing reports" by such witnesses and the many positive letters in his personnel file, I agree with the panel majority that petitioner does not recognize that engaging in sexual relations with students within weeks of graduation was inappropriate and to date has not shown any remorse or feel that he did anything wrong. Moreover, I do not find petitioner's character "unassailable." The hearing record reveals that not all character references were positive. Although petitioner had portions of their testimony stricken, as discussed above, Hummel and Marino did express some negative opinions about petitioner's character, as did another rebuttal witness.

At the time of the sexual encounter with Student A in 1989, petitioner was 28 and she was 18. At the time of the encounter with Student C in 1992, petitioner was 31 and she was 18. Not only was petitioner their teacher and coach while they attended school, he was the athletic director, whose duties continued after graduation. The teacher/coach-student relationship is one

⁵I find that the record is inconsistent regarding the use of alcohol as a grooming tool. Student A and S [redacted] both testified that they drank alcohol in the back of petitioner's vehicle after S [redacted]'s car broke down on the Tappan Zee Bridge returning from the first Mets game in April 1989. However, petitioner and his two witnesses who also attended that game denied that there was any alcohol in the car. In addition, petitioner and one of those witnesses state that they stopped at a Thruway rest stop, which does not sell alcohol. Student C testified that petitioner offered her a wine cooler before they attended their second Mets game in July 1992, the game after which they had intercourse. Petitioner, however, admitted drinking a mini beer, but denied offering one to Student C. While offering alcohol to underage students is clearly illegal and inappropriate, I do not find clear and convincing evidence that alcohol was used by petitioner as a grooming tool.

⁶Student A also testified that on one occasion, petitioner kissed her on the lips while in his school office. While inappropriate, since this kiss occurred after the sexual encounter, it would not constitute grooming.

in which an adult exercises supervisory control over children. Petitioner abused this role by developing personal relationships with Students A and C, which culminated in sexual relationships only a few weeks after graduation. Inherent in petitioner's conduct is a violation of trust that lies at the very core of the teacher/coach-student relationship. Moreover, the spigot of trust does not shut off the day following graduation. Petitioner took advantage of that trust and his actions were unacceptable and incompatible with his duties and responsibilities as a teacher and coach. The mere passage of time does not lessen petitioner's culpability. Nor, in this case, has it increased petitioner's awareness or acceptance of the impropriety of his actions.

Pursuant to §83.5(c) of the Commissioner's regulations, the Commissioner may affirm and adopt, reverse or modify the findings and recommendations of a hearing panel. As set forth above, I find that the record establishes that petitioner's sexual encounter with Student A took place after graduation and the panel majority's findings are modified accordingly. However, I agree with the panel majority's findings that petitioner engaged in an improper relationship with Students A and C and had groomed them for a physical relationship while he was their teacher/coach. Accordingly, based on the totality of the record before me, I find that the Department carried its burden of proving that petitioner lacks the requisite moral character to teach in the public schools of the State of New York. In light of these findings, I affirm the recommendation of the panel majority to suspend petitioner's teaching and administrative certificates for one year.

THE APPEAL IS DISMISSED.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 18th day of May, 2009.

Richard P. Mills
Commissioner of Education

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 16, 2010

509517

In the Matter of RANDY MUDGE,
Petitioner,

v

MEMORANDUM AND JUDGMENT

CAROLE F. HUXLEY, as Interim
Commissioner of Education
of the State of New York,
Respondent.

Calendar Date: October 14, 2010

Before: Mercure, J.P., Peters, Rose, Malone Jr. and
Egan Jr., JJ.

Richard L. Mott, Albany, for petitioner.

Andrew M. Cuomo, Attorney General, Albany (Zainab A.
Chaudhry of counsel), for respondent.

Rose, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which suspended petitioner's teaching and school administrator certifications for one year.

Petitioner, who was certified as a teacher and school administrator, requested a hearing in response to a notice from respondent that a substantial question existed as to his moral character. When the hearing panel determined that petitioner lacked the good moral character necessary to be a teacher in this state and recommended suspension of his certificates for one year, petitioner appealed to respondent, who modified the

findings of the panel but affirmed the recommended penalty. Petitioner then commenced this CPLR article 78 proceeding challenging respondent's determination, and Supreme Court transferred it to this Court pursuant to CPLR 7804 (g).

Our review of a determination rendered by respondent in this context is limited to whether it is arbitrary and capricious, irrational, affected by an error of law or an abuse of discretion (see Matter of Pearlman v Mills, 24 AD3d 837, 837-838 [2005]; Matter of Donlon v Mills, 260 AD2d 971, 972 [1999], lv denied 94 NY2d 752 [1999]; Matter of Groht v Sobol, 198 AD2d 679, 681-682 [1993], lv dismissed and denied 83 NY2d 961 [1994]; Matter of Cargill v Sobol, 165 AD2d 131, 133 [1991], lv denied 78 NY2d 854 [1991]; but see Matter of Moro v Mills, 70 AD3d 1269, 1270 [2010]; Matter of Welcher v Sobol, 227 AD2d 770, 772 [1996]). Although transfer was improper because the appropriate standard of review is not whether the determination is supported by substantial evidence, we will nevertheless retain the proceeding and resolve the issues in the interest of judicial economy (see Matter of Stedronsky v Sobol, 175 AD2d 373, 374 n [1991], lv denied 78 NY2d 864 [1991]).

Here, petitioner admitted that, in July 1989, when he was 28 years old and a high school physical education teacher, coach and athletic director, he had sexual intercourse with an 18-year-old former student in his vehicle after taking her to a New York Mets baseball game shortly after graduation. He also admitted that, in July 1992, then 31 years old and still employed in the same capacity, he had sexual intercourse with another 18-year-old former student in his vehicle after taking her to a Mets game shortly after graduation. Petitioner taught both girls during high school, coached them as members of the high school girls' soccer team, coached high school boys' teams for which both girls served as statisticians and, prior to graduation in the spring of these girls' respective senior years, attended Mets games with each of them. Based upon this pattern of behavior in affording the girls preferential treatment while they were students, including the pre-graduation trips to Mets games, respondent concluded that petitioner had groomed them for a sexual relationship while they were students and then, shortly after they graduated, exploited the relationships that he had

cultivated.

Petitioner's primary contention is that respondent's conclusion regarding grooming of the students prior to graduation is irrational. He argues that he did not invite the students to the pre-graduation Mets games, each of the various factors considered by respondent is innocent by itself, and his character is unassailable. We cannot agree. Given the evidence of petitioner's pattern of behavior with both girls, respondent's determination that petitioner was engaged in grooming and that he lacks the requisite moral character to be a teacher in this state is supported by a rational basis (see Matter of Groht v Sobol, 198 AD2d at 681-682; Matter of Stedronsky v Sobol, 175 AD2d at 374-375). To the extent that petitioner disputes the findings that he invited the girls to the games, we find no reason to disturb respondent's resolution of conflicts in the testimony (see Matter of Land v Commissioner of Educ. of State of N.Y., 174 AD2d 927, 929 [1991]). Further, petitioner's claim that his character is unassailable fails in light of the hearing testimony impugning his reputation for integrity.

We have considered petitioner's remaining contentions concerning the rulings of the Hearing Officer and the penalty imposed, and we find them to be similarly without merit.

Mercure, J.P., Peters, Malone Jr. and Egan Jr., JJ.,
concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:



Robert D. Mayberger
Clerk of the Court

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificate of JAMES F. MURRAY
to teach in the public schools
of the State of New York.

Petitioner appeals the findings and recommendations of a hearing panel that he lacks the requisite moral character to teach in the public schools of the State of New York and that his certificate be revoked. The appeal must be dismissed.

Petitioner holds a permanent certificate as a teacher of Social Studies 7-12, effective September 1, 2004. Petitioner has been employed with the Adirondack Central School District ("Adirondack") since 1999. He also coached varsity soccer and junior varsity baseball.

By letter dated July 2007, Adirondack's superintendent submitted a complaint regarding petitioner to the State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") pursuant to Part 83 of the Commissioner's regulations (8 NYCRR Part 83).

In the complaint the superintendent stated that the district had received information that petitioner might be involved in an inappropriate relationship with a student in the district who had just graduated. The superintendent indicated that he had interviewed several staff and other individuals and obtained information suggesting there may be substance to the allegations.

On November 14, 2007, a Notice of Substantial Question of Moral Character ("Notice") was issued pursuant to Part 83. The Notice set forth two charges. The first charge alleged that, from approximately 1999 through 2000, petitioner engaged in

inappropriate behavior with a minor female student (Student A) that included improper physical, intimate or sexual contact; improper communications and/or correspondence.

The second charge alleged that, from approximately 2005 to the present, petitioner engaged in inappropriate behavior with a minor female student (Student B) that included improper physical, intimate and/or sexual contact; improper communications and/or correspondence; providing gifts and rides to the student; providing the student with a credit card and/or allowing the student to use his credit card; and allowing the student into his home. It was alleged that the inappropriate behavior continued from the student's junior through senior years in high school and beyond.

Petitioner requested a hearing before a three-member hearing panel. The hearing was held over nine days and resulted in 2,814 pages of testimony. Petitioner was represented by counsel.

At the hearing, the Department introduced more than 90 exhibits and called 20 witnesses in support of the charges, including an OSPRA investigator. Petitioner testified on his own behalf, introduced 13 exhibits and called six witnesses.

In a unanimous decision dated June 10, 2009, ("Decision"), the panel dismissed the first charge but found that the Department had proved the second charge. The panel found that petitioner lacks good moral character and recommended that his teaching certificate be revoked.

On July 8, 2009, petitioner appealed the Decision pursuant to §83.5 of the Commissioner's regulations. Petitioner asserts that the panel's findings and recommendation with respect to charge two should be overturned. In addition to his arguments raised at the hearing, petitioner specifically claims that the panel's findings were inconsistent with the charge and also that, the panel failed to sufficiently account for petitioner's close personal relationship with the student's family.

On August 4, 2009, OSPRA submitted a letter in opposition to petitioner's appeal. OSPRA challenges the panel's dismissal of charge one and also asserts that I should uphold the panel's determination that petitioner lacks the moral character to teach.

With respect to charge one, I agree that dismissal is warranted. During the relevant time period, 1999-2000,

petitioner was a college student at the State University of New York at Potsdam and was student teaching as part of his course work. In April 1999, while in college, he began dating E.F., a senior at Morristown High School, located in a different school district than his student teaching assignment. The relationship lasted several years, during which E.F. graduated and attended Albany College of Pharmacy. Petitioner never was in a student-teacher relationship with E.F., nor did she even attend the school in which he was practice teaching. As the panel correctly noted, the relationship began when petitioner was in college and had not yet been issued any teaching certificate. Upon considering all these factors, I find the panel properly dismissed this charge.

The second charge relates to petitioner's relationship with D.W.¹, a student at Adirondack High School where petitioner was employed, and differed significantly from his college romance with E.F. Petitioner was employed as a social studies teacher at Adirondack High School when he first met D.W., then a freshman at the high school, in the fall of 2003. Commencing at least after her sophomore year, in the summer of 2005, and continuing through the summer of 2007 after D.W. graduated, petitioner engaged in conduct with the student that the panel found to be inappropriate and evidence of petitioner's lack of moral character. Upon review of the record, I concur with the panel's findings.

In this case, the determination of whether petitioner engaged in inappropriate behavior with D.W. largely turns on witness credibility. The panel heard testimony and observed the demeanor of 26 witnesses. Most of the conduct specifications are not disputed. However, the explanation and rationale for the behaviors differ significantly among witnesses. With respect to findings of fact in matters involving the credibility of witnesses, I will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the determination of credibility is inconsistent with the facts (Matter of Shurgin v. Ambach, 56 NY2d 700; Appeal of L.Z., 46 Ed Dept Rep 518, Decision No. 15,581; Appeal of L.F. and J.F., 46 id. 414, Decision No. 15,550). The panel's credibility findings, on which its determination and recommendation are based, are adequately explained, consistent with the facts, and supported by the evidence.

Petitioner maintains that his relationship with D.W. was appropriate at all times. He claims that the panel did not sufficiently take into account the full context of the

¹ Referenced as "Student B" in charge two.

relationship between him and D.W. in light of the closeness of he and his wife to D.W.'s family. The panel rejected his explanation that he is related to D.W.'s family and they are very close, noting that the family connection was too extenuated to provide a reasonable explanation: D.W.'s father's step-brother was married to petitioner's wife's cousin. Indeed, D.W.'s mother testified that her family got to know petitioner and his wife through school connections and only later realized that they had "family kind of - in common." Petitioner's claimed closeness with D.W.'s family to explain his conduct is belied by the record evidence of his failure to let D.W.'s parents know about her possession and use of his credit card, his purchase of a cell phone for her - that included texting despite their wishes, and referring to himself as "Mr. Murray" in a communication with D.W. Nor did petitioner ever discuss with D.W.'s parents rumors circulating about him and D.W. Petitioner testified that it was because of the closeness to D.W.'s family that he did not think it necessary to mention the cell phone and credit card, but the panel did not accept that explanation as reasonable. I concur with the panel's conclusion.

The panel's decision sets forth an exhaustive analysis of the extensive record in support of its findings and recommendation. It explains at length the reasons for either crediting or discrediting the various witnesses' testimony, including the panel's observation of the demeanor of the witnesses. Upon review of the extensive records, exhibits and comprehensive panel decision, I conclude the panel's findings in charge two are amply supported in the record. The Department proved that petitioner cultivated an improper relationship with D.W. that crossed appropriate boundaries between a teacher and student.

I also agree with the panel that petitioner does not recognize that his conduct was inappropriate. When testifying, petitioner addressed the panel regarding his moral character. He never acknowledged that his conduct with D.W., a high school student in the school in which he taught, was inappropriate in any way. He consistently excused his behavior based on his assertions of closeness with D.W.'s family, and denied any impropriety in purchasing a cell phone for the student or in making late night or early morning calls to her. Petitioner stated that he believed he was making sound decisions during a turbulent time in his life.

With respect to charge two, petitioner also contends that the panel's findings are inconsistent with and exceed the

charge. Charge two alleges that petitioner "engaged in inappropriate behavior with a minor female student (D.W.)". The specifications underlying the charge include: 1) improper physical, intimate and/or sexual contact; 2) improper communications and/or correspondence; 3) providing gifts to the student; 4) providing rides to the student; 5) providing student with a credit card and/or allowing the student to use his credit card; and 6) allowing the student into his home.

Petitioner asserts that, although the panel found there was no evidence in the record of sexual intimacy between him and D.W., the panel found that petitioner "had an inappropriate romantic relationship with D.W. while she attended Adirondack High School" and throughout the summer that she graduated. Petitioner contends that this finding impermissibly goes beyond the scope of the charges. He argues that, since he was not charged with having a romantic relationship with D.W., such a finding may not form the basis of any penalty. Petitioner asserts that, therefore, the panel "impermissibly penalized him for something not specifically alleged in the charges."

Petitioner's contention is without merit. Although the panel found no evidence of physical, sexual or intimate contact between petitioner and D.W., all five of the other specifications are established in the record and support a determination that petitioner engaged in an inappropriate relationship with D.W. Moreover, despite characterizing the relationship as "romantic" in one paragraph of its decision, the panel elsewhere states, "There is no question that (petitioner) had an inappropriate relationship with a female student which crossed the boundaries of professional interaction between a teacher and student" (emphasis supplied). The panel also states its final conclusion thusly, "the Department ... has proven ... that [petitioner] used his position as a teacher to cultivate an improper relationship with a minor female which crossed appropriate social boundaries between a teacher and a student ..." (emphasis supplied). The charge placed petitioner fully on notice that he was being charged with having an inappropriate relationship with a student. I do not find the panel determination to be inconsistent with the charge.

Moreover, I do not find the panel's characterization of the relationship as "romantic" at one point to exceed the scope of the charge. The charge of inappropriate behavior with a student is focused on the nature of petitioner's conduct with D.W. and reasonably encompasses a non-platonic relationship. The record indicates petitioner had adequate notice and opportunity to address the nature of his conduct with D.W. throughout the

proceedings. Indeed, petitioner introduced testimony from a licensed clinical social worker regarding predatory grooming behaviors, demonstrating petitioner's understanding of the conduct charged. Petitioner's claim in this regard has no merit.

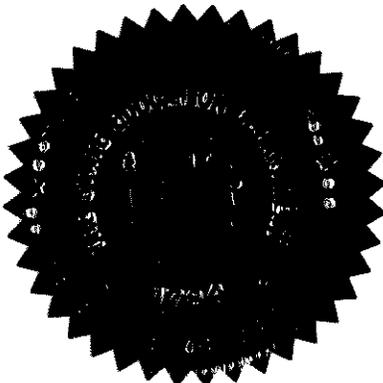
Pursuant to §83.5(c) of the Commissioner's regulations, the Commissioner may affirm and adopt, reverse or modify the findings and recommendations of the hearing panel. As set forth above, I find that petitioner engaged in inappropriate behavior with a minor student. The teacher-student relationship is one in which an adult exercises supervisory control over children. Inherent in petitioner's conduct is an abuse of trust that lies at the very core of the teacher-student relationship. Petitioner's actions were wholly unacceptable and incompatible with his duties and responsibilities as a teacher. His action also constitutes a breach of his duty to be a role model for students (Ambach v. Norwich, 441 US 68).

Based on the record before me, I find that petitioner does not have the requisite moral character to teach in New York State. Therefore, I affirm the recommendations of the hearing officer that petitioner's certification must be revoked.

IT IS ORDERED that the certificate of James F. Murray be and hereby is immediately revoked; and

IT IS FURTHER ORDERED that petitioner shall forthwith return to the State Education Department any copies of such certificate in petitioner's possession.

IN WITNESS WHEREOF, I, David M. Steiner, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 30 day of June 2010.



A handwritten signature in dark ink, appearing to read "D. Steiner", is written over a horizontal line.

Commissioner of Education

The University of the State of New York
Education  Department

In the matter of a proceeding held
pursuant to 8 NYCRR Part 83, to
determine whether

JAMES F. MURRAY

has the requisite good moral character
to teach in the public schools of the
State of New York

**NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER**

JAMES F. MURRAY, hereinafter referred to as “certificate holder”, presently holds a permanent New York State certificate, issued by the New York State Education Department (herein “Education Department”), as a teacher of Social Studies 7-12, effective September 1, 2004 and bearing the control number 550225041.

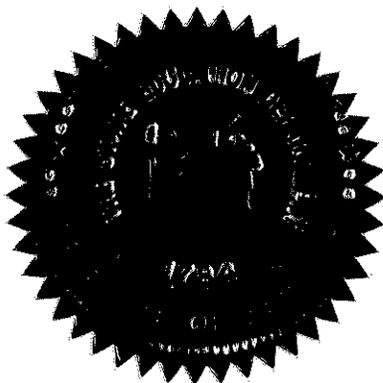
Information has been received by the New York State Education Department that from approximately 1999 through 2000, certificate holder engaged in inappropriate behavior with a minor female student (**Student A**) that included improper physical, intimate and/or sexual contact; improper communications and/or correspondence. The name of the victim and the nature of the conduct are known to the Department and will be provided upon request.

Information has been received by the New York State Education Department that from approximately 2005 to the present, certificate holder engaged in inappropriate behavior with a minor female student (**Student B**) that included improper physical, intimate and/or sexual contact;

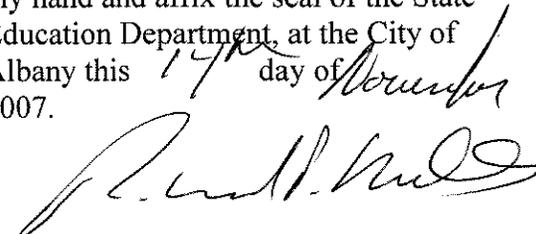
improper communications and/or correspondence; providing gifts and rides to the student; providing student with a credit card and/or allowing the student to use his credit card; and allowing the student into his home. The inappropriate behavior continued from the student's junior through senior years of high school and beyond. The name of the victim and the nature of the conduct are known to the Department and will be provided upon request.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83 and the Plain Language Summary of Hearing and Appeal Procedures, shall be mailed to the certificate holder by certified mail, return receipt requested and the certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificate(s) should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificate(s).



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 17th day of November 2007.


Commissioner of Education

THE UNIVERSITY OF THE STATE OF NEW YORK
EDUCATION DEPARTMENT

*IN THE MATTER OF A CERTIFICATE
HELD BY JAMES F. MURRAY
TO TEACH IN THE PUBLIC SCHOOLS
IN THE STATE OF NEW YORK
PURSUANT TO PART 83 OF THE
REGULATIONS OF THE COMMISSIONER
OF EDUCATION*

**RECOMMENDATION
OF THE PANEL**

Hearing Officer: **Diane J. Exoo, Esq.**

Hearing Panel: **Donald Averill
Paul Manchester
Robert Meldrum**

Appearances:

New York State Education Department
Office of School Personnel Review and Accountability
89 Washington Avenue
Albany, New York 12234
BY: **Daniel C. Harder, Esq.**

New York State United Teachers
800 Troy-Schenectady Road
Latham, New York 12110-2455
BY: **Kevin Harren, Esq.**, appearing
of counsel for James R. Sandner, Esq.
on behalf of Respondent James F. Murray

PROCEDURAL HISTORY

On November 14, 2007, Commissioner of Education Richard Mills issued a Notice of Substantial Question as to Moral Character in the above-entitled matter (Department's Exhibit 1), which was subsequently served on Respondent by certified mail, return receipt requested on

or about November 15, 2007 (Department's Exhibit 2). Respondent received the Notice of Substantial Question as to Moral Character on November 23, 2007 (Department's Exhibit 2), and subsequently requested a hearing before a hearing officer and three member panel within thirty days of the receipt of the document pursuant to 8 NYCRR 83, subd. 83.4 (a). (Department's Exhibit 3).

Commissioner Mills issued an Order designating a Hearing Officer and Setting Venue on March 25, 2008, directing that such hearing take place in the County of Oneida, State of New York. (Hearing Officer's Exhibit 1) Hearings were held in this matter on July 24 and 25, September 4, October 1 and 2, November 5, 6, and 7, and December 3, 2008, at 200 East Genesee Street, Utica, New York. By letter dated June 16, 2008, Respondent's counsel, Kevin Harren, Esq., was given the required fifteen-day notice of the hearing pursuant to part 83.4. (Transcript: p. 11).

FINDINGS OF FACT

The Department presented testimony from twenty witnesses and entered exhibits, and the Respondent offered testimony from six witnesses and also entered exhibits. Having carefully reviewed the entire record, including the testimony of all the witnesses and the exhibits submitted by both parties, the panel members make the following findings of fact:

1. James F. Murray holds a permanent New York State Teaching Certificate as a teacher of Social Studies, 7-12, issued 9/1/2004 (Department's Exhibit 4).
2. His Date of Birth is 9/16/1974.
3. He is currently employed as a Social Studies teacher with the Adirondack Central School District.

3. Adirondack Central School District placed James Murray on administrative leave on August 15, 2007, pending an investigation. (Department's Exhibit 35).

The Notice of Substantial Question of Moral Character contains two charges:

1. **CHARGE ONE**-The certificate holder, James F. Murray, from approximately 1999 through 2000, engaged in inappropriate behavior with a minor female student (Student A) that included improper physical, intimate, and/or sexual contact; improper communications and/or correspondence.

DISCUSSION

During the spring semester of 1999, James Murray was a college student at SUNY Potsdam and was student teaching in the Gouverneur and Hammond School Districts. On or about April of 1999, he became romantically involved with a high school senior, Er.Fi., (Student A) who attended Morristown High School, in Morristown, New York, which is located approximately ten miles from the Hammond School District. (Transcript p. 104, 109) The relationship continued after Er.Fi. graduated in June of 1999 until the end of Er.Fi.'s junior year in college, the spring of 2002. (Transcript 121). The panel is dismissing this charge because this relationship began while Respondent was still a college student and had not yet been issued a certificate to teach. Respondent's provisional certificate was issued on 9/1/99 (Department's Exhibit 4). Although Er.Fi. was a high school senior at the time she started dating James Murray, she did not attend the school district where he was student teaching, and she had never had a student/teacher relationship with Respondent. At the time he did receive his provisional teaching certificate in September of 1999, Er.Fi. was already a freshman in college at Albany Pharmacy College.

PANEL FINDING ON CHARGE ONE: DISMISSAL

2. **CHARGE TWO-** The certificate holder, James F. Murray, from approximately 2005 through the present, engaged in inappropriate behavior with a minor female student (Student B) that included improper physical, intimate, and/or sexual contact; improper communications and/or correspondence: providing gifts and rides to the student; providing student with a credit card and/or allowing the student to use his credit card; and allowing the student into his home.

DISCUSSION

The Respondent's relationship with Dn.Wt. (Student B) differs significantly from his college romance with Er.Fi. Mr. Murray was employed as a Social Studies teacher at Adirondack Central High School when he first met Dn.Wt. in the fall of 2003, who was then a freshman at the same high school. (Tr: 2217).

Both Mr. Murray and Dn.Wt. deny any sexual intimacy, and there is no evidence in the record to contradict this testimony; however, there is a great deal of evidence in the record to support the finding that Mr. Murray had an inappropriate romantic relationship with Dn.Wt. while she attended Adirondack High School, which continued throughout the summer of '07 after Dn.Wt. graduated.

A high school student, Nc. Ae., testified at the hearing and her sworn statement was entered as Department's Exhibit 23B. In her sworn statement she stated that in the summer of 2005, which was the summer before her junior year, Dn.Wt. called her and asked her if she wanted to go swimming. She accepted and when she arrived at Dn.Wt.'s house, James Murray was there and took the two girls, who were students at Adirondack Central High School at the time, swimming at Lyon's Falls. (Department's Exhibit 23B, Tr: 2271-2). After swimming they stopped by Mr. Murray's apartment where Nc.Ae. changed her clothes. (Department's Exhibit 23B). The girls wanted to see a movie in Rome, NY, and planned to meet some boys at

the movie. (Department's Exhibit 23B). According to Nc.Ae., Mr. Murray lied to Dn.Wt.'s parents and said he would drive Nc.Ae. and Dn.Wt. to meet Nc.Ae.'s father in Rome, NY, but dropped the girls off at a movie theatre first and waited for them until the movie was over. Nc.Ae.'s father picked her up, and Mr. Murray drove home alone with Dn.Wt. (Department's Exhibit 23B). Mr. Murray's testimony confirms that he took the students swimming and then to Rome, New York, to see a movie and drop off Nc.Ae. so that she could meet her father; however, he maintains that this was done with the permission of Dn.Wt.'s mother. (Tr: 2269-2270).

In December of 2005, two classmates of Dn.Wt.'s at Adirondack Central High School discovered a romantic e-mail from Mr. Murray to Dn.Wt. on her e-mail account. Nc. Ae. testified that on or about December of 2005, she overheard Mr. Murray asking Dn.Wt. if she had checked her e-mail account. (Tr: 324). Nc. knew Dn.Wt.'s e-mail account password, so she and Bt. Jo., another student, went on a school computer after school and accessed Dn.Wt.'s e-mail account. (Tr: 328) Bt. Jo. confirmed that Nc knew Dn.'s e-mail account password (Tr:645). Dn.Wt. confirmed that her password was not confidential. (Tr: 763-64, 1031) Nc. and Bt. read several e-mails from Mr. Murray to Dn.Wt., and then copied the body of one of the e-mails and saved it as a word document. (Tr: 338-9) Nc. did not want to forward the e-mail to her own e-mail address from Dn. Wt.'s account, because she thought Dn. Wt. would find out that she read the e-mail. (Department's Exhibit 23C). Nc. and Bt. wondered if they should do something about their discovery and decided to print it out and anonymously place a copy of the e-mail in Mr. Murray's school mail box in the main office, (Tr: 341). Subsequently, Nc. copied the e-mail to her own AOL account and sent the e-mail to herself and her mother's e-mail address. (Department's Exhibit 25 and 25A). The e-mail is as follows:

██████████

There are so many things I want to say to you, but I dont know if they are appropriate or if they matter anymore. The thought of you being with a boy here in school, for me to watch, is really bothering me---sorry. There is so much I have not done for you---in all ways...

Last night was the longest night in some time. I couldnt eat, sleep, think...obviously I could cry...lol

I will miss you, especially if things have to change...I just wanted to share some things with you so badly and I thought we were progressing. I can not believe I love you like this...I know that is why it hurts so much. This is now twice in my life I found myself so attracted to and a heart full of love for a woman, and unable to do anything about it.

I apologize if I have ever put in a situation you weren't comfortable with or I have said things to offend you. Hope you know I would never do anything to hurt you.

I could go on forever...I am not ready to leave us---this situation... "big sigh" ...

Love Frannie

PS I hope you still think about the offer...lol

Department's Exhibits 25 and 25A are copies of the same e-mail, which the students testified was originally from Dn. Wt.'s e-mail account. During Dn.Wt.'s initial interview with Investigator Regina Larkin in August of 2007, the student confirmed that Mr. Murray regularly e-mailed her and "instant-messaged" her. (Tr: 212). In that interview Dn.Wt. also confirmed that Mr. Murray had told her that he loved her and that it was the second time in his life that he had felt that way about someone. (Tr: 220).

Although the Respondent denies writing this e-mail, the panel did not find his claim to be credible, because it is not consistent with the evidence. When Department's Exhibits 25 and 25A are compared to e-mails that Mr. Murray admits he wrote (Department's Exhibits 41C, 41F, 41J, 43, 44, 45, 46, and 48), a distinctive writing style is evident throughout all the e-mails. For example, when the panel compared Department's Exhibits 25 and 25A, which Mr. Murray

denies writing, with the e-mails Mr. Murray admits writing, the panel noted that they contain the same punctuation errors. He does not use apostrophes in contractions. He frequently uses three ellipses and three hyphens (which is very unusual) to separate thoughts. James Murray admitted that he often uses this punctuation in his e-mails. (Tr:2438). He incorrectly uses three ellipses to end sentences, and he uses the abbreviation “lol” or “laugh out loud” in the e-mails.

Although Dn.Wt. testified at the hearing that she had never seen the e-mail (Department’s Exhibit 25), we do not find her explanation regarding the e-mail to be credible. According to Dn.Wt., two jealous classmates started rumors about her and Mr. Murray (Tr: 753) and must have written the e-mail themselves. Her assertion that students wrote this e-mail in an attempt to retaliate against her is unpersuasive. The word usage and incorrect punctuation use are consistent with the word usage and punctuation errors found in e-mails that the Respondent admitted that he had written. Further, we believe that the reference in the disputed e-mail to another woman is a reference to his relationship with Er.Fi., which was obviously a very important relationship in Mr. Murray’s life. (Department’s Exhibit 50 and 51).

To find the Respondent’s denials of authorship credible, the panel would not only have to accept that the high school students were astute enough to analyze Mr. Murray’s writing style and pick out consistent punctuation errors and word usage to insert in the alleged “fake” e-mail, but also that the students knew about Mr. Murray’s relationship history. It strains credulity to accept Respondent’s explanation that he did not write the e-mail.

First, there is no evidence that either of the students who discovered the e-mail on Dn.Wt.’s account was familiar with Mr. Murray’s e-mail writing style, so it’s not possible that they could use his other e-mails, analyze them and use that style to concoct a “fake” e-mail.

Second, there is no explanation about how the students would know about the teacher’s

past relationship and insert a reference to it in the e-mail. The panel is convinced that James Murray's relationship with Er.Fi. was a very significant relationship for him. In letters he referred to Er.Fi. as the "love of his life" and "soul mates." (Department's Exhibits 50 and 51) When Karli Hendrickson started dating James Murray, she complained to her colleague, Jessica Gibson, that he was still in love with Er.Fi. (Tr:492). Er. Fi. testified that her favorite song in high school was Rh by Fleetwood Mac and that her e-mail address and Instant Messenger name were Rh. (Tr: 127). James Murray testified he knew how much Er.Fi. liked the name Rh. and subsequently named his daughter, Rh. (Tr: 2653)

Third, although Mr. Murray acknowledged that his nickname in high school had been "Frannie," (Tr: 2428), he denied ever signing any e-mails "Frannie" (Tr: 2704-5) or currently using that as a nickname in the Boonville area, which is where Adirondack Central High School is located; however, during re-cross examination by Attorney Harder, Mr. Murray admitted that his e-mail home address listed on his cell phone bills from 2007 was Frannie07@hotmail.com. (Tr: 2718, Exhibits 25A and 25B). Dn.Wt. testified that Mr. Murray's middle name is Francis, that his nickname was "Frannie" (Tr: 822), and that the password on his Adirondack High School computer was "Fran something." (Tr: 833-34). The panel finds that Mr. Murray's denials that he wrote the incriminating e-mail to Dn.Wt. are not credible and that he was the author of the inappropriate e-mail.

Further, the panel finds Mr. Murray's actions when he first received a copy of the e-mail to be less than believable. According to his testimony, he received a copy of the e-mail on or about January 16, 2006, in his school mail box located in the school office. (Tr: 2280). He walked back to his room, read it, didn't show it to anyone, and then walked back to the school office, tore it up into many pieces and threw it into a garbage can. (Tr: 2280-2285). Mr. Murray

immediately spoke to the student, Dn. Wt. about the e-mail, and later that day told Karli Murray (who was at the time Karli Hendrickson, his fiancée), about the e-mail. (Tr: 2283) At no time did Mr. Murray report this “prank” to the school administration and ask for an investigation despite the fact that the copy he initially received had an e-mail address on it that he did not recognize. (Tr:2280). The panel is well aware that an e-mail address is traceable, but Mr. Murray did not take any action to ascertain who had placed the e-mail in his school mail box. There is no reasonable explanation about why this wasn’t reported to the school administration immediately or to a union representative to inquire about what steps a teacher could take to protect himself in this situation.

Approximately a week to a week and one half later, Mr. Murray again saw another copy of the e-mail. (Tr: 2286). On or about late January of 2006, Karli Murray, who was then Mr. Murray’s fiancée, Karli Hendrickson, received a copy of the e-mail in her school mailbox, which had been mailed to her anonymously, and the envelope was postmarked Utica, New York. (Tr: 1902). In a sworn statement, Lr. Ae., the mother of Nc. Ae., stated that she had received a copy of the e-mail from her daughter and mailed it anonymously to Karli at the school’s address. (Department’s Exhibit 23A). Karli Murray testified that she showed the document that she received to James Murray, and he told her that he had never seen it and that it “...wasn’t something he was aware of” (Tr:1904), which directly contradicts Mr. Murray’s testimony that he had first received a copy of the e-mail on January 16, 2006. (Tr: 2281). Mr. Murray acknowledged that Karli Murray showed him another copy of the e-mail that he had originally received, that he “glanced” at it, noted that it didn’t have headers on it, but that he did not read it. (Tr; 2285-2286). The second copy of the e-mail was destroyed as well. (Tr: 2429).

Karli Murray did not report this e-mail to the administration either. According to the testimony of her colleague, Jessica Gibson, in January of 2006 Karli Murray, then Karli Hendrickson, told her about e-mail between James Murray and Dn.Wt. and was very upset about it and believed them to be real. (Tr: 496-497). Jessica Gibson and Kim Carrock, another teacher, urged her to report the e-mails. (Tr: 500) Instead, in February of 2006, Karli Murray confronted the high school cheerleading squad, who she thought had written the e-mail to "get back" at Dn.Wt. (Tr: 1904-1907). At a cheerleading competition in Utica, New York, Karli Murray ordered the cheerleaders to follow her into the basement of the auditorium, lined the cheerleaders up against the wall, and "yelled" at them about the rumors about Dn.Wt. and James Murray, reducing some of the cheerleaders to tears (Tr: 357-8). Dn.Wt. was standing beside Karli Murray during this angry confrontation with the cheerleaders, and she testified that Karli demanded that the cheerleaders confess to starting rumors about Dn.Wt. and James Murray and apologize to Dn.Wt., but none of the cheerleaders confessed to starting rumors. (Tr:854).

Despite the fact that by January of '06 Mr. Murray was aware of the rumors about his relationship with Dn.Wt., he continued an inappropriate relationship with her. (Tr: 2396). Although Dn.Wt. did not take any classes from Mr. Murray during her senior year of '06-'07, she was in his classroom every morning. (Tr: 2229). Mr. Murray often gave her money for breakfast, and she would bring it back to his room to eat. (Tr:2231) Sometimes she would go to the cafeteria and purchase breakfast for both of them. (Tr; 2232). According to the sworn statement of Scott Zeintara, a school employee who monitored the cafeteria during breakfast, he observed Dn.Wt. nearly every morning buying two breakfasts and leaving the cafeteria with the food, and that he and other employees "joked" that it was for her and Mr. Murray. (Department's Exhibit 23R).

Mr. Murray does not dispute that Dn.Wt. was in his classroom in the mornings, but his explanation of these events is that he left his room open in the morning for a lot of students who would congregate in his room to do homework and socialize and that there wasn't any school policy prohibiting this practice. (Tr: 2228-2232).

During Dn. Wt.'s junior and senior year, James Murray gave her rides to and from school. (Tr: 883-885). James Murray testified that the distance from his home to Dn.Wt.'s home in Ava, New York, is approximately fifteen miles, so Mr. Murray would have to drive quite a distance out of his way to take her to school or drop her off at her home after school. (Tr: 2443) Regina Larkin testified that when she interviewed Karli Murray, she indicated that she did not know that her husband, James Murray, was giving Dn.Wt. rides to and from school until Superintendent Frederick Morgan told her after the investigation began. (Tr: 204).

The chair of the Social Studies Department, Michael Fauville, observed Dn. Wt. with James Murray so often in the halls and in Mr. Murray's classroom that he became concerned and warned Mr. Murray not to spend so much time with Dn.Wt. (Tr: 693-697).

Kevin Degraf, a school employee, saw James Murray with Dn.Wt. more than any other student, and observed them in April of 2007 two or three times arriving and leaving school together in Mr. Murray's car. (Tr: 606-609, Department's 23E).

Scott Zientara, another school employee, observed Dn. Wt. and James Murray picking up a pizza in Boonville in April of 2007. During April or May of 2007 he also observed James Murray pulling his car into the back lot by the gym doors, and Dn.Wt. exiting the school through the gym doors and getting into Mr. Murrays' car. (Department's 23R). In the spring of 2007 he also witnessed a verbal altercation between Mr. Murray and Dn.Wt. in the school parking lot around 3:30 p.m., and testified that Dn.Wt. was "yelling" at Mr. Murray and was very upset. (Tr:

610-613, Department's Exhibit 23R). The argument was over Dn.Wt.'s interest in a high school boy, and James Murray did not approve of her behavior. (Tr: 822)

Henrietta Wittwer has been a cleaner at Adirondack Central High School for six years. (Tr: 1248) According to her sworn statement, which she verified during her testimony, she saw Mr. Murray and Dn.Wt. alone together in the school ten to fifteen times. She saw Dn.Wt. leaving school with Mr. Murray in his car on several occasions. (Department's Exhibit 23Q). In the fall of 2006 she began finding Dn.Wt. unsupervised in Mr. Murray's room after school with her feet up on his desk. (Department's Exhibit 23Q). On three occasions, Dn.Wt. asked her to unlock Mr. Murray's room, because she had to retrieve personal items like her purse, shoes, and a sweater, which she kept in Mr. Murray's cabinet. (Department's Exhibit 23Q). In the spring semester of 2007, Henrietta Wittwer was cleaning A-wing at 10:00 p.m. when she heard laughing in the hallway and observed Mr. Murray and Dn.Wt. walking down the hallway together. (Department's Exhibit 23Q). According to Ms. Wittner, they did not see her, and she observed them going into the teacher's lounge in A-wing, which was dark and remain in that room for five to ten minutes. (Department's Exhibit 23Q). According to Mr. Murray's testimony he returned to the school after an away game, and since Dn.Wt.'s mother would be late in picking her up, he allowed her to enter the school and let her use the teacher's lounge bathroom. (Tr: 2249-50). Dn. Wt. denies ever being alone with Mr. Murray in the teacher's lounge. (Tr: 951).

Mr. Murray continued his inappropriate relationship outside of school as well. Dn. Wt. e-mailed and "instant messaged" each other. (Tr: 761-762). On a Saturday, June 17, 2006, Dn.Wt. "instant messaged" the computer at the Murray household, and asked Mr. Murray to come over to her house because she was upset. According to Dn.Wt.'s testimony, she was upset because

several days earlier, she had gone shopping with a male student who expressed an interest in beginning a sexual relationship with her.(Tr: 937). Mr. Murray testified that he left his house without his wife's knowledge and drove fifteen miles to Dn.Wt.'s residence while her parents were not at home to comfort her. (Tr: 2444). He testified that he "... wanted to make sure everything was okay." (Tr: 2446). When Mr. Murray's wife, Karli Murray, discovered the instant message left on the computer and the fact that her husband had left the house, she also immediately drove over to Dn.Wt.'s residence and passed her husband on the highway returning from Dn.Wt.'s house. (Tr: 509). Karli Murray told her friend and colleague, Jessica Gibson, an English teacher at Adirondack Central High School, that she made a rude gesture to her husband as she passed his car and continued to Dn.Wt.'s house where she angrily confronted the student about speaking with her husband. (Tr: 509, 942-3). Several days later, Karli Murray again confronted Dn.Wt. about this incident at school during Regent's Week. According to the testimony of Jessica Gibson, in June of '06 Ms. Murray confronted Dn.Wt. when she saw her talking to the same male student who allegedly had upset her so much and raised her voice shouting at Dn.Wt., "You don't look so upset now." (Tr: 508).

During her senior year in March of 2007, Dn.Wt. stayed at Mr. Murray's house alone with him while his wife, Karli Murray, was in the hospital for a week due to complications with the birth of their daughter. (Tr: 2255-2256) Dn.Wt. testified that she stayed there to take care of the cat and to house sit, despite the fact that Mr. Murray was returning to the residence at night. (Tr: 817). Dn. Wt. used Karli Murray's car during that time. (Tr: 819, 2263). Mr. Murray's mother came for a night or two, but the teacher and student were alone in his house the rest of the week. (Tr: 907). Mr. Murray testified it was his wife's suggestion that Dn.Wt. stay at the house with him alone while she was in the hospital. (Tr: 2393-2394). According to his

testimony, he was agreeable with Dn.Wt. staying alone with him, because it never crossed his mind that this situation was inappropriate. (Tr: 2394).

While Dn. Wt. was a high school student at Adirondack Central School District, James Murray took Dn. Wt. clothes shopping. During Dn.Wt.'s senior year, James Murray drove Dn.Wt. to the mall and purchased two pairs of capris, a shirt, and some perfume for her. (Tr: 909-913). She also testified that Mr. Murray purchased clothes at Label Shopper for her as a graduation present. (Tr: 914). According to a sworn affidavit from A.D., who was a friend and classmate of Dn.Wt., Mr. Murray bought Dn.Wt. clothes on a monthly basis. (Department's Exhibit 23F).

James Murray also stopped by Dn.Wt.'s place of employment to see her. In the spring of 2007, several months prior to high school graduation, Dn.Wt. started working at Label Shopper, a women's clothing store. According to the testimony of Brittany Fiorenza, who worked at the store from February of 2006-July of 2007, James Murray came to the store once in April or May of 2007 and again on three or four subsequent occasions to see Dn. Wt. while she was at work. (Department's Exhibit 23G). Mr. Murray would greet Dn.Wt. with a hug, and Dn.Wt. told Brittany Fiorenza that he was going through a divorce. (Department's Exhibit 23G). On two occasions Ms. Fiorenza observed Dn.Wt. leave the store at the end of her shift and get into Mr. Murray's car. (Department's Exhibit 23G)

After Dn.Wt.'s graduation in June of 2007, Mr. Murray's interest in her appears to have intensified. In June of 2007, Dn.Wt. asked Mr. Murray for a cell phone and requested that he place her on his cell phone plan, because she didn't like the cell phone she had. (Tr:790). On June 24, 2007, the day after high school graduation, Mr. Murray purchased a cell phone for himself and a companion cell phone for Dn.Wt. on the same account.(Tr:2330-2334) A review

of the cell phone records indicate that the teacher had contact with the student, Dn.Wt., 130 times from 6/24/07 to 7/4/07, with 8 of those contacts occurring between 12:00 a.m. and 5:00 a.m. (Department's Exhibit 26A and 26B). He did not inform his wife or Dn.Wt.'s parents that he had purchased these cell phones (Tr: 1943, 2335).

Prior to Mr. Murray purchasing a cell phone for Dn.Wt. on June 24, 2007, she had a TracFone phone, and the telephone records of Dn.Wt.'s TracFone indicate that she called Mr. Murray's home phone a total of 17 times from January 1-May 27, 2007. (Department's Exhibit 29A). Jessica Gibson, a colleague and friend of Karli Murray, testified that Karli Murray complained to her that she overheard telephone conversations between James Murray and Dn.Wt. where he addressed her by name and spoke to her in hushed tones. (Tr: 516). Jessica Gibson also testified that after Karli Murray returned to teaching after a maternity leave in May of 2007, Karli told her that James Murray didn't want to be married anymore and was having a relationship with Dn.Wt. (Tr: 520). Further, Karli Murray confided to Jessica Gibson that she was concerned about James Murray spending time with Dn. Wt. when Karli visited her parents out of town. (Tr; 591, 2172-73)

Karli Murray and her infant daughter moved out of the marital residence at the end of June, 2007. (Tr: 1942). In early July, Karli Murray returned briefly to the marital residence ostensibly to visit her husband and while searching the bedroom discovered her husband had hidden a cell phone in a pile of pants on a bedroom shelf. (Tr: 1942-3). She angrily confronted her husband and asked him why he didn't tell her he had a cell phone. (Tr: 1943). Although Mr. Murray testified that he purchased the cell phone to call his wife, the cell phone records do not list any calls made by Mr. Murray to his wife from 6/24/07 through 7/4/07. (Tr: 2569, Department's Exhibit 26A), which is in sharp contrast with the 130 cell phone contacts Mr.

Murray had with Dn.Wt. during the same time period. In an interview with Investigator Regina Larkin, Dn.Wt. told her that Mr. Murray had purchased the cell phone to contact her (Tr: 459), which is supported by the cell phone records. After his wife discovered his hidden cell phone, Mr. Murray changed his cell phone number. (Tr: 2336-2337) His explanation of why he changed his cell phone number after his wife discovered his cell phone is not credible. According to Mr. Murray, he changed his cell phone number after his wife discovered his hidden phone because he had received several texts from friends inviting him to go out and "hang out in bars." (Tr:2574). Investigator Larkin testified that Dn.Wt. told her that the cell phone number was changed because another former student, M.Z., was calling Mr. Murray (Tr: 250). Karli Murray told Investigator Larkin that the number had been changed because her husband had been communicating with his former girlfriend, Ei. Fr.. (Tr: 460). In an e-mail to Ei.Fr. James Murray claimed he changed his cell phone number because he was receiving calls from people at the Hulbert House (a bar) at 1:00 a.m. (Department's 11D). The cell phone records indicate that the only contacts from 12:00 a.m. to 5:00 a.m. were between Mr. Murray and Dn.Wt.

It appears that after Respondent obtained a new cell phone number, his telephone contact with Dn.Wt. continued. According to the phone records he had 219 contacts with Dn. Wt. from 7/4/07 – 7/31/07, which contrasts sharply with the number of contacts he had with his wife during that same time period: 32 calls. (Department's Exhibit 27A). During this time period, many of the calls and texts with Dn.Wt. occurred between 12:00 a.m. and 5:00 a.m. (Department's Exhibit 27A).

Dn.Wt. also called James Murray's home telephone a total of 23 times from June 24-July 31, 2007, with two telephone calls after 12:00 a.m. (Department's Exhibit 28A).

In total, Mr. Murray placed 349 calls/texts to Dn. Wt. from 6/24/07-July 31, 2007. The sheer volume of contact, which averages almost 10 calls/texts per day, indicates that this teacher became obsessed with a female student, which continued after her high school graduation. (Department's Exhibits 26A and 26B).

Despite the overwhelming evidence regarding cell phone contact between James Murray and Dn. Wt., Karli Murray testified that she still believes that her husband purchased a cell phone "...in hopes that things would get better between us and there would be contact." (Tr: 2178).

In addition to buying a companion cell phone for Dn.Wt., Mr. Murray gave Dn.Wt. his credit card and authorized her to use it. On or about the summer of 2007, Dn.Wt. stopped by James Murray's house for gas money, and he gave her his credit card to use and told her to keep it for awhile. (Tr: 798) Throughout the summer of 2007, Dn.Wt. continued to use the credit card to buy gas, personal items like hair products, and purchase shoes. (Tr: 799-801). While purchasing shoes at Payless Shoe Store on July 14, 2007, with Mr. Murray's credit card, Dn. Wt. signed the credit slip and underneath her signature wrote "girlfriend." (Tr: 805, Department's Exhibit 17A). According to Dn.Wt.'s testimony, the store clerk explained to her that in order to use Mr. Murray's credit card, she would have to "...be related or dating the person," so Dn.Wt. chose to identify herself as Mr. Murray's girlfriend rather than a family member. (Tr: 805).

In July of 2007, Dn.Wt. and James Murray attended the fireworks display together at the Lee Center Field Days. (Tr: 873). Dn.Wt. testified that her family often attended that event, but there was no explanation offered as to why she went with Mr. Murray rather than a family member. (Tr: 873).

Although both Mr. Murray and Dn.Wt. deny a physical relationship, there is no question that Mr. Murray had an improper relationship with a female high school student that far exceeded the boundaries of a teacher/student relationship. This inappropriate relationship started during the summer of 2005, which was the summer before Dn. Wt.'s junior year in high school, and continued throughout the summer of 2007 after the student's graduation in June.

Mr. Murray maintains that his relationship with Dn. Wt. was appropriate at all times. We have considered Mr. Murray's defense, which is that he is related to Dn.Wt. and that she is a family member. We must reject that explanation. The family connection, if any, is so extenuated that it does not provide a reasonable explanation for his actions. Dn.Wt.'s mother, Dl. Wt., testified she first met James Murray in 2004, because her oldest son had him as a teacher. (Tr: 1300). She started an acquaintance with Karli Hendrickson, now Karli Murray, because Dn.Wt. became a cheerleader in her freshman year, so Dl. Wt. and her husband attended all the home games, and "...[she] got to know Karli through that. I got closer and closer to them. And as [they] got to taking, realized that, you know, we had family kind of in—in common." (Tr: 1299) Through conversation she discovered that her husband's step-brother was married to Karli's cousin. (Tr: 1299-1300). This does not appear to be a close relative because Dn.Wt.'s sister, Nb.Wt., testified that she wasn't sure how to spell the relative's name and confirmed that the relative wasn't a blood relation. (Tr: 1406-1407). Dn.Wt. used a different name when referring to the same relative and also confirmed that there was no blood relation. (Tr: 757-758).

In any event, the Murrays attended bonfires at Dn.Wt.'s parents' home and went out for drinks, pizza and wings after the games. (1301-1303). Clearly, any connection between James Murray and Dn.Wt.'s family did not arise out of a family connection, but from his position as a teacher and his participation in school activities. The friendship couldn't have been that close

because Mr. Murray did not tell Dn.Wt.'s parents that he had purchased a companion cell phone for her on his account or that he was allowing her to use his credit card. (Tr: 1477, 1479, 2368-69). Conversely, Mr. Murray testified that it was precisely because he was so close to the Wt. family that it didn't occur to him to tell Dn. Wt.'s parents about the cell phone or credit card (2368-69), but the panel does not find that to be a reasonable explanation. Dl. Wt. said that she trusted James Murray as a "teacher." (Tr:1304-5, 1312). Mr. Murray abused that trust by usurping their parental authority and by focusing his attention solely on Dn. Wt.

The panel finds it significant that when Mr. Murray became aware of the rumors about him and Dn.Wt. in January of 2006, he never discussed it with Dn. Wt.'s parents despite their "close" friendship. Dl. Wt. testified that she first learned about the rumors concerning her daughter and Mr. Murray when she was contacted by the school's investigator in August of 2007. (Tr: 1484).

When determining the credibility of witnesses we took into consideration the interest or lack of interest in the outcome of the case, the possible bias or prejudice of a witness, the age, the appearance, conduct, and manner in which the witness gave testimony when viewed in the light of all the other evidence in the case. Further, we took into consideration any discrepancies in the evidence and whether the discrepancy could be reconciled by fitting all of the stories together, or whether it may have been an accidental misstatement due to the anxiety of testifying or the passage of time affecting memory. Overall, we found that the Department's witnesses' testimony about the inappropriate relationship with the Respondent which included testimony about the romantic e-mail sent to Dn.Wt. to be more credible than the Respondent's denials of an inappropriate relationship, because it was unbiased third party testimony, and it was supported by the other testimony and evidence; i.e.; the favoritism shown to Dn.Wt. by the Respondent,

the excessive amount of time that the Respondent spent with Dn.Wt. both inside and outside the school, the rides to school, the shopping trips, and allowing the student to stay alone with him in his house while his wife was in the hospital.

James Murray and his wife, Karli Murray, maintain that the school investigation that resulted in these charges was a "witch hunt" instigated by two other teachers, Jessica Gibson and Kim Carrock (Tr: 2189-2194, Department's Exhibit 11D); however, the panel finds that to be untrue. Jessica Gibson and Kim Carrock are responsible educators who reported their concerns to Adirondack Central School administrators. They were, as Karli Murray testified, her "best friends" at school (Tr: 2193-94), and there does not appear to be any motive for these two teachers to take any adverse action which would affect James Murray. The panel finds Jessica Gibson and Kim Carrock to be very credible witnesses. They were straight forward and truthful in their testimony and did not appear to have any motive, bias, or a direct interest in the outcome of this proceeding.

We have considered the testimony on the Respondent's witnesses and find that their testimony was not as unbiased or as credible as the Department's witnesses. Dn.Wt. presented as very confident and even flippant at times when she was offering testimony that was favorable to the Respondent, but she appeared to have a selective memory. She denied many of her statements to Investigator Larkin, and her testimony about the cell phone contact she had with Mr. Murray was evasive, often answering a question by stating that she couldn't recall or didn't remember. (Tr: 768-760). Her testimony wasn't always consistent. For example, at first Dn.Wt. testified that she didn't recall ever being alone with James Murray in the teacher's lounge at 10:00 p.m. but then she denied that the incident occurred (Tr: 951), which contradicted James Murray's testimony. Further, the panel did not find her explanation about the romantic e-mail to

be credible, since the testimony and evidence established that it was authored by Mr. Murray. Dn. Wt. testified that she was still “good friends” with Mr. Murray, which may have biased her testimony. (Tr: 754).

Prior to testifying on behalf of her husband, Karli Murray reviewed the transcripts of the testimony of several of the Department’s witnesses and made many notations about the testimony, which gave her ample opportunity to tailor her testimony. (Hearing Officer’s Exhibit 2). Further, she prepared an extensive “time-line,” which was reviewed by several of the Respondent’s witnesses prior to their testimony. (Tr: 1460-61, 1526). Karli Murray’s testimony about why the Murrays were planning to sell their house wasn’t credible. In her e-mails to her husband, it’s clear that the motivation for selling the house was due to the dissolution of their marriage (Department’s 41 A-J, 43, 44, 48 and 49); however, at the hearing she testified that the reason the house had been listed with a real estate broker in June of 2007 was because she liked to travel and owning a home was expensive and stressful. (Tr: 2061-2067). She denied that there were any other factors when making the decision to place the house on the market. (Tr: 2067). The panel believes that Karli Murray, who reconciled with the Respondent shortly after the school investigation began in July of 2007, was mistakenly trying to protect her husband, and her testimony was so biased that it simply cannot be credible. During her testimony she was so overcome with emotion at times that she was testifying through her tears making it necessary to take a break on occasion. The panel observed Mr. Murray throughout his wife’s testimony and noted that he rarely looked at her and seemed unaffected by her emotional pain.

DI. Wt. and Nb. Wt., Dn. Wt.’s mother and sister, both testified that they had reviewed Karli Murray’s time-line before testifying, and that they continue to have a relationship with the Murrays. DI. Wt. was very evasive about what documents she had reviewed prior to her

testimony, which affected her credibility (Tr: 1525). Nb. Wt. testified that she appeared at the hearing so that she could help “Jim.” (Tr: 1459) She said that she has also gone shopping with James Murray at least thirty times, but she couldn’t remember any items that he had purchased for her. (Tr: 1413). Dl.Wt. testified that she considered James Murray a “Godsend.” (Tr: 1515). She testified that she was grateful James Murray gave her children rides and took them shopping and bought them gifts. (Tr:1515-19) The mother’s credibility was affected by her continuing friendship with the Murrays and by the fact that she did not appear to recognize appropriate parental boundaries. She allowed her daughter to continue to spend time with this teacher and even allowed her to stay alone with the teacher at his home. (Tr: 1322). She testified that despite the fact that James Murray never told her that he had purchased a cell phone for Dn.Wt. or that he was allowing Dn.Wt. to use his credit card, she still trusted him. (Tr:1476-78). Although Dl. Wt. was upset that Mr. Murray didn’t tell her about the cell phone or the credit card use, she testified that she wasn’t concerned at all that her daughter and a teacher were texting each other at 3:00 a.m. in the morning. (Tr: 1495). These acts undermined her parental authority, and they should have been red flags for her, but she did not object, which calls into question the witness’ bias and perception.

Even if the panel accepts the testimony of Karli Murray and Dl. Wt., who both testified that they were aware of James Murray’s “close” relationship with Dn. Wt. and that it continued with their knowledge and permission, it does not excuse or explain James Murray’s actions, because it was his responsibility as an educator, not theirs, to recognize professional boundaries with his students at all times.

There is no question that James Murray had an inappropriate relationship with a female student, which crossed the boundaries of professional interaction between a teacher and student.

The testimony and evidence establish a relationship between a married, high school teacher in his 30's and a teenage female student that goes significantly beyond what would be considered appropriate for a number of reasons. The time spent with this student before, during and after the school day strongly suggest that this is not just an effort on the part of the teacher to encourage and support this student, but that there is an emotional relationship between the two of them that appears obsessive on the part of the teacher. The sheer quantity of the cell phone contacts alone strongly supports this view. This raises the question of what full-time teacher and coach, married with a new baby, would have the time to devote to such an endeavor unless a deep personal and emotional need were being met. It certainly raises suspicions about the Respondent's true intent in this relationship, which almost appears to be that of a jealous and controlling boyfriend.

In his defense Mr. Murray presented testimony that he was a talented teacher. Eric Vernold, the former principal of Adirondack Central High School, testified that James Murray was an excellent teacher and that his teaching evaluations were very positive. (Tr: 1168). In his opinion Mr. Murray was not "morally unfit." (Tr: 1170).

The panel also considered the testimony of Timothy Dowling, a licensed clinical social worker in private practice, who testified on behalf of the Respondent. Mr. Dowling has previously worked with Lewis County Child Protective Services in evaluating and treating sex offenders. (Tr: 2492-2497). His testimony regarding predatory grooming behaviors was very general, and he did not render an expert opinion specific to the Respondent or the facts of this case. Although Respondent's counsel stated on the record that Mr. Dowling has been providing counseling to Mr. Murray, no testimony or records were produced to verify Mr. Murray's

attendance and/or progress in treatment. The panel did not find this testimony very helpful in its decision making process.

PANEL FINDING ON CHARGE TWO: The Department of Education has proven by a preponderance of the evidence that the certificate holder, James F. Murray, used his position as a teacher to cultivate an improper relationship with a minor female student which crossed appropriate social boundaries between a teacher and student, beginning in her junior year of 2005, and continuing after her graduation from high school in 2007.

The Respondent currently has permanent certification as a Social Studies teacher, 7-12. As a teacher in the public schools of the State of New York, he is required to supervise children *in loco parentis*, and to serve as a positive role model for the students placed in her care. The position of a school teacher requires extreme trust, personal integrity, and the ability to practice good judgment. This requires a teacher to encourage and guide students, while respecting and recognizing professional boundaries at all times. If a teacher crosses those boundaries, it is a betrayal of trust and places the student at risk, both physically and emotionally.

No only was the student, Dn. Wt., the subject of community gossip due to the Respondent's poor judgment, but also the Respondent's actions caused chaos in the school and in the community. In the school setting, the focus should be on education; however, the Respondent's inappropriate relationship with this student distracted students, teachers, and staff causing alarm and generating rumors. Teachers were going to administrators to report their observations of Mr. Murray and the student and to express their concerns about the situation. Parents were sending anonymous notes to the school and calling the school to inform them about Mr. Murray's relationship with this student. (Tr: 736-737, Department's Exhibit 23A).

While testifying Mr. Murray addressed the panel and offered testimony regarding his moral character. (Tr: 2368-70) He did not show any insight into the events or remorse for his actions and never acknowledged that he had an inappropriate relationship with a high school student. His lack of insight is truly troubling, because without reflection and acknowledgement of his own actions that lead to this hearing, there is no indication to this panel that it wouldn't happen again.

Given the facts of this case, the panel finds that James F. Murray lacks the necessary moral character to teach in the public schools of New York State. The New York State Department of Education has a legitimate interest in protecting the safety and welfare of the children in its educational system, and allowing the Respondent to retain his current teaching certification, which would give him liberal access to children, would place students at risk.

RECOMMENDATION OF PENALTY

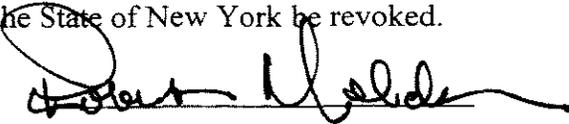
In a similar case entitled **In the Matter of the Arbitration between Binghamton City School and Brian Peacock**, 33 A.D. 3d 1074 (2006), a teacher had an inappropriate emotional relationship with a female student; i.e., a 32 year old teacher allowed a high school senior to be in his room constantly although she didn't have any classes with him, spent a great deal of time with the student privately after school, gave the student gifts and rides, spoke with her on the telephone constantly, and spent six hours alone with her at his house. In **Peacock** (supra) the Hearing Officer declined to find a romantic relationship, but found the teacher guilty of the charge of having an inappropriate personal relationship with a student and suspended the teacher without pay for one year. The teacher appealed to the New York State Supreme Court, and subsequently the Third Appellate Division affirmed the lower Court's decision which found the penalty to be "shockingly lenient" and remitted the matter for a new penalty. The facts of that

case are very similar to this case. The State of New York has an explicit and compelling policy to protect children from the harmful conduct of adults, particularly in an educational setting. (See **Social Services Law section 384-[b], Education Law Art. 23-B, Family Court Act Art. 10, Executive Law section 296 [4]**).

James F. Murray's actions with this teenage female student were grossly inappropriate and violated a strong public policy to protect children in New York State schools. His decision to continue this relationship with the student despite the disruption and chaos it caused not only to the student, her family, and school community, but also to his marriage shows extraordinary insensitivity and lack of insight. Since Respondent has failed to offer any testimony that he now has the insight and capability to maintain professional boundaries with students, a period of suspension cannot adequately protect students from him in the future were he allowed to continue teaching.

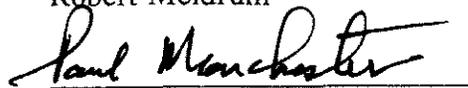
After careful consideration and weighing of all the testimony and evidence presented, we believe that this policy is best served by recommending that the teaching license of James F. Murray to teach in the public schools of the State of New York be revoked.

Date: June 9, 2009



Robert Meldrum

Date: June 9, 2009



Paul Manchester

Date: June 10, 2009



Donald Averill

COPY FOR RELEASE

The University of the State of New York Education Department

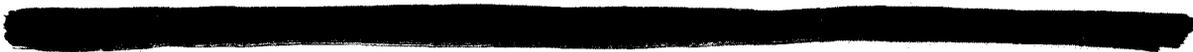
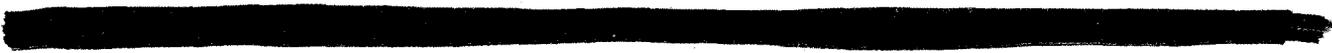
In the matter of a proceeding held pursuant to 8 NYCRR Part 83, to determine whether

KARLI C. MURRAY

has the requisite good moral character to teach in the public schools of the State of New York

NOTICE OF SUBSTANTIAL QUESTION OF MORAL CHARACTER

KARLI C. MURRAY, hereinafter referred to as "certificate holder", presently holds a permanent New York State certificate, issued by the New York State Education Department as a teacher of English 7-12, effective February 1, 2007 and bearing the control number 79593071.


Information has been received by the New York State Education Department that during the 2005-2006 school year, certificate holder engaged in inappropriate behavior that included failing to act on knowledge about a teacher's inappropriate conduct toward a female student. The name of the female student is known to the Department and will be provided upon request.

Information has been received by the New York State Education Department that during the 2005-2006 school year, certificate holder engaged in inappropriate behavior that included taking steps to conceal and/or destroy documentation relative to a teacher's inappropriate conduct

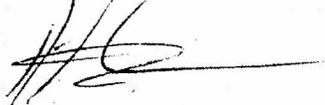
toward a female student. The name of the female student is known to the Department and will be provided upon request.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83 and the Plain Language Summary of Hearing and Appeal Procedures, shall be mailed to the certificate holder by certified mail, return receipt requested and the certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), Room 981-EBA, 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificate(s) should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificate(s) and/or the denial of any of certificate holder's application(s) for teaching certificate(s).



IN WITNESS WHEREOF, I, David M. Steiner, Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 26 day of October 2009.


Commissioner of Education

COPY FOR RELEASE

STATE OF NEW YORK
NEW YORK STATE DEPARTMENT OF EDUCATION

In the Matter of a Proceeding Held Pursuant to
8 NYCRR Part 83 to Determine Whether

KARLI C. MURRAY

Has the Requisite Good Moral Character to
Teach in the Public Schools of the State of New York

NYSED

OSRRB

SEP 29 2010

**HEARING OFFICER'S FINDING OF FACTS AND
RECOMMENDATION TO THE COMMISSIONER**

OSPRA

Before: Anne Reynolds Copps, Esq., Hearing Officer

Appearances: Samuel J. Finnessey, Jr., Esq. and Pamela Ladd, Esq. for New York
State Department of Education

Anthony J. Brock, Esq., NYSUT, for Respondent, Karli C. Murray

Karli C. Murray, Respondent

Hearing dates: July 7, 2010 and August 4, 2010
Albany, New York

Background

This hearing arises under Part 83 of the Regulations of the Commissioner of Education. The matter was commenced by service of a Notice of Substantial Question of Moral Character on Respondent, Karli C. Murray (D-1).¹ The undersigned was appointed as Hearing Officer by David M. Steiner, Commissioner of Education by Order dated February 18, 2010 (HO-1). Notice of the hearing was given to all parties (HO-2). The hearing was held on July 7, 2010 and August 4, 2010 in Albany, New York.

¹ (D-___) denotes Exhibits produced by Department of Education. (R-___) denotes Exhibits produced by Respondent. (HO-___) denotes Exhibits submitted by the Hearing Officer. (T-___) refers to pages of the Transcript of this Hearing.

[REDACTED]

The second charge relates to knowledge of James Murray's inappropriate conduct with student [REDACTED]. Exhibit D-10 contains the testimony of Jessica Gibson taken during the Part 83 Hearing of James Murray. Ms. Gibson, also a teacher at Adirondack High School, testified to a conversation at the school in which Respondent described to Ms. Gibson and Kimberly Carrock, Department Chair, receipt of the email which is Exhibit D-11/12. Ms. Gibson also states that Respondent was warned in that conversation that Respondent was a mandated reporter.

Ms. Gibson also testified about another conversation among the same 3 individuals after a social gathering again regarding the same email.

Ms. Gibson further described an incident at school where Respondent confronted and yelled at the student, [REDACTED]. Ms Gibson testified that Respondent told her that [REDACTED] sent James Murray an email during the weekend saying she was upset and asking James Murray to come to her. Respondent, upon seeing the email got in her car and drove to the home of [REDACTED]. She passed James Murray and "flipped him off". Ms. Gibson related that Respondent asked why [REDACTED] had to speak with her husband.

Ms. Gibson further related that Respondent told her that she could hear James Murray speaking in whispers on the telephone to [REDACTED] from their home.

Ms. Gibson further testified that Respondent told her that James Murray no longer wanted to be married to her because of [REDACTED].

Ms. Gibson testified that she reported the behavior of James Murray to her principal, Eric Vernold.

Similarly, Kimberly Carrock, the English Department Chair, testified about the conversation in school relating to the email in James Murray's Part 83 Hearing. (D-10 at Page 566) She, too, warned Respondent of her obligation as a mandated reporter.

Ms. Carrock also testified to the conversation following the social gathering.

Ms. Carrock further testified that she reported her concerns to principal, Eric Vernold, as well.

The third charge relates to an email which was received by Respondent in her school mailbox. (D-11, D-12) The panel in James Murray's Part 83 Hearing case found that the original email was written by James Murray and sent to [REDACTED] (D-5). This was confirmed by the Commissioner of Education (D-7) in his decision of June 30, 2010. Respondent testified at James Murray's Part 83 Hearing that she threw out the email (D-9 at Page 2159).

Respondent's Case

Respondent presented Kevin Harren, attorney for James Murray in his Part 83 Hearing.
[REDACTED]

Respondent presented [REDACTED] and [REDACTED]. Both testified to their family relationship with Respondent and James Murray.

Respondent herself testified. She discussed her relationship with the [REDACTED] family. She testified that she threw out the email because she knew it was a fake.

Respondent submitted mostly undated letters from students thanking her (R-C through R-I). Respondent also submitted very positive teacher evaluations covering 2005, 2006 and 2008 through 2010 (R-J through R-T). In addition, Respondent submitted affidavits of two Teachers testifying to her character (R-U and R-V). Neither affidavit acknowledges knowledge of the charges against Respondent.

Discussion and Findings of Fact

1. Karli C. Murray holds a permanent certificate in English 7-12 control number 79593071. (D-4)
2. Karli C. Murray has been teaching English at Adirondack High School since 2002 (T-page 214).
3. Karli C. Murray is married to James Murray (T-page 215).
4. Karli C. Murray was served with a Notice of Substantial Question of Moral Character dated October 26, 2009 (*sic*) (D-1) on October 8, 2009 (D-2).
5. Respondent's attorney received a Notice of Hearing dated May 19, 2010 scheduling the hearing for June 30 and July 7, 2010, giving Respondent the required 15 day notice.
6. James Murray had an inappropriate relationship with student, [REDACTED]. This fact was determined by the Panel in his Part 83 Hearing proceeding (D-5) and confirmed by the Commissioner of Education in his decision dated June 30, 2010 (D-7).
7. James Murray wrote and emailed to [REDACTED] the substantive content set forth in D-11 and D-12. This also was determined by the Panel in his Part 83 Hearing proceeding (D-5) and confirmed by the Commissioner of Education in his decision dated June 30, 2010 (D-7).
8. Karli C. Murray received the substantive content of D-11, D-12 in her mailbox at Adirondack Central School District.
9. Karli C. Murray disposed of the email described in findings 7 and 8 above. Respondent testified to this in both this proceeding (T-page 235) and the Part 83 Hearing of James Murray (D-9 at page 2159).
10. Karli C. Murray did not notify the school officials of her receipt of the email described in Findings 7 and 8 above.
11. Karli C. Murray knew or should have known that the email referred to in Findings 7 and 8 above was written by her husband, James Murray. Respondent claims that she "knew" it was a fake created by some of the cheerleaders to harm [REDACTED] (T-235). However, none of the cheerleaders could have known of his prior relationships or known of his nickname "Frannie". In addition, she should have recognized his distinctive style of writing emails (D-5 at 5-8)

Two teachers testified that she discussed the email with them on two occasions and was upset about it (D-10 at 497 et. seq. and 566 et. seq.). Ms. Carrock testified that Respondent did not tell her that she suspected the email was fabricated (D-10 at 590).

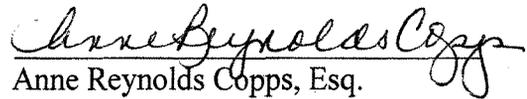
12. Karli C. Murray knew that she had an obligation to report the inappropriate relationship between James Murray and [REDACTED].

husband was having an inappropriate relationship with a student. There was no testimony from Respondent or anyone on her behalf that her behaviors were now understood to be wrong. In fact, Respondent still provided extensive testimony regarding the alleged close relationship of the two families to excuse her failure to act. These behaviors are the antithesis of good moral character. A teacher who is willing to engage in such activities is not a good role model but instead demonstrates for her students a decided lack of moral character. Teachers act in loco parentis with the students in their classes. Such behaviors tell parents that their students will not be safe in her care.

After careful consideration of the voluminous evidence and testimony presented in this case, I recommend suspension of Respondent's certificate to teach in the State of New York for a period of two years. I further recommend that during that suspension Respondent receive counseling and/or training to help her gain insight into her behavior to help insure that she will protect the child over her husband or any other adult in the future.

September 28, 2010

Respectfully submitted,



Anne Reynolds Copps, Esq.

Hearing Officer



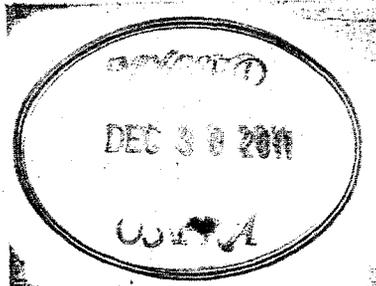
THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

Counsel and Deputy Commissioner for Legal Affairs
Tel. 518-474-6400
Fax 518-474-1940

December 29, 2011

REGULAR & CERTIFIED MAIL-RETURN RECEIPT

Anthony J. Brock
New York State United Teachers
Office of General Counsel
800 Troy-Schenectady Road
Latham, NY 12210-2455



Re: Certification of Karli C. Murray to teach in
the public schools of the State of New York

Dear Mr. Brock:

Enclosed are two copies of the decision of the Commissioner of Education in the above-referenced matter.

A duplicate original of the decision has been filed with the Office of School Personnel Review and Accountability.

Very truly yours,

America Sotomayor
America Sotomayor

Enclosure

cc: Deborah Marriott, Esq. ✓

COPY FOR RELEASE

University of the
Education



State of New York
Department

In the Matter

of the

Certificate held by KARLI C. MURRAY
to teach in the public schools of
the State of New York.

Petitioner appeals the findings and recommendations of a hearing officer that she lacks the requisite moral character to teach in the public schools of the State of New York. The appeal must be sustained in part.

Petitioner holds a permanent New York State certificate as a teacher of English for grades 7-12. Since 2002, petitioner has been employed as a high school English teacher in the Adirondack Central School District ("district").

In a prior decision of the Commissioner of Education, dated June 30, 2010, petitioner's husband was found to have engaged in inappropriate behavior with a minor student. The Commissioner determined that petitioner's husband did not have the requisite moral character to teach in New York State and revoked his teaching certificate.

On October 26, 2009, a Notice of Substantial Question of Moral Character ("Notice") was issued pursuant to Part 83 of the Commissioner's regulations ("Part 83"). The Notice sets forth three charges against petitioner.

[REDACTED]

The second charge alleged that, during the 2005-2006 school year, petitioner engaged in

inappropriate behavior that included failing to act on knowledge about a teacher's inappropriate conduct toward a female student. The third charge alleged that, during the 2005-2006 school year, petitioner engaged in inappropriate behavior that included taking steps to conceal and/or destroy documentation relative to a teacher's inappropriate conduct toward a female student. By order dated February 18, 2010, a hearing officer was designated to conduct a hearing, which was held on July 7 and August 4, 2010.

At the hearing, an investigator from the State Education Department's Office of School Personnel Review and Accountability ("OSPRA") testified for the Department. The Department introduced 16 exhibits. Petitioner testified on her own behalf and introduced 22 exhibits, including several letters from students and affidavits from colleagues describing her teaching abilities and good character. The attorney who represented petitioner's husband at his Part 83 hearing, the student and the student's mother also testified for petitioner.

In September 2010, the hearing officer issued a decision ("decision") finding that the Department had proved all three charges and that petitioner lacks good moral character. She recommended that petitioner's certificate be suspended for two years. She further recommended that, during the suspension, petitioner "receive counseling and/or training to help her gain insight into her behavior to help insure that she will protect the child over her husband or any other adult in the future."

On October 27, 2010, petitioner appealed the decision pursuant to §83.5 of the Commissioner's regulations. Petitioner asserts that the hearing officer's findings and recommendation should be overturned.

On November 26, 2010, OSPRA submitted a letter in opposition to petitioner's appeal. OSPRA urges that I uphold the findings of the hearing officer, modify the hearing officer's recommendation, and revoke petitioner's certificate.

In a Part 83 proceeding, the Department has the burden of proof to establish the certificate holder's lack of good moral character (8 NYCRR §83.4[c]). Pursuant to §83.5(c) of the regulations, the Commissioner may affirm, adopt,

reverse or modify the findings and recommendations of the hearing officer.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

However, with respect to the second and third charges, I find that the record does demonstrate that during the 2005-2006 school year petitioner engaged in inappropriate behavior that included failing to act on knowledge about a teacher's inappropriate conduct toward a female student and taking steps to conceal and/or destroy documentation relative to a teacher's inappropriate conduct toward a female student.

Initially, I note that Article 23-B of the Education Law requires certain school employees, including teachers, to file written reports of allegations of child abuse in an educational setting (Education Law §§1125 through 1133). This requirement is intended to safeguard the welfare of school children by ensuring that such allegations are properly brought to the attention of the appropriate local law enforcement officials.

In this case, petitioner was not specifically charged with failing to make a mandated report of child abuse (see cf. Matter of Cohen, 83-022). In fact, counsel for OSPRA acknowledged the same at petitioner's hearing by stating "It is very clear what we are alleging. [Petitioner] didn't report the fact that James Murray had crossed the appropriate boundaries between a teacher and a student. That is not necessarily abuse or, as [petitioner's attorney] wants to say, he wants to classify this as some sort of child abuse case (Transcript pp. 315-316)."

Nonetheless, although petitioner's compliance with Article 23-B of the Education Law is not squarely before me, I find that petitioner's conduct in relation to the alleged inappropriate relationship evinces a lack of good

moral character. Specifically, at Mr. Murray's hearing, petitioner testified that, in January 2006, she received in her school mailbox a copy of an email purportedly sent by Mr. Murray to a female student (hereinafter referred to as "the student"; Department Exhibit 8, pp. 1902-1904). Petitioner acknowledged in her testimony that the substantive content of the email suggested an inappropriate relationship between the sender and receiver (Department Exhibit 8, p. 2126).

She further testified that she discussed the email with her husband to be, the student and another student cheerleader whom she characterized as discreet (Department Exhibit 8, pp. 1902-1905). After learning that some of the other cheerleaders were discussing an email, petitioner, who was a cheerleading coach, met with those cheerleader students in February 2006. Petitioner testified that, at this meeting, "I wasn't speaking in a nice voice and said that they're messing around with people's lives, that this wasn't a joke. Rumors could really hurt people. I didn't appreciate it. My husband-to-be didn't appreciate it. [The student], didn't appreciate it. I chastised the girls for being harsh to [the student], excluding her at practices, ignoring her, and said this was not a way to solve any problem" (Department Exhibit 8, pp. 1904-1906). When a parent called her complaining about the meeting, petitioner testified that their conversation included a discussion about what could be done regarding the rumors and that petitioner suggested that the parent contact the school resource officer, who was also a police officer, or the principal (Department Exhibit 8, pp. 1910-1912; Transcript pp. 237-239). Petitioner also testified that she discussed the email with the student's parents and two colleagues, one of whom was her Department chair (Transcript pp. 271-272). Petitioner testified that she threw the email out (Transcript pp. 234-235).

It is clear from the record that during the 2005-2006 school year, petitioner was aware of rumors involving an alleged inappropriate relationship between Mr. Murray and a female student. It is also undisputed that petitioner disposed of an email that suggested an inappropriate relationship. While petitioner discussed the email and/or the nature of its contents with several individuals, including Mr. Murray, the student, other students and colleagues, she failed to bring it to the attention of appropriate district officials who could properly

investigate the matter. Petitioner contends that she thought the email was fabricated by other students, and yet she did not alert appropriate district administrators of this information to enable them to investigate the matter for purposes of determining whether student discipline was appropriate. If, as she testified, she believed the email was a fabrication by other students who had accessed the student's computer account, the reasonable, appropriate response of a teacher would be to bring it to the attention of appropriate district administrators.

Moreover, petitioner abused her position as a teacher and breached her duty to be a role model for students (Ambach v. Norwick, 441 US 68) by confronting other students regarding the matter, rather than discussing the matter with appropriate district administrators. I note that, under certain circumstances, it may be appropriate for a teacher to discuss with students the issues and problems that rumors may cause. However, in this case, where such rumors involved the serious allegation of an inappropriate relationship between a teacher and a student, petitioner's response evinces a serious lack of sound judgment and responsibility that is necessary for a teacher in New York State to possess. While it is understandable given petitioner's relationship to Mr. Murray that she would not want to believe allegations of an inappropriate relationship between Mr. Murray and the student, it does not excuse her actions in involving other students and failing to inform appropriate district administrators. Indeed, petitioner's actions may have discouraged the students from going to other teachers or administrators with any concerns they may have had regarding the alleged inappropriate relationship between Mr. Murray and the student.

Based on the totality of the record before me, I find that the Department carried its burden of proving by a preponderance of the evidence that petitioner lacks the requisite moral character to teach in the public schools of the State of New York.

As to the appropriate penalty, §83.6(b) of the Commissioner's regulations provides, in pertinent part: [t]he hearing officer or hearing panel, as applicable, may recommend and the commissioner may impose one of the following alternative penalties upon certified individuals:

- (1) revocation of a certificate; or
- (2) suspension of a certificate:
 - (i) wholly for a fixed period of time;
 - (ii) partially, until the certificate holder successfully completes a course of retraining in the area to which the suspension applies; or
 - (iii) wholly, until the certificate holder successfully completes a course of therapy or treatment;
- (3) limitation of the scope of a teaching certificate through revocation of an extension to teach additional subjects or grades;
- (4) a fine not to exceed \$5,000; or
- (5) a requirement that the certified individual pursue a course of continuing education or training (emphasis added).

In this case, with regard to petitioner's certificate, the hearing officer recommended a combined penalty which is not authorized by the regulations: suspension for a fixed period of time and that petitioner receive counseling and/or training during the suspension. As such, the hearing officer's recommendation must be modified to delete the recommendation that petitioner receive counseling or training.¹

After careful consideration of the entire record, I find that suspension of petitioner's certificate for two years is warranted. Such penalty is sufficient to impress upon petitioner the seriousness of her conduct.

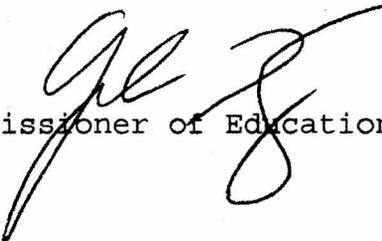
THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

¹ I note that pursuant to 8 NYCRR §100.2(hh)(2) each school district shall establish and implement on an ongoing basis, a training program regarding the procedures contained Article 23-B of the Education Law regarding child abuse in an education setting.

IT IS ORDERED that petitioner's teaching certificate be suspended for two years.



IN WITNESS WHEREOF, I, John B. King, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 2nd day of December 2011.


Commissioner of Education

The University of the State of New York
Education  Department

In the matter of the certificate(s) held by

DAVID D'AMATO

to teach in the public schools
of the State of New York

NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER

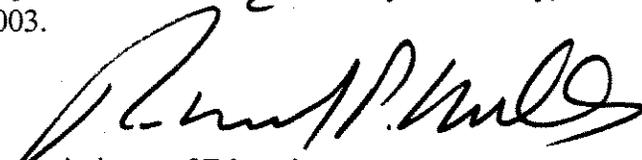
DAVID D'AMATO, hereinafter referred to as the certificate holder, presently holds the following permanent New York State certificates: school counselor effective September 1, 1993; school district administrator effective September 1, 1996; and school administrator and supervisor effective September 1, 1996, all bearing certificate number [REDACTED]. Information has been received by the New York State Education Department that after a plea of guilty on July 16, 2001 to two federal charges of "Computer Fraud and Abuse" [18 USC§1030 (A)(5)(C)], the certificate holder was sentenced on July 16, 2001 to 6 months confinement and a \$5,000 fine. Upon his release, he was placed on one year of supervised federal probation.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83, shall be mailed to the certificate holder by certified mail, return receipt requested, and he may request, in writing, to the New York State Education Department, Office of Teaching-Teacher Discipline Unit, 987 EBA, Albany, New York 12234,

within thirty days after receipt, that a hearing be held to determine whether the certificate holder's teaching certificates should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificates.

IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the Education Department this 27th day of January, 2003.


Commissioner of Education

**STATE OF NEW YORK
DEPARTMENT OF EDUCATION**

**IN THE MATTER OF A CERTIFICATE HELD
AND APPLICATION BY**

DAVID P. D'AMATO

**TO TEACH IN THE PUBLIC SCHOOLS OF
THE STATE OF NEW YORK**

**PURSUANT TO PART 83 OF THE
REGULATIONS OF THE COMMISSIONER OF EDUCATION**

**REPORT AND RECOMMENDATION
OF HEARING PANEL:**

**JEFFREY BELODOFF
HERBERT DICKSON
ROGER M. BENNETT**

**J. PAUL KOLODZIEJ, ESQ.
HEARING OFFICER**

**IN THE MATTER OF CERTIFICATES HELD
AND APPLICATION BY**

DAVID P. D'AMATO

**TO TEACH IN THE PUBLIC SCHOOLS OF
THE STATE OF NEW YORK**

**REPORT AND RECOMMENDATION
OF HEARING PANEL**

**PURSUANT TO PART 83 OF THE
REGULATIONS OF THE COMMISSIONER OF EDUCATION**

INTRODUCTION

This matter has been brought pursuant to Part 83 of the Regulations of the Commissioner of Education (8NYCRR83) concerning the appropriateness of permitting David P. D'Amato to retain his teaching certificates to teach in the public schools of the State of New York.

The Notice of Substantial Question, dated January 27, 2003 alleges that David D'Amato holds the following permanent New York State certificates: School Counselor, effective September 1, 1993; School District Administrator, effective September 1, 1996; and School Administrator and Supervisor, effective September 1, 1996. The Notice of Substantial Question further alleges that the New York State Department of Education received information that, after a plea of guilty on July 16, 2001 to two federal charges of "Computer Fraud and Abuse" [18 USC § 1030 (A)(5)(C)], Mr. D'Amato was sentenced on July 16, 2001 to 6 months confinement and a \$5,000 fine. Upon his release, he was placed on one year of supervised federal probation.¹

By Answer to Notice dated February 20, 2003, Mr. D'Amato denied the charges, requested a hearing,² and requested the appointment of a three member hearing panel.

The New York State Department of Education, by letter dated October 16, 2003, appointed Jeffrey Belodoff to the hearing panel. Mr. D'Amato, by letter from his attorneys, Rosen, Leff, Esqs. dated November 3, 2003, appointed Herbert Dickson to the hearing panel. Messrs. Belodoff and Dickson, by letter dated December 10, 2003, appointed Roger M. Bennett as the third panel member.

J. Paul Kolodziej, Esq. was appointed hearing officer pursuant to an Order Designating Hearing Officer and Setting Venue signed by Commissioner of Education Richard P. Mills, dated September 23, 2003.³

¹ Department Exhibit #1. In fact, Mr. D'Amato pled guilty to two *counts* of Computer Fraud and Abuse. The Notice of Discipline is accordingly amended to correctly recite this distinction.

² Respondent Exhibit #1

³ Hearing Officer Exhibit #1

The hearing was held on March 1, 2004, March 2, 2004, November 22, 2004, February 7, 2005 and March 8, 2005. The New York State Department of Education was represented by Deborah Mariott, Esq. and Daniel Harder, Esq. Respondent David P. D'Amato was represented by his counsel, Rosen, Leff, Esqs. (Robert M. Rosen, Esq. of Counsel).

On March 8, 2005, the Respondent submitted a written Closing Argument, following which the Department made its oral closing arguments.

FINDINGS OF FACT

The Department's case in chief was primarily documentary, consisting of, among other things:

- The minutes of the March 22, 2001 plea allocution in which Mr. D'Amato pled guilty to both counts of violating 18 U.S.C. §1030 (A) (5) (C), Computer Fraud and Abuse,⁴
- The Criminal Judgment dated July 16, 2001 in which Mr. D'Amato was adjudged guilty, upon his plea of guilty, of both counts of an Information charging him with violating 18 U.S.C. §1030 (A) (5) (C), Computer Fraud and Abuse,⁵ and
- The minutes of the July 16, 2001 sentencing proceeding concerning Mr. D'Amato.⁶

The criminal charge to which Mr. D'Amato pled guilty may seem abstract – Computer Fraud and Abuse. However, the factual underpinnings illuminate the gravity and severity of the charge.

These factual underpinnings are contained in the March 22, 2001 plea allocution⁷ and are set forth as follows, as enumerated by the Assistant United States Attorney to the Judge accepting Mr. D'Amato's plea of guilty concerning what she believed would be the evidence in that case:

- A student named [REDACTED] responded to an internet news group advertisement placed by a "Terry Tickle" also known as a female named "Terry DeSisto" who "was 'interested in obtaining videos of young men being tickled for long periods of time.' "
- Mr. D'Amato, under the guise of "Terry Tickle" or "Terry DeSisto," replied that if Mr. G. sent a video of him being tickled to a Post Office Box in Port Washington, New York that [s]he [DeSisto] would pay him \$600. Mr. G. and his friends in the Boston area "made and were paid for about 15 videos between August 1996 and April of 1997."

⁴ Department Exhibit #4

⁵ Department Exhibit #3

⁶ Department Exhibit #5

⁷ Department Exhibit #4

- Later, in 1997, when Mr. G. went out of state to attend a university and was in less contact with DeSisto, DeSisto threatened Mr. G. that, because he was ignoring her [DeSisto], she [DeSisto] intended to 'mail bomb' Mr. G.'s e-mail account. (A mail bomb attack involves sending a very large volume of e-mail so that the e-mail server is disabled).
- In December of 1997, Mr. D'Amato, under his Terry DeSisto female alias, mail-bombed Mr. G.'s e-mail account. In addition, Mr. D'Amato, again under his Terry DeSisto alias, also mail-bombed the e-mail account of the President of Drexel University, where Mr. G. was attending school.⁸
- Prior to the e-mail bombing of Mr. G.'s e-mail account and the e-mail account of the President of Drexel University, Mr. G. introduced ██████ C. to Terry DeSisto, in the fall of 1996. Mr. C. also made several videos of himself being tickled by his friends.⁹
- Later, Mr. C. reneged on a deal he made with Terry DeSisto to make five videos by August 31, 1997. He enrolled in Suffolk University in late August 1997. Mr. D'Amato, again under his Terry DeSisto female alias, threatened Mr. C. that "she would do to him what she had done to [Mr. G]."¹⁰
- On December 10, 1997, Mr. C. was notified by the Suffolk University Director of Operations that they were canceling his e-mail account because of mail bombing. Mr. C. denied that he had e-mail bombed anyone at Suffolk University, and advised the Director of Operations that a person named Terry DeSisto may have done so.¹¹
- Mr. D'Amato also e-mail bombed James Madison University in Harrisburg, Virginia between March 31, 1999 through February 2000. In each instance, e-mail service was disabled for 10-12 hours for the 15,000 students who used the James Madison e-mail system.¹²
- Subsequently, a search was conducted of Mr. D'Amato's residence. A great deal of information linked Terry DeSisto to Mr. D'Amato, including a Post Office box. When Mr. D'Amato was interviewed, he admitted he was the owner of the website www.tickling.com. Mr. D'Amato also admitted he was Terry DeSisto. He identified as his the Post Office boxes, addresses and telephone number which had already been linked to Terry DeSisto by victims of these e-mail attacks.
- Mr. D'Amato also described to the FBI how he performed his e-mail bombing. Using various programs, he found unsecured e-mail servers which provided

⁸ Department Exhibit #4, p. 14

⁹ Department Exhibit #4, p. 14

¹⁰ Department Exhibit #4, p. 15

¹¹ Department Exhibit #4, pp. 15-16

¹² Department Exhibit #4, pp. 16-17

access to send bulk e-mails. Mr. D'Amato admitted sending as many as 4,000 e-mail messages on a regular basis.¹³

- Mr. D'Amato admitted he mail bombed Mr. C.'s e-mail account as well as the e-mail account of "numerous administrators at Drexel University."¹⁴
- Mr. D'Amato also admitted that, posing as, or pretending to be Mr. C., he sent out bulk e-mails knowing that a large volume of this e-mail would be rejected and returned to his [Mr. C.'s] e-mail account.
- Mr. D'Amato admitted he mail-bombed James Madison University several times from late 1999 to January or February of 2000. He estimated to the FBI that he mail-bombed about a hundred people.¹⁵
- Damage estimates at Suffolk University exceeded \$10,000.00 and at James Madison University, in excess of \$11,000.00.¹⁶

At the conclusion of the recitation by the Assistant United States Attorney of these factual underpinnings of the two counts of violating 18 U.S.C. §1030 (A) (5) (C), the presiding judge asked Mr. D'Amato, who was under oath:

"...do you dispute anything that [the Assistant United States Attorney] had to say?"

Mr. D'Amato, under oath, responded:

"No, Your Honor ...That is what happened, your Honor."¹⁷

On July 16, 2001, Mr. D'Amato was sentenced to six months incarceration, a \$5,000 fine, supervised release for one year,¹⁸ and directed to participate in such mental health treatment as the probation department directed.¹⁹

MR. D'AMATO'S CASE

At the conclusion of the Department's case, Mr. D'Amato presented the testimony of Mr. Edward Levitan.^{19(A)} In addition, as part of the proceedings to have Respondent's Exhibit #2 admitted into evidence, Mr. D'Amato submitted his own Affidavit stating, among other things,

¹³ Department Exhibit #4, p. 17

¹⁴ Department Exhibit #4, p. 18

¹⁵ Department Exhibit #4, p. 18

¹⁶ Department Exhibit #4, p. 18

¹⁷ Department Exhibit #4, p. 22, See also p. 12, lines 21-25. For convenience, the entire text of the March 22, 2001 plea hearing is attached hereto in the Appendix.

¹⁸ Department Exhibit #5

¹⁹ Department Exhibit #5, p. 5, p. 56

^{19(A)} However, he was withdrawn by Mr. D'Amato when the Hearing Panel determined it did not need any testimony concerning the duties and responsibilities of an assistant principal, and/or the bearing of Mr. D'Amato's criminal conviction on performing these duties and responsibilities (TR, p. 225).

that he "authored and submitted" certain documents to the New York City Department of Education, the Day High School, and the West-Hempstead High School.²⁰ Among those documents Mr. D'Amato swore he "authored" was a document entitled "Writing Your College Essay."²¹

THE DEPARTMENT'S REBUTTAL CASE

In rebuttal, the Department submitted the Affidavit of John Conkright, Dean of Admissions at Randolph-Mason College, Ashland, Virginia, which stated that approximately ten years ago *he*, in fact, authored the two page brochure entitled "Writing Your College Essay."²²

MR. D'AMATO'S SUR-REBUTTAL

In sur-rebuttal, Mr. D'Amato introduced the Affidavit of Robert Edward Maher, Superintendent of Schools in the Greenburgh-New Castle Union Free School District, which stated that Mr. D'Amato's publication of "The College Selection and Admission Process for Students at West Hempstead High School," which included "Writing Your College Essay," did not amount to plagiarism.²³

RESPONDENT'S CLOSING ARGUMENTS

After some introductory remarks, Mr. D'Amato's Closing Brief asserts that "Mr. D'Amato's Internet Addiction was demonstrably cured over five years ago in February 2000. There is no issue that, during the events in question, Mr. D'Amato suffered from a mental condition that could and was treated successfully by the psychiatric assistance he sought."²⁴ Mr. D'Amato's Closing Brief then claims that "Mr. D'Amato's specific issues" were recognized by the sentencing judge, the Assistant U.S. Attorney, Mr. D'Amato's attorney, by Mr. D'Amato's treating physician [Dr. Allen Newman], and by the U.S. Department of Justice Probation Department. The brief goes on to assert "Everyone who was associated with Mr. D'Amato's matter before the Court recognized that his conduct was based on a problem that was treatable; not intentional, premeditated behavior."²⁵

Although broadly asserted, Mr. D'Amato's claims are completely without support in the record.

First of all, the crux of the two counts of the criminal charge to which Mr. D'Amato pled guilty was that Mr. D'Amato "intentionally accessed a computer system without authorization."²⁶ To now argue that Mr. D'Amato's conduct was "not intentional,

²⁰ Respondent Exhibit #5

²¹ Respondent Exhibit #2, Tab 42, VIII (pp. 15 et seq.)

²² Department Exhibit #9. The entire text of Department Exhibit #9 is contained in the Appendix hereto. Also set forth in its entirety in the Appendix is Mr. D'Amato's Affidavit, Respondent Exhibit #5 and Respondent Exhibit #2, Tab 42, Section XVIII.

²³ Respondent Exhibit #6.

²⁴ Respondent's Closing Brief, p. 4

²⁵ Respondent's Closing Brief, p. 4

²⁶ Department Exhibit #4, pp. 11-12, See also Department Exhibit #4, p. 12, lines 10-16.

premeditated behavior" is not only disingenuous, but barred by the doctrine of collateral estoppel.

Furthermore, the sole mention in the record of a so-called "Internet Addiction" came from the mouth of Mr. D'Amato, at the beginning of his March 22, 2001 plea hearing. The judge asked Mr. D'Amato whether Mr. D'Amato was under the care of a physician for any matter, and Mr. D'Amato responded that he was "under the care of a psychiatrist for a mental health condition" which condition he described as "Internet Addiction and job-related stress."²⁷ He stated he had been consulting with a psychiatrist since January 2000. Later in that proceeding, the Assistant U.S. Attorney argued that should Mr. D'Amato be released on his personal recognizance that it be with the condition that "he continues with the mental health treatment he's currently in." Based upon this, the judge released Mr. D'Amato "with that condition, that he continue with mental health treatment."²⁸

During Mr. D'Amato's sentencing proceeding, the Assistant U.S. Attorney recommended that Mr. D'Amato "continue to participate in mental health treatment, that he not use the Internet."²⁹ The Assistant U.S. Attorney went on to say that she concurred that "there's a basic psychological problem here...I think mental health training is - - - mental health treatment is extremely important and I think he has to stay completely away from the Internet."³⁰ Later, during colloquy between the sentencing Judge, the Assistant U.S. Attorney, and Mr. D'Amato's attorney, it was acknowledged that, despite Mr. D'Amato's commencement of his therapy in January 2000, Mr. D'Amato continued some of his internet activities past that time, continuing into February 2000.³¹ Mr. D'Amato's attorney told the court "[Mr. D'Amato] has been able - - - with the help of Dr. Newman - - - to use the Internet appropriately."³² His attorney went on to say that Mr. D'Amato "has a mental problem. He addressed the mental problem in an inappropriate way. He turned to the Internet."³³

Mr. D'Amato, later in this proceeding told the sentencing judge "...I recognized I had a problem. The assistance has been successful."³⁴ Near the end of the sentencing proceeding, Mr. D'Amato's attorney stated "I don't think anybody disputes that this was caused in part, because of a mental condition."³⁵ The judge noted that one of the considerations for sentencing Mr. D'Amato to a halfway house was "to permit him to have access to his current medical case providers..."³⁶ Mr. D'Amato's sentence also required him to "participate in such mental health treatment as the probation office may direct."³⁷

In reviewing the evidence, there is nothing to support the contention in Respondent's Closing Brief that Mr. D'Amato suffered from an "Internet Addiction." Except for Mr.

²⁷ Department Exhibit #4, p. 4

²⁸ Department Exhibit #4, p. 24

²⁹ Department Exhibit #5, p. 12

³⁰ Department Exhibit #5, p. 21

³¹ Department Exhibit #5, pp. 35-36

³² Department Exhibit #5, p. 36

³³ Department Exhibit #5, pp. 42-43

³⁴ Department Exhibit #5, p. 45

³⁵ Department Exhibit #5, p. 53

³⁶ Department Exhibit #5, p. 55. These problems also included a heart problem. See Department Exhibit #5 p. 39

³⁷ Department Exhibit #5, p. 52

D'Amato's statement that he was being treated for "Internet Addiction and job-related stress," there was not a shred of evidence whatsoever indicating what this so-called condition was, that Mr. D'Amato in fact suffered from it, or that he was cured.

Although it was apparently recognized that Mr. D'Amato was suffering from some sort of mental condition – unspecified anywhere – Mr. D'Amato's Closing Brief attempts to marry these few fragments of testimony concerning Mr. D'Amato's mental health with a supposed "Internet Addiction." From this, it is argued, Mr. D'Amato recognized he needed help, then sought help, and became miraculously cured some time in February 2000, only a short time after he commenced therapy in January 2000.

Nevertheless, Mr. D'Amato's Closing Brief continued to make broad arguments based upon matters not in evidence. For example, his closing brief asserts, without basis in the record, that [Mr. D'Amato's] infatuation with the Internet brought about his psychiatric condition.³⁸

Later, Mr. D'Amato's Closing Brief states that Mr. D'Amato "sought professional assistance from Dr. Allen I. Newman, a forty-year diplomat of the American Psychiatric Association and a Board Certified physician in the field of Psychiatry, for that addiction. Within a very short period of time, Mr. D'Amato was diagnosed with, and was cured of, Internet Addiction. The record reflects that, then and now."

However, nothing could be farther from the truth. There is absolutely *nothing* in the record describing Dr. Newman's credentials, and no medical report from Dr. Newman of any diagnoses or cure of this supposed Internet Addiction. The record is completely devoid of any such evidence.

Similarly, Respondent's Closing Brief next asserts that the sentencing judge, the Assistant U.S. Attorney, Dr. Newman and the U.S. Probation Department "were aware that Mr. D'Amato's problem was psychiatric and was not volitional and they knew that it was treatable and that successful treatment was underway." This bold statement, like so many others in Mr. D'Amato's Closing Brief, are made without citation to the record. This is because nothing in the record supports these blatantly false statements. In fact, the record contradicts them.

Rather, if the sentencing judge believed that Mr. D'Amato's actions were not volitional, it would seem unlikely he would have accepted his guilty plea to "intentionally" accessing a computer system without authorization.³⁹

At this point in his Closing Brief, it was noted that Mr. D'Amato fully cooperated with the FBI agents who interviewed him, and that he made voluntary restitution, prior to sentencing. This does appear in the record and is to Mr. D'Amato's credit.

Mr. D'Amato next argues that Mr. D'Amato was denied procedural process because there was no evidence in the record that the Subcommittee of the State Professional Standards

³⁸ Respondent's Closing Brief, p. 4

³⁹ Department Exhibit #4, p. 11, lines 19-25, and p. 12, lines 1-2. Specifically, the judge stated to Mr. D'Amato: "The important point here is they [the United States Attorney's Office] have to show you did this intentionally."

Practices Board for Teaching met or voted on the matters set forth in the Notice of Substantial Question.

This argument is completely without merit. The Notice of Substantial Question clearly recites that the information set forth in the Notice of Substantial Question was presented to the Subcommittee and that the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.⁴⁰

Mr. D'Amato's Closing Brief then boldly asserts: "Since the Subcommittee never met..." However, it is one thing to say "there was no evidence presented that the Subcommittee met." It is quite a leap from this to assert that, since no evidence of an action was presented, that the action didn't take place, or that if a document was not presented, that it doesn't exist. Frankly, while no one can dispute counsel's right to advocate for their client's position, the apparent willingness to fabricate and distort the record of this proceeding as contained in Respondent's Closing Brief is striking.

In summary, Mr. D'Amato's claim that this procedure was flawed and Mr. D'Amato denied procedural due process is utterly without merit.

Mr. D'Amato Closing Brief next discusses his criminal conviction.

Mr. D'Amato's Closing Brief sets up an elaborate argument concerning Mr. D'Amato's plea proceeding predicated on what should or shouldn't be deemed to be "evidence" in this Part 83 proceeding.

Notably, Mr. D'Amato's Closing Brief asserts that, after the Assistant United States Attorney told the judge what she believed would be proven as the facts underlying the criminal charge, and the judge asked Mr. D'Amato "do you dispute anything that [the Assistant U.S. Attorney] had to say?", and Mr. D'Amato's replied "No...that is what happened" should be interpreted as replying "only to the validity of the Criminal Information filed by the U.S. Attorney...not to the validity of [the Assistant U.S. Attorney's] presentation of events surrounding it."⁴¹ This argument, however, is not supported by the record, or by the law, by the facts.

In order for a court to accept a plea of guilty, the court must first determine that there is a factual basis to support the charge.⁴² Prior to hearing what the Assistant U.S. Attorney stated would be proven at a trial, the judge stated to Mr. D'Amato: "...what I would like you to do is listen very carefully to what [the Assistant U.S. Attorney] has to tell us would be the evidence in the case. Because when she's through, I'm going to turn to you and say, 'Is that what happened?'"⁴³ In the present case, the Assistant U.S. Attorney delineated to the Court the government's position as to the acts of Mr. D'Amato, recited previously herein. Mr. D'Amato did not dispute the Assistant U. S. Attorney's recitation of the factual underpinnings of the criminal charge and clearly admitted "that is what happened." Period. He is now bound by

⁴⁰ Department Exhibit #1

⁴¹ Respondent's Closing Brief, pp. 11-12

⁴² Department Exhibit #4, lines 19-22.

⁴³ Department Exhibit #4, lines 21-25.

those admissions. In Mr. D'Amato's own words: "That is what happened." In summary, Mr. D'Amato's arguments contained in this portion of his Closing Brief have no basis in law or fact.

And yet again, permeated throughout this argument are more references to this supposed Internet Addiction. Without any foundation whatsoever in the record, Mr. D'Amato's Closing Brief asserts that this supposed Internet Addiction is "a medically recognized affliction." Again, no citation to the record is made for this broad statement for the simple reason that there is nothing in the record to even remotely suggest that this so called Internet Addiction is "a medically recognized affliction."⁴⁴

Like a sequence from Alice in Wonderland, the *leit motif* of Internet Addiction continues on the next page of Respondent's Closing Brief: "It is clear, however, that all parties to the criminal proceeding concurred that Mr. D'Amato's behavior had been based on his Internet Addiction. This addiction is a recognized and legitimate medication affliction with a treatment protocol for its case."⁴⁵ Again, there is nothing in the record that could even remotely support these bold statements, which have been discussed at length above. Nevertheless, Mr. D'Amato's Closing Brief then continues by stating "[h]is conduct was not intentional, his conduct was driven by his Internet Addiction, a serious compulsion for which he was been successfully treated..."⁴⁶

It should be noted that, despite all the talk about Mr. D'Amato's supposed Internet Addiction in his Closing Brief, no evidence was ever presented as to what this supposed Internet Addiction was. Was it Mr. D'Amato's masquerading as a female to get young men to send him videotapes of them being tickled? Was it his operation of a website named www.tickling.com? Was it maintaining Post Office boxes and other addresses under his female persona Terry DeSisto? Was it impersonating the young men who refused to provide Mr. D'Amato in his female persona Terry DeSisto with more ticking videos when, using their e-mail identities, Mr. D'Amato let loose a torrent of e-mail bombs to at least three universities knowing that these young men would be blamed for these e-mail attacks? Or was it threatening at least one young man that, when he refused to send Mr. D'Amato or his female persona Terry DeSisto any more tapes, he would let the student's assistant high school principal know about his previous participation in the making of the tickling videos?⁴⁷

Mr. D'Amato's Closing Brief next goes on to state: "[the sentencing judge] had convinced himself that Mr. D'Amato's Internet issues had effectively long since been put to rest and cured."⁴⁸ This statement, like so many other statements contained in Mr. D'Amato's Closing Brief, has no support in the record.

While the Assistant U.S. Attorney argued that Mr. D'Amato should be banned from using the Internet for a year, and the judge declined to order such a ban, it cannot rationally be inferred, assumed or suggested that the sentencing judge "had convinced himself that Mr. D'Amato's Internet issues had effectively long since been put to rest and cured." First, forget

⁴⁴ Respondent's Closing Brief, p. 11

⁴⁵ Respondent's Closing Brief, p. 12

⁴⁶ Respondent's Closing Brief, p. 12

⁴⁷ Department Exhibit #5, pp. 19-20

⁴⁸ Respondent's Closing Brief, p. 13

for the moment that no evidence was introduced to show what an Internet Addiction was or that Mr. D'Amato ever suffered from such a condition. Next, it should be noted that no evidence was ever presented that Mr. D'Amato had been "cured" of this so-called addiction. Lastly, it should be remembered that Mr. D'Amato still had his Internet issues in February of 2000, and he was sentenced only some five months later – hardly a "long" time.

Next, Mr. D'Amato's Closing Brief attempts to build on the concept of his supposed cure to his supposed Internet Addiction. He seeks to assure the hearing panel: "You can be comfortable with the fact that none of the acts caused by Mr. D'Amato were intentional, once you factor in the symptomology of his Internet Addiction."⁴⁹ Yet again, Mr. D'Amato seeks to revisit his criminal conviction, which as an essential element of the charge was that his conduct was intentional.⁵⁰ And yet again, dispute the assertion of a supposed Internet Addiction, Mr. D'Amato introduced absolutely no evidence of the existence of an Internet Addiction or what its symptomology might be.

Nevertheless, Mr. D'Amato's Closing Brief proceeds to state: "The treatment was successful." Again, there is no evidence of what treatment Mr. D'Amato may have received, and no evidence that any such treatment was successful.

Continuing to build on this supposed theme of treatment and successful cure of a supposed Internet Addiction, Mr. D'Amato's Closing Brief seeks to bolster these unsupported claims by Mr. D'Amato, by Mr. D'Amato's employment at his father's law firm of which Mr. D'Amato's father is the lead name in the firm of D'Amato and Lynch. It is in this section that Mr. D'Amato's Closing Brief outrageously goes above and beyond the limits of aggressive advocacy. Because the record is devoid of evidence supporting Mr. D'Amato's claims, he must now continue to make bold assertions about matters not contained in the record. For example, his Closing Brief talks about the reputation of D'Amato and Lynch, its areas of practice, its number of attorneys, its annual billings and, *somewhat* surprisingly (or perhaps not at all), invites the hearing panel to look beyond the record and check out the law firms web site! This is clearly and obviously improper and frankly reflects poorly on the credibility of Mr. D'Amato's other arguments.⁵¹ Suffice it to say, there was no evidence presented as to what Mr. D'Amato does in his father's law firm, nor should his employment there be viewed as vouching for his "cure" or good moral character.

Nevertheless, Mr. D'Amato's Closing Brief continues to talk about his "past aberration...resultant from a treated disorder of narrow scope," with nary a shred of evidence of either the scope or treatment of the so-called disorder.⁵²

Yet, Mr. D'Amato's Closing Brief continues to be able to discern the mind of the sentencing judge, stating that "Mr. D'Amato so impressed [the sentencing judge] that the Judge did something that is entirely unheard of in Federal Court...then or now..." This argument

⁴⁹ Respondent's Closing Brief, p. 14

⁵⁰ Department Exhibit #4, pp. 11-12

⁵¹ Respondent's Closing Brief, pp. 14-15

⁵² Respondent's Closing Brief, p. 15

seems to evolve from the affirmation of Richard Guay, Esq.⁵³ who wrote that Mr. D'Amato's sentence was unusual.

In the next area of Mr. D'Amato's Closing Brief, as a build-up to the discussion of Mr. D'Amato's moral character, Mr. D'Amato continues with the completely unsupported theme that Mr. D'Amato's actions were not "intentional, rational conduct" but were the result of Mr. D'Amato's "psychiatric impairment," which was "professionally addressed, and subsequently, treated."⁵⁴ However, yet again, there is no evidence in the record to support these statements.

Continuing to build upon the Internet Addiction theme, Mr. D'Amato's Closing Brief contends that Mr. D'Amato's Internet Addiction should be viewed similarly to alcohol abuse, stating that "Alcoholics look to Alcoholics Anonymous." The Closing Brief then makes similar analogies to drug addiction. The Closing Brief continues to say that "with Dr. Newman's counsel, he beat it." This argument fails on at least two bases. The first, of course, is that Mr. D'Amato did not introduce any evidence of Internet Addiction, or cure. Secondly, if, as Mr. D'Amato argues, Mr. D'Amato suffered from an addiction similar to alcoholism, it is common knowledge that such addictions are not magically cured but are rather managed.

Because Mr. D'Amato introduced no evidence of rehabilitation, he now seeks to have such rehabilitation inferred. His Closing Brief suggests that Mr. D'Amato's admission to Fordham Law School "confirms his rehabilitation."⁵⁵ Frankly, this argument is so specious it need not be addressed, but illustrates the complete absence of evidence of rehabilitation or good moral character presented by or on behalf of Mr. D'Amato.

Yet, Mr. D'Amato's Closing Brief contains excerpts from a number of letters submitted on his behalf prior to his sentencing. However, these deal primarily with his abilities as an educator, and do not address the issue of his current moral character. And, yet again, Mr. D'Amato's Closing Brief, again without a scintilla of support in the record, states: "Not only did David bare his soul to his own private psychiatrist Dr. Allen Newman..."⁵⁶

Next, Mr. D'Amato's Closing Brief discusses Mr. D'Amato's application to obtain a New York City Department of Education teaching and administrative certificate. Because of the New York City Department of Education issued Mr. D'Amato a certificate for Assistant Principal (Administration), Supervisor of Guidance (Education and Guidance) and Guidance Counselor in Secondary Schools, Mr. D'Amato's Closing Brief asserts that the New York City Board of Education had to determine there was no "direct relationship" between his conviction and the duties and the responsibilities necessary for these certificates, and then asserts: "We can infer, the Department of Education of the City of New York determined, by the issuance of the above Certificates, that Davis [sic] D'Amato had sufficient moral character to possess those licenses to be employed in the New York City school system."⁵⁷ However, the New York City Board of Education does not have a good moral character component and the New York City Board of Education was concerned with the issuance of certificates relating to employment as

⁵³ Respondent's Exhibit # 7

⁵⁴ Respondent's Closing Brief, p. 16

⁵⁵ Respondent's Closing Brief, p. 17

⁵⁶ Respondent's Closing Brief, p. 22

⁵⁷ Respondent's Closing Brief, p. 28

distinguished from this Part 83 proceeding which is to determine whether Mr. D'Amato possesses the requisite good moral character to retain his teaching certificates issued by the New York State Department of Education.

Mr. D'Amato's other arguments are discussed further below.

ANALYSIS AND DISCUSSION

Upon the presentation of the Department's case, the Department met its burden of proof by a preponderance of the evidence that Mr. D'Amato lacked the requisite good moral character to retain his teaching certificates. The documentary evidence submitted by the Department was sufficient to meet its burden of proof. The Department of Education was not required to submit additional proof.

Pursuant to Part 83.4 (d) (3) of the Regulations of the Commissioner of Education:

...proof of conviction for any of the following acts constituting a crime in New York State committed subsequent to certification shall create a rebuttable presumption that the individual so convicted lacks good moral character...

(3) any crime committed [] on school property...

Mr. D'Amato's convictions are within the ambit of Part 83.4 (d) (3). He pled guilty to two counts of a Federal charge. These crimes were committed subsequent to certification. These crimes were committed "on school property" - that being the campuses of Drexel University, Suffolk University and James Madison University.

Mr. D'Amato rested his case shortly after calling in his first witness, Mr. Levitan. He presented no evidence rebutting the presumption provided by Part 83.4 (d) (3).

However, notwithstanding this finding and conclusion, even after considering the provisions of Corrections Law Sections 752 and 753, the Department has met its burden of proof that Mr. D'Amato lacks the requisite good moral character to retain his teaching certificates.

Corrections Law Section 752 requires that:

No application for any license or employment, to which the provisions of this article are applicable, shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety and welfare of specific individuals or the general public.

Corrections Law Section 750 defines 'Direct Relationship' as meaning that:

...the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.

Concerning the Corrections Law Sections 750 and 752 analyses, it is clear that Mr. D'Amato's convictions bear a direct relationship to his specific teaching certificates and to his fitness to perform his duties and responsibilities relating thereto, and would involve an unreasonable risk to the property or to the safety and welfare of specific individuals and the general public.

It should be noted that Mr. D'Amato was *not* charged and convicted upon his plea of guilty to any crime involving pornography or immorality. He pled guilty to Computer Fraud and Abuse. However, the factual underpinnings reveal a more malevolent persona of Mr. D'Amato.

Mr. D'Amato's actions were vengeful and in retribution for the students involved failing to provide him with the videotapes of them being tickled as they had previously agreed to provide to him. He used aliases to obtain his videos. His mail bombing was sometimes done assuming the identity of the students who did not do his bidding. In one instance, Mr. D'Amato, himself an Assistant Principal, threatened a high school student that, unless the student did his bidding, he would reveal the student's tickling video to his Assistant Principal.⁵⁸

Presented with this clear evidence, and there being no rebuttal or rehabilitation, it is evident that a direct relationship exists between Mr. D'Amato's criminal offenses and the teaching certificates he seeks to retain, and that continuance of his licensure would involve an unreasonable risk to property and/or to the safety and welfare of the general public and in particular, those within the school environment, both students, and teaching and administrative staff.

Notwithstanding Mr. D'Amato's assertions that his criminal convictions stemmed from or resulted from a so-called "Internet Addiction" from which he was subsequently cured, no evidence of any such addiction or cure was presented by Mr. D'Amato.

CORRECTIONS LAW SECTION 753 ANALYSIS

- Clearly, New York State encourages the licensure and employment of persons previously convicted of one or more criminal offenses.⁵⁹
- Mr. D'Amato was a guidance counselor and assistant principal.⁶⁰
- Mr. D'Amato's convictions bear upon his fitness and ability to perform the duties and responsibilities of individuals who hold his certifications. His actions involve identity

⁵⁸ Department Exhibit #5, pp. 19-20

⁵⁹ Corrections Law §753 1 (a)

⁶⁰ Corrections Law §753 (b)

theft, fraud, vengeance and retribution unleashed against students who did not do what Mr. D'Amato wanted them to do.⁶¹

- Mr. D'Amato's criminal activities spanned a time frame from August 1996 to February 2000. He pled guilty March 22, 2001 and was sentenced on July 16, 2001. Only a brief period of time has elapsed between his criminal activities and the commencement of this proceeding.⁶²
- Mr. D'Amato was, by any analysis, a grown man and an educated man at the time he committed his criminal offenses.⁶³
- Mr. D'Amato's crime was serious, had significant impacts, both personal (to his victims) and financial (to the colleges).⁶⁴
- Mr. D'Amato produced no information or evidence of his rehabilitation or good moral character.⁶⁵
- The Department of Education has a legitimate interest in protecting the property and safety and welfare of individuals and the general public who could be affected by Mr. D'Amato.⁶⁶

In summary, even considering the provisions of Corrections Law Sections 752 and 753, it is clear that Mr. D'Amato does not possess the requisite good moral character to retain his teaching certificates.

As noted herein above, Mr. D'Amato's convictions presented a prima facie case of lack of good moral character. Mr. D'Amato presented no credible evidence to rebut the presumption of lack of good moral character provided by Part 83.4 (d) (3) or to credibly address the provisions of Corrections Law Sections 752 and 753.

Rather, Mr. D'Amato dug his hole deeper, himself providing proof of his current lack of good moral character by his obvious plagiarism. This was proved not only in his submission of his application to the New York City Board of Education and the Greenburgh and West Hempstead School Districts, but also by his sworn Affidavit, in which, by his own handwriting,

⁶¹ Corrections Law §753 (c)

⁶² Corrections Law §753 (d)

⁶³ Corrections Law §753 (e)

⁶⁴ Corrections Law §753 (f)

⁶⁵ Corrections Law §753 (g)

⁶⁶ Corrections Law §753 (h)

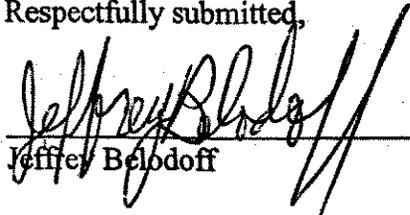
he continued to insist he "authored" the obviously plagiarized Conkright essay "Writing Your College Essay."⁶⁷

RECOMMENDATION

Based upon the foregoing, it is the recommendation of the hearing panel that Mr. D'Amato's teaching certificates be revoked.⁶⁸

Dated: October 17, 2005

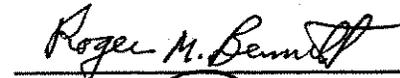
Respectfully submitted,



Jeffrey Belodoff



Herbert Dickson



Roger M. Bennett



J. Paul Kolodziej, Hearing Officer

⁶⁷ Notwithstanding the assertions contained in the Affidavit of Robert Maher, the hearing panel finds Mr. D'Amato's inclusion of John Conkright's "Writing Your College Essay" in his [D'Amato's] Application, without attribution, clearly constitutes plagiarism. To insist otherwise is disingenuous. Furthermore, Mr. D'Amato, himself, in his own handwriting interlined in his Affidavit the words "and authored" not once, not twice, but three times. For a man as educated as Mr. D'Amato, who has received certificates as a guidance counselor and assistant principal, this plagiarism confirms his lack of good moral character.

⁶⁸ The hearing panel has considered the remainder of Mr. D'Amato's arguments, not discussed herein, and found them lacking merit. Similarly, the hearing panel has considered the issue of Mr. D'Amato's representations concerning the reasons he withdrew from Fordham University Law School and found the testimonial and documentary evidence concerning same as insufficient to warrant consideration.

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificates of David D'Amato to
teach in the public schools of the
State of New York.

Petitioner appeals the findings and recommendations of a hearing panel that he lacks the requisite moral character to be a counselor, supervisor or administrator in the public schools of the State of New York and that his certificates in these areas be revoked. The appeal must be dismissed.

Petitioner holds permanent New York State certification as a school counselor, school administrator and supervisor, and school district administrator.

On or about July 16, 2001, petitioner pled guilty to two counts of computer fraud and abuse, a violation of federal law for obtaining unauthorized access to a protected computer system and unintentionally causing damage in excess of \$5,000. He was sentenced to six months in a halfway house, with the recommendation that he be allowed unsupervised release time to attend law school, and one year of post-confinement probation. He was also fined \$5,000.

The facts underlying petitioner's guilty plea indicate that he was involved in an Internet scheme whereby he established a website, assumed a female persona ("Terri Tickle" or "Terri DeSisto") and solicited individuals to provide videos of themselves being tickled. Through this scheme, petitioner obtained videos of high school boys being tickled. Petitioner paid the boys \$600 per video. (One student and his friends provided petitioner with approximately 15 videos in 1996 and 1997.) Between 1997

and 2000, when three boys stopped providing petitioner with videotapes, petitioner "mail-bombed" the boys' college email accounts as well as those of the college administrators. Specifically, he sent thousands of email messages, disabling the email systems of two universities and causing more than \$21,000 in damages. Petitioner estimates that he mail-bombed approximately 100 individuals.

On January 27, 2003, I issued a Notice of Substantial Question of Moral Character pursuant to Part 83 of the Commissioner's regulations. Petitioner requested a hearing before a three-member panel, which was held on March 1 and 2, 2004. A June 2004 hearing date was adjourned as petitioner sought to have the hearing officer and panel removed through an Article 78 proceeding in New York State Supreme Court, which was dismissed as premature and for failure to exhaust administrative remedies. The hearing continued on November 22, 2004, February 7, 2005, and March 8, 2005.

At the hearing, the New York State Education Department ("Department") introduced 10 exhibits, including two affidavits and the testimony of an investigator for the Department's Office of School Personnel Review and Accountability ("OSPRA"). As part of its case, the Department also introduced a 2000 publication written by petitioner while he was employed as a high school assistant principal and director of guidance. This publication contained a section entitled "Writing Your College Essay." The Department introduced further evidence that "Writing Your College Essay" was actually written by the Dean of Admissions at Randolph-Macon College in 1994 and was used in petitioner's 2000 publication without attribution.

Petitioner introduced seven exhibits, which included several affidavits and letters of reference attesting to his good character and employment performance from his employers, co-workers and family. The exhibits also included "Certificates of Eligibility for Supervisory Placement" in the titles of Supervisor of Guidance and Assistant Principal in Day High Schools and a "Certified Provisional Certificate" to serve as a substitute Guidance Counselor in Secondary Schools, issued by the New York City Board of Education in 2002, following petitioner's criminal conviction.

By decision dated October 17, 2005, the panel found no evidence to support petitioner's claim that he had suffered from "Internet Addiction," had been treated and cured. It concluded that a substantial question existed with respect to petitioner's moral character and recommended that his school counselor, school administrator and supervisor, and school district administrator certificates be revoked. This appeal ensued.

Petitioner asserts, inter alia, that prior to his federal criminal conviction, he sought treatment for Internet addiction and was subsequently cured of this condition. He argues that he has been rehabilitated and therefore possesses the requisite moral character to serve as a counselor and administrator in the public schools of New York State. As evidence of his rehabilitation, petitioner submitted an affidavit from his supervisor stating that petitioner has been employed at his law firm since 2002 as the "Director of Internet Research and Special Projects" and has performed the duties of this position "both diligently and responsibly." Petitioner also maintains that the hearing panel incorrectly applied the burden of proof in this case.

By letter dated January 3, 2006, OSPRA recommended that the panel's findings and recommendations be upheld. Specifically, OSPRA argues that the hearing panel's decision is supported by the record. OSPRA further maintains that the hearing panel applied both burden of proof analyses set forth in §83.4 of the Commissioner's regulations and found that under either petitioner lacks the requisite moral character to be a counselor or administrator in the public schools of New York State.

I must first address the burden of proof. Petitioner points out that, in general, the Department has the burden to establish lack of good moral character in a Part 83 proceeding (8 NYCRR §83.4[c]). However, pursuant to §83.4(d) of the Commissioner's regulations, in the case of a certified individual, proof of a conviction of any crime committed on school property creates a rebuttable presumption that the individual so convicted lacks good moral character. Petitioner claims that the panel erroneously applied §83.4(d) in this case because his criminal conduct did not occur on school property.

In its decision, the panel determined that petitioner's convictions are "within the ambit of Part 83.4(d)(3). He pled guilty to two counts of a Federal charge. These crimes were committed subsequent to certification. These crimes were committed 'on school property' - that being the campuses" hosting the email accounts which petitioner used to send out thousands of email messages. The panel concluded that petitioner "presented no evidence rebutting the presumption provided by ... 83.4(d)(3)."

However, the panel also found that "notwithstanding this finding and conclusion, even after considering the provisions of Corrections Law Section 752 and 753, the Department has met its burden of proof that [petitioner] lacks the requisite good moral character to retain his teaching certificates." Because I agree with the panel that petitioner lacks moral character under this analysis, I need not determine whether petitioner's crime was committed on school property under §83.4(d) of the regulations.

Pursuant to §83.5(c) of the regulations, the Commissioner may affirm, adopt, reverse or modify the findings and recommendations of the hearing panel. In determining whether a certificate should be revoked or suspended based on a previous criminal conviction, the panel must apply the standards for denial of a license application set forth in Correction Law §752 and consider the factors specified in Correction Law §753 (8 NYCRR §83.4[e]). Correction Law §752 provides:

No application for any license or employment shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the

specific license or employment sought; or

- (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Correction Law §753 identifies eight factors that must be considered in determining whether to grant a license or employment to an individual with a previous criminal conviction. They are:

The public policy of this [S]tate ... to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

The specific duties and responsibilities necessarily related to the license or employment sought.

The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

The time which has elapsed since the occurrence of the criminal offense or offenses.

The age of the person at the time of occurrence of the criminal offense or offenses.

The seriousness of the offense or offenses.

Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

(Correction Law §753[1][a] - [h]).

The panel considered whether petitioner's certificates should be revoked based upon his conviction under the standards set forth in Correction Law §§752 and 753. The panel found that petitioner's criminal conduct had a nexus with his fitness to be a school administrator and counselor:

[Petitioner's] actions were vengeful and in retribution for the students involved failing to provide him with the videotapes of them being tickled as they had previously agreed to provide him. He used aliases to obtain his videos.... In one instance, [petitioner], himself an Assistant Principal, threatened a high school student that, unless the student did his bidding, he would reveal the student's tickling video to his Assistant Principal.... [I]t is evident that a direct relationship exists between [petitioner's] criminal offenses and the teaching certificates he seeks to retain, and that continuance of his licensure would involve an unreasonable risk to property and/or to the safety and welfare of the general public and in particular, those within the school environment, both students, and teaching and administrative staff.

The panel also observed that petitioner's conviction occurred less than two years prior to his initiation of this appeal.

The panel considered petitioner's claim that he has been rehabilitated, but noted that there was no evidence on the record to support this claim. Petitioner asserts that

he sought treatment for "Internet addiction" in 2000, prior to his federal criminal conviction, and was subsequently cured of this condition. However, there is no competent evidence in the record that petitioner was legitimately diagnosed with an "Internet addiction." Moreover, aside from the affidavit from his supervisor and petitioner's own assertions, there is no evidence in the record that petitioner actually completed a successful course of treatment for such an addiction.

The panel also considered the fact that at the time petitioner engaged in the criminal conduct, he was an educated adult who was employed as an assistant principal/director of guidance in a public high school. Petitioner submitted several letters and affidavits from his employers, colleagues, former students, friends, and family attesting to his good work performance and his general character traits of caring, generosity, and compassion.

However, the evidence of petitioner's conduct, the absence of evidence as to his treatment and rehabilitation and the evidence submitted by the Department that petitioner used the writing of another person without appropriate attribution convince me that petitioner does not possess the requisite moral character to serve as a role model for the students he would serve. It is important for persons working with students to be able to guide students toward appropriate life choices. This is particularly true of a guidance counselor because that position requires the individual to assist students in planning for their futures.

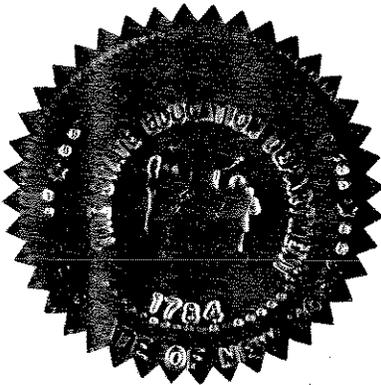
Moreover, I find that the activities underlying the criminal conviction to which petitioner admitted are incompatible with the requisite moral character for a school supervisor, counselor or administrator. Specifically, petitioner's use of an assumed name and persona to obtain videos from high school boys is disturbing. In conjunction with the vengeful activities that followed, I conclude that petitioner's continued certification presents an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Based on the totality of the record before me, I cannot conclude that petitioner has the requisite moral

character to serve as a counselor or administrator in the public schools of New York State. Therefore, I affirm the findings and recommendations of the panel that petitioner's certifications must be revoked.

IT IS ORDERED that the certificates of David D'Amato be and hereby are immediately revoked; and

IT IS FURTHER ORDERED that petitioner shall immediately return to the State Education Department any copies of such certificates currently in petitioner's possession.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department at the City of Albany, this 7th day of March, 2008.

Richard P. Mills
Commissioner of Education

The University of the State of New York
Education Department



In the matter of the certificate held, and
the application by

MICHAEL D. DREXLER

to teach in the public schools
of the State of New York

NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER

MICHAEL D. DREXLER, hereinafter referred to as the "certificate holder", is a holder of a provisional New York State certificate as a teacher of Pre-K-6, effective September 1, 2000, bearing number [REDACTED] and is an applicant for an Early Childhood Annotation to said certificate.

Information has been received by the New York State Education Department that during summer of 2002, through the summer of 2003, certificate holder engaged in an inappropriate sexual relationship with a sixteen year-old female. The name of the victim and the exact nature of the conduct are known by the Department and will be provided upon request.

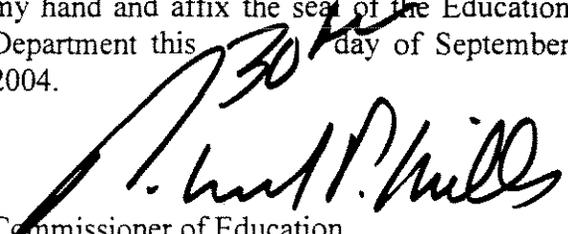
Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83, shall be mailed to the certificate holder by certified mail, return receipt requested, and the certificate holder may request, in writing, to the New York

D-1

State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt, that a hearing be held to determine: whether the certificate holder's certificate to teach should be revoked or subject to an alternate penalty pursuant to section 305(7) of the Education Law; and whether certificate holder's application for a teaching certificate should be granted. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's certificate to teach and the denial of the certificate holder's application for a teaching certificate.

IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the Education Department this 30th day of September 2004.


Commissioner of Education

STATE OF NEW YORK
DEPARTMENT OF EDUCATION
DIVISION OF TEACHER EDUCATION AND CERTIFICATION

IN THE MATTER OF THE CERTIFICATE HELD AND
THE APPLICATION BY MICHAEL D. DREXLER TO
TEACH IN THE PUBLIC SCHOOLS IN THE STATE
OF NEW YORK

Report and
Recommendation of
Hearing Officer

Hearing Officer: John E. Dorfman, Esq.

Appearances: Daniel C. Harder, Esq.
Office of School Personnel Review and Accountability of the
New York State Education Department
Attorneys for Petitioner
89 Washington Avenue
Albany, New York 12234

James R. Sanders, Esq. by
Catherine V. Battle, Esq., Associate Counsel
New York State United Teachers
Attorneys for Michael D. Drexler
52 Broadway, 9th Floor
New York, New York 10004

Michael D. Drexler

PROCEDURAL HISTORY

This proceeding was initiated by the issuance of a Notice of Substantial Question of Moral Character dated September 30, 2004 (State's Exhibit 1). This Notice was properly served upon Michael D. Drexler, by certified mail, return receipt requested, at his residence, 21110 18th Avenue, Apt. L-2, Bayside, New York, 11350-1501, in accordance with Part 83 of the Regulations of the Commissioner of Education, and further pursuant to the "Notice of Substantial Question of Moral Character".

By Order dated January 11, 2005, (Hearing Officer's Exhibit 1), the Honorable Richard P. Mills, Commissioner of Education of the State of New York, designated the undersigned to conduct a hearing pursuant to the provisions of Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83) concerning the appropriateness of permitting Michael D. Drexler to teach in the public schools of the State of New York. The

above-entitled matter having been timely scheduled for a Part 83 Hearing on March 17th, 2005, by notice dated February 8, 2005, in compliance with 8 NYCRR, Part 83, and an amended Notice of Part 83 Hearing having been served on February 25, 2005 identifying newly retained counsel on behalf of Michael D. Drexler, and following multiple telephone conferences with counsel for petitioner and respondent for purposes of rescheduling, a Second Amended Notice of Part 83 Hearing dated March 2, 2005 was served setting forth hearing dates of May 16, 2005, May 17, 2005 and May 18, 2005, in compliance with 8 NYCRR, Part 83, and the above-entitled matter having duly come on for a hearing on May 16th, 2005 and May 17th, 2005 and August 19, 2005 at the Offices of the New York State Education Department, 89 Washington Avenue, Albany, New York, to determine the appropriateness of permitting Michael D. Drexler to teach in the public schools of the State of New York, and The Education Department of the State of New York having appeared by Daniel C. Harder, Esq., Office of School Personnel Review and Accountability, and the respondent, Michael D. Drexler, having appeared in person and by James R. Sanders, Esq., Catherine V. Battle, Esq., of counsel, and after having heard the proof presented herein, and the matter having been fully submitted and due deliberation having been had thereon, the following Findings of Fact and Discussion and Recommendation are made:

FINDINGS OF FACT

1. Michael D. Drexler presently holds a provisional pre-kindergarten through sixth grade New York State Certificate and is an applicant for an Early Childhood Annotation to said certificate.
2. The date of birth of Michael D. Drexler is August 26, 1977.
3. That in or about the summer of 2002, and at all times relevant herein, Michael D. Drexler was an employee at a day camp identified as Deer Mountain Day Camp and worked at the Waterfront.
4. That during the summer of 2002, an individual identified as [REDACTED], date of birth [REDACTED], worked as a junior lifeguard counselor at the Deer Mountain Day Camp.
5. Thereafter and at times not specifically identified, but prior to August 14, 2003, Michael D. Drexler engaged in sexual intercourse with [REDACTED], both at his residence at [REDACTED] New York and at a hotel. That as of

August 14, 2003, said date representing the date wherein Michael D. Drexler was interviewed by Detective Jeffrey Wanamaker of the Town of Clarkstown Police Department, Michael D. Drexler was 26 years of age and [REDACTED] would have been 16 years of age.

6. That [REDACTED] was dating an individual by the name of [REDACTED] and that [REDACTED] and [REDACTED] were sexually active and that [REDACTED] was approximately two years older than [REDACTED]

7. That on or about August 11th, 2003, [REDACTED], mother of [REDACTED] had a taped telephone conversation with Michael D. Drexler, wherein, among other things, Michael D. Drexler admitted having sexual intercourse with [REDACTED] (see Department's Exhibit "18" [Time 13:50 -14:14; 16:25 - 16:32] in evidence).

8. That [REDACTED] has refused to cooperate in any degree with the Town of Clarkstown Police Department in this investigation.

9. That Sergeant Wanamaker was permitted to testify without objection to his interview with [REDACTED] on August 6, 2003 wherein she admitted to him that she has had sexual intercourse with Michael D. Drexler "earlier in the year"; that she "was the one that initiated the relationship and was the one who initiated all the sexual contact".

10. That Michael D. Drexler was employed by the Board of Education of the City School District of the City of New York at the Michaelangelo Middle School-144 located in the Bronx, New York commencing September 2000 through the end of the school year in the time frame 2003 - 2004.

11. That Michael D. Drexler has positive performance reports for his term of employment at the Michaelangelo Middle School.

12. Mr. Drexler taught lessons to the sixth and seventh grade students in the area of science, and according to the affidavit of Ellen Barrett, he performed as an "exceptional teacher" and "possessed a rare honesty and willingness to assist others, and I consider him to be an excellent role model for the children at Michaelangelo Middle School".

13. Mr. Drexler is also a Captain in the New City Volunteer Ambulance Corps. and Rescue Squad, and as submitted in the affidavit of Robert Hak, a volunteer EMT

individual, he is an asset to the Corps. and volunteers at the minimum of sixty hours per month for the ambulance corps. Mr. Drexler has further obtained the position of "Captain".

DISCUSSION

8 NYCRR 83.4(c) provides that with respect to certificate holders or applicants, "the department shall have the burden of proof of lack of good moral character". The Department has met its burden of proof in this proceeding.

It should be noted from the outset that the Notice of Substantial Question of Moral Character dated September 30, 2004 does not arise out of a previous criminal conviction, and therefore, the standards set forth in Section 83.4 do not apply, and the Hearing Officer will not consider Section 752 and Section 753 of the Corrections Law of the State of New York in determining any issues raised in this proceeding.

It is uncontroverted that Michael D. Drexler, date of birth August 26, 1977, engaged in sexual intercourse with [REDACTED], date of birth [REDACTED] and from the testimony adduced, Mr. Drexler would have been 26 years of age at the time he was having sexual relations with [REDACTED], who would have been only 16.

It must be pointed out that pursuant to the Penal Law of the State of New York, it is unlawful for a person over the age of 21 years to engage in sexual intercourse with a female less than 17 years of age. In essence, such a female is incapable of providing consent. (See New York State Penal Law Section 130.25).

The Hearing Officer is well aware that Mr. Drexler was not charged with a violation of the Penal Law of the State of New York, and no inference is being drawn specifically as to the Penal Law consequence of Mr. Drexler's actions. However, the Hearing Officer cannot ignore the issue in this matter, which is to determine and address the issue concerning the appropriateness of permitting Michael D. Drexler to teach in the public schools of the State of New York.

The term "good moral character" is not defined in Part 83 and neither statute nor decision clearly addresses this definition as to "good moral character". However, Judge Learned Hands' definition of "good moral character" in Posusta v. United States, 2 CAR., 285 F2d 533, 534-535, establishes a standard to be applied when dealing with such a term: ... "It is settled that the test is not the personal moral principles of the individual

judge or court before whom the applicant may come; the decision is to be based upon what he or it believes to be the ethical standards current at the time ... Obviously, it is a test incapable of exact definition; the best we can do is to improvise the response that the 'ordinary' man or woman would make, if the question were put whether the conduct was consistent with a 'good moral character' ...". The conduct of Mr. Drexler in engaging in sexual intercourse with [REDACTED] when he was of the age of 26 years and she was of the age of 16 years, establishes such poor judgment and establishes the lack of good moral character on the part of Michael D. Drexler.

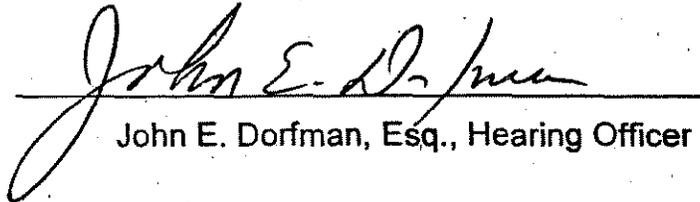
The position of a school teacher requires extreme trust, personal integrity and the ability to practice good judgment given the non-reviewability of many of the decisions and actions made by teachers affecting the children under their supervision. Above all, it is the best interests of the students that must be first and foremost in the minds and actions of the teacher. The term "student" as used herein includes adolescents and young adults, who for whatever reason, lack the maturity and foresight to always act in their own best interests. The responsibilities of a teacher do not end at the end of a class day, and follows that teacher in his or her interactions outside of school with adolescents and young adults, who for whatever reason, come under the care, tutelage or supervision of the teacher. It is not the adolescent's desires and actions that must control the teacher, but the teacher's good sense and "good moral character" that permit a proper interaction and relationship between the individuals. Mr. Drexler's conduct potentially had significant negative consequences for [REDACTED], albeit that she acknowledges her willingness, and for that matter, aggressiveness in seeking out a sexual relationship with Mr. Drexler. Mr. Drexler had a responsibility and for that matter, a duty to refrain from engaging in any sexual contact with [REDACTED] and his failure to abide by a course of conduct and interaction with [REDACTED] that did not include sexual intercourse and other sexual contact, was inappropriate, improper, deceitful, unlawful and establishes lack of good moral character.

RECOMMENDATION

After careful consideration and weighing all of the testimony and evidence in the record, including the exhibits offered into evidence by the respondent, I recommend that Michael D. Drexler's teaching certificate be revoked and that his application to teach in the public schools in the State of New York be denied. The Education Department has

met its burden of proof showing lack of good moral character on the part of Michael D. Drexler. To permit Michael D. Drexler to retain his teaching certification and to teach in the public schools in the State of New York would involve an unreasonable risk to the safety and/or the welfare of the children of the New York State Public School System.

Dated: October 3, 2005


John E. Dorfman, Esq., Hearing Officer

The University of the State of New York
Education Department



In the matter of the certificate(s) held by
and the application by

MICHAEL D. DREXLER

to teach in the public schools
of the State of New York

**REVOCATION OF
TEACHING
CERTIFICATE
AND DENIAL OF
APPLICATION
FOR TEACHING
CERTIFICATE**

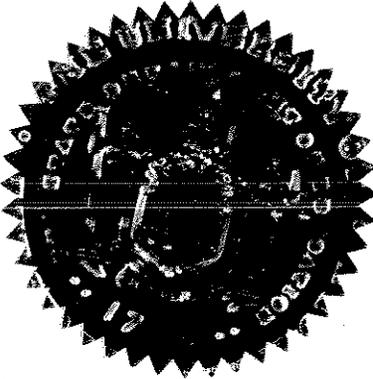
MICHAEL D. DREXLER, hereinafter referred to as "certificate holder", presently holds a provisional New York State certificate as a teacher of Pre-K-6, effective September 1, 2000, bearing the number [REDACTED] and is an applicant for an Early Childhood Annotation to said certificate.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), information concerning certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education, a Notice of Substantial Question of Moral Character ("Notice") signed by the Commissioner on September 30, 2004, together with a copy of Part 83, was mailed to certificate holder by certified mail, return receipt requested and copy by first class mail on October 28, 2004. The certificate holder received the Notice on or before November 12, 2004. Hearings dates were May 16, 17 and August 19, 2005 to determine whether certificate holder's teaching certificate should be revoked. At the hearing, evidence was presented and in the decision dated October 3, 2005 the hearing

officer recommended to the Commissioner that certificate holder's certificate should be revoked and his application be denied. No appeal was taken.

IT IS ORDERED that pursuant to the authority of the Commissioner of Education under section 305 of the Education Law and in accordance with the procedures set forth in Part 83 of the Regulations of the Commissioner, the teaching certificate held by Michael D. Drexler is hereby revoked and the certificate holder's application for teaching certificate is hereby denied.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 6th day of March 2006.

Richard P. Mills
Commissioner of Education

The University of the State of New York
Education  Department

In the matter of a proceeding held
pursuant to 8 NYCRR Part 83, to
determine whether

WAYNE G. WIGGS

has the requisite good moral character
to teach in the public schools of the
State of New York

**NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER**

WAYNE G. WIGGS, hereinafter referred to as "certificate holder", presently holds the following New York State certificates, issued by the New York State Education Department: permanent certificate as a School Social Worker, effective September 1, 2001 and bearing the control number 125338021; and permanent certificate as a School District Administrator, effective September 1, 2002 and bearing the control number 245914031.

Information has been received by the New York State Education Department that on or about July 17, 1991, certificate holder was convicted, upon plea of guilty, of Driving While Intoxicated (Class U Misdemeanor) and was sentenced to a conditional discharge and a fine of \$350.

Information has been received by the New York State Education Department that on or about September 7, 2010, certificate holder was convicted, verdict after trial, of Public Lewdness (Class B Misdemeanor) and was sentenced to conditional discharge and a fine of \$250.

Information has been received by the New York State Education Department that in

approximately November 2009, certificate holder, while in a public place, engaged in improper conduct, which included exposing his penis to a police officer and/or asking a police officer to engage in sexual behavior.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83 and the Plain Language Summary of Hearing and Appeal Procedures, shall be mailed to the certificate holder by certified mail, return receipt requested and the certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Room 981-EBA, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificate should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificate(s) and/or the denial of any of certificate holder's application(s) for teaching certificate(s).



IN WITNESS WHEREOF, I, David M. Steiner, Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 9 day of February 2011.


Commissioner of Education

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

In the matter of a proceeding held pursuant
to 8 NYCRR Part 83, to determine whether

REPORT OF THE HEARING PANEL

WAYNE G. WIGGS,

has the requisite good moral character to teach
in the public schools of the State of New York

APPEARANCES:

Daniel Harder, Esq.
NEW YORK STATE EDUCATION DEPARTMENT
OSPRA
89 Washington Avenue, Room 981 EBA
Albany, New York 12234, for the Department

A. Andre Dalbec, Esq.
SAANYS
8 Airport Park Blvd.
Latham, New York 12110, for Respondent.

PANELISTS: David G. Maestri, Jean S. Maxson, Herbert Dickson
Hearing Officer: Walter Donnaruma, Esq.

INTRODUCTION: By Order of the Commissioner of Education of the State of New York, the undersigned has been designated to conduct a hearing pursuant to Section 305(7) of the Education Law and Part 83 of the Regulations of the Commissioner of Education (8 NYCRR Part 83) concerning the appropriateness of permitting Wayne G. Wiggs, hereinafter referred to as the Respondent, to teach in the public schools of the State of New York. The Respondent presently holds a permanent certificate as a School Social Worker, effective September 1, 2001, bearing control number 125338021; and a permanent certificate as a School District Administrator, effective September 1, 2002 and bearing the control number 245914031.

DISCUSSION: The charges against the Respondent, as recited in the Notice of Substantial Question, are (1) that on or about July 17, 1991, Respondent was convicted, upon plea of guilty, of Driving While Intoxicated (Class U Misdemeanor) and sentenced to a conditional discharge and a fine of \$350; (2) that on or about September 7, 2010, Respondent was convicted after trial of Public Lewdness (Class B Misdemeanor) and sentenced to conditional discharge and a fine of \$250; and (3) that in approximately November 2009, certificate holder, while in a public place, engaged in improper conduct, which included exposing his penis to a police officer and asking a

police officer to engage in sexual behavior.

The Department proved the charges by documentary evidence and the testimony of an investigator. Not contesting the charges, the Respondent offered explanations by way of testifying on his own behalf. Regarding the incident that led to his lewdness conviction, the Respondent testified:

I went into the park. I was hanging out in my car and then I decided to go for a walk. While I was in the park walking around, I had made eye contact with another gentleman. It turns out to be a sheriff's deputy. We had gone for a walk together, at which point we walked back into a pretty secluded part of the park. At that point we had a conversation, continued to have a conversation, pretty much, you know, how are you, what's going on, what are you doing? I felt that we both had indicated that we wanted to get together. I think at one point we actually had a conversation about leaving the park. He said he did not have a place to go. Obviously I'm married and should not have been there to begin with and did not have a place to go. At that point he indicated to me -- I think he even made the comment of something about I just like to watch. At that point I opened my pants and exposed my penis. At that moment he identified to me that he was a sheriff's deputy and that I was under arrest for public lewdness.

Attempting to put his misconduct in context, the Respondent testified:

I was informed, unfortunately, that my, actually, my biological father had passed. It was a pretty significant event in my life, in that when I was much younger, approximately 12 years old, my father had abandoned our family. For numerous years I'd attempted to have contact with him and it was not reciprocated, that contact. I think at that point we had planned going out to the funeral services and memorial service, at which time my father's family had told us we were not welcome. I think at that point in my life, I think the finality of my inability of having closure with my father, pretty much left me pretty emotionally detached from a lot of things that was going on in my life at the time.

Subsequent to his arrest, Respondent was placed on leave by his employer, and following his conviction, was evaluated for purposes of determining if he was fit to return to work. After a positive finding by the examiner, Respondent re-assumed his duties. He continues to receive therapy.

In formulating its findings and recommendation, the Panel has applied the standards set

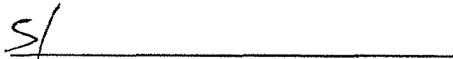
forth in Correction Law 752, and considered the factors specified in Correction Law Section 753. Regarding Section 752, the proof in this proceeding establishes a direct relationship between Respondent's convictions and his licenses as teachers are obligated to serve as behavioral examples for impressionable youngsters. Criminal convictions erode an individual's ability to guide students towards respect for law, an essential component of an orderly democratic society. Regarding Section 753, the Respondent was a mature individual when he committed the criminal acts, and his lewdness conviction is serious and recent. While a certificate of relief from disabilities was issued to the Respondent, said certificate does not prevent the Commissioner from exercising his discretionary power to suspend or revoke Respondent's certificates. (Correction Law § 701.)

FINDINGS, CONCLUSIONS & RECOMMENDATIONS: Based upon the credible evidence presented at the hearing, the Panel finds and concludes that a substantial question exists as to the Respondent's moral character. The Panel recommends that the Commissioner revoke Respondent's teaching certificates. Panelist Maestri dissents from the Panel's recommendation and recommends instead that the Commissioner suspend the Respondent's certificates for a period of two years.



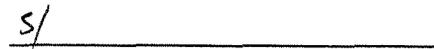
Walter Donnaruma, Hearing Officer

Dated: January 6, 2012



David G. Maestri, Panelist

Dated: December 19, 2011



Jean S. Maxson

Dated: December 15, 2011



Herbert Dickson

Dated: December 14, 2011

forth in Correction Law 752, and considered the factors specified in Correction Law Section 753. Regarding Section 752, the proof in this proceeding establishes a direct relationship between Respondent's convictions and his licenses as teachers are obligated to serve as behavioral examples for impressionable youngsters. Criminal convictions erode an individual's ability to guide students towards respect for law, an essential component of an orderly democratic society. Regarding Section 753, the Respondent was a mature individual when he committed the criminal acts, and his lewdness conviction is serious and recent. While a certificate of relief from disabilities was issued to the Respondent, said certificate does not prevent the Commissioner from exercising his discretionary power to suspend or revoke Respondent's certificates. (Correction Law § 701.)

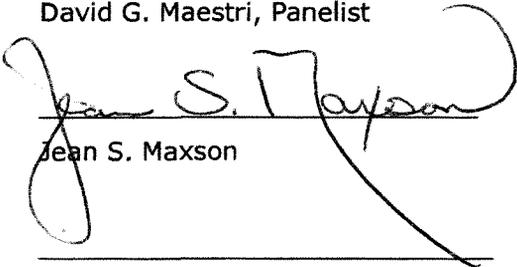
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Walter Donnaruma, Hearing Officer

Dated:

David G. Maestri, Panelist

Dated:



Jean S. Maxson

Dated: December 15, 2011

Herbert Dickson

Dated:

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Walter Donnaruma, Hearing Officer

Dated:

David G. Maestri, Panelist

Dated:

Jean S. Maxson

Dated:


Herbert Dickson

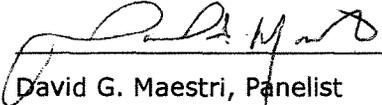
Dated: 12/14/2011

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Walter Donnaruma, Hearing Officer

Dated:



David G. Maestri, Panelist

Dated: 12/19/2011

Jean S. Maxson

Dated:

Herbert Dickson

Dated:

The
University of the
Education  State of New
York

*This copy
for Superintendent
of her FOIL
request*

In the Matter

of the

Certificates held by WAYNE G.
WIGGS to teach in the public
schools of the State of New York.

Petitioner appeals the findings and recommendations of a three member hearing panel that he lacks the requisite moral character to be a school social worker and administrator in the public schools of the State of New York and that his certificates be revoked. The appeal must be dismissed.

Petitioner holds a permanent certificate as a school social worker, effective September 1, 2001, and a permanent certificate as a school district administrator, effective September 1, 2002. At all times relevant to this appeal, petitioner has been employed as an administrator by the Board of Cooperative Educational Services for the Second Supervisory District of Monroe County ("BOCES").

The record indicates that on or about July 17, 1991, petitioner was convicted upon a plea of guilty for Driving While Intoxicated ("DWI"), and that on or about September 7, 2010, petitioner was convicted of public lewdness. The facts underlying petitioner's public lewdness conviction were that on or about November 11, 2009 - a legal holiday during which school was not in session - petitioner was observed exposing his penis by a plain-clothed police officer on a foot path in a public park. The police officer noted that the trail petitioner was on could be seen by runners, walkers, and boaters on the waterway.

Petitioner was sentenced to a conditional discharge and a \$250 fine.

On February 9, 2011, Commissioner David M. Steiner¹ issued a Notice of Substantial Question of Moral Character ("Notice") pursuant to Part 83 of the Commissioner's regulations ("Part 83"), based on the information that petitioner had pled guilty to DWI and had been found guilty of public lewdness involving sexual behavior. Petitioner requested a hearing pursuant to §83.4(a) of the Commissioner's regulations and, by order dated on or about July 11, 2011, a hearing officer was appointed.

The hearing occurred on October 18, 2011. Petitioner appeared and was represented by counsel. An attorney from the State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") submitted approximately 13 exhibits, including a February 2, 2010 certificate of disposition regarding the conviction for public lewdness, an October 17, 2011 certificate of disposition regarding the 1991 DWI conviction,² and several other documents, including but not limited to, the public lewdness trial court transcript and the charging instruments. The Department presented one witness, an investigator, and contended that under the standards set forth in Correction Law §§752 and 753, there was a direct relationship between petitioner's convictions and his certifications, and that petitioner posed an unreasonable risk to students and school staff. The Department further contended that petitioner's conviction evinced a lack of judgment and impulse control. The Department sought revocation of petitioner's certificates.

Petitioner submitted approximately 22 exhibits consisting of affidavits of support, evaluations of petitioner's mental health and his job performance, and a permanent certificate of relief from disabilities issued on September 16, 2010 for his public lewdness conviction. At the hearing, petitioner testified on his own behalf. He admitted that he went to the park and exposed his penis to the police officer. Petitioner claimed that he has

¹ David M. Steiner was the Commissioner of Education through June 14, 2011.

² I note that the hearing officer sustained petitioner's attorney's objection to the inclusion of the October 17, 2011 certificate in the record. However, in his testimony, petitioner admitted the conviction and the certificate was subsequently admitted into the record.

received professional counseling for his criminal behaviors, that he is professionally qualified to remain a certificate holder, and that his current supervisor at BOCES is supportive of his continued employment but was prevented from testifying on his behalf. Finally, petitioner requested a penalty other than revocation.

By decision dated January 6, 2012, the panel noted that it had considered the standards set forth in Correction Law §752 and the factors of Correction Law §753. The panel found that the proof in this matter established a direct relationship between petitioner's criminal convictions and his certificates. The panel also found that petitioner's criminal convictions eroded his ability to "guide students towards respect for law," that his public lewdness conviction was both recent and serious, that he was a mature adult at the time of the conviction, and that his certificate of relief from disabilities did not "prevent the Commissioner from exercising his discretionary power to suspend or revoke [petitioner's] certificates." The hearing panel determined that petitioner lacks good moral character, with two members recommending revocation and the other recommending a one-year suspension of his certificates. This appeal ensued.

On appeal, petitioner argues that the Commissioner should reverse or modify the findings of the hearing panel based on the record and the law. Specifically, petitioner asserts that the hearing panel did not consider that his BOCES and community continue to support his employment, that his convictions did not directly relate to the duties of his certificates, and that he posed "no threat to staff, students, or property." Petitioner states that the panel did not consider the "people who have the most to risk" by continuing his employment, and did not adequately address and weigh the factors contained in Correction Law §753. Petitioner further argues that the decision of the hearing panel was arbitrary, capricious, irrational, contrary to law, disproportionate to the misconduct, and "shocking to the conscience." Finally, petitioner asserts that the panel improperly disregarded his certificate of relief from disabilities and requests that I reconsider the hearing officer's revocation of his certificates.

OSPRA submitted a response in opposition to petitioner's appeal, contending that the Department had proven its case against petitioner. OSPRA asserted that,

because this was a matter predicated upon previous criminal convictions, the panel properly applied Correction Law §752 and the factors contained in Correction Law §753. OSPRA noted that the hearing panel found a "direct relationship" pursuant to Correction Law §752(1), not an "unreasonable risk," as suggested by petitioner, pursuant to Correction Law §752(2). Finally, OSPRA requests that I uphold the hearing panel's determination that petitioner lacks moral character and that his certificates should be revoked.

In a Part 83 proceeding, the Department carries the burden of proof to establish the certificate holder's lack of good moral character (8 NYCRR §83.4[c]). Upon my review of the record, and as discussed more fully below, I find that the Department met its burden of proving that petitioner lacks good moral character. Pursuant to §83.5(c) of the Commissioner's regulations, the Commissioner may affirm, adopt, reverse or modify the findings and recommendations of the hearing panel. In reviewing this matter, I have examined the appeal papers and the transcripts and evidence presented to the hearing panel.

In determining whether a certificate should be revoked or suspended based on a previous criminal conviction, the hearing officer must apply the standards for denial of a license application set forth in Correction Law §752 and consider the factors specified in Correction Law §753 (8 NYCRR §83.4[e]). Correction Law §752 provides:

No application for any license or employment ... shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Correction Law §753 identifies eight factors that must be considered in determining whether to grant a license or employment to an individual with a previous criminal conviction when making a decision pursuant to Correction Law §752. They are:

(a) The public policy of this [S]tate ... to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

In addition, Correction Law §753(2) states that, in making a determination pursuant to Correction Law §752, "the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."

In this case, the hearing officer reviewed the record, finding that there was no dispute that petitioner was convicted of the crimes of DWI and public lewdness. The hearing panel also noted, however, that conviction of a crime does not itself create a conclusive presumption of lack of good moral character, citing Correction Law §752, which requires a finding of a direct relationship between the criminal conduct and the license, or an unreasonable risk to the property, safety or welfare of specific individuals or the general public. In Bonacorsa v. Van Lindt, et al., 71 NY2d 605 (1988), the Court of Appeals analyzed the interplay between Correction Law §§752 and 753. The Court concluded that it is necessary to interpret Correction Law §§752 and 753 differently depending on whether the agency or employer is seeking to deny the license or employment pursuant to the direct relationship exception (§752[1]) or the unreasonable risk exception (§752[2]).

When applying the direct relationship exception, the agency or employer must first determine whether a direct relationship exists. The factors in Correction Law §753 are not considered in determining whether a direct relationship exists. If a direct relationship does not exist, the exception does not apply and the inquiry ends. If the agency or employer determines that a direct relationship exists, the agency or employer must then proceed to consider the factors in Correction Law §753 to determine whether the license should be granted notwithstanding the existence of a direct relationship. When applying the unreasonable risk exception, on the other

hand, the agency applies the factors in Correction Law §753 to determine whether an unreasonable risk exists (Bonacorsa v. Van Lindt, et al., 71 NY2d 605 (1988) at 613-614; see also Arrocha v. Bd. of Educ. of the City of New York, et al., 93 NY2d 361).

Contrary to petitioner's assertion, the record indicates that the hearing panel considered the relationship between petitioner's criminal conduct and his fitness to perform the duties of a certified school social worker and a school district administrator, and properly determined them to be directly related. Pursuant to Correction Law §750(3), "direct relationship means that the nature of the criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought."

Pursuant to §80-2.4 of the Commissioner's regulations, the duties of a school district administrator include providing "general district-wide administration" services. Specifically, in accordance with §35(g) of the Civil Service Law, the Commissioner has certified that the functions, duties and responsibilities of school district supervisory staff include:

... wholly or principally, the function of supervision of teaching, or, wholly or principally, the function of administration of teaching, i.e., supervision and direction of supervisors, principals and all other members of the teaching and supervisory staffs....

. . .

[T]eaching, either of an entire class or classes, or of individuals or groups of individuals, of the pupils attending any school or schools in any of the three types of units of the State Education System ... or the supervision or administration of such teaching in any such unit [Certification of Classes of Positions of the Teaching and Supervisory Staffs: Pursuant to

paragraph (g) of Section 35 of the Civil Service Law, signed April 5, 1962, Commissioner James E. Allen, Jr.].

In accordance with §35(g) of the Civil Service Law, the Commissioner has certified the functions, duties and responsibilities of a school social worker to include:

[V]arious functions ... such as a caseworker who counsels with students and their parents, a collaborator who works cooperatively with other members of the school staff, a coordinator who serves as an agent to bring school and home, and school and community into better working relationships, as a consultant who is available to confer with other staff members even though he may not be directly involved with students or their immediate problems, and such similarly related work...

. . . .

Subject to the supervision and direction of the superintendent of schools, [the school social worker] performs case work service with the individual pupil toward the correction of certain personal, social, or emotional adjustments; performs case work service with parents as an integral part of the task of helping the pupil to increase parents [sic] understanding, their constructive participation and their use of appropriate resources; ... cooperative action with other members of the pupil personnel service team in the referral of pupils, cooperation with parents, contact with community social agencies, coordination of school social work services with the work of these agencies, and cooperation with such agencies in determining needs for and developing additional case work

resources [Certification of Classes of Positions of the Teaching and Supervisory Staffs: Pursuant to paragraph (g) of Section 35 of the Civil Service Law, signed July 9, 1971, Commissioner Ewald B. Nyquist].

Clearly, individuals certified as school social workers and school district administrators are in positions that require not only contact with students, teachers, parents and the community, but also the responsibility to guide and direct teaching and learning as well as staff and student development in the schools of the district. Such individuals must serve as role models for students (see Ambach v. Norwick, 441 U.S. 68, 78-79; Matter of Ellu v. Ambuch, 124 AD 2d 854, lv to app den. 69 NY 2d 606).

As the hearing panel stated, "teachers are obligated to serve as behavioral examples for impressionable youngsters. Criminal convictions erode an individual's ability to guide students toward respect for the law, an essential component of an orderly democratic society." While petitioner argues that his convictions are "unrelated to the duties he performs as an administrator with the BOCES," he acknowledges that his employment requires him to maintain "responsibility for the BOCES transition program for 18 to 21 year old developmentally and intellectually disabled students transitioning into the adult world." While petitioner's criminal conduct did not occur on school property, his convictions do have a bearing on his ability and fitness to serve as a positive role model and example for this vulnerable population of students, which is required of one who holds such certificates.

Petitioner also argues that the hearing panel considered only three of the eight factors required by Correction Law §752. While the panel's decision does not include a complete analysis of each of the eight factors, the decision does state that in "formulating its findings and recommendation, the panel has ... considered the factors specified in Correction Law Section 753." Moreover, the panel's decision specifically references the following: that despite his convictions, petitioner is still employed by the BOCES; the duties and responsibilities related to his licenses and the bearing such conduct will have on his fitness to carry out such duties, which include consideration of the welfare of

students; the fact that the public lewdness was both "serious and recent" and occurred when he was a "mature individual;" and that he continues to receive therapy. The hearing panel also acknowledged petitioner's certificate of relief from disabilities, but did not find it to overcome the totality of the record. Based on this record, I cannot conclude that the panel failed to properly consider the Correction Law factors (see e.g., Bevacqua v. Sobol, 176 AD2d 1).

The record clearly indicates that petitioner has exhibited both poor judgment and a lack of impulse control. By exposing his penis in a public park, petitioner acted in disregard of the public (including children and students) who might have been in a position to view him, and of his responsibilities as a certificate holder to act as a role model for students. The record contains ample evidence to support the finding that petitioner does not possess the requisite moral character necessary to fulfill the roles and duties of a certified social worker or school district administrator.

Petitioner claims that he has the support of his BOCES, community, and boss and that his boss was in fact prevented from testifying on his behalf. While petitioner now cites the "demonstrable and shocking unfairness" that the BOCES District Superintendent could not testify on his behalf, at the hearing he testified that this was due to a conflict of interest. Moreover, although petitioner submitted several affidavits in support of his good moral character - including one from his wife - he presented no witnesses to testify on his behalf and be subject to cross-examination at the hearing.

Petitioner also alleges that he has maintained his employment with BOCES subsequent to his convictions apparently without incident, that he is supported by the "community," that he is remorseful, that he commenced therapy with an employee assistance plan provided by the BOCES, and that the loss of his teaching certificates would cause him and his family financial difficulties. As noted above, the panel considered the facts that petitioner has maintained his employment and continues to receive therapy. However, the panel also considered petitioner's admissions at the hearing and his attempts to explain and contextualize his conduct. With respect to findings of fact in matters involving the credibility of witnesses, I

will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the determination of credibility is inconsistent with the facts (Appeal of C.S., 48 Ed Dept Rep 497, Decision No. 15,929; Appeal of B.M., 48 *id.* 441, Decision No. 15,909; Appeal of a Student Suspected of Having a Disability, 48 *id.* 391, Decision No. 15,895). Based on this record, I find no reason to substitute my judgment for that of the hearing panel in this case.

I further agree with the hearing panel's determinations regarding petitioner's rehabilitation. Although petitioner presented a certificate of relief from disability fully covering his conviction for public lewdness, thereby creating a presumption of rehabilitation (Correction Law §753[2]), such a certificate does not establish a prima facie entitlement to the license or employment sought. Rehabilitation is only one of the eight factors that an agency must consider in determining whether to grant a license or employment to an individual with a criminal conviction (Arrocha v. Bd. of Educ. of the City of New York, et al., 93 NY2d 361, 365; Bonacorsa v. Van Lindt, et al., 71 NY2d 605, 614; see Correction Law §753[1][g]). As noted by the hearing panel, the presumption of rehabilitation does not preclude any judicial, administrative, licensing or other body, board or authority from considering any of the other seven factors, unrelated to rehabilitation, as a basis for the exercise of its discretionary power to suspend, revoke, or refuse to issue any license, permit or other authority or privilege (Arrocha, 93 NY2d at 366; Bonacorsa, 71 NY2d at 614; see Correction Law §701[3]). Here, while the record contains evidence that petitioner continues to receive therapy, his testimony and submissions do not set forth substantial information about such therapy or his rehabilitation. Further, less than three years has elapsed since petitioner's public lewdness conviction. As noted above, petitioner's criminal offenses impact his responsibility to be a role model to students and the Department's legitimate interest in protecting school property and the safety and welfare of students and school employees. On this record, these factors outweigh the presumption of rehabilitation the certificate of relief from disabilities provides.

Based upon the record before me, and for the reasons set forth above, I affirm the findings and recommendations of the hearing panel that petitioner's certificates be

revoked because he lacks the requisite moral character to teach in the public schools of the State of New York.

In light of this disposition, I need not address the parties' remaining contentions.

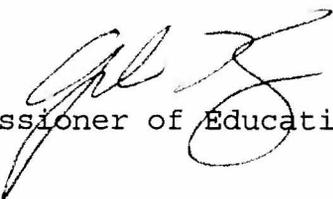
THE APPEAL IS DISMISSED.

IT IS ORDERED that the certificates of Wayne G. Wiggs, be and hereby are immediately revoked; and

IT IS FURTHER ORDERED that petitioner shall immediately return to the State Education Department any copies of such certificates currently in petitioner's possession.



IN WITNESS WHEREOF, I, John B. King, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 27th day of February 2013.


Commissioner of Education

The University of the State of New York
Education  Department

In the matter of a proceeding held
pursuant to 8 NYCRR Part 83, to
determine whether

CHRISTINE R. HAFER

has the requisite good moral character
to teach in the public schools of the
State of New York

**NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER**

CHRISTINE R. HAFER, hereinafter referred to as “certificate holder”, presently holds a professional New York State certificate, issued by the New York State Education Department, as a teacher of English Language Arts 7-12, effective September 1, 2009, and bearing the control number 371325091. Certificate holder is also an applicant for a professional certificate to be a teacher of English Language Arts (Grades 5-9).

Information has been received by the New York State Education Department that during the 2009-2010 school year and the 2010-2011 school year, certificate holder engaged in inappropriate behavior with a teacher on school property that included, among other behavior, improper physical and/or sexual contact; and improper communications and/or correspondence. The name of the teacher and the nature of the conduct are known to the Department and will be provided upon request.

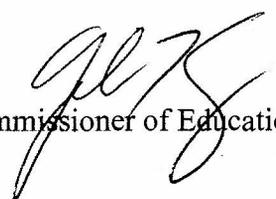
Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83),

the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83 and the Plain Language Summary of Hearing and Appeal Procedures, shall be mailed to the certificate holder by certified mail, return receipt requested, and the certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt, that a hearing be held to determine: whether the certificate holder's certificate to teach should be revoked or subject to an alternate penalty pursuant to section 305(7) of the Education Law; and whether certificate holder's application for a teaching certificate should be granted. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's certificate(s) to teach and the denial of the certificate holder's application(s) for teaching certificate(s).



IN WITNESS WHEREOF, I, John B. King, Jr., Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 14th day of December 2011.


Commissioner of Education

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

In the matter of a proceeding held pursuant
to 8 NYCRR Part 83, to determine whether

REPORT OF THE HEARING OFFICER

CHRISTINE R. HAFER,

has the requisite good moral character to teach
in the public schools of the State of New York

APPEARANCES:

DANIEL HARDER, ESQ.
NEW YORK STATE EDUCATION DEPARTMENT
OSPRA
89 Washington Avenue, Room 981 EBA
Albany, New York 12234, for the Department

SUSAN WHITELEY FULLER, ESQ.
of counsel to RICHARD E. CASAGRANDE, ESQ.
Attorney for Respondent
800 Troy-Schenectady Road
Latham, New York 12110-2455

Hearing Officer: Walter Donnaruma, Esq.

INTRODUCTION:

By Order of the Commissioner of Education of the State of New York, the undersigned has been designated to conduct a hearing pursuant to Section 305(7) of the Education Law and Part 83 of the Regulations of the Commissioner of Education (8 NYCRR Part 83) concerning the appropriateness of permitting Christine R. Hafer, hereinafter referred to as the Respondent, to teach in the public schools of the State of New York. Respondent presently holds a permanent New York State certificate as a teacher of English Language Arts 7 through 12, and is an applicant for a professional certificate to be a teacher of English Language Arts, grades 5 through 9.

The charges against the Respondent, as recited in the Notice of Substantial Question, are that during the 2009-2010 school year and the 2010-2011 school year, Respondent engaged in inappropriate behavior with a teacher on school property that included, among other behavior, improper physical and/or sexual contact and improper communications and/or correspondence. The Department asks that Respondent's certificate be revoked and her application denied.

A hearing was held in Albany on April 25, 2012 and May 2, 2012. Post-hearing submissions by the parties were received on June 11, 2012.

FACTUAL BACKGROUND:

DUSANKA MILASINOVIC, a custodial worker at the Owego Apalachin Middle School, testified that she knows the Respondent, and that during the 2009-2010 school year, she cleaned teachers' rooms in the Middle School, including the Respondent's room, which she cleaned every

day. On February 10, 2010, while cleaning a room adjacent to the Respondent's room, the witness heard "sex" noises coming from Respondent's room. (The rooms are separated by sliding partitions that allow sounds to flow between rooms.) The witness testified that she heard such noises emanating from Respondent's room on multiple occasions.

In beginning when they going inside room, they laughing, talking and at that time just quiet and then you can hearing desk and then banging on cabinet and then her noise. I know it's her noise, not his.

Regarding physical evidence of intimate encounters, the witness testified

I noticed, first off I see on the floor some dots ... and I first off think that's some glue on floor. When I mopping it so hard to go, so I have to scrap with mop. So next day I come and I see glue again and I think what's going on, the same place ... Then later on next day I come and I see baby wipers. They kind of yellowish and then they on top on garbage can. You cannot miss them. I see that, and then that thing on floor and smell, then I know that this smell, it's cum smell. It's what you call sperm or whatever you want to say. ... And complete room smell like that. Especial that corner where you come ... If I come after, after them, they just kind of liquid or they just kind of white spots, because it's kind of eating wax. Wax gone on that place. Something strong, but it's, you could see dots on wax.

According to the witness, the encounters in the Respondent's classroom occurred between 2:50 pm and 3:30 pm when students were still in the building:

Sometime they laughing next to door, they looking and then door always been locked and half of a light on when I working and the blinds always pulled down.

In a girls' bathroom, the witness saw written on a wall - *Mrs. Hafer is really good fucker*. The witness stated that she never saw the Respondent engaging in any intimate encounters in the school.

KEVIN FERGUSON, a cleaner at the Middle School, testified that in February 2010 he heard noises coming from the Respondent's room.

It started out as like cupboards, that kind of banging, and then you could hear a female's voice ... saying oh God, oh God, like ... (t)wo people having sex ... you could hear exactly what she was saying and it was kind of like a screechy voice ...

The witness testified that on other occasions he heard similar noises coming from Respondent's classroom when there were students present in the hallways, and that he tried to stop the noises by banging on the lockers. The witness also observed semen on one of the desks in Respondent's classroom. He never saw the Respondent engaging in any intimate behavior.

SCOTT SANGUNITO, a cleaner at the Middle School, testified what he saw and heard during the 2010-2011 school year, while doing repair work and cleaning in close proximity to Respondent's classroom:

a bunch of giggling, laughing. So I just carried on, starting moving

stuff out and I wasn't quiet about it, and then I kind of heard like ooh. So I just like stopped a minute and proceeded, you know, I started to clean again and then I'd hear oh, that feels good, and then kind of like desk sliding. So I paused. I kind of got by the petition door. They have like a gap underneath the door like that and I went under, kind of got on my hands and knees and bent down to look under the door and that's when I saw ... the reflection -- well, at first I saw his pant legs down and his belt buckle down. You could see that visibly. And I saw the silhouette of her feet hanging down from the desk and that's when I heard the desk go like this ... and you hear her going uh, that feels so good. ... The other occasion I had seen where she was possibly doing oral ... a blow job. I recall kids going by giggling, laughing. You know, we got to chase the kids out. You chase them out and then they are back up and you hear them giggle, laughing. There was another occasion during the summer when we had some summer help in from students and the students would be talking about, well, we were in there stripping the floors and they're like, well, we don't want to be in here, this room is the sex room.

MICHAEL DINKINS, a custodian at the Middle School, testified that during the 2009-2010 school year, he was asked by a school cleaner by the name of Marika to examine some "smear marks" on a table and on the floor in Respondent's classroom.

It looks like someone was wiping up their person, you know, doings. So it did not look good.

Regarding noises coming from Respondent's classroom, the witness stated

about a year and a half ago. There was -- it was during the school play bat night. It was kind of like a high pitched uh, uh kind of feel, like, and like moving of the desk.

MARIKA SIGNS, a cleaner at the Middle School, testified that in 2011, late in the afternoon, she heard noises coming from Respondent's classroom: *banging on the closet and moaning*. The witness said that she saw "sperm" on the floor, on the closet door, and on a student desk. She saw students listening by the classroom door and giggling. The smell in the room was "like a hoar [sic] house," "terrible." To air out the room the witness

opened the windows and I opened the door and left it for awhile so that, because it would smell bad. So then I come back in to clean it.

When she cleaned the floor, the witness used a different mop to remove the unusual substances effectively. She testified that she had to do this "every day." She further testified that she saw John Robertson enter the Respondent's classroom every day, and that Robertson and the Respondent, both wearing shorts, sat towards each other in the manner of Indians. When Robertson and the Respondent exited the classroom, Robertson's hair was sticking up, his face was red, and Respondent's arm and legs were red. The witness saw "sperm" on tissues in the garbage can. When asked if she ever saw the Respondent and Robertson having sex with each other, the witness answered no.

PAMELA DONAVAN, the principal secretary of the high school, Owego Free Academy, testified that, as part of an investigation, she visited the classroom adjacent to the Respondent's classroom.

There was talking going on next door, you know, just normal, and then all of a sudden you heard silence. You heard a desk being dragged across the floor, like the legs were dragging. Again, there was giggling, and then you could hear the moaning and groaning of an act happening. Only from knowing what it sounded like. It was a sexual act.

JAMES MILLER, a CSC Aide and President of the Owego Apalachin Employee Association, the union representing the custodial workers, testified that he accompanied Pam Donovan on her visit to the classroom adjacent to Respondent's classroom:

We went upstairs and we went into Mike Bartlow's room. And how his room is and her room, there was a wall, but it's a divider that you can actually open and shut. And then Pam Donovan and I were in there and Christine Hafer and John Robertson were on the other side of their wall in her room and they were talking and they were giggling and they were talking about dogs or cats. I don't remember exactly which it was. It was small talk. Then, all of a sudden it got quiet and then all of a sudden you heard moaning, Christine moaning, and you heard like, like the desk and the like pounding, where the desk hitting like the cupboard or the wall, hitting something, and her moaning and oh my God, oh, and then you heard John breathing deep, deep, and then they got done and they got done and they started giggling and Christine said, oh, that was good. And he goes, yes, this was real, very good ...

The witness also visited the Respondent's classroom with custodial personnel and observed

... semen still on the floor and you could see on the desk where it was like smeared and on the cupboard, you still could see the dried spot of semen that was there and when you walked in, it smelt very, I don't -- it was a nasty smell. The odor was very strong.

The witness further testified that he never saw the Respondent engaging in sexual activity with anyone.

Witnesses Donovan and Miller did not give the precise date when they made their observations, but Miller's testimony indicated that it was during the 2010-2011 school year.

BERNARD C. DOLAN, JR., Associate Superintendent of the Owego Apalachin Central School District, testified that the Respondent resigned her teaching position with the District after 3020-a disciplinary charges were preferred against her.

JOHN ROBERTSON, a seventh grade English teacher at the District during the 2009-2011 time period, testified that he had sexual intercourse with the Respondent in her classroom two or three times a week during the aforementioned time period, that school employees and students were present in the Middle School building when the sexual activity occurred, that the Respondent moaned and spoke during the sexual activity, and that the witness received oral sex from the Respondent in her classroom. Mr. Robertson stated that the sexual activity usually took place between 3:30pm and 4:00pm near the cabinets and on student desks. On cross-examination, the

witness testified that he has never been served with any Part 83 charges regarding his moral character or teaching certification.

DISCUSSION:

The issues for determination in this Part 83 proceeding are whether a substantial question exists with respect to the Respondent's moral character, and, if so, what action should be taken regarding her teaching certification. The Department proved the charges regarding the sexual encounters in the classroom, but failed to prove the improper communications allegation. While acts of physical intimacy between consenting adults are neither moral nor immoral per se, there are proper and improper venues for such activity. It is doubtful that anyone would argue that a classroom in a public school building is an acceptable venue for such activity, or that the selection of such a venue raises questions not only about the judgment of a participant, but about the character of the participant as well. While no one actually saw the Respondent and her partner in flagrante, it could have easily happened, and a young student might have been an observer. Although students giggled at the noises emanating from the Respondent's room, the reaction might have been entirely different had the students actually seen what was going on. Witnessing such a spectacle may have been emotionally harmful to a young teenager. Fortunately, no one saw the actual events, so no harm was done. The harm that was done, however, at least from the student perspective, was reducing an otherwise upright educational institution to something resembling a bawdy house, the last thing youngsters need in the challenging educational environment that exists in public schools today. From that viewpoint, Respondent's conduct was a disgrace.

The proof adduced at the hearing unquestionably raises a substantial question as to the Respondent's moral character. Regarding penalty, the Department urges that her teaching certificate be revoked. Undermining that position, however, is the Department's inexplicable failure to prefer moral character charges against John Robertson, an equal participant in the misbehavior and colleague of the Respondent. In addition, Respondent violated no law, caused no one harm, or was otherwise derelict in the performance of her pedagogical duties. Moreover, as a consequence of her misbehavior, Respondent lost her job and undoubtedly suffered obloquy in her community.

FINDINGS, CONCLUSIONS & RECOMMENDATIONS:

Based upon the credible evidence adduced at the hearing, the undersigned hearing officer finds and concludes that a substantial question exists as to the moral character of the Respondent, and recommends that the Commissioner suspend the Respondent's teaching certificate for eighteen months and deny her pending certification application.

Respectfully submitted by,

Walter Donnaruma

Walter Donnaruma, Hearing Officer

Dated: 27 August 2012

The University of the State of New York
Education  **Department**

In the matter of a proceeding held
pursuant to 8 NYCRR Part 83, to
determine whether

CHRISTINE R. HAFER

**SUSPENSION OF TEACHING
CERTIFICATE**

has the requisite good moral character
to teach in the public schools of the
State of New York

PLEASE TAKE NOTICE THAT:

CHRISTINE R. HAFER, hereinafter referred to as “certificate holder”, presently holds a professional New York State certificate, issued by the New York State Education Department, as a teacher of English Language Arts 7-12, effective September 1, 2009, and bearing the control number 371325091. Certificate holder is also an applicant for a professional certificate to be a teacher of English Language Arts (Grades 5-9).

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), information concerning certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to certificate holder’s moral character.

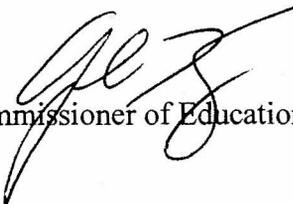
Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education, a Notice of Substantial Question of Moral Character (“Notice”) signed by the

Commissioner on December 14, 2011, together with a copy of Part 83 and Plain Language Summary, was mailed to certificate holder by certified mail, return receipt requested on December 19, 2011. Certificate holder received the Notice on or about December 22, 2011. A hearing was held on April 25 and May 2, 2012 to determine whether certificate holder's teaching certificate(s) should be revoked and whether certificate holder's application(s) for teaching certificate(s) should be denied. At the hearing, evidence was presented and in the decision dated August 27, 2012 the hearing officer recommended to the Commissioner that certificate holder's certificate(s) should be suspended and application(s) for teaching certificate(s) should be denied. No appeal was taken.

IT IS ORDERED that pursuant to the authority of the Commissioner of Education under section 305 of the Education Law and in accordance with the procedures set forth in Part 83 of the Regulations of the Commissioner, the teaching certificate held by certificate holder is hereby suspended for eighteen (18) months and the application for teaching certificate is hereby denied.



IN WITNESS WHEREOF, I, John B. King, Jr.,
Commissioner of Education of the State Education
Department, do hereto set my hand and affix the
seal of the State Education Department, at the City
of Albany this 19th day of December 2012.


Commissioner of Education

The University of the State of New York
Education  Department

In the matter of a proceeding held
pursuant to 8 NYCRR Part 83, to
determine whether

ROBERT T. REDMAN

has the requisite good moral character
to teach in the public schools of the
State of New York

**NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER**

ROBERT T. REDMAN, hereinafter referred to as "certificate holder", presently holds the following New York State certificates, issued by the New York State Education Department: permanent certificate as a teacher of Business Education, effective September 1, 1987 and bearing the control number 186503871; permanent certificate as a School Administrator/Supervisor, effective February 1, 1990 and bearing the control number 316610901; and permanent certificate as a School District Administrator, effective September 1, 1994 and bearing the control number 623829951.

Information has been received by the New York State Education Department that from approximately the 2006–2007 school-year through the 2008-2009 school-year, certificate holder engaged in inappropriate behavior, which included among other things: improper communications and/or correspondence; improper communications and/or correspondence during school hours and/or during a time that certificate holder was expected to be fulfilling his administrative duties to

his own school district; improper communications and/or correspondence with an adult female ("Adult A") during school hours and/or during a time that certificate holder was expected to be fulfilling his administrative duties to his own school district; engaged in approximately 1500 e-mails with Adult A via his District issued computer and/or his District issued e-mail address, while at school and/or during school hours when the certificate holder should have been fulfilling his duties as an administrator; engaged in improper e-mail exchanges with Adult A while he was in a classroom performing required teacher evaluations and/or observations; engaged in improper e-mail exchanges with Adult A while he was in attendance at a school meeting with a parent, a student, and/or several District employees; used the District telephone to engage in improper communications with Adult A during school hours and/or during a time that certificate holder was expected to be fulfilling his administrative duties to his own school District; used his personal cell telephone to engage in improper communications with Adult A during school hours and/or during a time that Certificate Holder was expected to be fulfilling his administrative duties to his own school District; provided false information to the District regarding his whereabouts during school business hours; provided false records of his use of benefit time by leaving his place of work to tend to personal matters and/or failing to account for the appropriate leave time; and shared details of a District employment interview and/or interview process with Adult A.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education

this Notice, together with a copy of Part 83 and the Plain Language Summary of Hearing and Appeal Procedures, shall be mailed to the certificate holder by certified mail, return receipt requested and the certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Room 981-EBA, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificate should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificate(s) and/or the denial of any of certificate holder's application(s) for teaching certificate(s).



IN WITNESS WHEREOF, I, David M. Steiner, Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 1 day of March 2011.

A handwritten signature in black ink, appearing to read "D. Steiner", is written over the printed name of the Commissioner of Education.

Commissioner of Education

STATE OF NEW YORK
NEW YORK STATE DEPARTMENT OF EDUCATION

In the Matter of a Proceeding Held Pursuant to
8 NYCRR Part 83 to Determine Whether

ROBERT T. REDMAN

Has the Requisite Good Moral Character to
Teach in the Public Schools of the State of New York

**HEARING OFFICER'S FINDING OF FACTS AND
RECOMMENDATION TO THE COMMISSIONER**

Before: Anne Reynolds Copps, Esq., Hearing Officer

Appearances: Daniel C. Harder, Esq., for New York State Department of Education

Robert T. Fullem, Esq., Andre Dalbec, Esq. and Jennifer T. Carlson,
Esq., of School Administrators Association of New York State for
Respondent, Robert T. Redman

Robert T. Redman, Respondent

Background

This case arises under 8 NYCRR Part 83. The action was commenced by the service upon Respondent of a Notice of Substantial Question of Moral Character dated March 1, 2011 (D-1) along with a copy and a summary of Part 83 Regulations. This Notice was served by certified mail, return receipt requested on March 4, 2011 and received by Respondent, R. Terrence Redman on March 8, 2011 (D-2). Respondent, by his attorneys requested a hearing by letter dated March 10, 2011 (D-3). Commissioner David M. Steiner issued an Order Designating Hearing Officer and Setting Venue dated April 25, 2011 (HO-1). By letter dated June 20, 2011, hearing dates of July 25, 26, 27, September 7, 8, 9, 26 and 27, 2011 were scheduled (HO-2). Hearings were held on each of those dates except September 27, as the parties completed their cases on September 26. The transcripts include 1,421 pages. There are three (3) Hearing Officer Exhibits, Department Exhibits 1-24, 26, 27, Respondent Exhibits 1-9, 11-29. It should be noted that the Exhibits together filled five (5) bankers boxes.

(D-____) refers to Department's Exhibits
(R-____) refers to Respondent's Exhibits
(T-____) refers to the Transcript of Proceedings
(HO-____) refers to Hearing Officer's Exhibits

The Notice of Substantial Question of Moral Character (D-1) alleges that from approximately the 2006-2007 school year through the 2008-2009 school year, Respondent “engaged in inappropriate behavior, which included among other things: improper communications and/or correspondence; improper communications and/or correspondence during school hours and/or during a time that certificate holder was expected to be fulfilling his administrative duties to his own school District; improper communications and/or correspondence with an adult female (Adult “A”) during school hours and/or during a time that certificate holder was expected to be fulfilling his administrative duties to his own school District; engaged in approximately 1500 e-mails with Adult A via his District issued computer and/or his District issued e-mail address, while at school and/or during school hours when the certificate holder should have been fulfilling his duties as an administrator; engaged in improper e-mail exchanges with Adult A while he was in a classroom performing required teacher evaluations and/or observations; engaged in improper e-mail exchanges with Adult A while he was in attendance at a school meeting with a parent, a student, and/or several District employees; used the District telephone to engage in improper communications with Adult A during school hours and/or during a time that certificate holder was expected to be fulfilling his administrative duties to his own school District; used his personal cell telephone to engage in improper communications with Adult A during school hours and/or during a time that Certificate Holder was expected to be fulfilling his administrative duties to his own school District; provided false information to the District regarding his whereabouts during school business hours; provided false records of his use of benefit time by leaving his place of work to tend to personal matters and/or failing to account for the appropriate leave time; and share details of a District employment interview and/or interview process with Adult A.”

The Department presented the Testimony of four (4) witnesses (James Prezpazniak, Jeffrey Rabbey, Laurie Faso and Regina Larkin). Respondent presented the Testimony of eight (8) witnesses (Mark Higgins, Anthony Martino, Samuel Trumbore, Thomas Murtaugh, Steven Altshuler, Rachel Cohon, Respondent and Amy Redman).

Findings of Fact

1. Respondent is the holder of three (3) permanent certifications: (D-4)
 - a. Business Education, issued: 9/1/1987
 - b. School Administrator/Supervisor, issued: 2/1/1990
 - c. School District Administrator, issued: 9/1/1994
2. The Matter came to the attention of the Department by means of a complaint filed by then-Superintendent Jeffrey Rabey dated 7/2/2009. (D-5)
3. Respondent served as High School Principal of Lake Shore Central School District in Angola, New York from 1999 (T-951) until placed on administrative leave in May, 2009. (T-1085)

4. By Agreement with the Lake Shore Central School District, Respondent was reinstated on July 1, 2010 as an Administrator on Special Assignment. (R-26)
5. Respondent engaged in an approximately three (3) year sexual affair with Laurie Faso while married to Amy Redman.¹
6. Respondent violated the Acceptable Use Agreement of the Lake Shore Central School District dated August 31, 2007 as signed by Respondent on 9/4/2007. (D-5) In that, he sent several thousand e-mails (D-11) of a personal nature including numerous of a sexually explicit or sexually suggestive nature (D-10) on school owned computer equipment, using a school e-mail account.
7. Respondent engaged in sexual activity with Laurie Faso in his principal's office and his private restroom adjacent to his office in the Lake Shore Central High School on two occasions while employed by Lake Shore Central School District. (T-424, 429)
8. Respondent, during normal school hours, left his office at Lake Shore Central School District under false pretenses on two occasions to have sexual relations with Laurie Faso in a hotel and without charging proper leave time. (T-1198, D-5, D-23-C)
9. Respondent, on six (6) occasions sent and/or received sexually explicit or sexually suggestive e-mails during a time in which he was engaged in teacher observation and evaluation in a classroom where students were present. (T-15, 16, 17, 18, 19 and 20) (D-5)
10. Respondent sent and received sexually explicit and/or sexually suggestive e-mails during the "Finance Academy" (T-1066) meeting on December 3, 2008 at which a parent and student were present, (T-1055 et seq.) as well as faculty and staff members of the Lake Shore Central School District.

Discussion

Under other circumstances, the fact that a public school principal had an extramarital affair would be of little consequence to his professional life. However, in this case it provides much of the context for the other inappropriate behaviors of the Respondent.

The Department has the burden of proving by a preponderance of the evidence that the Respondent lacks the requisite moral character needed to be a teacher or administrator certified to practice in the public schools of the State of New York.

Both the Department and Respondent provided evidence through their own witnesses and through cross-examination of each other's witnesses as to what is involved in determining

¹ Normally an extramarital affair would be a private matter. However, here it provides the context for all of the other inappropriate behaviors of the Respondent.

good moral character. Several witnesses agreed that it included many things such as honesty, integrity, trustworthiness, loyalty, fidelity and compassion as the Department proffered. (T-760, 929, 818)

Rev. Trumbore posited that one could not judge a whole life by one action or event. (T-743) He further suggested that the actions taken following a deviance could be more indicative of character than the deviance. (T-744) Engaging in counseling, being open and honest and making amends would be signs of good moral character. (T-744)

Dr. Cohon described character as a patchwork of virtues and vices. (T-925) Dr. Cohon was extraordinarily vague in her attempt to define character but did term certain actions of Respondent as "creepy". (T-941)

Neither Dr. Cohon nor Rev. Trumbore had any acquaintance with the Respondent. Their testimony was primarily directed to what constitutes character in their particular fields. Cross-examination, using hypothetical questions, allowed them to discuss the importance of the characteristics posited by the Department. (T-760, 929)

Dr. Altschule was able to say that Respondent does not suffer from any current psychological disorders. (T-834, 855) (R-17)

Thomas Murtaugh, a teacher and neighbor of Respondent traveled a very long distance to support his friend. (T-784) He was clearly shocked by some things he learned on cross-examination. (T-805) He felt one could not send sexually explicit e-mails and do a proper job observing a teacher. (T-808)

Amy Redman, wife of Respondent maintained that Respondent was still respected by his daughters. (T-1268) She testified that she and Respondent have a much better marriage. (T-1262) Sadly, she seemed to blame herself for the affair by stating that she had gained weight (T-1252) and had sexual issues. (T-1252) She did take one swipe at Laurie Faso stating that she knew what type of person she is. (T-1306) Mrs. Redman teaches character development. (T-1297) She indicated that character is defined as knowing right from wrong and is determined by behavior over time. (T-1297) She suggested that the affair was out of character for Respondent. (T-1306)

All of Respondent's witnesses agreed that the complained of behavior was wrong.

This testimony, together with the voluminous sexually graphic e-mail correspondence, other evidence and the existing case law and regulations, gives a framework for analysis of Respondent's moral character.

The most revealing witness was Respondent. He admitted to a course of conduct, including the affair of three years (T-967), sending e-mails that were sexually explicit from a school computer, using the school phone to pursue the affair, leaving school to have sex, and having sex in his office. However, he tried to minimize his behavior by suggesting that he could send sexually explicit e-mails while in an observation or meeting and still pay

attention. (T-1139) He further suggested that he couldn't remember if he really sent or received the e-mails during the Finance Academy meeting, indicating that perhaps they could have been done during a break. (T-1068) He stated that he only sent the e-mails during transitions in the classes he was observing. (T-1015) Superintendent Przepazniak testified that the Finance Academy was important to the school. (T-58) Respondent was extremely important as the high school principal in terms of leadership to make the program successful. (T-60) Mr. Przepazniak also testified that one of the most important responsibilities of a high school principal is staff evaluation. (T-169) Failure to pay strict attention to these duties was a significant lapse.

Respondent further denied any arousal or interest in the e-mails, terming them "rote". This was simply not credible and belied by his statements in the e-mails themselves. (T-1183-1188)

Respondent further minimized his behavior when he stated that he took care to be sure that no one could see the screen of his laptop while in the Finance Academy meeting and observations (T-1014, 1060) by selecting his seating carefully.

Respondent also made sure to lock the door to his school office and close the blinds when engaging in sexual relations with Laurie Faso in said office. (T-428, 986) Laurie Faso testified to having passed students and custodian in the hall as she proceeded to Respondent's office. (T-427)

None of the safeguards are fool proof. It is quite amazing that it took three (3) years for Respondent to be caught. It is fortunate that his inappropriate e-mails came to light through e-mail filters (T-186) rather than a means that could have exposed his salacious language and pornographic descriptions to the entire school community. It is easy for an e-mail to be misdirected or for someone to hack into a computer or for a screen to be viewed inadvertently.

It is also quite fortunate that the custodian or assistant principal who had keys to Respondent's office (T-984), did not walk in on Respondent when he was receiving oral sex in his office. Respondent's witness, Thomas Murtaugh, recounted instances in his District where similar activities had occurred. (T-797) Respondent's risky behavior left the potential for exposure of his activities to the students and faculty of his District. Such exposure would be damaging to the entire school community. Superintendent Rabey testified that he felt he had been hit in the stomach with a baseball bat when he learned of Respondent's transgressions. (T-189) Surely the response of the community would have been equally strong.

Teachers and principals have the obligation to act as role models to their students (Ambach v. Norwick 441 U.S. 68). Clearly Respondent failed in that duty and risked exposing salacious material by his outrageous violations of the Acceptable Use Policy. The policy states, "The District DNCS are only to be used for school related work or activities..." (D-5) The policy further states, "...transmitting threatening, obscene or harassing material or correspondence is strictly prohibited." (D-5) There is no way that Respondent could have

been under the impression that his e-mails to Laurie Faso were within in the Acceptable Use Policy. Respondent attempted to minimize his failures by pointing out that others sent personal e-mails as well. (T-1072) No one else was alleged to have sent sexually explicit e-mails on the District system. Even if someone did send such e-mails, it does not excuse or justify Respondent's behavior. This attempt to minimize his culpability demonstrates his lack of understanding of the serious nature of his transgressions, indicative of a significant character flaw.

One of the duties of a principal is to be certain that rules are followed and to discipline those who do not adhere to rules. It would be difficult to discipline students for violation of the Acceptable Use Policy when the principal, himself, has so flagrantly ignored it.

One of the elements of good moral character discussed by Respondent's witnesses is compassion. (T-927) This trait was raised with Respondent on direct examination. (T-1108) He was asked who the victims are in this extramarital affair. (T-1108) Respondent stated, "My wife and my two daughters." (T-1109) This was further explored by the Department on cross-examination. (T-1204) Respondent could think of no other victims. (T-1204) Only after substantial prodding did Respondent reluctantly agree that the high school aged daughter of Laurie Faso was also a victim. (T-1205-1206) Respondent was unable to see the husband of Laurie Faso as a victim. (T-1208) Respondent did not consider whether the taxpayers, students or teachers were victims of his behavior. Surely they were, as he diverted his energy from his duties as principal to carry on this affair in school over a three (3) year period.

Respondent lacked credibility in his dealings with others. He initially failed to reveal to those individuals who provided him with affidavits of good moral character the extent of his transgressions. (T-1118, 1123, 1124 and 1125) Thus, very little weight can be given to those affidavits. Respondent tried to correct this by obtaining supplemental affidavits revealing the incidents of sex in his office. (R-27, 28 and 29) It is Respondent's blatant failure to reveal the extent of his transgressions to those he would ask to defend his moral character that stands out, not the content of the affidavits. Clearly the affiants believed Respondent was an effective administrator but that is only tangentially germane to good moral character. He failed to reveal to Thomas Murtaugh the extent of his transgressions. Even Thomas Murtaugh, who withstood a rigorous cross-examination by the Department, reluctantly agreed that sending sexually explicit e-mails during an observation was inappropriate. (T-808)

Respondent failed to reveal to Dr. Altshuler, who was trying to help Respondent, that he had sex in his home with Laurie Faso. (T-866)

Respondent's lack of candor can also be seen in his testimony regarding one particular e-mail from Respondent to Laurie Faso on October 6, 2008 15C Bates #002854 as follows:

Good Morning...completing my first observation of the year.

How was the dance? Go well?

Close call at home Saturday...Amy got home and went to change the sheets in Amanda's room...I quickly grabbed the damp pillowcases...she notices something on the sheets...looked at them, said...."what is this on the sheets" talk about getting nervous [*sic*]....nothing more was said...that was close....makes you wonder if we are pushing our luck...or what

During his testimony Respondent claimed that he lied to Ms. Faso in the e-mail, (T-1173) that in fact, Mrs. Redman did not change the sheets. It was his way of trying to end the relationship (T-1178) (which continued for eight (8) more months (T-968)).

He further testified relating to the incident which resulted in the damp pillows. He stated that his wife was shopping in Buffalo for the day. (T-1164) He brought Laurie Faso to his home and had sex on the floor of his basement with her. (T-976, 1162) After sex, she requested a tour of the house. (T-1163) While upstairs, the phone rang and he answered it. (T-1169, 977) When he finished the call, he found Ms. Faso in the bed in which he slept (formerly that of his daughter, Amanda). (T-1170) He could not remember whether she was clothed. (T-1171) He claimed that her hair was still damp from a shower she took before coming to his home. (T-978) He denied having sex in that bed. (T-977)

Laurie Faso's response to his above e-mail was "Oui" (R-15C Bates #002584), apparently meaning yes – we must be careful about leaving stained sheets. If they had not had sex in that bed, a more likely response would have been "What stains?" Respondent testified that Laurie Faso never asked about his reference to stained sheets. (T-1246)

Having sex in his daughter's bed is "creepy" to quote Dr. Cohon. (T-941) Such behavior is not punishable by one's employer. It is the prevarication over this incident which is of concern to this proceeding. There was no need to lie about this incident, except that it made him look bad.

Respondent was also evasive in his answer on cross-examination when asked if he had an erection during the oral sex he received in his office. (T-1143) Again, there was no reason to be evasive except that the true answer might make him look bad.

Respondent also suggested that during teacher evaluation observations the e-mails were only sent or reviewed during "transitions". (T-1015) This lacked credibility given the numbers of e-mails and the time required to type and/or read them.

Respondent's lack of credibility is very disturbing and reflects quite adversely on his moral character.

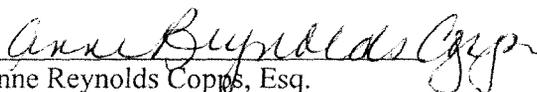
It is laudable that Respondent engaged in counseling, began and continues volunteer work and learned new skills as a tax preparer and baseball umpire during his administrative leave. (T-1085-1086) It is also laudable that his wife has forgiven him and stands by him. However, these positives juxtaposed with his course of conduct, together with the continued minimization, lack of compassion and inability to be completely honest show

that he does not have the requisite moral character to be certified to teach and administer in the public schools of the State of New York.

Recommendation

For the reasons set forth above, Respondent lacks the requisite moral character required of a certified teacher and administrator in the State of New York. It is recommended that all certificates held by Respondent be revoked.

Respectfully submitted,


Anne Reynolds Copps, Esq.
Hearing Officer

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificates held by ROBERT T.
REDMAN to teach in the public
schools of the State of New York.

Petitioner appeals the findings and recommendations of a hearing officer that he lacks the requisite moral character to teach or serve as an administrator in the public schools of the State of New York and that his certificates be revoked. The appeal must be dismissed.

Petitioner holds permanent certificates as a teacher of Business Education, effective September 1, 1987; as a School District Administrator, effective September 1, 1994; and as a School Administrator/Supervisor, effective February 1, 1990. Petitioner has been employed by the Lake Shore Central School District ("Lake Shore") as a high school principal since 1999.

On or about July 2, 2009, Lake Shore's superintendent submitted a moral character complaint regarding petitioner to the State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") pursuant to Part 83 of the Commissioner's regulations (8 NYCRR Part 83). The complaint stated that the district had received information that petitioner engaged in a sexual relationship with an employee at another school district, resulting in conduct which was a substantial breach of the district's confidence in petitioner. The superintendent indicated that petitioner was alleged to have engaged in such conduct during school hours using district resources during times when he was expected to be fulfilling his

duties to the district and performing tasks in furtherance of the district's mission. Specifically, the complaint alleged that petitioner engaged in sexually explicit communications during times he was performing classroom observations, provided false information to a district administrator regarding his whereabouts during school hours and submitted false records of his use of leave accruals.

On March 1, 2011, a Notice of Substantial Question of Moral Character ("Notice") was issued pursuant to Part 83. The Notice stated that the Department had received information relating to petitioner's alleged inappropriate conduct during the 2006-2007 through the 2008-2009 school years. Such inappropriate conduct included, "among other things," the following: improper communications and/or correspondence with an adult female during school hours and/or during a time that petitioner was expected to be fulfilling his administrative duties to his own school district; engaging in approximately 1,500 email communications with such adult female via his district-issued computer and/or his district-issued email address while at school and/or during school hours when petitioner should have been fulfilling his duties as an administrator; engaging in improper email exchanges with such adult female while he was in a classroom performing required teacher evaluations and/or observations; engaging in improper email exchanges with such adult female while he was in attendance at a school meeting with a parent, a student and/or several district employees; using the district telephone to engage in improper communications with such adult female during school hours and/or during a time that petitioner was expected to be fulfilling his administrative duties to his own school district; providing false information to the district regarding his whereabouts during school hours; providing false records of his use of leave time by leaving his place of work to tend to personal matters and/or failing to account for the appropriate leave time; and sharing details of a district employment interview and/or interview process with such adult female.

Petitioner requested a hearing before a three-member panel and subsequently waived such request. A hearing was held before a single hearing officer over seven days in July and September, 2011, and resulted in a transcript of approximately 1,400 pages. Petitioner was represented by counsel.

At the hearing, the Department introduced 26 exhibits and called four witnesses in support of the charges, including the adult female with whom petitioner had allegedly engaged in inappropriate conduct and communications. Petitioner testified on his own behalf, offered testimony from eight witnesses and entered 28 exhibits.

In a written decision ("Decision"), the hearing officer found that the Department had established its case as set forth in the charges. The hearing officer found that petitioner lacked good moral character and recommended that his teaching certificate, School Administrator/Supervisor certificate and School District Administrator certificate be revoked. On November 18, 2011, petitioner appealed the Decision pursuant to §83.5 of the Commissioner's regulations.

Petitioner raises several objections to the Decision, including that the hearing officer applied an incorrect standard of proof and that her findings were not supported by a preponderance of the evidence in the record. Petitioner argues, inter alia, that he was denied fair notice that the charges included having sexual relations in his school office; that the hearing officer's instruction that petitioner not communicate with his attorney overnight denied his due process right to representation; and that the hearing officer improperly rejected the affidavits of good moral character that were submitted as evidence on petitioner's behalf. Petitioner argues that the hearing officer's finding that he sent and received sexually explicit emails at a Finance Academy meeting at which a parent and student, as well as other faculty and staff, were present, was unsupported by the record. Petitioner further challenges the hearing officer's finding that he lacked credibility in claiming that his emails during teaching observations occurred during teaching transitions and argues that the hearing officer's determination was not supported by law, court decisions or regulation and did not consider the expert and other informed testimony regarding relevant factors in determining moral character.

On December 19, 2011, OSPRA submitted a letter in opposition to petitioner's appeal. OSPRA urges that I uphold the hearing officer's determination and recommendation as rational, supported by the record and based on a proper assessment of witness credibility. OSPRA

argues that petitioner received fair notice of the charges, including those regarding sexual conduct in his office; that the hearing officer's instruction that petitioner not confer with counsel during an overnight break in petitioner's testimony did not constitute a fatal error, particularly in light of the fact that petitioner's attorney failed to timely object; that petitioner's own witnesses testified that his behavior was inappropriate and exhibited a lack of good moral character; and that the penalty is appropriate.

I will first address petitioner's procedural objections. Petitioner asserts that the hearing officer did not apply the correct standard of proof, "preponderance of the evidence." While §83.4(c) of the Commissioner's regulations states that "the Department shall have the burden of proof of lack of good moral character," it does not state what standard of proof is to be applied.

Where an adverse determination in a hearing could be stigmatizing and could adversely impact an individual's future employment, the Court of Appeals has stated that "any procedural safeguard of proof by less than a preponderance of the evidence is constitutionally inadequate to protect against an erroneous deprivation of a tangible liberty interest" (Miller v. DeBuono, 90 NY2d 783, 794 [1997]). Thus, the Court of Appeals in Miller has ruled that in such circumstances a preponderance of the evidence standard, rather than the lesser substantial evidence standard is constitutionally required (*id.*). A Part 83 hearing may result in revocation of an individual's teaching certificate, which will foreclose that individual's future employment as a teacher. In addition, once a decision is rendered determining that the teacher lacks good moral character, the State Education Department treats the decision as a public record, creating a risk of stigmatization.

As such, I find that the analysis used in Miller is applicable and a preponderance of the evidence standard should be used in Part 83 hearings (*cf.* Agnew v. North Colonie Cent. School Dist., et al., 14 AD3d 830 [3d Dept. 2005] [hearing on termination of teacher aide for theft properly held using substantial evidence standard as teacher aide's future employment was not impacted by determination]).

Petitioner states that the hearing officer actually applied the lesser substantial evidence standard based on her purported statement that "given inference[s] [were] reasonable and plausible." Contrary to petitioner's assertion, however, it is clear from the Decision that the hearing officer applied the correct standard of proof. The hearing officer specifically stated that "the Department has the burden of proving by a preponderance of the evidence that the [petitioner] lacks the requisite moral character needed to be a teacher or administrator." Therefore, I find that the hearing officer properly applied the correct standard of proof in rendering her decision.

Petitioner also asserts that he was denied fair notice because "consensual sexual activity in his school office" was not charged or identified prior to the hearing. I find this claim unsupported by the record and without merit. The Notice alleges inappropriate behavior during the 2006-2007 school year through the 2008-2009 school year, which "included, among other things," the conduct set forth in the charges. As noted above, the described conduct all relates to petitioner's alleged involvement in a sexual relationship and his use of various district resources to engage in such relationship. The gravamen of the charges focuses on petitioner's involvement in the sexual relationship along with the use of district resources during the specified period of time. Addressing "consensual sexual activity in his school office" during that time period is within the scope of the charged conduct and cannot be deemed surprising so as to deny petitioner an opportunity to defend such conduct. Indeed, during the hearing, petitioner provided extensive testimony about these specific inappropriate behaviors and the sexual activities which occurred, admitting to two such incidents in his school office. Due to the nature of the conduct alleged and the evidence and testimony in the record, I cannot conclude that petitioner was not provided with sufficient notice that all aspects of his inappropriate conduct on school property and using school resources included "office sex." Accordingly, I find no merit to this claim.

Petitioner also argues that, by instructing him not to consult with his attorney during an overnight break in his testimony, the hearing officer denied his due process right to representation. The record indicates that, at the conclusion of petitioner's direct testimony on September 8,

2011 and prior to his cross-examination the following morning, the hearing officer directed petitioner to "not discuss the case with [his attorneys]." Petitioner argues that this directive violated his due process rights and that, given the weight the hearing officer gave his testimony on cross examination, such a violation requires that I vacate the hearing officer's determination and order a re-hearing.

The record reflects that, upon breaking for lunch during petitioner's direct testimony, his counsel asked the hearing officer whether she would "like [petitioner] not to be with [his attorneys during lunch]," to which the hearing officer responded that petitioner could have lunch with his attorneys, but "shouldn't discuss the case" with them. At the conclusion of petitioner's direct testimony that afternoon, the hearing officer stated that cross-examination would begin the following morning and that petitioner "is still under the requirements to not discuss the case with" his attorneys. Petitioner's attorneys raised no objection to this instruction, nor did they indicate that they needed to consult with petitioner on matters generally related to the case, but unrelated to his testimony the next day. Petitioner's attorneys did not raise this argument the following day prior to cross-examination or re-direct or during closing arguments. Rather, petitioner asserts, for the first time in this appeal, that the hearing officer's overnight preclusion instruction was a violation of his right to representation.

To support his argument, petitioner cites Elmore v. Plainview-Old Bethpage Central School Dist., Bd. Of Education (180 Misc 2d 762, aff'd 273 AD2d 307 [2d Dept. 2000] ["Elmore"]). Elmore involved an Education Law §3020-a disciplinary proceeding in which a hearing officer ruled - over the teacher's objection - that the teacher could not confer with his attorney during breaks in his testimony, which spanned several weeks. In finding that the teacher's right to counsel was violated in that instance, the Elmore court cited decisions for the proposition that the preclusion of communications between a criminal defendant and his attorney during an overnight or weekend recess is a violation of the right to counsel (citing People v. Carracedo, 89 NY2d 1059 [1997]; People v. Joseph, 84 NY2d 995 [1994]; see also People v. Enrique, 80 NY2d 869 [1992]; People v. Schiliro, 179 AD2d 693 [2d Dept. 1992]).

However, in contrast to the instant appeal, the teacher in Elmore objected during the hearing to the hearing officer's instruction. In this case, the hearing transcript indicates that petitioner's counsel failed to do so. Under these circumstances, I cannot conclude that petitioner was denied his right to counsel.

Petitioner also argues that the hearing officer's rejection of his affidavits of good moral character violated his due process rights. Petitioner alleges that the hearing officer "refused to consider [the affidavits] on the sole basis that [petitioner] failed to reveal to those affiants he had sex in his school office." I find no merit to this claim. The record indicates that the hearing officer did not refuse to consider the affidavits, but rather gave what she determined to be the appropriate weight to the affidavits, which were sworn to without full knowledge of the extent of petitioner's conduct. The Decision states that, due to petitioner's lack of candor with his affiants, "very little weight" could be provided to the affidavits. Indeed, petitioner admitted that he failed to inform his affiants that he had sexual relations in his office because he believed it did not constitute "inappropriate behavior" as specified in the charges. Moreover, the record indicates that petitioner later sought supplemental affidavits from these individuals, one of whom stated that the information "changed [her] perception of [petitioner's] conduct during his extra-marital affair." In ascribing appropriate weight to the affidavits, the hearing officer clearly considered them, and petitioner's claim in that regard must fail.

Turning to the merits, petitioner claims that the Department has failed to demonstrate that he lacks good moral character warranting permanent revocation of his certificates. Upon careful consideration of the record, I cannot agree. As described above, the hearing officer heard testimony and observed the demeanor of 12 witnesses, including petitioner. With respect to findings of fact in matters involving the credibility of witnesses, I will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the determination of credibility is inconsistent with the facts (Appeal of C.S., 48 Ed Dept Rep 497, Decision No. 15,929; Appeal of B.M., 48 *id.* 441, Decision No. 15,909; Appeal of a Student Suspected of Having a Disability, 48 *id.* 391, Decision No. 15,895). The hearing officer's findings, on

which her determination and recommendation are based, are adequately explained, consistent with the facts and supported by the evidence. For example, the hearing officer explained that "[a]ll of [petitioner's] witnesses agreed that the complained of behavior was wrong." She also stated that:

The most revealing witness was [petitioner]. He admitted to a course of conduct, including the affair of three years, sending e-mails that were sexually explicit from a school computer, using the school phone to pursue the affair, leaving school to have sex, and having sex in his office. However, he tried to minimize his behavior by suggesting that he could send sexually explicit e-mails while in an observation or meeting and still pay attention.... He further suggested that he couldn't remember if he really sent or received the e-mails during [a] meeting, indicating that perhaps they could have been done during a break He stated that he only sent the e-mails during transitions in the classes he was observing....

[Petitioner] further denied any arousal or interest in the e-mails, terming them "rote". This was simply not credible and belied by his statements in the e-mails themselves....

[Petitioner] further minimized his behavior when he stated that he took care to be sure that no one could see the screen of his laptop while in the Finance Academy meeting and observations ... by selecting his seating carefully.

[He] also made sure to lock the door to his school office and close the blinds when engaging in sexual relations ... in his office.... [The adult female] testified to having passed students and

custodian [sic] in the hall as she proceeded to [petitioner's] office.

I find no basis on this record to substitute my judgment for that of the hearing officer regarding matters of witness credibility.

The underlying facts of this case are not in dispute, and the record clearly supports a finding that petitioner repeatedly engaged in inappropriate behavior during school time, using school district resources and in situations in which others - including impressionable young students - could have observed such conduct. Teachers and principals have the obligation to act as role models to their students (Ambach v. Norwick, 441 US 68). Engaging in such behavior during the school day when students were present posed a serious risk that students would witness such inappropriate activity which would have severely compromised petitioner's role as an effective authority figure in the school. Petitioner's actions were wholly unacceptable and incompatible with his duties and responsibilities as a principal.

As noted by the hearing officer, petitioner makes various attempts to explain, justify and excuse his conduct. For example, he objects to the hearing officer's finding that his use of the district's email system to engage in sexually explicit communications violated the district's "acceptable use" policy, which states that the district's computer system is to be used only for "school related work or activities." Petitioner argues that it is common practice for district staff to regularly use the district's email for personal purposes despite the acceptable use policy, and that the vast majority of emails at issue in this case were not sexually explicit in nature.

I recognize that it may be common practice for employees to use their employer's computer resources for personal purposes and this decision should not be construed to mean that such personal use in violation of an "acceptable use" policy, in and of itself, constitutes a lack of the requisite good moral character to teach in the public schools of the State of New York. However, the specific concern raised by the hearing officer in this case was that petitioner's personal use of the district's email system included sexually explicit and graphic language and he breached his duty to act as a role model for students

when he "risked exposing" such material through his conduct. Petitioner's own affidavits of good moral character describe the emails as including "lewd and crass sexual terms," "crude" and "sexually explicit" language. One affiant stated: "I don't care to repeat those terms ... they include some crass terms for body parts and sexual activities...." Petitioner's former assistant superintendent testified that he found the content of the emails "gut-wrenching," and stated that "the content, the sexual nonsense conversation that was going on was unbelievable." The superintendent described the emails as "pornographic." The record contains the text of the emails and there is no question that the emails were extremely sexually explicit and grossly inappropriate. Under these circumstances, I agree with the hearing officer that petitioner's conduct in this respect breached his duty to act as a role model for students.

In addition to challenging the hearing officer's credibility finding regarding emails sent and/or received during teaching observations, which was addressed above, petitioner also asserts that the finding that he sent and/or received sexually explicit emails during a Finance Academy meeting was unsupported by a preponderance of the evidence. The record indicates that the four sexually explicit emails sent or received during the Finance Academy meeting on December 3, 2008 were timed at 11:08 a.m., 12:05 p.m., 12:27 p.m. and 1:53 p.m. Petitioner argues that the hearing officer failed to acknowledge his computer forensic expert's testimony that the computer-generated times were unreliable. He also asserts that the superintendent testified that petitioner could have left the room for a break during those times and may not have engaged in those exchanges during the meeting itself. However, the assistant superintendent testified that the Finance Academy meeting was on an agenda and that the meetings were "traditional," with lunch brought into the meeting room between 11:30 a.m. and noon. The assistant superintendent also testified that he recalled petitioner using his district laptop during the meeting. Further, petitioner himself testified that it was possible that he received and sent sexually explicit emails during the meeting. As such, I find that the hearing officer's findings with respect to this charge were supported by the record.

Petitioner also asserts that the ultimate question on moral character was determined with neither "reference nor

deference" to law, court decisions or regulation and without consideration of the expert and other informed testimony regarding relevant factors for determining moral character. Petitioner provided several affidavits from individuals, including former colleagues, generally describing his good moral character and positive employment history with the district. However, petitioner admitted that he did not reveal his sexual encounters in his office to his affiants because he did not deem this to be the inappropriate conduct referenced in the formal charges. Petitioner also called several expert witnesses to provide testimony on the factors that contribute to moral character. For example, a college philosophy professor testified generally about character. Notably, however, she was not aware of all of petitioner's sexual conduct prior to her testimony and stated that some of his conduct would indicate that there was "something morally serious here."

Upon my review of the testimony and evidence, I concur with the hearing officer's decision that the Department met its burden of proving that petitioner lacks the requisite good moral character to serve as a teacher and administrator in the public schools of the State. I also agree with the hearing officer's assessment of witness credibility and find no basis to substitute my judgment. As described above, the hearing officer's decision sets forth a thorough analysis of the extensive record in support of her findings and recommendation.

As stated above, petitioner's actions constitute a clear breach of his duty as a teacher to be a role model for students (see Ambach v. Norwick, 441 US 68, 78-79). Further, §100.2(a) of the Commissioner's regulations requires school districts to employ a principal in each building for the purpose of providing:

[l]eadership in the development of the educational program of the school to which he or she is assigned, including the supervision and administration of the school program, involvement with the selection and retention of staff, professional consultation, direction and assistance to the faculty and students of the school, and fostering effective home/school/community partnerships.

As principal, petitioner serves not only as a role model for students, but he also serves an important leadership role in his building, district, and community, and must possess the requisite moral character to carry out these responsibilities and duties. Using district property and resources during the school day, in the presence of students, teachers, parents and others, to carry out a sexual relationship evinces a significant lack of impulse control and moral character. Indeed, the record indicates that such conduct occurred during meetings and classroom observations of teachers - responsibilities with which petitioner, as high school principal, was entrusted in order to ensure effective instruction and operation of his school building. Moreover, petitioner's lack of truthfulness and failure to accept responsibility for his conduct is directly related to his responsibilities as a principal and his fitness to serve, both as a role model for students and as a public servant responsible for the welfare of children. Under no circumstances can such conduct be tolerated.

As the hearing officer noted, petitioner has engaged in counseling and volunteer work, learned new skills, and has been forgiven by his wife. However, "these positives juxtaposed with his course of conduct, together with [his] continued minimization, lack of compassion and inability to be completely honest, show that he does not have the requisite moral character" to teach in the public schools of the State of New York. Based on this record, I agree.

Pursuant to §83.5(c) of the Commissioner's regulations, the Commissioner may affirm and adopt, reverse or modify the findings and recommendations of a hearing officer. As set forth above, based on the record before me, I find that the Department carried its burden of proving by a preponderance of the evidence that petitioner lacks the requisite moral character to teach in the public schools of the State of New York. Therefore, I affirm the findings and recommendations of the hearing officer that petitioner's certificates must be revoked.

I have considered petitioner's remaining contentions and find them to be without merit.

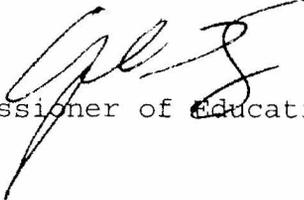
THE APPEAL IS DISMISSED.

IT IS ORDERED that the teaching and administrative certificates of Robert T. Redman be and hereby are immediately revoked; and

IT IS FURTHER ORDERED that petitioner shall immediately return to the State Education Department any copies of such certificate currently in petitioner's possession.



IN WITNESS WHEREOF, I, John B. King, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 25th day of July 2013.


Commissioner of Education

The University of the State of New York
Education Department



1

In the matter of the certificates held by

LUTHER STEPHNEY

to teach in the public schools
of the State of New York

NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER

LUTHER STEPHNEY, hereinafter referred to as "certificate holder", presently holds permanent New York State teaching certificates in: Pre K-6, effective February 1, 2001 and School District Administration, effective September 1, 2003, and a provisional certificate in School Administration and Supervision, effective September 1, 2003, each bearing the number

[REDACTED]

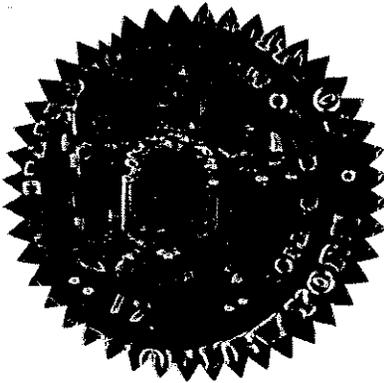
Information has been received by the New York State Education Department that:

- a) During the school day, on at least six different occasions between February 9, 2004 and March 9, 2004, the certificate holder, who was employed as a second-grade teacher, used his school district-issued computer in his classroom to search for, access and view pornographic images. Such conduct was in violation of the school district Internet Use policy.
- b) In a January 11, 2005 decision following a 3020-a disciplinary hearing, the certificate holder was found guilty of the above-referenced conduct.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices

Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83, shall be mailed to the certificate holder by certified mail, return receipt requested and by first class mail. The certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificates should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificates.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the Education Department this 20th day of July, 2005.

Richard P. Mills
Commissioner of Education

IN THE MATTER OF THE CERTIFICATE(S)
HELD BY LUTHER STEPHNEY TO TEACH
IN THE PUBLIC SCHOOLS IN THE STATE OF
NEW YORK

REPORT AND
RECOMMENDATION OF
HEARING OFFICER

Hearing Officer: Cynthia E. Preiser, Esq.

Appearances: Cheryl Randall, Esq.
Office of School Personnel Review and Accountability of the
New York State Education Department

Paul D. Clayton, Esq. NEA New York for Respondent
Luther Stephney, Respondent

PROCEDURAL HISTORY

This proceeding was initiated by the issuance of a Notice of Substantial Question of Moral Character dated July 28, 2005 (Dept. Exhibit 1) which was properly served upon Luther Stephney by certified mail, return receipt requested at his residence in accordance with Part 83 of the Regulations of the commissioner of Education and further pursuant to the "Notice of Substantial Question of Moral Character"(Dept. Exhibits 2 and 3). Respondent, through his attorney, requested a hearing be held with respect to this matter (Dept. Exhibit 4).

By Order dated September 15, 2005, the Honorable Richard P. Mills, Commissioner of Education of the State of New York, designated the undersigned to conduct a hearing pursuant to the provisions of Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83) concerning the appropriateness of permitting Luther Stephney to teach in the public schools of the State of New York (H.O. Exhibit 1).

A hearing was scheduled and held on November 28, 2005 and continued on January 3, 2006 at the Education Building on Washington Avenue, Albany, New York. Luther Stephney was present and represented by Paul D. Clayton at all proceedings.

The Notice of Substantial Question of Moral Character alleges that Luther Stephney engaged in inappropriate conduct by using a school district issued computer on at least six different occasions between February 9, 2004 and March 9, 2004 to access and view pornographic images. This conduct was in violation of the school district Internet Use policy. The Notice further alleges that on January 11, 2005 the certificate holder was found guilty of the above conduct at a 3020-a disciplinary hearing.

The Department presented two witnesses in support of its case, Inv. Matthew Couch and Paul Scott, Superintendent of Schools for the Peru School District. The respondent testified on his own behalf.

The parties stipulated to the introduction of exhibits including but not limited to the decisions from the underlying 3020-a hearing and media reports of the incident. The parties furthermore stipulated to my reviewing the entire record from the 3020-a hearing including a compact disc containing pictures of the images viewed by the respondent.

FINDINGS OF FACTS

Upon a thorough review of all of the testimony, exhibits and my notes I find the following facts:

1. Luther Stephney presently holds two permanent New York State Teaching Certificates and a provisional certificate as a School District Administrator and Supervisor (Dept. Exhibit 5). The permanent certificates are in Pre K through 6 and School District Administrator. The certificates all bear number 560416537.
2. That Luther Stephney has been teaching in the Peru Central Schools since 1999. That he received Tenure in the District in the 2001-2002 school year.
3. That Luther Stephney was teaching in the Peru School District in 2003-2004 as a second grade teacher.
4. That on approximately six different occasions between February 9, 2004 and March 9, 2004 Mr. Stephney viewed pornography on his classroom computer in violation of the District's "Acceptable Use Policy".
5. That Mr. Stephney freely admitted to his conduct and cooperated in the investigation against him.
6. That at a hearing pursuant to Section 3020-a of the Education Law, Mr. Stephney was found to be guilty of the above-alleged conduct.
7. That Mr. Stephney has admitted in all hearings that he was the person who viewed pornography on the school's computer and that he was in violation of the "Acceptable Use Policy".

DISCUSSION

The Department has addressed two separate charges against the Respondent. The purpose of this hearing was to determine if Luther Stephney possesses the requisite moral character to retain his certificates to teach in the Public Schools of New York.

The statutory guidelines for the hearing and determination are set forth in Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83) and Section 305(7) of the Education Law. This section provides for a hearing to be held when an individual holding a teaching certificate has committed an act which raises a reasonable question as to the individual's moral character.

In any such hearing, the burden of proof rests solely on the New York State Education Department to prove by a preponderance of the competent evidence that the certificate holder lacks good moral character.

In the present case, the Department presented evidence that on six separate dates, on more than one occasion on some dates, Respondent searched for and viewed pornography on the school district issued computers that were in his second grade classroom.

The issue before me as a hearing examiner is not whether the conduct occurred, the Respondent has admitted to the conduct and is also bound by the doctrine of collateral estoppel, due to the fact that this matter was decided at a 3020-a Hearing, but only if Respondent possesses the good moral character to remain as a teacher in the public schools of New York.

I have had an opportunity to review the entire record in this case including but not limited to the transcripts of the underlying proceedings, a disc, which portrays the images viewed by Mr. Stephney, and printouts, which show the search terms and pictures that were generated as a result of the search. The images that were generated ranged from clinical to comical to hard-core pornography.

I find it disturbing that a teacher who has been entrusted to teach children would engage in such behavior in a classroom setting. By Mr. Stephney's own admission he did not look at these images at home because he did not want to risk his own children viewing the images (transcript page 98). Therefore, he knew that what he was doing was inappropriate but still chose to do it in the classroom.

In this day and age where computers are an integral part of the classroom setting and students, even at the second grade level, are schooled in the use of them, any action that could put the students at risk of discovering or viewing these images is unacceptable. The risk of a student entering the classroom or finding a way to search the history of the computer and uncover the images is a risk that a teacher in our elementary schools should not be willing to take.

In his defense, Respondent testified that this conduct only took place while the students were out of the classroom and he was alone. Furthermore, he testified that he has been sufficiently punished through the 3020-a results and that he would never engage in this conduct again. If this had been a single act, that might have been a sufficient punishment, but this conduct took place on approximately eight different occasions for over seventy five minutes.

In his summation, counsel for Respondent argues that revocation would be excessive and that the needs of society would be met with a less severe sentence. He further compares this situation with other situations in which less severe punishments were meted out. I don't think that because one hearing officer finds that a teacher who views pornography should be returned to the classroom that this is the appropriate decision in all cases.

Counsel for Respondent further argues that if the Department employs the doctrine of collateral estoppel with respect to Respondent's guilt on the charges they are therefore bound by the underlying decision, I disagree. The Part 83 hearing is a process that has a separate objective than a 3020-a hearing and therefore, may or may not have a different result. But due to the fact that Respondent has admitted to the conduct this argument is moot.

Additionally, counsel alludes to Respondents good moral character, but that issue was never fully addressed by Respondent at the hearing. He was able to elicit from the testimony of the Superintendent of Schools that there was little negative feedback about this incident but did not produce any independent testimony of his good moral character.

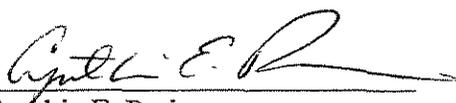
RECOMMENDATION

The decision to recommend whether a teacher's certificate to teach should be revoked is never an easy decision and this case is no exception. On the one hand there is the totally egregious conduct of viewing pornography on a school computer and on the other is an otherwise good teacher whose conduct did not result in any children being exposed to the images.

The New York State Department of Education has a legitimate interest in protecting the safety of students within its public schools and allowing Luther Stephney to teach at this time would be a safety risk to the students.

After careful consideration and weighing of all of the testimony and exhibits, I strongly recommend that the certificates to teach in the Public Schools of the State of New York held by Luther Stephney be revoked.

Dated: May 1, 2006


Cynthia E. Preiser
Hearing Officer

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificates held by LUTHER STEPHNEY
to teach in the public Schools of the
State of New York.

Petitioner appeals the findings and recommendations of a hearing officer that he lacks the requisite moral character to teach in the public schools of the State of New York. The appeal must be dismissed.

On February 1, 2001, petitioner was issued a permanent teaching certificate in grades prekindergarten through 6. On September 1, 2003, he was issued a permanent certificate in School District Administration ("SDA") and a provisional certificate in School Administration and Supervision ("SAS"). Petitioner has taught second grade in the Peru Central School District ("district") since 1999, and has been tenured since 2001. He was previously tenured in the Northeastern Clinton Central School District.

On or about March 10, 2004, the district's Information Technology coordinator ("IT coordinator") discovered through the use of filtering software that someone had been accessing pornography on a school-issued computer located in petitioner's classroom. The IT coordinator contacted petitioner, who admitted that he had viewed the inappropriate Internet sites. Petitioner was placed on paid leave while an investigation ensued. An examination of the hard drive of the three computers in petitioner's classroom revealed that he had visited inappropriate and pornographic Internet sites on six dates between February 9 and March 9, 2004. The district also commenced a Title IX sexual harassment investigation to

determine whether petitioner's actions violated its Title IX policy.

On May 11, 2004, the district's board of education served a "Notice of Determination of Probable Cause on Charges Brought Against Tenured School District Employee, Section 3020-a, Education Law" containing seven charges. The first six charges involved the following activity occurring on those six dates:

Searching and Viewing Inappropriate, Obscene, Immoral and Pornographic Materials on the District's Computer; Neglect of Duty; and Violation of District Policy and Insubordination

Specification A - Searching for, Obtaining and Viewing Inappropriate, Obscene, Immoral and Pornographic Materials
Specification B - Neglect of Duty
Specification C- Violation of District Policy and Insubordination

Petitioner was charged with accessing pornographic Internet sites on each date by using inappropriate search words. On two dates, petitioner accessed sites more than once. Petitioner spent from 1 to 50 minutes online at each session for a total of two and one half hours. Although the record indicates that the second graders were not in the classroom when petitioner accessed the websites, petitioner was charged with neglect of duty because his online activity occurred during his work hours. Petitioner was also charged with violating the district's Information Technology Network Policy, for which he signed a consent statement in February 2002, and the district's Acceptable Use/Safe Use Policy, contained in the district's Code of Conduct, that prohibited the transmission or reception of "inappropriate material including visual depictions that are obscene, immoral, child pornography, harmful to minors, violent or illegal."

The seventh charge was for "Providing False and Misleading Information to District Administrators." Petitioner claimed that he had visited inappropriate websites only two or three times, whereas the investigation revealed a total of nine occasions on six dates. Accordingly, petitioner was charged with purposefully providing misleading information.

A hearing was held on October 1 and October 19, 2004. By decision dated January 11, 2005, the hearing officer dismissed the seventh charge, finding that the district did not meet its burden of proving that petitioner's initial statement regarding the number of times he visited websites was purposeful. However, the hearing officer found petitioner guilty of the first six charges, finding that petitioner had admitted that "he accessed the websites in question, violated District policy and showed horrible judgment in accessing and looking at the sites." The hearing officer determined that petitioner's conduct was egregious enough to warrant a significant suspension without pay and suspended petitioner for the remainder of the 2004-2005 school year -- the equivalent of approximately five and one half months. He also retained jurisdiction for two years so that if petitioner repeated his errant behavior, the parties would have the opportunity to present new evidence.

By petition dated January 27, 2005, the district's board of education appealed the penalty portion of the hearing officer's decision in the Supreme Court of the State of New York, Clinton County, asserting that the hearing officer exceeded his authority under Education Law §3020-a by retaining jurisdiction over the case for two years and seeking dismissal of petitioner or remand for imposition of a penalty based on the hearing officer's findings of misconduct.

By letter dated February 14, 2005, the district's superintendent submitted to the New York State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") for review, pursuant to Part 83 of the Commissioner's regulations ("Part 83"), the record and January 11, 2005 decision in the Education Law §3020-a proceeding.

By decision dated July 6, 2005, Supreme Court Acting Justice Kevin K. Ryan granted the board's petition on appeal, determining that the hearing officer not only lacked authority to retain jurisdiction over petitioner's behavior until the end of the 2006-2007 school year, but also violated public policy with the penalty portion of the award. Accordingly, Justice Ryan vacated the award and remanded for a determination of an appropriate penalty.

On July 28, 2005, while the remand was pending, I issued a Notice of Substantial Question as to Moral Character ("Notice") with two charges pursuant to Part 83:

- a) During the school day, on at least six different occasions between February 9, 2004 and March 9, 2004, the certificate holder, who was employed as a second-grade teacher, used his school district-issued computer in his classroom, to search for, access and view pornographic images. Such conduct was in violation of the school district Internet Use policy.
- b) In a January 11, 2005 decision following a §3020-a disciplinary hearing, the certificate holder was found guilty of the above-referenced conduct.

By decision on remand dated August 12, 2005, the same §3020-a hearing officer ordered petitioner to attend counseling to address his misconduct, in addition to the original suspension without pay. The hearing officer retained jurisdiction for two years to ensure compliance with the counseling part of the order. He also ordered that petitioner be permitted to return to the classroom effective September 2005.

By order dated September 15, 2005, I designated a hearing officer to conduct a hearing under Part 83, which was held on November 28, 2005 and January 3, 2006. At the Part 83 hearing, the superintendent testified for the district and an OSPRA investigator testified on the Department's behalf. The Department submitted 14 exhibits and petitioner submitted one. In addition, the entire record of the §3020-a proceeding against petitioner was submitted into the record. Petitioner testified on his own behalf.

In a decision dated May 1, 2006, the hearing officer discussed the exhibits and charges contained in the Notice. The hearing officer concluded that petitioner lacks the requisite moral character to teach in the public schools of the State of New York and recommended that his teaching and administrative certificates be revoked.

On May 26, 2006, petitioner initiated this appeal from the hearing officer's findings and recommendation pursuant to §83.5 of the Commissioner's regulations. Petitioner contends that his conduct does not warrant revocation.

On June 26, 2006, OSPRA submitted a letter in opposition to petitioner's appeal, requesting that I affirm the hearing

officer's decision in its entirety and revoke petitioner's teaching certificates.

The underlying facts of this case are without dispute. When confronted by the district's IT coordinator, petitioner admitted that he was the sole person responsible for the use of the computers in his classroom and he conceded that he had used inappropriate words to search for and view pornography on the Internet. He admitted these facts again in a meeting with the superintendent following the district's investigation, in a letter to the district's board of education, at the §3020-a hearing and at the Part 83 hearing. The §3020-a hearing officer determined that "there is no question concerning [petitioner's] 'guilt' relating to these charges." The Part 83 hearing officer determined that "the Department presented evidence that on six separated dates, on more than one occasion on some dates, [petitioner] searched for and viewed pornography on the school district issued computers that were in his second grade classroom."

Furthermore, I agree with the Part 83 hearing officer's assessment: "The issue before me as a hearing examiner is not whether the conduct occurred, [petitioner] has admitted to the conduct and is also bound by the doctrine of collateral estoppel, due to the fact that this matter was decided at a 3020-a Hearing, but only if [petitioner] possesses the good moral character to remain as a teacher in the public schools of New York." Under New York law, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or cause of action are the same" (Ryan, et al. v. N.Y. Tel, et al., 62 NY2d 494; Burkybile v. Bd. of Educ. of Hastings-On-Hudson UFSD, et al., 411 F3d 306; Chairnoff and Rosof v. National Westminster Bank, N.A., 309 F Supp 2d 581). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (Chairnoff and Rosof v. National Westminster Bank, N.A., 309 F Supp 2d 581, citing Parker v. Blauvelt Volunteer Fire Co., Inc., et al., 93 NY2d 343).

Petitioner argues, however, that "part of the collateral and res judicata rationale should include that this case is one that does not call for revocation; rather it has been fully litigated and did not justify such a drastic result." In other

words, petitioner argues that the penalty of five and a half months suspension without pay and counseling imposed by the §3020-a hearing officer is also determinative and binding on the Part 83 hearing officer. Petitioner, however, provides no authority for his argument that the doctrine of collateral estoppel must be extended to include a penalty imposed under a prior action and thus bar any other potential penalty under a different statute and/or standard, and indeed, there is none.

It is patently clear that Part 83 and §3020-a proceedings have different statutory authority, procedures, prescribed penalties, appeal procedures, and purposes (see Education Law §§305[7] and 3020-a; 8 NYCRR Part 83). A §3020-a proceeding is a disciplinary hearing brought by an employer, specifically a school district, against a tenured teacher and results in penalties relating to the teacher's employment rights in that individual district. In contrast, a hearing under Education Law §305(7) and Part 83 of the Commissioner's regulations determines whether an individual's moral character warrants the revocation or suspension of an individual's certification, regardless of tenure or employment status. Each proceeding is independent of the other, and each can be held without the other as a prerequisite. Accordingly, once the Part 83 hearing officer accepted the facts of petitioner's guilt as conceded in the §3020-a hearing, she was not only free to apply the standards of Part 83 to those facts, but obligated to do so.

Petitioner implies that he was denied due process because the Part 83 decision is "devoid of analysis" and the hearing officer allegedly "favors a bright line rule that if one views pornography on the internet then one forfeits the right to teach in the public schools." I disagree with petitioner's argument. Petitioner was afforded a full and fair hearing on the record on November 28, 2005 and a second opportunity to add to the record on January 3, 2006. I find that the hearing officer's determination is supported by the record and that the decision reflects a careful weighing and analysis of the testimony and evidence.

It is clear that the hearing officer did not apply a bright line test but rather considered the nature of all the pornographic evidence including the search terms and images. She noted that the images ranged "from clinical to comical to hard-core pornography," and determined:

I find it disturbing that a teacher who has been entrusted to teach children would

engage in such behavior in a classroom setting. By Mr. Stephney's own admission he did not look at these images at home because he did not want to risk his own children viewing the images. Therefore, he knew that what he was doing was inappropriate but still chose to do it in the classroom.

Furthermore, the hearing officer evaluated petitioner's testimony, including the alleged mitigating factors that he admitted his conduct, that he acted only when the students were out of the room, that the computers were approximately 30 feet from the door and that an easel blocked their screens. In assessing the penalty, however, the hearing officer determined that "[i]f this had been a single act, that might have been a sufficient punishment, but this conduct took place on approximately eight different occasions for over seventy five minutes." She also noted the lack of independent testimony about petitioner's good moral character and weighed his teaching ability against his egregious conduct.

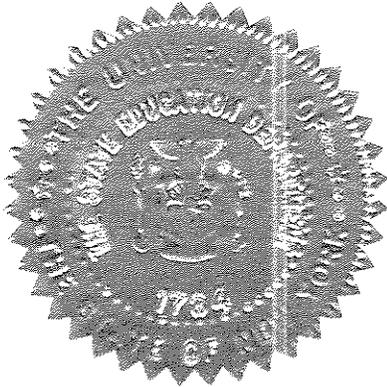
Accordingly, I find that the hearing officer's Report and Recommendations are supported by the testimony and evidence. Although petitioner admitted his conduct, there is no indication that he would have refrained from continued Internet misuse had the IT coordinator not confronted him. Indeed, the record reveals that on March 9, the day the filtering software alerted the IT coordinator, petitioner accessed Internet websites three different times during the day for a total of 60 minutes, using a dozen different search words. Moreover, most of the search words petitioner used, which I will not repeat in this decision, have one, and only one, explicitly sexual meaning or connotation. Petitioner admitted in his testimony that he was aware he was violating the district's acceptable use policy but nonetheless continued to view pornography at work, and that he stopped his Internet searching because he had been suspended from school on March 10.

Based on my review of the record, I concur with the hearing officer's determination that the Department met its burden of proving that petitioner lacks good moral character. I also concur with her recommendation that petitioner's certificates to teach in the public schools of New York State be revoked.

THE APPEAL IS DISMISSED.

IT IS ORDERED THAT petitioner's permanent teaching certificate in grades prekindergarten through 6, permanent certificate in School District Administration ("SDA") and provisional certificate in School Administration and Supervision ("SAS") be revoked; and

IT IS FURTHER ORDERED that petitioner shall immediately return to the State Education Department any copies of such certificates currently in his possession.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 31st day of August, 2007.

Richard P. Mills
Commissioner of Education

The University of the State of New York
Education Department



In the matter of the certificates held by

MICHAEL A. HENERY

to teach in the public schools
of the State of New York

NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER

MICHAEL A. HENERY, hereinafter referred to as "certificate holder", presently holds permanent New York State teaching certificates as a School District Administrator and School Business Administrator, both effective September 1, 2002 and each bearing the number [REDACTED]

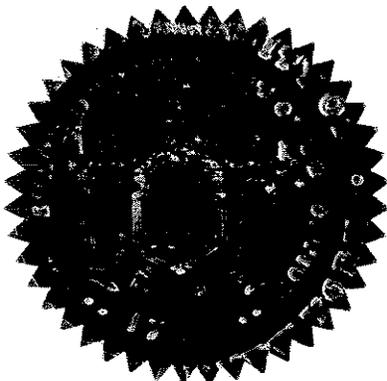
Information has been received by the New York State Education Department that:

- a) On or about January 24, 2004, the certificate holder, a school business administrator, sent an email that included a picture of a nude female to a colleague and other business administrators; and, as a result, was the subject of a sexual harassment complaint by the colleague;
- b) After learning that he was the subject of a sexual harassment investigation related to the email he sent, the certificate holder and his brother went to the middle school on a Sunday evening in February 2004, asked a custodian to unlock the computer room, told him they were going to handle a problem related to a virus, and spent an hour apparently attempting to access the school server, when they were not so authorized.
- c) On or about April 27, 2004, the certificate holder was reprimanded for sending the email with the nude photo and for the unauthorized access, and warned by his supervisor to use his office computer for only business purposes;
- d) In or about September, 2004, the certificate holder's hard drive on his office computer was found to contain significant amounts of pornographic material that he had accessed and viewed during school hours;

- e) Upon information and belief, the certificate holder had installed a personal software program on his office computer designed to periodically erase the history of his Internet use and activity, an installation that violated school policy;
- f) The certificate holder resigned in or about November 2004 in lieu of termination.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83, shall be mailed to the certificate holder by certified mail, return receipt requested and by first class mail. The certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificates should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificates.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and ~~affix the~~ seal of the Education Department this 1st day of February 2005.


Commissioner of Education

THE UNIVERSITY OF THE STATE OF NEW YORK
EDUCATION DEPARTMENT

IN THE MATTER OF THE CERTIFICATE
HELD BY MICHAEL A. HENERY

**REPORT AND
RECOMMENDATION OF
HEARING OFFICER**

TO TEACH IN THE PUBLIC SCHOOLS
IN THE STATE OF NEW YORK

PROCEDURAL HISTORY

This proceeding was initiated by the issuance of a "Notice of Substantial Question of Moral Character" by Commissioner of Education Richard P. Mills, dated February 1, 2005 (Department's Exhibit No. 1). The Notice alleged that:

Michael A. Henery, hereinafter referred to as the "certificate holder", presently holds permanent New York State teaching certificates as a School District Administrator and School Business Administrator, both effective September 1, 2002 and each bearing the number 116501204.

Information has been received by the New York State Education Department that:

- a) On or about January 24, 2004, the certificate holder, a school business administrator, sent an e-mail that included a picture of a nude female to a colleague and other business administrators; and, as a result, was the subject of a sexual harassment complaint by the colleague;
- b) After learning that he was the subject of a sexual harassment investigation related to the email he sent, the certificate holder and his brother went to the middle school on a Sunday evening in February 2004, asked a custodian to unlock the computer room, told him they were going to handle a problem related to a virus, and spent an hour apparently attempting to access the school server, when they were not so authorized.

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- c) On or about April 27, 2004, the certificate holder was reprimanded for sending the e-mail with the nude photo and for the unauthorized access, and warned by his supervisor to use his office computer for only business purposes;
- d) In or about September, 2004, the certificate holder's hard drive on his office computer was found to contain significant amounts of pornographic material that he had accessed and viewed during school hours;
- e) Upon information and belief, the certificate holder had installed a personal software program on his office computer designed to periodically erase the history of his Internet use and activity, an installation that violated school policy;
- f) The certificate holder resigned in or about November 2004 in lieu of termination.

By Order dated March 7, 2005, the Hon. Richard P. Mills, Commissioner of Education of the State of New York, designated Patricia L. R. Rodriguez, Esq. to schedule and conduct a hearing pursuant to the provisions of Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83) concerning the appropriateness of permitting Michael A. Henery to teach in the public schools of the State of New York. That Order designated the place of the hearing in the County of Albany. (Hearing Officer Exhibit No. 1).

Hearings were held on May 18 and 19, 2005 and January 13, 2006 in Albany, New York. Cheryl A. Randall, Esq. appeared on behalf of the Office of School Personnel Review and Accountability (OSPRA) of the New York State Education Department. Mr. Henery was represented by William F. Ryan, Jr., Esq., of Tabner, Ryan and Keniry, LLP. The New York State Education Department called Mr. John Guarracino, superintendent of the Greenwood Lake Union Free School District, Mr. Charles Malloy, interim superintendent of the Greenwood Lake Union Free School

District, the State Education Department investigator, Matthew Couch and Mr. James Hargadon, computer network specialist for the Orange Ulster BOCES on its direct case. The Respondent testified on his own behalf and offered the testimony of two witnesses, Daniel Henery, Respondent's brother and Graham Brown. The Department also offered two rebuttal witnesses, John Guarracino and Investigator Couch. Eighteen exhibits were received into evidence.

FINDINGS OF FACT

At the hearing, the New York State Education Department introduced sixteen exhibits into evidence. The first was the Notice of Substantial Question of Moral Character (Department's Exhibit No. 1). Exhibits 2 and 3 are the Affidavit of Service and the United States Postal Service certified mail receipt signed by Respondent. Exhibit 4 is the Respondent's request for a hearing and Exhibit 5 is a computer printout of Respondent's current certificates. The Department offered Exhibit 6, which is a pornographic image sent from Respondent's home computer to local school district administrators. Exhibits 7 to 14 are documents concerning Respondent's employment in the Greenwood Lake Union Free School District involving his use of email, the district's investigation and Respondent's resignation from that position. Exhibits 15 and 17 contain pornographic images retrieved from Respondent's work computer. Exhibit 16 is the State Professional Standards and Practices Board for Teaching investigative report which recommends that the issue of Respondent's certificates go to a hearing. Exhibit 19

is a letter from Mr. Hargadon concerning results of his review of Respondent's internet files, dated November 1, 2004.

At the hearing, the Department presented evidence as to question (a) that the Respondent had sent an unauthorized pornographic e-mail to a colleague and to fellow business administrators. The Department introduced Exhibit 6, the image in question. Mr. Malloy testified that the superintendent of buildings and grounds gave him the e-mail and told him that Respondent had sent it to him and other business administrators. The witness testified that upon the advice of counsel, an investigation ensued which resulted in a counseling memo to Respondent (Tr. p. 74-75). In his direct testimony, Respondent admitted that he had sent the photograph as alleged by the Department (Tr. p. 239).

As to question part (b), the Department presented the testimony of Mr. Guarracino that, among other things, the Respondent's visit to the school computer with his brother on a Sunday was not authorized by school authorities. Respondent testified that he and his brother, who is a computer consultant, were merely visiting the school computer system to assess the need for a new computer as requested in the school budget. While both Respondent and his brother testified that it was their intention only to analyze the existing capability of the computer system, it again did not appear authorized by the school district, despite the respondent's testimony that he believed he was authorized to do so by another school district employee (Tr. p. 265). The Department's witness, Mr. Malloy, specifically denied that Respondent had been authorized to conduct such an examination and Department's Exhibit 14 states that the school district did not authorize

Respondent's access to the district mail server and considered it a breach of security. The timing of the visit by Respondent during a period of investigation of Respondent's internet usage is highly suspect. Further, there was no evidence that the Respondent's actions were previously authorized in any way by his employer and in fact, the evidence weighs to the contrary on this issue.

The Department also submitted two exhibits (Department's No. 15 and 17) related to pornography that were found on Respondent's computer after it was seized by the school district. The Respondent's hard drive contained numerous, graphic pornographic images. The testimony of the computer consultant, Mr. Hargadon, was that, inter alia, this information was found on Respondent's computer, and further, that these images were not "pop ups." Additionally, the witness testified that the Respondent had previously never made a complaint that unwanted pornography had been found on his computer. Although Respondent testified that he did not place these images on his computer, he offered no explanation as to how they were placed on his computer, nor that others had access to his computer or were motivated to implicate Respondent. In fact, since Respondent admitted to sending Exhibit 6, a pornographic picture, to other school district administrators, it strains credibility to believe that Respondent did not access the pornographic images on his work computer.

I have carefully examined Department Exhibits No.15 and 17 and find while some of the images appear to be advertisements or pop ups of some sort since they contain writing that that appears to be advertising or solicitation, several of the images

contain no writing whatsoever and are graphic pornographic images. Furthermore, I did not find Respondent credible in his testimony at the hearing that he was not responsible for the images and had no idea how they were found on his computer.

I find that the Department met its burden of proof that Respondent lacks good moral character. The testimony of the Department's witnesses concerning the Respondent's unauthorized internet use was compelling and although disputed by Respondent's testimony, this hearing officer did not find the Respondent credible. Furthermore, Respondent exhibited extremely poor judgment in his use of pornography in the workplace and his admitted transmission of pornography to fellow business administrators, even though that action was not done on school property.

Respondent's defense consisted primarily of a denial of the majority of the charges, the testimony of his brother regarding question (b) and his examination of the school district computer system. Finally, Respondent offered the character testimony of Graham Brown, who was a personal friend of the Respondent's and an associate of Respondent's in the youth soccer activities. His testimony was primarily to attest to his personal relationship with the Respondent, Respondent's involvement and commitment to youth soccer. He testified that he had no personal knowledge of the charges faced by Respondent.

FINDINGS, CONCLUSIONS AND RECOMMENDATION

After careful consideration and weighing all of the testimony and evidence in the record, I find that the State Education Department has met its burden of proof showing lack of good moral character on the part of the Respondent. I recommend that the school administrator and school business certificates of the Respondent be suspended for a period of one year and I also recommend that a fine of \$1000 be imposed.

DATED: March 31, 2006


Patricia L. R. Rodriguez
Hearing Officer

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificates held by MICHAEL A.
HENERY to teach in the public
schools of the State of New York.

Petitioner appeals the findings and recommendations of a hearing officer that he lacks the requisite moral character to teach in the public schools of the State of New York. The appeal must be dismissed. In addition, the recommendations of the hearing officer are modified.

On September 1, 2002, petitioner was issued permanent certificates as a School District Administrator ("SDA") and School Business Administrator ("SBA").¹ Petitioner is also a licensed certified public accountant ("CPA"). In June 2003, the Board of Education of the Greenwood Lake Union Free School District ("district") granted petitioner a probationary appointment as a business administrator.

On October 8, 2004, the district's superintendent submitted a report to the State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") pursuant to Part 83 of the Commissioner's regulations ("Part 83") requesting an investigation into petitioner's conduct primarily involving inappropriate Internet use and pornography at work.

On February 1, 2005, I issued a Notice of Substantial Question as to Moral Character ("Notice") with six charges pursuant to Part 83. By order dated March 7, 2005, I

¹ School district administrator and school business administrator certificates are defined as "teachers' certificates" pursuant to Part 80 of the Commissioner's regulations.

designated a hearing officer to conduct a hearing, which was held on May 18 and 19, 2005 and January 13, 2006.

At the hearing, the current superintendent, the former interim superintendent and a computer network specialist testified for the district, and an OSPRA investigator testified on the Department's behalf. The Department submitted 18 exhibits. Petitioner testified on his own behalf and offered as witnesses his brother and a fellow youth soccer coach.

In a decision dated March 31, 2006, the hearing officer discussed the exhibits and charges contained in the Notice. The hearing officer concluded that petitioner lacks the requisite moral character to teach in the public schools of the State of New York and recommended that his school administrator and school business certificates be suspended for one year and that a fine of \$1,000 be imposed.

On May 2, 2006, petitioner appealed the hearing officer's findings and recommendation pursuant to §83.5 of the Commissioner's regulations. Petitioner contends that there was a complete lack of proof that he lacks good moral character.

On May 30, 2006, OSPRA submitted a letter in opposition to petitioner's appeal. OSPRA contends that I should uphold the hearing officer's findings of fact that petitioner is guilty of the charged conduct. OSPRA requests, however, that I revoke petitioner's teaching certificates.

The Notice alleged the following:

- a) On or about January 24, 2004, [petitioner] sent an email that included a picture of a nude female to a colleague and other business administrators; and, as a result, was the subject of a sexual harassment complaint by the colleague;
- b) After learning that he was the subject of a sexual harassment investigation related to the email

he sent, [petitioner] and his brother went to the middle school on a Sunday evening on February 2004, asked a custodian to unlock the computer room, told him they were going to handle a problem related to a virus, and spent an hour apparently attempting to access the school server, when they were not so authorized.

- c) On or about April 27, 2004, [petitioner] was reprimanded for sending the email with the nude photo and for the unauthorized access, and warned by his supervisor to use his office computer for only business purposes;
- d) In or about September, 2004, [petitioner's] hard drive on his office computer was found to contain significant amounts of pornographic material that he had accessed and viewed during school hours;
- e) Upon information and belief, [petitioner] had installed a personal software program on his office computer designed to periodically erase the history of his Internet use and activity, an installation that violated school policy; and
- f) [Petitioner] resigned in or about November 2004 in lieu of termination.

The superintendent testified that he had been briefed about petitioner's conduct by the former interim superintendent -- the supervisor who had reprimanded petitioner in April 2004 pursuant to charge (c). The superintendent also testified that, at the beginning of the new school year in September 2004, he noticed unusual budget transactions and that petitioner spent an inordinate amount of time on his computer and would blank out the

screen whenever he entered petitioner's office. Consequently, he determined both to request an audit and to have a network specialist check petitioner's computer when petitioner was away from the office. The superintendent later viewed the Internet files that were downloaded and copied to a CD from petitioner's computer. This investigation led to charge (d).

Upon my review of the testimony and evidence, I agree with the hearing officer's determination that the Department met its burden of proving that petitioner lacks good moral character. This case revolves around witness credibility, and in matters of credibility, I will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the hearing officer's determination is inconsistent with the facts, or that the hearing officer fails to adequately explain the rejection of otherwise convincing testimony (Appeal of B.K. and R.K., 44 Ed Dept Rep 195, Decision No. 15,146; Appeal of T.R. and M.D., 43 id. 411, Decision No. 15,036; Appeal of K.M., 41 id. 318, Decision No. 14,699). I find that the hearing officer's credibility findings are consistent with the facts and supported by the evidence.

Regarding charge (a), petitioner admitted that he sent the email as charged. He contends, however, this is not substantial proof that he lacks good moral character. He tries to minimize his conduct stating that he had sent the email from home, not work, late at night, and mistakenly sent it to the building supervisor. Whether the transmittal of the email to the supervisor was accidental, he never disputes his intent to send the email to other business administrator colleagues, several of them at their work addresses. Furthermore, his testimony reveals that he never fully grasped the seriousness of his conduct, stating that he found the email "to be comical." The exhibit clearly shows the photograph to be obscene and wholly inappropriate to be transmitted by an educator to fellow educators at their workplace. I find that the hearing officer properly determined that petitioner admitted sending the email. Moreover, I find that this alone is proof that petitioner lacks good moral character.

Regarding charge (b), petitioner claims that there was no proof that "anything he did was inappropriate, unauthorized or lacked good moral behavior." Petitioner claims in his petition that he went to the middle school

merely to evaluate the capacity of the computer server, and brought his brother, a computer consultant, to assist him. In his testimony, petitioner claimed that he had mentioned to the district's assistant superintendent for technology that he was going to go to the middle school to look at the server.

However, a memorandum from that assistant superintendent to the former interim superintendent clearly states that neither she nor the middle school computer technician was "aware of any problem that needed attention during the weekend" and that petitioner's action of going there on the weekend "may result in a breach of security." Furthermore, the former interim superintendent testified that the petitioner had no authorization; that when he heard about petitioner's Sunday visit, he feared petitioner was getting in the server to delete something; and that he was "suspect" of petitioner's explanation.

I agree with the hearing officer's findings on this charge that the "timing of the visit by [petitioner] during a period of investigation of [his] internet usage is highly suspect." There is no evidence, as petitioner claims in the petition, that he had any authorization to be on school grounds on weekends to check on janitors. Even if he had such authorization, I agree with the hearing officer's determination that there was no evidence that petitioner's actions in accessing the computer server were previously authorized in any way "and in fact, the evidence weighs to the contrary on this issue." I attribute little credibility to petitioner's explanation of why it was necessary to access the server on a Sunday during non-working hours. In addition, I find his brother's testimony self-serving and unreliable as to the true nature of the computer functions he performed.

The testimony and evidence primarily concerns the pornographic images allegedly downloaded from petitioner's computer by the district's computer specialist relating to charge (d). Petitioner claims that he never accessed pornography from his office computer as a business official at the district, and that the only proof of his doing so is the superintendent's testimony that he spent an inordinate amount of time on his computer. He asserts that his job required frequent computer access, others had access to his office and computer, and no password was required for Internet access to his computer. He claims that the

Department had no evidence against him because the reformatting of the hard drive download to a CD reduced the evidentiary value of the hard drive, the modified times on the files were wrong and there is no way to distinguish the type of image by looking at an image file.

Based upon my review of the record, I agree with the hearing officer's determination that petitioner was not "credible in his testimony at the hearing that he was not responsible for the images and had no idea how they were found on his computer." I also agree with the hearing officer's assessment that "since [petitioner] admitted to sending Exhibit 6, a pornographic picture, to school district administrators, it strains credibility to believe that [petitioner] did not access the pornographic images on his work computer."

I find highly credible the testimony of the computer network specialist regarding the process he followed in procuring and securing these images, as well as his explanation and conclusion that these images were not "pop-ups" or advertisements but rather were sites that had been directly accessed by petitioner. He also testified that each teacher and administrator had a password and would only have access to his or her own account, and denied that petitioner contacted him about pornographic or other inappropriate pop-ups on his computer. I also find credible the superintendent's testimony about his concern about petitioner's computer use, his request for an investigation by the computer specialist and his observation of the download process and outcome. Additionally, any dispute about the times on the downloaded files was satisfactorily rectified by the rebuttal testimony of the OSPRA investigator regarding daylight savings time that demonstrated that the pornography was accessed during petitioner's admitted work hours. Collectively, the evidence and testimony demonstrated that the pornography was accessed on weekdays during work hours, when petitioner was present at work. I do not find credible petitioner's vague contentions that someone else might have accessed his office or the Internet on his computer, which required a password.

There are no findings by the hearing officer on charge (e). The computer network specialist testified that he did not notice the installation of the Tracks Eraser program on petitioner's computer when he examined petitioner's

Internet files on September 29, 2004. Accordingly, the Department did not meet its burden of proof on this charge. I also note that charges (c) and (f) are actually statements of fact that do not require proof.

I agree with the hearing officer's overall assessment that petitioner was not credible and the testimony of the Department's witnesses concerning his Internet use was "compelling." The testimony of the soccer coach as a character reference, who was unfamiliar with petitioner's professional duties, was insufficiently persuasive to contradict the body of evidence.

Pursuant to §83.5(c) of the regulations, the Commissioner may affirm, adopt, reverse or modify the findings and recommendations of the hearing officer. I affirm and adopt the hearing officer's decision but modify the recommendations. I find that, given the facts of this case, the penalty imposed is inadequate. Petitioner never grasped the gravity of his conduct. He maintained that the initial email was "comical." He also attempted to access the district server on a Sunday without authorization in what can only be perceived as an attempt to cover his tracks. Pornography in an educational setting cannot be tolerated. Although petitioner is not a classroom teacher, his professional certificates and responsibilities demand good moral character and require that he work in an educational environment where minors are often present. In this case, petitioner's office was located in an elementary school, and, as he testified, was accessible to students. Particularly significant is the fact that, even after petitioner received a warning memorandum about sending pornography to colleagues and was directed to use his office computer for business purposes only, he continued to access the Internet for improper and illicit purposes. Moreover, his actions, occurring during work hours, undoubtedly diminished the time he could have spent on his duties and were also wholly incompatible with an educational setting.

Accordingly, based on the record before me and the for the reasons set forth above, I conclude that petitioner lacks the requisite moral character to teach in the New York State public schools and I affirm and the findings of the hearing officer. However, I order that the petitioner's certificates as a School District Administrator ("SDA") and School Business Administrator

("SBA") be suspended for five years. I also reverse the imposition of the \$1000 fine.

THE APPEAL IS DISMISSED AND MODIFIED TO THE EXTENT INDICATED.

IT IS ORDERED THAT petitioner's certificates as a School District Administrator ("SDA") and School Business Administrator ("SBA") be suspended for five years.

IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 31st day of August, 2007.



Richard P. Mills
Commissioner of Education

The University of the State of New York
Education  Department

In the matter of a proceeding held
pursuant to 8 NYCRR Part 83, to
determine whether

STEPHEN A. MORO

has the requisite good moral character
to teach in the public schools of the
State of New York

**NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER**

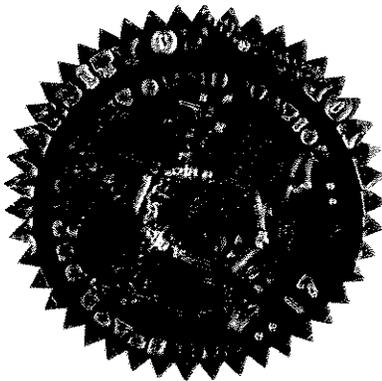
STEPHEN A. MORO, hereinafter referred to as "certificate holder", presently holds a provisional New York State certificate as a teacher of Music, effective February 1, 2004 and bearing the number [REDACTED]

Information has been received by the New York State Education Department that on or about December 7, 2004, the certificate holder exposed his penis to and/or masturbated in the presence of a 14 year-old student while the student was taking a music lesson in his office.

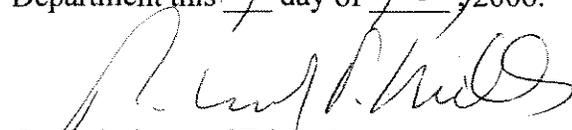
The name of the victim(s) and the nature of the conduct are known to the Department and will be provided upon request.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83, shall be mailed to the certificate holder by certified mail, return receipt requested and by first class mail. The certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificate(s) should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificate(s).



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the Education Department this 7 day of July 2006.


Commissioner of Education

NYSED

MAY 31 2007

OSPRA

THE UNIVERSITY OF THE STATE OF NEW YORK
EDUCATION DEPARTMENT

*IN THE MATTER OF A PROCEEDING
HELD PURSUANT TO 8 NYCRR PART 83
TO DETERMINE WHETHER*

**HEARING OFFICER'S
RECOMMENDATION**

STEPHEN A. MORO

*HAS THE REQUISITE GOOD MORAL
CHARACTER TO TEACH IN THE PUBLIC SCHOOLS
IN THE STATE OF NEW YORK*

Hearing Officer: Diane J. Exoo, Esq.

Counsel: Cheryl L. Randall, Esq.
Office of School Personnel Review and Accountability
New York State Department of Education

Paul D. Clayton, Esq., Associate Counsel
Office of General Counsel,
James R. Sanders, Esq., General Counsel
New York State United Teachers

PROCEDURAL HISTORY

On July 7, 2006, Commissioner of Education Richard P. Mills issued a Notice of Substantial Question as to Moral Character in the above entitled matter (Department's Exhibit 1), which was served by certified mail on the Respondent on July 19, 2006 (Department's Exhibit 2). Respondent received the Notice of Substantial Question as to Moral Character on July 24, 2006 (Department's Exhibit 3), and requested a hearing within thirty days of receipt of the Notice (Department's Exhibit 4).

Commissioner Mills issued an Order designating a Hearing Officer and setting venue on August 25, 2006, directing that such hearing take place in the County of Albany, State of New

York (Hearing Officer's Exhibit 1). Respondent's counsel, Paul D. Clayton, Esq., acknowledged receipt of a letter from the Hearing Officer dated October 17, 2006, informing Respondent of the times, dates, and location of the hearings pursuant to 8 NYCRR Part 83.4(a) (Transcript: p. 10, lines 12-20). Hearings in this matter were held on November 2 and 3, 2006, at the Offices of the State Education Department, 80 Wolf Road, Albany, County of Albany, New York.. The hearings were held pursuant to Education Law section 305 (7) and 8 NYCRR Part 83.

FINDINGS OF FACT

The Notice of Substantial Question of Moral Character alleges that the Respondent, Stephen A. Moro, on or about December 7, 2004, exposed his penis and/or masturbated in the presence of a 14 year old student while the student was taking a music lesson in his office. The New York State Education Department has established the following facts by a preponderance of the evidence :

1. Stephen A. Moro, age 38 at the time of the hearing, currently holds a permanent license, number 050562698, to teach Music, grades 7-12, in the public schools of the State of New York.

2. During the 2004-05 school year, the Respondent was employed as a probationary teacher at the Baldwinsville Central School District where he taught 8th and 9th grade band and directed the marching band at Durgee Junior High School.

3. On December 7, 2004, the Respondent gave a private trumpet lesson to a 14 year old female student, A.S., in an office located in the school band room, blindfolded the child with his necktie, exposed his penis and masturbated, which the student observed when the blindfold

slipped .

4. The Baldwinsville Central School District placed Stephen A. Moro on paid leave on December 7, 2004, and he subsequently resigned from his teaching position on March 18, 2005. He is currently employed as a high school band teacher at Abilene High School, Abilene, Texas.

DISCUSSION

In December of 2004 Stephen Moro was teaching 8 & 9th grade band at Durgee Junior High School. On the morning of December 7, 2004, during first period class, he was supposed to give a group trumpet lesson to three students; however, two students didn't appear because they had to take a test (Transcript: p. 29, lines 9-13). A.S., a 14 year old female student, was the only one to appear for a trumpet lesson on that day. Mr. Moro instructed A.S. to go into his office because a drum lesson was going to be held in the band room, and he shut the door behind them (Transcript: p.29, lines 1-13). With the door shut no one is able to see into the office and it affords the occupant complete privacy. A.S. testified that the window in the door was covered with a large poster and the window located on the wall was covered with blinds (Transcript: p.29, lines 14-22). During the lesson when A.S. was having difficulty playing a measure of music from memory, Respondent took a necktie that he had in the office and blindfolded her by placing it over her eyes and holding it behind her head (Transcript: p. 30, lines 2-15). When the student expressed discomfort with being blindfolded, Mr. Moro told her that it was just "another" memorization technique (Id). After the student successfully played that piece of music, Mr. Moro added some more measures of music and once again blindfolded A.S., but this time he tied the blindfold behind her head (Transcript: p. 30 lines 21-22). She testified that the teacher then stepped behind her and she heard clothes "ruffling" (Transcript: p. 60, lines 6). The necktie

slipped and when she turned around to look at her teacher, she observed his penis “sticking out of his pants” dripping fluid (Transcript: p. 30, line 21- p.31, line 8). A.S. testified that Mr. Moro then told her to face the wall and keep playing her trumpet (Transcript: p. 31, lines 5-22). She left the office at the end of the lesson and didn’t say anything to Mr. Moro because she was “too scared” (Transcript: p. 31, lines 20-22). As she was putting her trumpet away in the band room, she looked back at Mr. Moro who was still in the office and “...it looked like he was adjusting himself to make sure he was all in.” (Transcript: p. 32, lines 8-14). She then walked quickly out of the band room and went to her second period class where she told a friend what had happened (Transcript: p. 32, lines 19-22).

During third period the student had to return to the band room for class. She had been crying and felt ill. Mr. Moro noticed this and told her that she could go lie down in his office, but she refused and decided to remain in class (Transcript: p. 33, lines 4-13). By fourth period A.S. was feeling too ill to remain in school, so she attempted to telephone her mother and when she couldn’t reach her mother, she contacted a family friend, Michelle Sunderhaft, to pick her up from school (Transcript: p. 33, line 17- p. 34, line 8). Ms. Sunderhaft transported A.S. to her home and attempted to contact A.S.’s mother. A.S. told Ms. Sunderhaft what had occurred, and when A.S.’s mother arrived at Ms. Sunderhaft’s home an hour later, A.S. tearfully told her mother about the incident (Transcript: p. 145, lines 22-23). They returned to their home and A.S.’s father was informed as well. The parents contacted the school and the police were notified (Transcript: p. 34, line 3-18).

Jeanne Dangle, Baldwinsville Central School Superintendent, testified that after she learned of the student’s allegations, she interviewed Stephen Moro with his union president,

Eileen Foss, present on the same day of the incident. According to her testimony, Stephen Moro did not deny that he exposed his penis. He told her that the student, A.S., was not lying and that something must have happened (Transcript: p. 83, lines 6-12). The Respondent admitted that he was alone with A.S. in his office, that he blindfolded her with a necktie during a music lesson, and that his zipper may have been down and that A.S. may have seen something (Transcript: p. 85, line 6- p. 86, line 5). Ms. Dangle spoke with the other music teachers in the district and none of the other teachers had heard of the practice of blindfolding a student during a music lesson. (Transcript: p. 97, lines 10-14). Ms. Dangle testified that Stephen Moro was an outstanding teacher (Transcript: p. 72, line 12); however, she had “very deep concerns” about Mr. Moro’s moral character after the incident and would no longer allow him to work with students (Transcript: p. 87, lines 15-19).

Officer Patrick Holtman, Baldwinsville Police Department, testified that he interviewed Stephen Moro on December 7, 2004, at approximately 5:00 p.m. Initially, the interview began at Durgee Junior High School and then Mr. Moro voluntarily accompanied Officer Holtman to the police station. (Transcript: p. 104, line 9- p. 105, line 18). According to Officer Holtman, the Respondent explained that the incident was an accident; to wit, that he didn’t wear any underwear that day and his “fly” must have been down, so that his penis must have been exposed through his open zipper (Transcript: p. 105, line 20- p. 106, line 8). When asked why he wasn’t wearing underwear that day, Mr. Moro told Officer Holtman that he had forgotten because he was in a hurry (Transcript: p. 106, lines 11-14). Stephen Moro told Officer Holtman that after school personnel informed him of the complaint, he retrieved a pair of dirty underwear, which he used as a rag, from his vehicle, went back into the school and put them on (Transcript:

p. 107, lines 15-23). Officer Holtman asked to see Mr. Moro's underwear and observed the waist band, which he testified did not appear to be a rag (Transcript: p. 126, lines 3-21).

Stephen Moro admitted to Officer Holtman that he blindfolded A.S. (Transcript: p. 109, line 15-17) and that A.S. was the only music student at Baldwinsville with whom he had used this technique (Transcript: p. 128, lines 20-23).

Officer Holtman informed Mr. Moro at the interview that his fellow officer was searching the school office where the incident took place and asked him if there was any reason why the police would find semen in the room. According to the witness' testimony, Mr. Moro admitted to Officer Holtman that he had previously masturbated several times in his school office and maintained that if any semen was found, it would be attributable to the prior incidents. (Transcript: p. 111, line 13-20).

A criminal trial was held in the summer of 2005, and Officer Holtman testified that Mr. Moro was acquitted (Transcript: p. 113, lines 6-12). Upon cross-examination Officer Holtman stated that he had testified about Mr. Moro's statements at a suppression hearing in the criminal matter and that the admissions were suppressed at the criminal trial (Transcript: p. 116, lines 4-14).

Laurie Raschella, a Baldwinsville music teacher who was Mr. Moro's friend and mentor, testified that in her twenty-two years of teaching, she has never heard of a memorization technique that involved blindfolding a student (Transcript: p. 177, line 23 - p. 178, line 6). She also testified that as his mentor, she advised him not to cover the windows in his office (Transcript: p. 174, lines 16-22). Further, Ms. Raschella stated that Mr. Moro admitted to her that he told the police that he had previously masturbated in his school office, which corroborates

the testimony of Officer Holtman. (Transcript: p. 196, line 13 - p. 197, line 9).

Stephen Moro testified that he was alone with the student in the office (Transcript: p. 343, line 16- p. 344, line 8) and that the door was closed and the blinds were drawn (Transcript: p. 358, lines 10-20). He also admitted that he had not followed his mentor's advice to leave the window uncovered (Transcript: p. 383, line 8-p. 884, line 20). Further, he admitted to blindfolding the student twice during the music lesson (Transcript: p. 361-p.362, line 13) and that she was the only student he had ever blindfolded at Baldwinsville (Transcript: p. 393, lines 3-8). He admitted that he told Officer Holtman that he hadn't worn underwear on the day in question and that the student may have seen something because his "fly" must have been down (Transcript: p. 374, lines 3-8). Based on Mr. Moro's own testimony, there are legitimate concerns about his judgment regarding appropriate interaction with a student. To say these actions indicate poor judgment would be an understatement. Even if we accept the teacher's explanation that this was an unintentional wardrobe malfunction, his appalling lack of judgment traumatized a fourteen year old ninth grade student.

When determining the credibility of witnesses we took into consideration the interest or lack of interest in the outcome of the case, the possible bias or prejudice of a witness, the age, the appearance, conduct, and manner in which the witness gave testimony when viewed in the light of all the other evidence in the case. Further, we took into consideration any discrepancies in the evidence and whether the discrepancy could be reconciled by fitting all of the stories together, or whether it may have been an accidental misstatement due to the anxiety of testifying or the passage of time affecting memory. Overall, we found that the testimony of A.S. regarding the Respondent's actions, which included testimony about masturbation, to be more credible than the

Respondent's denials, because her testimony was supported by the evidence and the testimony of other witnesses.

A. S. was a music student devoted to the school's award winning marching band, which was directed by Stephen Moro. He was her favorite teacher, and she considered him "an uncle" or a "big brother." (Transcript: p. 26, lines 7-9; p. 27, lines 17-20). Prior to the incident she and a friend would often bring him coffee and "hang out" in his classroom before classes began in the morning, and there were occasions when he would pick her up and spin her around. (Transcript: p. 26, lines 4-p. 28, line 11). On one occasion she ran up to him in the hallway and he "slapped her butt." (Id). During a party in the band room after a competition, Mr. Moro lifted A.S. on his shoulders and twirled her around (Transcript: P. 175, lines 9-13). These are indications that Mr. Moro may have singled this student out for special treatment.

It is important to note that A.S.' entire family was involved in the marching band experience: her mother volunteered on an almost daily basis, sewing uniforms and helping with fund raisers (Transcript: p. 155, line 22- p. 156, lines 1-12), and her father was planning to drive a truck with band equipment to Indianapolis for a competition (Transcript: p. 229, lines 5-21). A.S.' grandmother encouraged her granddaughter's interest in music by buying her a new trumpet (Transcript: p. 227, lines 14-23). A. S.' father testified about their participation in the marching band: "It was just like one big family. I never seen it so happy. They were just enjoying themselves" (Transcript: p. 229, lines 19-21).

Although Respondent's counsel maintains that a civil proceeding filed by A.S.' parents against Mr. Moro and the school district after the incident seeking money damages motivated A.S. to make a false allegation against a teacher, I find the testimony of A. S. and her parents to

be credible. All testimony indicates that prior to the incident of December 7, 2004, A.S. and her family were actively participating in marching band activities, and had no motive to discredit their child's favorite teacher, which would adversely affect their daughter's involvement in the marching band. In fact, A.S. did not want her parents to report the incident. The Baldwinsville Superintendent, Jean Dangle, testified that A.S. was upset with her parents because they had contacted the authorities after A.S. told them about the incident (Transcript: p. 95, lines 2-10).

Indeed, the entire family has suffered as a result of reporting this incident. A.S. no longer wanted to attend school in Baldwinsville after the incident, her grades dropped, and she was in therapy for over a year after the incident (Transcript: p. 228, line 4- p. 230, line 9). She lost interest in music and hasn't played her new trumpet (Transcript: p. 227, line 15- p. 228, line 3). The student's father testified about the trauma of the trial to the family (Transcript: p. 225, line 16- p. 226, line 19), the hostile treatment of his daughter by other students, and the hate mail she received (Transcript: p. 241, line 15- p. 242, line 21).

Both A.S.' mother and Ms. Sunderhaft testified that A.S. was crying and hysterical on the day of the incident (Transcript: p. 141, line 9- p.142, line 13; p. 157, line 21 p. 158, line 17). Her mother testified that she had never seen her daughter so upset (Transcript: p. 169, lines 8-14). A.S. reluctantly went back to school the next day only after her parents had been assured by school officials that Mr. Moro would not be present (Transcript: p. 224, lines 9-21). The fact that A.S. did not say anything to Mr. Moro when she saw his exposed penis in the school office (Transcript: p. 31, lines 20-22) or that she "did not appear abnormal" when she exited the office according to another music teacher, Jennifer Vacanti, (Transcript: p. 300, lines 4-9) is entirely consistent with a victim who is stunned or in shock. I do not find it likely that A.S. would

subject herself to the ridicule and hatred of the other students because she was upset, as Mr. Moro speculated, by a trumpet audition two weeks earlier in which A. S. was assigned third chair out of eight students in the trumpet section (Transcript: p. 408, lines 1-15). When asked if Amanda had ever been first chair in the trumpet section, Mr. Moro thought she had been first chair a "couple of times" in eighth grade (Transcript: p. 417, lines 8-10), so evidently A.S. wasn't always assigned first chair in the trumpet section and hadn't retaliated in the past by making a false accusation against Mr. Moro. The facts simply do not support Mr. Moro's supposition that A.S. would make a false allegation against him because she didn't do as well as she had hoped in an audition. There is no evidence in the record that the student was deceptive in any way or that she had a pattern of behavior problems in the school. A colleague of Mr. Moro's, Ms. Raschella, who was acquainted with the student described A.S., who is very petite, as a "typical little girl" and a "nice little girl." (Transcript: p. 177, lines 19-22; p. 195, lines 5-11).

Conversely, I do not find Stephen Moro's testimony to be credible. His answers to questions on both direct and cross examination were so evasive and rambling that several times his own attorney had to interrupt him and direct him to answer the questions. Mr. Moro's testimony directly contradicted the testimony of A.S., Officer Patrick Holtman, and Mr. Moro's own colleague and friend, Laurie Raschella. Mr. Moro's explanations of why Laurie Raschella and Officer Holtman would offer testimony which conflicted with his own included faulty memories and speculation that they were jealous of Mr. Moro's popularity in the community (Transcript: p. 408, line 16- p. 411, line 13). The Respondent's assertions of possible bias are totally unsupported by any of the testimony or evidence in this hearing.

Further, Mr. Moro's testimony was inconsistent. Although he did not deny that he told

the superintendent, principal, and police officer on the day of the incident that his zipper may have been down and that his penis may have been exposed to a student (Transcript: p. 370, line 7-p. 371, line 15), he then testified at the hearing that he didn't remember zipping up his pants that day, which was "...beginning to tell [him] it was never down in the first place." (Transcript: p. 388, line 19-p. 389, line 9). On cross examination he "absolutely" denied that his penis had been exposed (Transcript: 387, line 10-14). His explanations have changed over the course of time, and the fact that he is now offering a new theory on what he believes occurred on December 7, 2004, affects his credibility.

Five music teachers, all former colleagues of the Respondent, testified at this hearing. All five indicated that it was inappropriate to blindfold a student and that none of the witnesses had ever used a blindfold as a memorization technique during a music lesson (Transcript: p. 177, line 23-p. 179, line 1; p. 209, lines 5-20; p. 293, line 17- p. 294, line 11; p. 306, lines 6-12; p. 319, line 10-p. 321, line 2). They testified that if you wanted a student to memorize a piece of music, you instruct them to close their eyes, turn their music stands around, or hold a paper in front of the student's eyes. (Id.)

If Mr. Moro's explanation of the incident is to be believed, he is the victim of a string of unfortunate coincidences. He gave a private music lesson to a favorite female student in a small school office in which all the windows were covered; he shut the door, which gave him complete privacy; he failed to wear underwear on that day; he spontaneously blindfolded the student for the first time with his tie which happened to be in his office; his zipper may have been open and he may have unintentionally exposed himself; and he happened to have an old pair of dirty underwear in his car, which he put on prior to his police interview. This confluence of unlikely

events defies the laws of probability.

Mr. Moro admitted that he had been previously advised by his teacher mentor, Laurie Raschella, not to cover the windows in his office (Transcript: p. 383, line 8- p. 384, line 20). He had previously been warned by Superintendent Dangle in 2003 that he needed to be properly dressed at school, because she had observed that his fly was unzipped (Transcript: p. 69, line 6- p. 70, line 12). On cross examination Mr. Moro admitted that he had shown poor judgment on December 7, 2004, but I find that the testimony and evidence indicate that his actions are more than a lapse in judgment. It is much more probable that he deliberately blindfolded a student with an article of his personal clothing (which has sexual innuendo) in a private office because he did not want her to see that he was stimulating himself. If his goal was to help the student with a memorization technique, he could have simply removed the sheet music or held a paper in front of her eyes. Instead, he chose to blindfold her which would have blocked the student's peripheral vision. Two witnesses, who do not appear to have any bias in this matter, testified that after the incident occurred, Mr. Moro told them that he had masturbated in his office on previous occasions, which adds credence to the testimony of A.S.

I have considered the argument offered by Respondent's counsel that it would be physically impossible for Mr. Moro to reach ejaculation in twenty to thirty seconds, which he calculates is the amount of time it would take for A.S. to play the piece of music she was practicing at the time of the incident, but I do not find it persuasive for several reasons. First, there was no expert testimony offered by either party on this issue. Instead, Respondent's counsel refers to a Wikipedia article in his closing statement. Second, even if I accept Respondent's counsel's argument that the four stages of sexual response (arousal, plateau, climax, and

resolution) cannot be completed within twenty to thirty seconds, his argument assumes that the first stage of arousal began the second time Mr. Moro blindfolded the student. The class period was forty minutes long (Transcript: p. 305, line 21-p. 306, line 1). If the arousal stage started when Mr. Moro shut the door to begin the lesson or the first time he used his necktie to blindfold a student, he would have had enough time to reach the pre-ejaculation or ejaculation stage.

There is no question that Mr. Moro is an outstanding band director who has won numerous awards during his employment with several different school districts. In his defense he submitted thirty-nine affidavits from colleagues, friends, parents of students, and students. Although many were obviously written in a fill-in-the-blank format and contain identical phrases, the affidavits state that Mr. Moro possesses excellent teaching skills, that he is hard-working, that he is a good friend and teacher, and that in the writer's opinion, he has good moral character. He is, by all accounts, a very talented and charismatic teacher.

The Respondent seeks to retain his certificate to teach in the public schools of the State of New York, which requires him, in addition to his teaching responsibilities, to supervise children *in loco parentis*, to exercise sound judgment when children are in his care, to practice good impulse control, to provide a safe learning environment for children, to recognize appropriate social boundaries at all times, and to serve as a positive role model for the students placed in his care. If a teacher lacks these qualities or skills, it can place students at risk, both physically and emotionally, and create an unsafe learning environment. Without these qualities Mr. Moro does not possess the necessary moral character to teach in the State of New York. Unfortunately, the affidavits are not enough to overcome the evidence in this case that Mr. Moro's actions traumatized a fourteen year old student.

Mr. Moro's actions illustrate a serious lack of judgment and poor impulse control, which are directly related to his fitness to perform his teaching duties. This not only calls into question his moral character, but also indicates that he poses a safety risk to the children in his care.

CONCLUSION

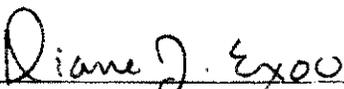
The testimony and evidence raise legitimate concerns about Mr. Moro's judgment regarding what is considered appropriate behavior with a student.

The Respondent currently has permanent certification as a Music teacher, 7-12. The position of a school teacher requires extreme trust, personal integrity, and the ability to practice good judgment. This requires a teacher to recognize professional boundaries at all times. Given the facts of this case, we find that Stephen Moro lacks the necessary moral character to teach in the public schools of New York State. The New York State Department of Education has a legitimate interest in protecting the safety and welfare of the children in its educational system, and allowing the Respondent to retain his current teaching certification, which would give him liberal access to children, would place students at risk.

RECOMMENDATION

After careful consideration and weighing of all the testimony and evidence presented, we recommend that the teaching license of Stephen A. Moro to teach in the public schools of the State of New York be revoked.

Date: May 29, 2007



Diane J. Exoo, Esq.
Hearing Officer

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificate of Stephen A. Moro to
teach in the public schools of the
State of New York.

Petitioner appeals the findings and recommendations of a hearing officer that he lacks the requisite moral character to be a teacher in the public schools of the State of New York and that his certificate be revoked. The appeal must be dismissed.

Petitioner holds permanent New York State certification as a teacher of music for grades 7-12. During the 2004-2005 school year, he was employed as a probationary teacher by the Baldwinsville Central School District ("district") and taught eighth and ninth grade band and marching band.

By letter dated February 28, 2005, the district's superintendent ("superintendent") submitted a report to the State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") pursuant to Part 83 of the Commissioner's regulations stating that petitioner had been arrested and charged with endangering the welfare of a child.*

An investigation by OSPRA revealed that on or about December 7, 2004, petitioner was alleged to have exposed his penis to and/or masturbated in the presence of a 14-year-old female student ("the student") while giving her a music lesson in his office.

* Petitioner was acquitted after a criminal trial.

Based on this information, on July 7, 2006, I issued a Notice of Substantial Question of Moral Character pursuant to Part 83 of the Commissioner's regulations. By order dated August 25, 2006, I designated a hearing officer to conduct a hearing, which was held on November 2 and 3, 2006.

At the hearing, the student, her parents, a family friend, the superintendent, petitioner's teaching mentor, and the investigating police officer testified for the Department. The Department introduced eight exhibits. Petitioner testified on his own behalf and introduced three exhibits and a summation. Petitioner's exhibits included 38 affidavits from friends, colleagues, former students and parents attesting to his good character, integrity and teaching skills. Petitioner also submitted an affidavit from a music teacher in Texas who hired petitioner in 2006 as an assistant band director in his school district. Six witnesses testified on petitioner's behalf, including former students, parents, a teaching colleague and petitioner's former supervising teacher.

The student testified that on December 7, 2004, petitioner was scheduled to provide a trumpet lesson to her and two other students during first period, but the other two students were unable to attend the lesson. Petitioner conducted the lesson in his office alone with the student with the door closed, the window blinds drawn and a calendar covering the window in the door.

The student testified that when she had difficulty playing a piece of music, petitioner held a necktie over her eyes to shield her from the sheet music. When she told petitioner she "didn't like it," he responded that it was just "another memorization" technique. Petitioner then tied the tie around the student's head. When she started playing the trumpet again, she heard petitioner's "clothes ruffling" and the tie began to slip from her eyes. The student testified that when she turned around, she saw petitioner's penis "sticking out of his pants with white stuff dripping from it." She stated that she was "too scared" to say anything to petitioner about what she saw and that she tried to continue with the lesson. According to the student, at the end of the lesson, petitioner "looked like he was adjusting himself to make sure he was all in."

The student testified that she went to her second class, where she cried and told one of her friends what had happened. The student's third class was a band class taught by petitioner, during which the student couldn't stop crying and told another friend what had happened. She stated:

[Petitioner] noticed that I was crying and I didn't look right, so he told me to come over and talk to him. And I did. And when I went over there, he said, "Are you feeling okay?" And I said, "No. I just have - my stomach hurts." And then he said, "You can go lay down in my office if you want."

During her fourth class, the student felt like she was going to faint and called a family friend who picked her up from school. The student's mother and family friend both testified that the student was crying and "hysterical" after the incident.

The student also testified that, prior to this incident, band had been her favorite class and petitioner had been her favorite teacher. She described petitioner as being "like an uncle or a big brother to me" and that "sometimes [petitioner] would pick me up and spin me around. And one time I saw him in the hall after school, and I ran up to him, and he picked me up and slapped my butt." However, the student stated that after the December 7, 2004 incident, she stopped playing the trumpet because she was "afraid to pick it up," her grades dropped and she was threatened and shunned by other students. As a result, she began seeing a counselor.

At the hearing, the police officer who questioned petitioner on December 7, 2004 described petitioner's explanation of the student's allegations: "[I]f that was the case, it was an accident. And that [petitioner] hadn't been wearing underwear that day. And that his fly must have been down, and that his penis must have been exposed through his open fly." The police officer also testified that, when asked if there was any reason the police would find semen in his office, petitioner stated that he had masturbated there several times.

The superintendent testified that when she was first introduced to petitioner in school during the summer of 2003, the zipper on his pants was down. The superintendent described a subsequent meeting with petitioner and his teacher-mentor during which she told petitioner, "[Y]ou came into my office like a whirlwind, and then even you're working with kids, your zipper was down. You need to ensure that ... you're properly dressed when working with students."

Petitioner's teacher-mentor corroborated this meeting, stating: "We did have a conversation at one point with the Superintendent about the fact that she ... had seen [petitioner] with his fly down." She also testified that she had recommended that petitioner remove the calendar covering the window on his door and that petitioner told her he admitted to the police that he had masturbated in his office.

By decision dated May 29, 2007, the hearing officer concluded that a substantial question existed with respect to petitioner's moral character and recommended that his teaching certificate be revoked. On June 27, 2007, petitioner initiated an appeal from the hearing officer's findings and recommendations pursuant to §83.5 of the Commissioner's regulations.

Petitioner asserts that the Department has failed to demonstrate that he lacks the requisite moral character to serve as a teacher in the public schools of New York State and that the hearing officer improperly admitted evidence against him. Petitioner also claims that it would have been impossible to have masturbated to ejaculation during the short time the student was blindfolded and that he did not receive a fair hearing because the female hearing officer lacked a "basic frame of reference regarding male functioning" and was unable "to bring any relevant male life experience to her deliberations."

On July 26, 2007, OSPRA submitted a letter in opposition to petitioner's appeal. OSPRA urges that the hearing officer's findings and recommendations be upheld. Specifically, OSPRA argues that the hearing officer's decision is supported by the record and that the hearing officer's gender is irrelevant to her ability to render an impartial decision.

Petitioner raises several objections regarding the testimony permitted at the hearing. Specifically, he argues that the hearing officer erred in admitting the police officer's testimony regarding statements petitioner made during questioning on December 7, 2004. Petitioner claims that because these statements were deemed inadmissible in his criminal proceeding, they should not have been admitted at the hearing. Petitioner also claims that the hearing officer improperly permitted irrelevant and prejudicial testimony as well as opinion testimony from lay witnesses.

Administrative hearings are not generally subject to the rules of evidence with which courts must comply, other than those pertaining to privilege (State Administrative Procedure Act §306[1]). Accordingly, a hearing officer has broad discretion to accept evidence that would be excluded under the traditional rules of evidence in a court of law (see Matter of Cole v. New York State Educ. Dept., 94 AD2d 904, lv denied 60 NY2d 556 [1983]). In addition, the rules of evidence in criminal cases are inapplicable to administrative hearings in which different rules apply (Id.). Thus, the hearing officer acted within her discretion when she admitted the aforementioned evidence.

Pursuant to §83.5(c) of the Commissioner's regulations, the Commissioner may affirm and adopt, reverse or modify the findings and recommendations of the hearing officer.

At the hearing, petitioner admitted that he conducted the student's trumpet lesson alone in his office with the door closed, the blinds drawn and the window in the door covered. He explained that he used his office for the student's lesson because the main band room was being used by another teacher for a large group lesson; that the blinds were drawn because the sun shone directly through the window; and that he hung his calendar over the window in the door because the office walls were made of acoustical material. However, these explanations do not excuse petitioner's lack of judgment in conducting a music lesson alone with a 14-year-old female student in his office behind a closed door.

Petitioner also admitted to holding a tie over the student's eyes as she played the trumpet, and claimed that he did so to help her memorize music. The musicians and

educators who testified at the hearing agreed that shielding a student's eyes from sheet music was a pedagogically sound method for improving sight-reading and memorization. According to the witnesses, however, this technique is commonly accomplished by removing the sheet music from the student's sight, shielding the student's eyes with a sheet of paper or turning the music stand around rather than by using a blindfold. Indeed, petitioner himself admitted that blindfolding the student was a "tremendous error in judgment."

Moreover, although petitioner denies ever masturbating in his office, two witnesses testified that he admitted to doing so. Testimony also revealed that petitioner's pants had been unzipped while he was in the school building on at least one occasion prior to December 7, 2004 and that as a result, the superintendent discussed with him the need to dress appropriately at school. Petitioner admitted that, on December 7, 2004, he had not worn underwear to work, which he acknowledged was "probably bad judgment."

Thus, after hearing testimony from petitioner, the student and various others, and evaluating the evidence, the hearing officer found the student's account to be more credible "because her testimony was supported by the evidence and the testimony of other witnesses."

This case revolves around witness credibility, and in matters of credibility, I will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the hearing officer's determination is inconsistent with the facts, or that the hearing officer fails to adequately explain the rejection of otherwise convincing testimony (Appeal of B.K. and R.K., 44 Ed Dept Rep 195; Decision No. 15,146; Appeal of T.R. and M.D., 43 id. 411, Decision No. 15,036; Appeal of K.M., 41 id. 318, Decision No. 14,699). I find that the hearing officer's credibility findings are consistent with the facts and supported by the evidence.

The hearing officer determined that the Department met its burden of proving that petitioner lacks good moral character, reasoning:

[Petitioner] seeks to retain his certificate to teach in the public schools of the State of New York, which

requires him, in addition to his teaching responsibilities, to supervise children *in loco parentis*, to exercise sound judgment when children are in his care, to practice good impulse control, to provide a safe learning environment for children, to recognize appropriate social boundaries at all times, and to serve as a positive role model for the students placed in his care. If a teacher lacks these qualities or skills, it can place students at risk, both physically and emotionally, and create an unsafe learning environment. Without these qualities [petitioner] does not possess the necessary moral character to teach in the State of New York. Unfortunately, the affidavits are not enough to overcome the evidence in this case that [petitioner's] actions traumatized a fourteen year old student ... [Petitioner's] actions illustrate a serious lack of judgment and poor impulse control, which are directly related to his fitness to perform his teaching duties. This not only calls into question his moral character, but also indicates that he poses a safety risk to the children in his care.

I find that the record supports the hearing officer's findings that petitioner exposed himself and masturbated in the presence of a 14-year-old student and that the student was traumatized by the incident. Such conduct is wholly inappropriate and is an abuse of the trust that lies at the very core of the teacher-student relationship. Petitioner's conduct also constitutes a breach of petitioner's duty as a teacher to be a role model for students (Ambach v. Norwich, 441 US 68, 78-79).

Moreover, I find no basis to support petitioner's assertion that he did not receive a fair hearing because the hearing officer was biased. Based on the totality of the record before me, I find that the hearing officer's findings that petitioner does not have the requisite moral character to teach in New York State are consistent with

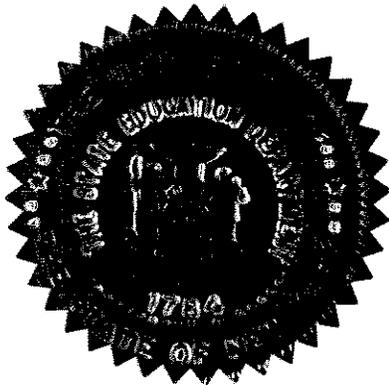
the facts and supported by the weight of the evidence. Therefore, I affirm the findings and recommendations of the hearing officer that petitioner's certification must be revoked.

In light of this disposition, I need not address petitioner's remaining contentions.

IT IS ORDERED that the hearing officer's finding that petitioner is not presently fit to return to teaching is affirmed;

IT IS FURTHER ORDERED that the certificate of Stephen A. Moro be and hereby is immediately revoked; and

IT IS FURTHER ORDERED that petitioner shall forthwith return to the State Education Department any copies of such certificate currently in petitioner's possession.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 25th day of

April, 2008.



Commissioner of Education

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 25, 2010

507071

In the Matter of STEPHEN A.
MORO,
Petitioner,

v

MEMORANDUM AND JUDGMENT

RICHARD P. MILLS, as
Commissioner of Education
of the State of New York,
Respondent.

Calendar Date: January 11, 2010

Before: Cardona, P.J., Peters, Spain, Stein and Garry, JJ.

D. Jeffrey Gosch, Syracuse, for petitioner.

Andrew M. Cuomo, Attorney General, Albany (Julie M.
Sheridan of counsel), for respondent.

Garry, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which revoked petitioner's teaching certificate.

Petitioner held permanent New York State certification as a music teacher for grades 7 through 12. In February 2005, the superintendent of the district where he was employed on a probationary basis as a teacher of band and marching band advised the Department of Education that petitioner had been arrested and

charged with endangering the welfare of a child.¹ The Department conducted an investigation and determined that, in December 2004, petitioner had allegedly committed an act of sexual misconduct in the presence of a 14-year-old student to whom he was giving a music lesson. Respondent issued a notice of substantial question of moral character and designated a Hearing Officer, who recommended the revocation of petitioner's teaching certificate following a hearing. Upon appeal, respondent affirmed the recommendation and revoked the certificate. Petitioner commenced this CPLR article 78 proceeding challenging the determination, and Supreme Court transferred the proceeding to this Court.

Petitioner's threshold argument that respondent lacked jurisdiction to determine the appeal on the ground that he was also the party who commenced the initial administrative proceedings is unreserved, as it was not raised at the administrative level; thus we may not address it (see Matter of Khan v New York State Dept. of Health, 96 NY2d 879, 880 [2001]; Matter of World Buddhist Ch'An Jing Ctr., Inc. v Schoeberl, 45 AD3d 947, 951 [2007]).

As to petitioner's substantive claim, we find that the challenged determination is supported by substantial evidence, that is, proof "'so substantial that from it an inference of the existence of the fact found may be drawn reasonably'" (Matter of Welcher v Sobol, 227 AD2d 770, 772 [1996], quoting 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 179 [1978]). In making this evaluation, we "'may not weigh the evidence and substitute [our] own judgment even in light of conflicting testimony'" (Matter of Rogers v Sherburne-Earlville Cent. School Dist., 17 AD3d 823, 824 [2005], quoting Matter of Malloch v Ballston Spa Cent. School Dist., 249 AD2d 797, 798 [1998], lv denied 92 NY2d 810 [1998]). The Hearing Officer's determination was based on the testimony of the student, who gave a detailed description of the incident at issue, as well as that of the district superintendent, several other teachers, the investigating police officer, and petitioner, among others. The Hearing Officer concluded that the student's testimony was

¹ Petitioner was acquitted of this charge following trial.

credible, finding that her testimony was supported by the evidence and by other witnesses, and that petitioner's conflicting testimony was inconsistent and controverted by the other testimony. This determination was fully within the Hearing Officer's exclusive province (see Matter of Rogers v Sherburne-Earlville Cent. School Dist., 17 AD3d at 824; Matter of Brown v Saranac Lake Cent. School Dist., 273 AD2d 785, 786 [2000]). Though the student was the sole eyewitness to the underlying incident, no corroboration was required for her testimony (see Matter of Welcher v Sobol, 227 AD2d at 772).

Petitioner's challenges to the Hearing Officer's evidentiary rulings lack merit. The investigating police officer was properly permitted to testify regarding certain statements made by petitioner that were ruled inadmissible at his criminal trial. The exclusionary rule is applied in administrative proceedings by balancing the deterrent effect of exclusion against its detrimental impact on the process of determining the truth. Relevant evidence is not excluded when little or no deterrent benefit will result (see Matter of Boyd v Constantine, 81 NY2d 189, 195 [1993]; Matter of Stedronsky v Sobol, 175 AD2d 373, 375 [1991], lv denied 78 NY2d 864 [1991]). The testimony in question was clearly relevant to the determination of petitioner's moral fitness to teach school children, and petitioner identified no deterrent benefit likely to result from its exclusion (see generally Matter of Stedronsky v Sobol, 175 AD2d at 374-375). Petitioner's further evidentiary objections, to the extent that they were preserved for our review, are unavailing. The Hearing Officer was not required to follow traditional rules of evidence (see Education Law § 3020-a [3] [c]; Matter of Soucy v Board of Educ. of N. Colonie Cent. School Dist., 51 AD2d 628, 629 [1976]), and no violation of the "fundamentals of a fair hearing" was shown (Matter of Rudner v Board of Regents of N.Y. State Dept. of Educ., 105 AD2d 555, 556 [1984]).

Petitioner did not establish bias based upon the adverse evidentiary rulings and unfavorable ultimate determination. The mere allegation of bias is not enough to disturb an administrative determination (see Matter of Chatelain v New York State Dept. of Health, 48 AD3d 943, 944-945 [2008]). Nothing in

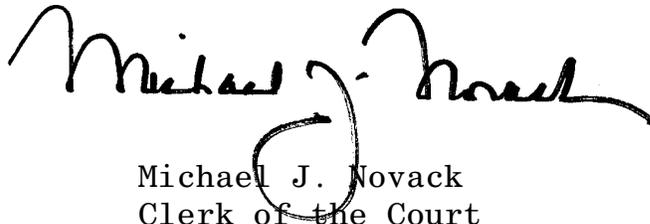
the record constitutes the requisite "factual demonstration supporting a claim of bias or that the ultimate determination resulted from that bias" (Matter of Kole v New York State Educ. Dept., 291 AD2d 683, 686 [2002]).

Finally, we do not find that the penalty imposed was inappropriate. Revocation of petitioner's teaching certificate is not shocking, excessive, or incommensurate with his offense of inappropriate sexual conduct in the presence of a young female student whom he was engaged in teaching (see Matter of Rogers v Sherburne-Earlville Cent. School Dist., 17 AD3d at 824-825; Matter of Stedronsky v Sobol, 175 AD2d at 375; contrast Matter of Harris v Mechanicville Cent. School Dist., 45 NY2d 279, 284-285 [1978]).

Cardona, P.J., Peters, Spain and Stein, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:



Michael J. Novack
Clerk of the Court

THE UNIVERSITY OF THE STATE OF NEW YORK
EDUCATION DEPARTMENT

*IN THE MATTER OF THE CERTIFICATE
HELD BY MICHAEL KLINGER
TO TEACH IN THE PUBLIC SCHOOLS
IN THE STATE OF NEW YORK
PURSUANT TO PART 83 OF THE
REGULATIONS OF THE COMMISSIONER
OF EDUCATION*

DECISION

Hearing Officer: Diane J. Exoo, Esq.

Counsel: P.E. Sherman, Esq., for New York State Department of Education
Salvatore J. Marinello, Esq., for the Respondent

Procedural History

On October 19, 2001, Commissioner of Education Richard Mills issued a Notice of Substantial Question as to Moral Character in the above entitled matter. Respondent requested a hearing within thirty days of the receipt of the Notice of Substantial Question as to Moral Character pursuant to 8 NYCRR 83, subd. 83.4. Commissioner Mills issued an Order designating a Hearing Officer and Setting Venue on December 12, 2001, directing that such hearing take place in New York City. Respondent acknowledged receipt of a letter dated January 4, 2002, giving the required fifteen-day notice of hearing pursuant to Part 83.4. There was a hearing held in this matter on March 4, 2002, at the New York State Education Offices, 475 Park Avenue South, New York City, New York. The hearing was held pursuant to the authority granted to the Commissioner of Education as found in New York State Education Law section 305 (7) and 8 New York Code of Rules and Regulations part 83. Paul E. Sherman, Esquire, appeared on behalf of the Education Department and Salvatore J. Marinello, Esq., appeared for the Respondent. The New York State Education Department presented testimony from NYSED Senior Investigator Anthony Signoracci, and Paula Wallace. The Respondent, Michael Klinger, testified on his own behalf and did not call any

other witnesses.

Findings of Fact

At the hearing New York State Education Department Counsel produced a certified Certificate of Disposition of a plea bargain which occurred on March 22, 2001, in the following criminal proceeding: **People v. Michael Klinger**, County Court, County of Nassau, Indictment No. 849N-99. (State's Exhibit 2). Respondent Teacher was arrested on April 2, 1999, and initially charged with Tampering with Physical Evidence, Hindering Prosecution 2nd Degree, and Reckless Endangerment 1st Degree. In full satisfaction of any pending charges, Respondent Teacher plead to Attempted Reckless Endangerment 1st Degree, a class E felony. He was subsequently sentenced to time served and five years probation.

The facts underlying the criminal charges are as follows:

1. On or about February 14, 1999, Raymond Klinger, the Respondent-teacher's brother, met a woman at a night club in West Hempstead, New York. She became extremely intoxicated and around 3:30 a.m., he took her to the Capri Motor Inn, West Hempstead, New York, where he physically assaulted, raped, and injured her to the extent that she was subsequently hospitalized.

2. Around 5:00 a.m., on February 14, 1999, Raymond Klinger telephoned his brother, Michael Klinger, and requested a ride, so the Respondent-teacher drove over to the motel to help his brother. The sexual assault victim was placed in the back seat of the Respondent-teacher's car, and the brothers attempted to drive her home, but they didn't know where she lived, and she was unable to articulate her exact address, other than to say she lived in Valley Stream. They drove her to the Valley Stream area and when they could not locate her house, they simply put her out of the car at approximately 6:30 a.m. She was dressed inappropriately, no hose, no shoes, and no coat, and it was a cold winter morning. Neither brother assisted the victim. The victim wandered the neighborhood for approximately fifteen minutes, unable to find her home, until a passing motorist stopped to help her at approximately 6:45 a.m., and notified the police.

3. Subsequently, Michael Klinger, Respondent-teacher, was indicted and charged with Tampering With Physical Evidence, Hindering Prosecution 2nd Degree, Reckless

Endangerment 1st Degree, a class "E" felony. (See State's Exhibit 2 - Certificate of Disposition).

4. New York State Penal Law §120.25 defines Reckless Endangerment in the 1st Degree as follows):

"[a] person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."

New York State Penal Law §110.00 defines "attempt" as follows:

"[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime he engages in conduct which tends to effect the commission of such crime."

In other words, by pleading guilty to attempted reckless endangerment in the first degree, the Respondent admitted that with criminal intent he engaged in conduct that could have resulted in the acts as described in New York State Penal Law §120.25.

5. Respondent-teacher was sentenced to time served and five (5) years probation. No Notice of Appeal was filed. A transcript of the allocution in Nassau County Court on March 22, 2001, wherein the Respondent-teacher admitted to the crime, was entered as State's Exhibit 5:

The Court: I want you to tell me what happened, February 14th, 1998, in Valley Stream, in the County of Nassau, State of New York.

The Defendant: I observed the victim was injured, it was cold outside. I let her out of the car and she was lightly clothed.

The Court: So you were aware of her injuries at the time of [sic] you let her out of the car?

The Defendant: Yeah.

The Court: And you were aware that it was cold outside at the time you let her out of the car?

The Defendant: Yes.

The Court: You knew she was lightly clothed at the time you let her out of the car?

The Defendant: Yes.

6. In his defense, the Respondent-teacher testified that he had no prior knowledge of his brother's criminal conduct and that the only injury he observed on the victim was a swollen eye, so he saw no reason to seek medical aid.

7. The victim testified that her face was beaten, her eye swollen, and that she was bleeding profusely from her vagina and that the blood was running down her legs.

8. A sworn statement from the passerby, Thomas Winter, who stopped to help her, reports the following: "The woman was naked except for her underwear. She had a big bump on the side of her head. She was covered with bruises about her body. She had blotches of blood on her face. She had a big bruise on her chest area." (See State's Exhibit 8).

When determining the credibility of witnesses, I have taken into consideration the interest or lack of interest in the outcome of the case, the possible bias or prejudice of a witness, the age, the appearance, conduct, and manner in which the witness gave testimony when viewed in the light of all the other evidence in the case. Further, I took into consideration any discrepancies in the evidence and whether the discrepancy could be reconciled by fitting all of the stories together, or whether it may have been an accidental misstatement due to the anxiety of testifying or the passage of time affecting memory, or whether the witness may have deliberately tried to mislead with false information. I find the testimony of the Education Department's witnesses to be credible, and although the testimony of Paula Wallace contained some inconsistencies, I believe that it was due to her inability to remember all the details of the physical assault, rape, and subsequent events, which was affected by her physical state at the time of the trauma, rather than a deliberate attempt to offer

false testimony.

I do not find the Respondent-teacher's testimony to be credible. First, the fact that his brother called him at 5:00 a.m. should have alerted him that an emergency situation of some kind had arisen. His explanation that his brother called him because he didn't have cab fare and that his brother didn't tell him about the evening's events strains credulity. If all his brother needed was a ride, why not wait until the check out time of the hotel or at least a more convenient time for the Respondent.

Second, I do not believe Respondent-teacher's testimony that he was unaware of the victim's injuries. He previously acknowledged his crime before the Nassau County Court and stated under oath that he was aware of her injuries. Now he seeks to minimize his role in this crime by claiming in his plea that he meant only one injury - her swollen eye. No one disputes that on the morning of February 14, 1999, the victim was incoherent, semiconscious, and inappropriately clothed. She didn't even know her address. Her physical appearance was alarming enough so that a passerby felt compelled not only to stop to assist her, but also to immediately notify the police.

The victim never told the passerby that she had been attacked - she only asked him to take her home, but it was clear to him that she needed medical assistance.

If it was clear to someone driving by in a vehicle that the victim needed medical assistance, it should have been clear to the Respondent-teacher who, by his own testimony, spent 1-1/2 hours with her in his car. He observed her being loaded into his car and observed her throughout the trip, attempted to converse with her, and observed her exiting his car. If he didn't notice, he should have.

Third, the Respondent-teacher, under cross-examination, stated that he didn't have any other pending criminal charges against him, but finally admitted that he had in fact been charged with attempting to possess an illegal drug, which he believes will be dismissed.

Fourth, in order to help his brother cover up a crime, the Respondent-teacher chose to leave an obviously injured, incapacitated, scantily-clad woman on the side of the road on a cold winter's morning. His callous disregard for another's welfare and safety is shocking and calls into question his judgment.

As a social studies teacher, the Respondent will play a critical role in developing his students' cultural values and shaping his students' attitudes toward good citizenship, which should include encouraging responsible and caring behavior toward their fellow human beings. The state has a keen interest in promoting and developing compassionate and intelligent citizens who can effectively participate in our society. In addition to classroom teaching and curriculum, one of the ways a teacher influences his or her students is by being a good role model.

There is no question that "[a] teacher serves a critical function as a role model or example for his or her students, exerting a subtle but important influence over their perceptions and values." *Ambach v. Norwick*, 441 US 68 (1979). In *Matter of Goldin*, 35 N.Y. 2d 534, at 543, the Court of Appeals, held that "...what might otherwise be considered private conduct beyond the scope of licit concern of state officials ceases to be such in at least either of two circumstances- if the conduct directly affects the performance of the professional responsibilities of the teacher, or if, without contribution on the part of school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities."

I don't believe the Respondent has the ability to be a good role model for students. One of the most disturbing aspects of this case is that the Respondent teacher testified that he doesn't believe that he showed poor judgment that night. There has been no reflection, no growth, and no indication of rehabilitation. He hasn't learned anything from this experience, and although he had the chance on the day he was sentenced and again at the hearing, he never apologized to the victim. He was jailed and has been placed on five years probation and still refuses to acknowledge that his actions endangered another human being. He is unable to comprehend that he actively participated in a serious crime. He just doesn't get it, and he needs to get it before we allow him to be in a classroom with children.

Section 83.4 (d) states that "Evidence of conviction of a crime shall be admissible in any proceeding conducted pursuant to this Part, but such conviction shall not in and of itself create a conclusive presumption that the person so convicted lacks moral character...."

Section 83.4 (e) states that "In determining whether a certificate should be revoked or suspended or an application for certification should be denied based on a previous criminal conviction, the hearing officer or panel shall apply the standards for denial of a license application set forth in Correction Law, section 752 and shall consider the factors specified in Correction Law section 753."

In accordance with the Commissioner's regulations, the eight factors considered are as follows:

(a) The purpose of Correction Law Article 23-A is to encourage the "licensure and employment of persons previously convicted of one or more criminal offenses." Correction Law section 753(a). Further, the public policy behind this legislation is to eliminate any bias against a person in obtaining employment based solely on their status as an ex-offender.

(b) The specific duties and responsibilities necessarily related to the license or employment sought are as follows: The Respondent seeks to retain his certificate to teach in the public schools of the State of New York, which requires him, in addition to his teaching responsibilities, to supervise children *in loco parentis*, and to serve as a role model for the students placed in his care.

(c) The bearing, if any, the criminal offense for which the person was convicted will have on his fitness or ability to perform one or more of his duties is as follows: the conviction based on the Respondent's behavior with an incapacitated adult in need of medical attention indicates a serious lack of judgment, a callousness toward human life, and a willingness to place family loyalty above the law. The position of a school teacher requires extreme trust, personal integrity, and the ability to practice good judgment, given the non-reviewability of many of the decisions and actions made by teachers affecting the children under their supervision, and the ability to provide for a safe environment.

(d) The time which has elapsed since the occurrence of the criminal offense is approximately three years.

(e) The age of the Respondent at the time of the criminal occurrence was 31 years old.

(f) The seriousness of the offense is as follows: Respondent plead to Attempted Reckless Endangerment 1st Degree, a class E felony.

(g) The Respondent testified on his behalf regarding his ability to be an effective teacher; however, he admitted under cross examination that he has been charged with another crime, which is currently pending. Respondent testified that he believed that the charge would soon be dismissed. Respondent did not produce any evidence or testimony in regard to his rehabilitation in this matter, and he did not call any witnesses to testify to his moral character.

(h) The New York State Department of Education has a legitimate interest in protecting the safety and welfare of the children in its educational system.

The factors in the Respondent's favor include the underlying policy of Correction Law Article 23-A, the fact that this crime did not involve a minor child and was not committed on school property, and the lack of any other criminal convictions at the time of the hearing.

Against these factors, it must be considered that the Respondent was a fully mature adult of 31 years at the time of the crime, that the crime of which he was convicted involved a serious lack of judgment on the part of the Respondent, evinced a callousness toward human life, and displayed a willingness to place another human being in a very dangerous situation. Further, the New York State Department of Education has a legitimate interest and responsibility in protecting the safety and welfare of the children in its educational system.

As a teacher Respondent has liberal access to children and functions *in loco parentis* in a supervisory role with students, which requires good judgment, personal integrity and trust. I find that there is a sufficient nexus between the Respondent's private conduct and his teaching responsibilities to adversely impair his capability to discharge his teaching duties.

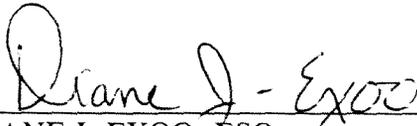
Pursuant to Correction Law section 752, I find that allowing the Respondent to retain his teaching certificate would involve an unreasonable risk to the safety or the welfare of the children in the New York State public school system.

Weighing all these factors, I find that the Respondent lacks the necessary good moral character to continue teaching in the public schools of the State of New York. His explanation of the night's events are not credible. His actions indicate a serious lack of judgment, which raises concerns about Respondent's ability to satisfactorily perform his teaching duties, which include being a good role model for students, and calls into question the safety of the minor children under his supervision.

Recommendation

After careful consideration and weighing of all the testimony and evidence presented, I strongly recommend that the Respondent's teaching certificate be revoked. The Education Department has met its burden of proof showing lack of good moral character on the part of the Respondent. The testimony by the other witnesses and the evidence presented by the Respondent do not resolve the substantial question about his moral character. Since the primary purpose of a Part 83 hearing is to protect the children of New York State, that purpose is best served at this time by revoking the teaching certificate of Michael Klinger to teach in the public schools of the State of New York.

Date: March 8, 2002



DIANE J. EXOO, ESQ.
HEARING OFFICER

**STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
Case File 4,604**

RECEIVED

AUG 11 2003

In the Matter of the Disciplinary Proceeding by the

SDEER

HYDE PARK CENTRAL SCHOOL DISTRICT

Against

KATHLEEN W. SHANNAHAN

**Before: Dr. David L. Gregory, Esq., Hearing Officer
For the District: Mr. John M. Donoghue and Ms. Felice A. Bowen, Esqs.
For the Respondent: Messrs. Robert T. Reilly and James R. Sandner,
Esqs.**

**Hearing Officer David L. Gregory
August 9, 2003 Decision**

INTRODUCTION

On November 26, 2002, the Board of Education of the Hyde Park Central School District, P.O. Box 2033, Hyde Park, New York 12538, 386 Violet Avenue, Poughkeepsie, New York 12601 met in executive session and found probable cause for the Charge and Specification timely preferred by Mr. David A. Burpee, Superintendent of Schools, against Kathleen W. Shannahan, the Respondent tenured teacher.

The Respondent has been employed by the District as a tenured teacher for the better part of three decades. She has many hours of graduate course credits beyond her master's degree in English. She taught English at the Haviland Middle School at the time of the May 24-25, 2002 incidents. Until this proceeding, she has never been brought upon on Section 3020-a charges. In 1996 and again in 2002, she was recognized in Who's Who Among America's Teachers . (Respondent's Exhibits 11 A, 11 B, 12)

By its January 31, 2003 email , the State Education Department notified me that I had been selected to be the Hearing Officer; I immediately accepted this appointment, confirmed by the Department's February 10, 2003 confirmation letter.

On February 11, 2003, the Respondent filed its written motion to dismiss. I denied the motion during the prehearing conference on February 24, 2003. On March 10, 2003, the Respondent filed its renewed written motion to dismiss; the District filed its

memorandum in opposition on March 14, 2003. I denied the Respondent's renewed motion by my written decision on March 17, 2003.

Hearings in this Section 3020-a proceeding occurred on March 21, June 24, July 3, and July 7, 2003.

The Respondent was present throughout each of the four hearing dates, each of which was conducted in the conference board room at the District's office, 386 Violet Avenue, Hyde Park, New York. New Paltz Police Department Sergeant Karl Baker, Ulster County Sheriff's Department Sergeant Eric Benjamin, New Paltz Police Department Officer Kathleen Burns, District Superintendent David Burpee, New Paltz Police Department Detective David Dugatkin, A.K. (a minor for purposes of the legal drinking age in New York; minor's initials) and the Respondent testified as sworn witnesses.

The parties were represented by counsel throughout, and were afforded full opportunity to conduct direct and cross examination of witnesses and to present documentary evidence. Transcript by court reporter totaled 632 pages. There were almost thirty exhibits, some with subparts, in the evidence of record.

Also present at the hearings was Ms. Karen Collins, Esq., an attorney with the law firm Ainsworth, Sullivan, Tracy, Knauf, Warner & Ruslander, 403 New Karner Road, P.O. Box 12849, Albany, New York 12212-2840, 518.464.0600. She accompanied her

New Paltz client's police officers, who testified pursuant to subpoena as witnesses called by the District. At the first hearing on March 21, 2003, Ms. Collins asserted that the criminal trial record regarding the Respondent was sealed pursuant to NY CPL Section 160.50 (Tr. 65 ff), substantially precluding the District from proceeding with direct examination of any of the New Paltz police officers that the District had subpoenaed as witnesses in this Section 3020-a proceeding. By his written decision and order on May 29 2003, Acting Justice Bruce E. Tolbert of the New York State Supreme Court unsealed the record in the criminal proceeding involving the Respondent.

The parties waived their right to present oral closing arguments. Pursuant to mutual agreement, the parties submitted post hearing briefs. I completed receipt and exchange of the parties' post hearing briefs on August 4, 2003.

APPEARANCES

The District was represented by Mr. John M. Donoghue, Esq., of the law firm Donoghue, Thomas, Auslander & Drohan, 2517 Route 52, Hopewell Junction, New York 12533, 845.227.3000. Also present for the District was Mr. Victor M. DeBonis, Assistant Superintendent for Business. Ms. Felice A. Bowen, Esq., of Mr. Donoghue's law firm, joined Mr. Donoghue on the post hearing brief for the District.

The Respondent was represented by Mr. Robert T. Reilly, Esq., Office of General Counsel, New York State United Teachers, 800 Troy-Schenectady Road, Latham, New York 12110-2455, 518.213.6000. Also present was Mr. James R. Sandner, Esq., General Counsel.

THE CHARGE AND SPECIFICATION (District Exhibit 1)

CHARGE

“Immoral character or conduct unbecoming a teacher.”

SPECIFICATION

“On or about the evening of May 25, 2002, you allowed the consumption of alcoholic beverages by underage children, including but not limited to AH* [The minor’s name is set forth in the original specification; as Hearing Officer, I use only initials in order to protect the identity of minors.], to be conducted in your home at 6 James Court, New Paltz, New York, and in addition, escorted an intoxicated 16-year old female attendee, AH, from the event in which alcoholic beverages were being consumed, from your house to a location other than her home, and left her alone at that locations (sic) and that said underage female was left at that site without her clothes and wearing only a potting soil

bag, and that 16-year old, AH, who had been dropped off by you, was significantly intoxicated at the time of the incident.”

THE POSITIONS OF THE PARTIES

THE POSITION OF THE DISTRICT

The District maintains that it has proven the Respondent’s immoral character and conduct unbecoming a teacher, and seeks the penalty of dismissal.

The credible evidence proving the charged conduct is overwhelming, according to the District. The documentary exhibits in the evidence of record, and the testimony of the police officers and of Mr. A.K., and, indeed the testimony of the Respondent herself, unequivocally establish that, at the very least, the Respondent drove the plainly intoxicated, disheveled, and oddly and partially dressed female minor A.H. from the Respondent’s property about midnight on May 24-25, 2002, and that the Respondent let the highly intoxicated A.H. exit the Respondent’s vehicle at a residence that was not, in fact, that of A.H.

The District also points to the contemporaneous admissions of the Respondent made to the investigating police, acknowledging that minors had been consuming beer at her home on the evening of May 24, 2002. (District Exhibits 4-6), consonant with the

police finding significant physical evidence of beer residue on the Respondent's property on the morning of May 25, 2002. The District asserts that the Respondent's after-the-fact equivocations and denials about the alcohol minors consumed at her house on the evening of May 24, 2002 are self-serving and not credible. "At the hearing, Respondent testified that it was not until the police came to her home later on the morning of May 25th that she discovered that alcohol had been consumed in her home. This testimony is in direct contradiction of her prior statements given by her to police officers hours after the incident occurred and not credible under the circumstances." (District post hearing brief at 5).

Even in the light most favorable to the Respondent, the District points out that the Respondent exercised extremely poor judgment in failing to adequately supervise minors at her home on the evening of May 24, 2002, and thereby facilitated their consumption of alcohol.

The District asserts that the penalty of dismissal is suitable and proportionate to the proven charge of immoral character and unbecoming off-duty, off-school premises conduct, "because the misconduct directly pertains to Respondent's teaching and supervision ability (or lack thereof) and constitutes an exercise of such poor judgment that is simply inexcusable...a fundamental deficiency in her ability to carry out the essential responsibilities of being a teacher....This misconduct clearly calls into question whether Respondent in her position as a teacher where children are regularly entrusted to her care would exercise the same extremely poor judgment that she exercised in her

personal life. The terrible judgment exhibited by Respondent in this instance, if repeated, could expose her students, or students she is entrusted to supervise, in a potentially dangerous, if not life threatening situation...Such an exercise of lack of judgment is so unjustifiable that progressive discipline is not an appropriate alternative and dismissal is the only appropriate penalty.” (District post hearing brief at 7-8, 10).

THE POSITION OF THE RESPONDENT

The Respondent presents several arguments that the charge should be dismissed in its entirety.

The Respondent contends that there is no rational nexus between the charged conduct and the teacher’s duties. Any initial adverse public notoriety was inconsequential and negligible, and, ultimately, was completely nullified by the subsequent positive equivalent publicity surrounding the Respondent’s acquittal and exoneration with respect to the criminal charges. Concomitantly, there is no evidence whatsoever that the alleged conduct directly affected the Respondent’s ability to perform her substantive teaching duties. In fact, the evidence is that the Respondent performed her teaching duties and taught all of her regular classes without any impairment whatsoever for the balance of the 2001-2002 academic year, through June 25, 2002, several weeks after the events of late

May, 2002.

The Respondent maintains that the District has failed to prove the charge by the preponderance of the evidence. The Respondent points out that the “one specification to the charge consisting of a complex and compound sentence...; each clause or phrase of that sentence is fatally flawed.” (Respondent post hearing brief at 20).

The Respondent parses the terminology of the specification, beginning with the District citing the wrong date; in fact, the alleged incidents occurred on the evening of May 24 and on the early morning of May 25, 2002, and not on the “evening” of May 25, 2002 as erroneously set forth from the inception of the specification.

The Respondent argues that there is “no record evidence that Ms. Shannahan ‘allowed’ A.H. to consume alcohol.” (Id. at 21) The Respondent posits that the District’s use of the term allow in the charge requires the District to prove that the Respondent knowingly, intentionally, affirmatively permitted A.H. to consume alcohol; negligence or failure to supervise will not establish culpability by omission, according to the Respondent. The Respondent concedes that “A.H., no doubt, was intoxicated, but Ms. Shannahan was not responsible for it.” (Id. at 23)

Likewise, the Respondent maintains that the District has failed to prove that the Respondent intentionally left A.H. alone at the residence at 314 South Ohioville Road. Instead, the Respondent argues, the evidence shows that the Respondent drove A.H. to

the residence that she understood was that of A.H. and her parents, and, believing that she saw A.H. enter the door of that residence, understandably departed. This hardly constitutes the Respondent intentionally abandoning A.H. after midnight in an isolated, deserted area.

The Respondent maintains that the specification is fundamentally flawed, in that the evidence makes it impossible for the District to prove that A.H. was wearing only the potting soil bag. Several of the District's witnesses and exhibits plainly establish that A.H. was substantially clothed with several items above the waist, in addition to the soil bag and other items below the waist.

In the alternative, assuming that the charge and specification are proven, the Respondent argues that a letter of reprimand, rather than the termination that the District seeks, would be the appropriate, progressive sanction for this off-duty, off-premises, outside-the-District incident. The Respondent contends her previously unblemished 26 years of exemplary, recognized service "mitigates against anything more than a nominal penalty." (Id. at 28)

FINDINGS, ANALYSIS, AND DISCUSSION

Until the events of May 24-25, 2002, the Respondent has had an unblemished record in her twenty-six year career as a teacher with the District. She has not previously been the subject of any disciplinary action. She has always received the highest ratings on her evaluations. She has been twice recognized by inclusion in Who's Who Among America's Teachers.

There were three adverse articles mentioning the Respondent, published in newspapers of general circulation in the mid-Hudson Valley regarding the events of May 24-25, 2002. These articles appeared at page C2 in The Daily Freeman on May 27, 2002 ("Two charged with serving minors at New Paltz party"); in The Times Herald-Record on May 29, 2002; and, at page 3 in The New Paltz Times on May 30, 2002 ("Mother and son charged by New Paltz police").

The Respondent was arrested on May 27, 2002, and criminally prosecuted. Two of the charges were dismissed on September 9, 2002 before trial (misdemeanor charges of providing alcoholic beverage to minor and unlawfully dealing with a child) (Respondent Exhibit 13); at trial on September 24, 2002, Town Justice Bartlett A. Wagner dismissed the misdemeanor charge of endangering welfare of a child

There was one positive local newspaper article at page A2 of The Daily Freeman on October 1, 2002 ("Hyde Park teacher cleared of charges"), reporting that the

Respondent was cleared of all criminal charges stemming from the events of May 24-25, 2002. Some of these articles continue to be available in archival form on websites (e.g., DailyFreeman.com: “Top Stories; Two charged with serving minors at party; New Paltz- A New Paltz woman and her adult son, who was under house arrest due to being on probation, were arrested Saturday by town police and charged with serving alcohol to minors”; “Drunken teen tips police to party”)

In her testimony at the hearing, the Respondent testified as follows:

She did not have prior or contemporaneous knowledge of, approve of, or allow any alcohol to be brought into, or consumed in, her home on May 24-25, 2002. Prior to May 24, there already were some garbage bags containing a empty few beer cans or bottles consumed prior to May 24, and stored on the back deck of her home for removal. Her son B.M. (minor’s initials; minor for purposes of the drinking age in New York) lives with her.

After she returned home from school in the late afternoon of May 24, she granted her son B.M.’s request and gave him permission to invite some of his friends to their home on the evening of May 24. Her son had known many of his friends since early elementary school, and had been classmates with several of these young men through the New Paltz High School graduating class of 2001. These boys were returning from college, and the Respondent testified that she granted her son’s request because, in part,

she believed that her son's college friends, discussing their college experiences, would be positive influences on her son.

She testified that she spent most of the evening of May 24 upstairs, in her study or bedroom. She did not use the downstairs bathroom that evening, and she did not see any keg of beer in the bathroom or anywhere else on the premises. On the several separate occasions that she went partially downstairs between approximately 9 P.M. and midnight on May 24, she testified that she did not see any of the young men at her son's party consuming anything other than pizza and soda. She did not see any cans or bottles of beer, wine, or alcohol, or any keg of beer, she did not provide any alcoholic beverages, and she did not give anyone permission to consume or possess any alcoholic beverages. She did not see any female at the party or within her house on the evening of May 24. She did not circulate downstairs during the party, because she did not want to embarrass her son.

By about midnight, however, she was very tired, the boys were making more noise, and she decided to terminate the festivities. She again went partially downstairs, and told her son to conclude the party. She testified that she told her son that she did not really care what he had to tell his friends, but that she did expect him to tell them that the party had to quickly conclude. (Respondent Exhibit 16) She testified that she told him that he could tell his friends that, inter alia, the neighbors had called the police. (I believe that this became transmogrified into "She [Ms. Shannahan] said, 'The cops might be

coming,” in Mr. A.K.’s supporting deposition hand-written statement given to the New Paltz Police Department on May 26, 2002. (District’s Exhibit 7C)

Shortly thereafter, the party concluded and the boys left the house. The Respondent then saw, for the first time, Ms. A.H., a young minor female, standing in the Respondent’s driveway. She never saw A.H. enter the Respondent’s residence. (Respondent Exhibit 16). She observed Ms. A.H. wearing a blouse and an overshirt; she did not immediately notice what else Ms. A.H. was wearing, because her view was obstructed by Ms. A.H. standing behind a car.

She heard A.H. arguing with B.M. about leaving the Respondent’s property. Upon Respondent inquiring whether she needed a ride home, A.H. replied that she would walk home. At that point, the Respondent decided that it was not safe for a minor female to walk home unescorted at midnight. The Respondent so informed Ms. A.H., and the Respondent drove Ms. A.H. to what she understood from Ms. A.H. was Ms. A.H.’s home. The Respondent testified that the drive was about one mile, and it took only a few minutes, and that their conversation during the drive was inconsequential. Other than the Respondent and Ms. A.H., no one else was in the Respondent’s car, and the Respondent drove no one else home that evening or morning.

Only during the drive did the Respondent notice that Ms. A.H. was wearing the soil bag as a de facto skirt; upon her inquiry, Ms. A.H. told the Respondent that she had ripped her jeans. The Respondent testified that she did not see, and did not look for or

attempt to retrieve, Ms. A.H.'s allegedly ripped jeans. She testified that, other than Ms. A.H.'s hair appearing to be slightly disheveled, she noticed nothing peculiar about Ms. A.H.'s deportment, speech, or behavior. The Respondent testified that she did not notice any odor of alcohol emanating from Ms. A.H., and she did not perceive Ms. A.H. to be intoxicated.

Other than this brief drive by the Respondent of Ms. A.H. at about midnight, the Respondent did not previously see or interact whatsoever with Ms. A.H. on the evening of May 24 or the morning of May 25. The Respondent did not have independent knowledge of Ms. A.H.'s actual residence. Instead, she relied upon Ms. A.H.'s instructions, and she dropped off Ms. A.H. at what Ms. A.H. told her was her home. "Ms. H. gave me directions and I drove her to the location she specified. A. exited the vehicle and went to the front door of the residence, which she claimed was her home. When I saw the front door open I assumed A. would gain entry and I left." (Respondent Exhibit 16) In fact, the house that the Respondent drove Ms. A.H. to (314 South Ohioville Road, New Paltz, New York) was not Ms. A.H.'s residence. While the intoxicated Ms. A.H., dirty and with disheveled hair and dressed partially in an Agway potting soil bag was attempting to entered that house, the alarmed homeowner called the police.

I find the Respondent's testimony generally credible, with one especially important exception. The Respondent testified that she did not notice any alcoholic odor emanating from, or intoxication by, Ms. A.H. as the Respondent drove Ms. A.H. from the Respondent's property at 6 James Court, New Paltz, New York to 314 South Ohioville

Road, New Paltz, New York. This important element of the Respondent's testimony is not credible. On the contrary, I find that Ms. A.H. was plainly intoxicated during her interaction with the Respondent; even the Respondent admitted in her testimony that Ms. A.H. had somewhat disheveled hair, and was wearing a soil bag around her waist--- hardly the sort of empirical evidence that is generally consonant with the wearer's sobriety and uneventful comportment at midnight. The Respondent's contention that A.H. somehow cleverly concealed her already-intoxicated condition from the Respondent, and then "easily could have consumed additional substances during that time period" (Id. at 24) after the Respondent left A.H. at 314 South Ohioville Road is not plausible. As the District correctly observes, "it would have been apparent to a lay person that A.H. was highly intoxicated...it is incompletely (sic) incredulous that A.H. could have been completely sober and coherent at the time that Respondent dropped her off." (District post hearing brief at 6)

I find very credible the testimony of Mr. A. K. regarding Ms. A.H.'s condition on the evening of May 24. He drove Ms. A.H. to the party. They had little and inconsequential social conversation during the brief drive. She apparently was fully dressed, including wearing jeans---and not the soil-bag-as-impromptu skirt---when he drove her to the party on the evening of May 24. There is no evidence that she was intoxicated, disoriented, confused, or had difficulty walking or talking during her brief ride with Mr. A.K. to, or upon her arrival at, the party at the Respondent's home. Apparently, A.H. repeatedly left, and returned to, the Respondent's home on three

separate occasions throughout the evening of May 24. (District Exhibit 8, pages 6, 19-24).

I also find very credible the testimony of the police officers regarding Ms. A.H.'s intoxicated condition on the early morning of May 25, finding her dirty, disheveled, confused, argumentative, incoherent, disoriented, staggering, unresponsive, partially dressed in a soil bag as an ad-hoc skirt, ignorant of where she was, how she arrived there, or where her jeans, shoes, and underwear were, unable to state her correct address, and glassy-eyed and reeking of alcohol. (Tr. 87-88, 94-95, 226-229, 525-527)

Likewise, the relevant documentary evidence offers further congruent corroboration of Ms. A.H.'s plainly intoxicated condition. (e.g., Respondent Exhibit 9: "...subject walking around with no shoes or pants in a state of confusion...stated she wanted to end her life by running in front of a car." District Exhibit 2: "...she was wearing a plastic top soil bag as a skirt with only a sweatshirt on, no shoes or socks and seemed to be very dirty... she had been drinking District Exhibit 15: "A. had the smell of alcohol on her breath and from her waist down was wearing nothing but a plastic potting soil bag...A. did not know where she was or how she had gotten to her current location...she became vague about her clothing and lapse of memory.")

There is no doubt that Ms. A.H. was intoxicated.

I do not find it credible that Ms. A.H., whom even the Respondent testified had disheveled hair and who was wearing the soil bag and not her jeans during the drive, somehow completely and cleverly concealed her intoxication throughout her interaction with the Respondent, only to become further intoxicated after the Respondent left A.H. at the 314 South Ohioville Road location.

While there is no direct eyewitness testimony that the Respondent deliberately and intentionally provided alcohol to Ms. A.H. or to anyone else, for that matter, during her son B.M.'s party at the Respondent's home on the evening of May 24, I find it very likely from all of the credible circumstantial evidence that Ms. A.H. consumed alcohol on the Respondent's premises at some point in the evening of May 24 and before the Respondent drove her from the Respondent's premises.

Mr. A.K. credibly testified, for the most part, albeit rather grudgingly, about the alcohol at the party. His May 26, 2002 supporting deposition specifically mentions that many minors less than age 21 were drinking alcohol at the party, as young as age 15. (District Exhibit 7C). In direct response to my question to him at the hearing, Mr. A.K. confirmed that Ms. A.H. was the 15 year-old-person at the party to whom he had alluded in his supporting deposition. (Tr. 407) While Mr. A.K. was equivocal as to whether he actually witnessed Ms. A.H. as among the minors Mr. A.K. saw who were drinking alcohol at the party, I find that the cumulative credible evidence of record points to a sober Ms. A.H. arriving at the party with Mr. A.K., and then subsequently becoming intoxicated at the party and before leaving the Respondent's premises.

Shortly after the Respondent dropped off Ms. A.H. at the house at 314 South Ohioville Road, the police were called by the alarmed homeowners at that address. The police found the intoxicated Ms. A.H.; she smelled of alcohol, was disoriented, had difficulty walking and speaking, and she could not tell the police how she came to the premises or where her other clothes (jeans and underwear) were, as she was dressed partially in a potting soil bag. Her blood alcohol tested at .18 on the early morning of May 25.

Although the Respondent contends that A.H. did not drink any alcohol at the Respondent's home, even the Respondent concedes that A.H. did consume significant quantities of alcohol on May 24-25. "A.H. did not drink anything at Ms. Shannahan's house. But, when A.H. left her house to go to Mikel's house, she took a bottle of wine with her. She consumed that bottle of wine on an empty stomach between her house and Mikel's house. She fully consumed that bottle of wine before returning to Ms. Shannahan's house. A.H. concealed her consumption of alcohol." (Respondent's post hearing brief at pages 6-7)

It is incredible that the Respondent did not perceive the disheveled and oddly and partially clad A.H., and reeking of the odor of alcohol according to the police, as intoxicated before and while the Respondent chauffeured A.H. shortly after midnight on May 25 from the Respondent's property to the house at 314 South Ohioville Road.

I find that the District has proven, in part by the Respondent's own testimony at this hearing, that the Respondent drove the minor female A.H., from the Respondent's premises, while the Respondent knew, or should have known, that Ms. A.H. was intoxicated. I do not find credible the Respondent's testimony that she did not perceive any odor of alcohol emanating from, or intoxication by, Ms. A.H. during the Respondent's interaction with Ms. A.H. I find that Ms. A.H. became intoxicated on the Respondent's property on the evening of May 24. Mr. A.K. credibly testified that he did not drink on the evening of May 24, and that he had earlier picked up and driven Ms. A.H. to the party. He credibly testified that Ms. A.H. had little to say during their drive earlier that evening to the party. There was no evidence of any disheveled hair, missing or torn jeans or underwear, or Ms. A.H. dressed in the bag, until well after she was driven to B.M.'s party by A.K.

The Respondent's course of conduct was outside school hours, off school premises beyond the District, and did not involve any of the District's or the Respondent's current students. Nevertheless, a teacher remains a role model even in these off-site, off-hours contexts. Appeal of the Board of Education of the Warsaw Central School District, 34 Ed. Dep. Rep. 226 (1994), citing Ambach v. Norwick, 441 U.S. 68, 78-79 (1979); Melzer v. Board of Education of the City of New York, 196 F. Supp.2d 229 (E.D.N.Y. 2002).

As the District properly contends, students read newspapers, including, potentially, accounts of their teachers' conduct outside school hours and off school premises. Although there is no direct evidence that this occurred in this case, there is credible evidence that some members of the Board were quickly aware of those initial negative newspaper articles and that they immediately thereafter telephoned the Superintendent to convey their concerns. (Tr. 444-450)

There was some testimony by the Superintendent about telephone calls that he received from some Board members in the immediate wake of the newspaper publicity regarding the Respondent's alleged involvement in the events of May 24-25, 2002 (Tr. 444-450). The Superintendent testified that he initially read copies of the articles left anonymously in his mail at his office; apparently, he did not unilaterally read the articles, in the first instance, in the newspapers. (Tr. 436-448) Unlike the Melzer case, where there was overwhelming and notorious negative publicity debilitating the teacher's classroom efficacy, there is no credible evidence that any of the publicity in the present case impaired the Respondent's ability to perform her substantive classroom teaching duties for the District. Indeed, as the Respondent emphasizes, she taught the balance of the academic year without incident subsequent to the events of late May, 2002. As the Respondent summarizes: "Other than Ms. Shannahan, none of the persons involved with the alleged conduct were in any way related to the District. No District students were involved, no District parents were involved, no administrators were involved, no board members were involved and no other staff were involved. The alleged conduct took place

off-duty and outside the boundaries of the District.” (Respondent’s post hearing brief at 13-14.)

While the public notoriety surrounding the events of May 24, 2002 and post was not flamboyant, even the Respondent concedes, however, that there was some degree of notoriety inevitably flowing from these events (although the Respondent minimally characterizes it as “There was hardly any notoriety at all.” Respondent’s post hearing brief at 14)

The Respondent’s misconduct on May 24-25, 2002 is well known among the minors who attended, and who witnessed at least some of the events at, her son B.M.’s party at the Respondent’s residence. In the small communities of Hyde Park and New Paltz, the Respondent virtually guaranteed her notoriety among high school and college students who attended the May 24-25, 2002 party at her house. According to the Respondent’s testimony at the hearing, the boys quickly departed her home under the false, but prominent, impression that the police had been called, a rumor which she contrived and which she expressly encouraged her son to disseminate. Thus, many minors quickly left her house at about midnight, under the impression that the police were on the way. According to her own testimony, the Respondent herself was the primogenitor of the false but effective police-have-been-called-and-are-on-the-way rumor that ensured inherent notoriety among the minors who were in attendance. While her ability to teach English was never in question, I find that the Respondent undermined the District’s confidence in her judgment.

It is axiomatic that off-duty, off-school premises teacher conduct can be cause for disciplinary action only when the “conduct directly affects the performance of the responsibilities of the teacher, or without contribution on the part of the school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capacity of the particular teacher to discharge the responsibilities of his position.” Goldin v. Board of Education of the County of Harrison, 169 W. Va. 63, 285 S.E.2d 665 (1981); Jerry v. Board of Education of Syracuse, 35 N.Y.2d 534 (N.Y. 1974). “Publicity alone cannot suffice as a basis for disciplining an employee for conduct which would otherwise be private off duty conduct.” In the Matter of the Arbitration of the Department of Correctional Services v. Council 82, Security Unite Employees (Kuhnel), PERB No. D96-2018 (Arbitrator Robert Simmelkjaer, June 20, 1997), affirmed, In the Matter of New York State Correctional Officers and Police Benevolent Association, Inc. v. State of New York, N.Y.2d, N.Y.S.2d (1999). I find that the Respondent substantially fostered public notoriety sufficient to significantly and reasonably undermine the District’s confidence in her judgment.

While there is no direct evidence that the Respondent knowingly furnished, or knowingly allowed to be furnished, alcohol to Ms. A.H., or to anyone else, on the evening of May 24 or morning of May 25, there is sufficient credible evidence from the contemporaneous written statement that Mr. A.K. furnished to the police that alcohol was consumed by minors, including, but not necessarily limited to, Ms. A.H. on the Respondent’s property on the evening of May 24; this was consonant with his more

grudging, but essentially corroborative testimony, at the hearing. (Tr. 384) Police evidence also credibly establishes that police investigators found party residue, including half-empty cups of beer, and beer bottles and cans, on the Respondent's property on the early morning of May 25, 2002. (Tr. 107-108, 219, 353)

She admitted in her testimony that she later learned that there had been alcohol consumed at her residence by persons at her son's party on May 24-25. She admitted in her testimony that she drove the disheveled Ms. A.H., wearing a soil bag, from her property at about midnight. Although she was not criminally convicted, the above admitted circumstances, standing alone and in the light most favorable to the Respondent, inherently are very problematic. The very credible testimony of the police officers about Ms. A.H.'s palpably drunken condition, and the incredible testimony of the Respondent that she did not perceive that Ms. A.H. was intoxicated, unequivocally prove that the Respondent in fact knew, or certainly should have known, that she had an intoxicated minor on her property on May 24-25. As the District correctly emphasizes, A.H.'s intoxicated state would have been obvious to the untrained lay person, let alone to an educator with 26 years of teaching experience. The District had good reason to doubt the judgment of the Respondent in discharging her responsibilities with her students, or students in her care, in the wake of the events of May 24-25, 2002.

CONCLUSION

Based on the record in this proceeding, including the testimony of the witnesses, the exhibits in the evidence of record, the parties' post hearing briefs, and my own independent research into the law, with regard to the Charge and Specification:

I find that the District has proven the Specification, in so far as the Respondent was negligent in not prohibiting minors from consuming, and thus, by negligent omission of any supervision, effectively allowed them to consume alcoholic beverages in the Respondent's home on the evening of May 24, 2002. I further find that the District has proven the Specification, in so far as the Respondent drove the intoxicated and partially dressed minor female A.H. from the Respondent's home to, and left A.H. at, a residence not that of A.H. on the late evening of May 24, 2002 or early morning of May 25, 2002.

As the District aptly summarizes, "this conduct still demonstrates extremely poor judgment...This lack of judgment in itself...created an environment that facilitated the consumption of alcohol by minors." (District post hearing brief at 5-6).

I find that the District has proven that the Respondent engaged in conduct unbecoming a teacher. I find, however, that the District has not proven "immoral character," in that, while the Respondent was negligent, she did not deliberately, knowingly, and intentionally engage in any immoral activity.

The Respondent has a long teaching career without any prior Section 3020-a charges brought against her. She has twice been recognized in Who's Who Among America's Teachers, in 1996 and again in 2002. These are legitimate mitigating factors in assessing the sanction to be imposed, congruent with analogous decisions of the courts, the Commissioner, and other Hearing Officers.

Although the Superintendent testified about the District's efforts against alcohol and drug use, the Respondent has not received specialized training in these issues and she is not among the trained professionals sited for these intake and counseling purposes within the Respondent's school. While her extremely poor judgment and unbecoming conduct on May 24-25, 2002 are alarming, I find that, in the fuller context of her otherwise impressive record of long good service, without any other instance of poor judgment or unbecoming conduct, the unusual factual circumstances involving the Respondent are unlikely to recur.

In light of all of these considerations, a penalty less than the termination sought by the District is warranted. The decisions cited by the District are not dispositive in this case. For example, in the Appeal of the Board of Education of the Warsaw Central School District, 34 Ed. Dept. Rep. 266 (1994), the eighteen specifications included multiple felony and misdemeanor commissions and convictions by a teacher who, while intoxicated, drove his vehicle, caused property damage, left the scene of an accident, and drove without insurance, and who subsequently was unsuccessful in his attempt to becoming rehabilitated from his drinking problem. In Appeal of the Board of Education

of the City School District of the City of Canandaigua, 25 Ed. Dep. Rep. 387 (1986), the proven specifications also included multiple felony and misdemeanor commissions and convictions for driving while intoxicated and reckless driving, by a teacher with a prior disciplinary history.

Warsaw and Canandaigua present proven facts far more egregious than those in the present case. Nevertheless, the ultimate penalties levied in the Warsaw and Canandaigua cases, for far greater misconduct, were two and one year disciplinary suspensions without pay, respectively, rather than the dismissal that the District urges in the present case.

Unlike the Warsaw and Canandaigua decisions cited by the District, I find that the present dynamic is much more analogous to that in Indian River Central School District SED 3,750 (2000) (letter of reprimand, after dismissal of criminal charges, single incident away from school, no negative publicity, and no demonstrated debilitation of the ability to teach; recognizing some adverse publicity in the present situation); see also, City School District of New York SED 4,369 (Hearing Officer Robert Coulson, August 2, 2002, dismissing charges). It is also true, however, that, in these cases, the teachers were not interacting with minors; in the present case, the Respondent irresponsibly and negligently interacted with an intoxicated minor at about midnight, both on and off the Respondent's property.

The Respondent's misconduct does not begin to approach that of other teachers' far more egregious proven misconduct, resulting in penalties less than dismissal, such as in the Warsaw and Canandaigua decisions cited by the District, or in illustrative addition, for example, Ellis v. Ambach, 124 A.D. 854 (3rd Dept. 1986) (Drivers education teacher who struck and killed with his car a bicycle-riding teenager, and injured another, was convicted of criminally negligent homicide and incarcerated for one year, and was suspended for two years without pay, despite the fact that this crime was widely reported in the media.); Appeal of the Board of Education of Community School District 19 of the City School District of New York, 32 Educ. Dept. Rep. 354 (1992) (six month suspension without pay for teacher who pled guilty in court to attempted possession of cocaine in the third degree in violation of the Penal Law); North Shore Central School District, SED 4,230 (Hearing Officer David Gregory, August 1, 2002) (\$100,000 fine for teacher who nearly struck parent and child, while driving in an alcoholic blackout near school)

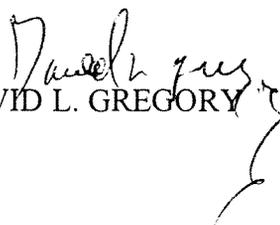
Consequently, as even the Warsaw and Canandaigua cases cited by the District recognize, dismissal is not the appropriate penalty in the present case. Neither, however, is the proven misconduct in this case de minimis. Virtually everyone recognizes the social scourge of unlawful consumption of alcohol by minors, facilitated and exacerbated by the negligence of adults. At the very least, the Respondent exhibited several instances of extraordinarily poor judgment by her proven misconduct on May 24-25, 2002. Absent her long, previously unblemished, and repeatedly well-recognized service properly operating here as a legitimate mitigating factor, a significant disciplinary suspension without pay would be a viable sanction.

There is nothing productive or constructive to be accomplished by imposing a suspension without pay upon this substantively very competent teacher. The unusual facts and circumstances of May 24-25, 2002 are unlikely to recur, and the Respondent's proven misconduct and extremely poor judgment manifested on those dates are also very unlikely to recur.

The District and its students shall have the benefit of the Respondent's services as an active teacher. Therefore, the Respondent shall resume active teaching without delay.

There shall be no suspension, with, or without, pay. A letter of reprimand alone, however, is an insufficient sanction.

The appropriate sanction is a letter of reprimand and a fine of five thousand dollars (\$5,000.00). Commencing with the first day of the month following the Respondent's return to teaching, the Respondent shall pay five hundred dollars (\$500.00) each month as a partial payment of the total fine. On the first day of each month thereafter, the Respondent shall make a \$500 payment until the entire amount of the \$5,000 fine is paid in full. The District is hereby authorized to make the \$500 deduction directly from the Respondent's first paycheck each month according to this schedule, until the \$5,000.00 fine is paid in full.


DAVID L. GREGORY

I, David L. Gregory, upon my oath as Attorney and Hearing Officer, affirm that I have executed this document as my findings and decision in this matter on this 9th day of August, 2003.

David L. Gregory
DAVID L. GREGORY

The University of the State of New York
Education  Department

In the matter of the certificate(s) held by

RICHARD R. MUSTO

to teach in the public schools
of the State of New York

NOTICE OF SUBSTANTIAL
QUESTION OF MORAL
CHARACTER

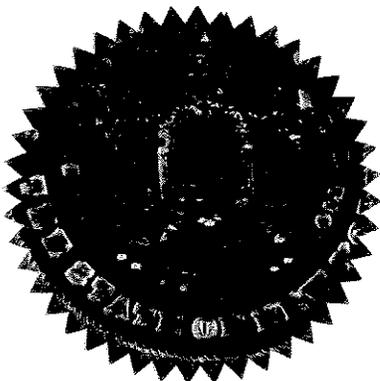
RICHARD R. MUSTO, hereinafter referred to as the "certificate holder", presently holds the following permanent New York State certificates: as a teacher of Chemistry 7-12, effective September 1, 2002 and, as a teacher of Biology and General Science 7-12, effective September 1, 2002. Both certificates bear number [REDACTED]

Information has been received by the New York State Education Department that certificate holder altered and/or falsified certain June 2004 Chemistry Regents Examination scores by making inappropriate additions, modifications and/or deletions to various student's answer booklets. The exact nature of the conduct is known to the Department and will be provided upon request.

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), the above information concerning the certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to the certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education this Notice, together with a copy of Part 83, shall be mailed to the certificate holder by certified

mail, return receipt requested and by first class mail. The certificate holder may request, in writing, to the New York State Education Department, Office of School Personnel Review and Accountability (OSPRA), 89 Washington Avenue, Albany, New York 12234, within thirty days after receipt of the Notice, that a hearing be held to determine whether the certificate holder's teaching certificate(s) should be revoked, or that an alternate penalty should be imposed pursuant to Section 305(7) of the Education Law. Failure of the certificate holder to request a hearing in this matter within thirty days after receipt shall result in the revocation of the certificate holder's teaching certificate(s).



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the Education Department this 1st day of December 2004.


Commissioner of Education

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OSPRA

In the Matter of the Certificate
Held by

RICHARD MUSTO,
Respondent

HEARING OFFICER'S
REPORT AND
RECOMMENDATIONS
TO THE COMMISSIONER

To Teach in the Public Schools
of the State of New York

A Hearing Pursuant to Section N.Y.C.R.R. Part 83

Before: Kevin G. O' Haire, Hearing Officer

Appearances: Dan Harder, Esq.
William Sheekutz, Esq.
Richard Musto, Respondent

BACKGROUND

This is a N.Y.S. Education Department Part 83 Hearing. This action was commenced by service upon respondent of a Notice of Substantial Question of Moral Character dated December 1, 2004 (Dept. Exhibit "1"). The Notice states that respondent is a holder of several permanent teaching certificates in the fields of chemistry, biology, and general science. The Notice further alleges that respondent altered and/or falsified certain June 2004 Chemistry Regents Examination scores by making inappropriate additions, modifications and/or deletions to students' answer booklets. Respondent subsequently requested a hearing in this matter (Dept. Exhibit "4"). Hearings were held in Albany, N.Y. on August 17, 2005 and again on October 25, 2005 in New York City. The sole issue presented for my consideration is to determine whether or not respondent is morally fit to teach in the public school system of New York. In drafting this report I have relied upon my review of the various documents, affidavits, letters and other exhibits submitted by the parties herein.

THE DEPARTMENT'S CASE

The N.Y.S. Education Department called no witness on its direct case against respondent. Instead, it submitted some twenty (20) exhibits. Among these exhibits were the following:

1) Exhibit "6-a", a summary of the scoring irregularities found in the Chemistry Regents Exam prepared by Eric L. Eversley, Superintendent of Schools at the Freeport Public Schools where respondent had been employed.

2) Exhibit "7", a memorandum drafted by Steve Katz, the Bureau Chief for Test Administration of the New York State Education Department.

3) Exhibit "8" through Exhibit "17", being the subject examination booklets altered by respondent.

4) Exhibit "8(a)" through Exhibit "17(a)", being statements signed by respondent wherein he admits altering students' responses on the subject examination.

5) Exhibit "18", the Directions for Administering and Scoring Regents Examinations.

6) Exhibit "19", the Scoring Key for the subject examination.

The Department rested its direct case upon submission of the above exhibits.

THE RESPONDENT'S CASE

Respondent called Paul Dooher as his first witness. Mr. Dooher is a Physics Teacher at Freeport High School. He stated that respondent is a dedicated teacher. Mr. Dooher said that instructors at the school felt pressure from the administration to improve students' performance on Regents exams.

Wembo Shungu testified next. He stated that respondent is a gifted teacher and has good moral character. He stated that respondent cares greatly about his students and is a hard worker. He is well liked and respected by his colleagues, he testified.

Richard Musto testified next. He admits altering answers on the 2004 Chemistry Regents Examination. (See Exhibits "8(a)" through "17(a)".) Respondent stated that he was uncertain as to how to grade the examinations and that the school failed to properly prepare him. Respondent said several other teachers advised him that it was okay to "give a student a point or two, just don't get caught". He stated that he believed other teachers had altered exams in the past.

Respondent said that he lives by an "honor code" he learned in the Boys Scouts and at college at the Citadel. He said that he does not lie, cheat or steal. Respondent states that he takes responsibility for his actions. He said he acted out of concern for his students. He explained that he had taken time out to look for another job and, as a result, the students' exam preparations suffered. He claimed that he never received Department Exhibit "18", the Directions book for scoring the regents exam. Respondent states that he loves teaching. Respondent submitted some fifteen (15) exhibits, including several classroom observation reports, evaluations and testimonials attesting to his hard work and other positive attributes.

THE DEPARTMENT'S REBUTTAL CASE

At the hearing held on October 25, 2005, the Department called two rebuttal witnesses, Sam Nepote and Robert Capalbo. A third, Geraldine Borzello, was unavailable and furnished an affidavit. The witnesses all denied ever telling respondent that it was all right to alter student's answers on Regents exams.

DISCUSSION & FINDINGS OF FACT

There is no dispute that respondent took it upon himself to alter, delete and add to various student's answers on the 2004 Chemistry Regents exam. Respondent has admitted this conduct in written statements (Exhibit "8"(a)" through "17(a)") and in his testimony at the hearing. On its face, this is a bizarre and outrageous admission by a teacher in our public school system. It goes without saying that the integrity of the grading of these important exams (indeed, all exams) should and must be honest, fair and beyond reproach. The question then becomes, is there some justification or excuse for respondent's peculiar conduct in the case before me.

Respondent argues that the system at Freeport High School quietly condoned the practice of "finding a point or two" in order to allow a student to achieve a passing grade. This is disputed by the teachers who testified in rebuttal. He also argues he acted as he did out of concern for his students. He professes guilt over missing classes as he looked for work in 2004. Then he argues that school officials never properly instructed him how to grade the exam. Conveniently, he states that he never received Department Exhibit "18", the Directions for scoring the exam. He also didn't read the relevant sections of Department Exhibit "19", the Rating Guide. Now, he says, he realizes this was all wrong and he pledges not to repeat his mistake.

Respondent's actions in this matter constitute a very serious lapse in judgment. He has violated the trust that integrity of the educational system demands of a teacher. He shouldn't have had to read directions to know that it is wrong to falsify scores on exams. I am, frankly, suspicious of respondent's stated motivations for his actions. Was it all about the kids as he suggested, or was it all about him and his future employment prospects as the Department hints at. Respondent testified to a strong belief in an Honor Code. Respondent's actions here make me question the validity of that statement.

Respondent begs forgiveness and states that he is remorseful. He pleads that revocation is too severe a penalty. Unfortunately, his expressions of remorse and acceptance of responsibility aren't, in my view, supported by the record in this matter. At several different points he sought to lay the blame on other teachers, the school district and then his job hunt. The Department recommends that revocation is appropriate given the serious nature of the offense and that it occurred fairly recently. I am not unmindful that revocation is the equivalent of the death penalty for a licensed instructor. However, on balance and after a careful review of all of the facts and circumstances presented for my consideration, I must agree with the Department that respondent lacks the requisite good moral character and that revocation is the only appropriate penalty.

RECOMMENDATIONS TO THE COMMISSIONER

Accordingly, I respectfully recommend that the Commissioner of Education revoke the teaching certificates held by respondent, Richard Musto.

The University of the State of New York
Education  Department

In the matter of the certificate(s) held by

RICHARD MUSTO

to teach in the public schools
of the State of New York

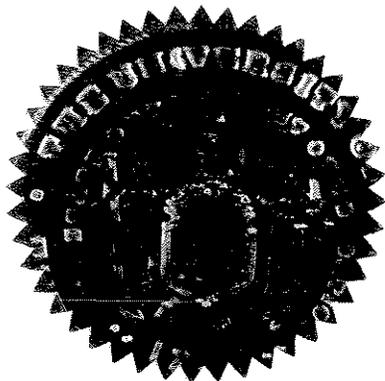
**REVOCATION OF
TEACHING
CERTIFICATE(S)**

RICHARD MUSTO, hereinafter referred to as "certificate holder", presently holds the following permanent New York State certificates: as a teacher of Chemistry 7-12, effective September 1, 2002 and. as a teacher of Biology and General Science 7-12, effective September 1, 2002. Both certificates bear number [REDACTED]

Pursuant to Part 83 of the Regulations of the Commissioner of Education (8 NYCRR 83), information concerning certificate holder was presented to the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching. Based upon that information, the Subcommittee determined that a substantial question exists as to certificate holder's moral character.

Therefore, in accordance with Part 83 of the Regulations of the Commissioner of Education, a Notice of Substantial Question of Moral Character ("Notice") signed by the Commissioner on December 1, 2004, together with a copy of Part 83, was mailed to certificate holder by certified mail, return receipt requested and copy by first class mail. Hearings were held on August 17, 2005 and October 25, 2005 to determine whether certificate holder's teaching certificates should be revoked. At the hearing, evidence was presented and in the decision dated November 10, 2005 the hearing officer recommended to the Commissioner that certificate holder's certificates should be revoked. No appeal was taken.

IT IS ORDERED that pursuant to the authority of the Commissioner of Education under section 305 of the Education Law and in accordance with the procedures set forth in Part 83 of the Regulations of the Commissioner, the teaching certificates held by Richard Musto are hereby revoked.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State Education Department, do hereto set my hand and affix the seal of the State Education Department, at the City of Albany this 6th day of *March* 2006.

Richard P. Mills
Commissioner of Education

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificates held by ISBEN JEUDY to
teach in the public schools of the
State of New York.

Petitioner appeals the findings and recommendations of a hearing officer that he lacks the requisite moral character to teach in the public schools of the State of New York. The appeal must be dismissed.

Petitioner holds permanent New York State certification as a teacher of Mathematics for grades 7-12 and as a School District Administrator. Petitioner has also applied for a permanent certificate as a School Administrator and Supervisor. In September 2002, petitioner began his employment with the Jericho Union Free School District ("district") as a curriculum associate for mathematics instruction. In 2003, petitioner was promoted to assistant principal of the district's high school, a position he held until his resignation on June 30, 2005.¹

By letter dated June 27, 2005, the district's superintendent ("superintendent") submitted a report to the State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA") pursuant to Part 83 of the Commissioner's regulations. The report stated that petitioner was "the subject of an investigation by the New York State Attorney General's

¹ The record indicates that in the spring of 2005, petitioner accepted employment as a high school principal in the Uniondale Union Free School District. As a result, petitioner resigned from his position as assistant principal with the Jericho Union Free School District, effective June 30, 2005.

Office relative to a security breach in the storage and handling of the June, 2005 [R]egents examinations."

An investigation by OSPRA revealed that in June 2005, petitioner, in his capacity as assistant principal, failed to properly safeguard the June 2005 New York State Regents Examination in Global History and Geography ("Global History Regents Examination") prior to its administration. Specifically, petitioner removed the answer key for the Global History Regents Examination from a shrink-wrapped package inside a locked box in the district's secure storage location and provided the answers to the multiple-choice portion of that examination to his son, then a 10th-grade student in another school district.²

In connection with this conduct, petitioner was arrested and charged with Official Misconduct, a Class A Misdemeanor, on or about June 27, 2005. Petitioner pled guilty to this charge on or about March 13, 2006 and was sentenced to three years of probation on July 10, 2006. As a condition of his probation, petitioner was required to complete 500 hours of community service. Petitioner was discharged from probation on September 17, 2007.

Based on this information, on April 3, 2008, I issued a Notice of Substantial Question of Moral Character pursuant to Part 83 of the Commissioner's regulations. By order dated April 25, 2008, I designated a hearing officer to conduct a hearing, which was held on June 18, 2008.

At the hearing, the OSPRA investigator and the superintendent testified on behalf of the Department. The Department introduced 18 exhibits. Petitioner testified on his own behalf and introduced 21 exhibits, including letters from family, colleagues and former students attesting to his good character, integrity and teaching skills. During the hearing, petitioner indicated that his application for a certificate of relief from disabilities was pending. The hearing officer granted petitioner's request to keep the record open for an additional 30 days to afford him the opportunity to submit such certificate. Although petitioner failed to submit his certificate of relief from disabilities within the allotted 30 days, the hearing officer accepted and considered the certificate over OSPRA's objection.

² The record indicates that petitioner's son shared the multiple-choice answers with another student.

By decision dated September 5, 2008, the hearing officer concluded that a substantial question existed with respect to petitioner's moral character. The hearing officer recommended that petitioner's teaching and School District Administrator certificates be revoked and that his application for a School Administrator and Supervisor certificate be denied. This appeal ensued.

Petitioner asserts, inter alia, that the hearing officer (1) "failed to determine whether there existed any correlation between the conduct underlying [petitioner's] conviction and his certificate to teach mathematics" and (2) "erred in applying Correction Law sections 752 and 753 by failing to distinguish between [petitioner's] mathematics certificate and administrative license and application." Petitioner seeks to retain his Mathematics teaching certificate and asks that his School District Administrator's certificate be suspended rather than revoked.³

By letter dated October 28, 2008, OSPRA opposed petitioner's appeal, arguing that the hearing officer's decision has a rational basis, is supported by the record and should be upheld.

Initially, I note that generally the Department has the burden to establish lack of good moral character in a Part 83 proceeding (8 NYCRR §83.4[c]). However, where a crime is committed by a certificate holder either on school property or while in the performance of teaching duties, §83.4(d) provides, inter alia, that there is a rebuttable presumption that the individual lacks good moral character. In this case, the record indicates that petitioner's conduct occurred both on school property and while in the performance of his duties as an assistant principal. Therefore, the burden shifts to petitioner to show that he possesses good moral character.

In determining whether a certificate should be revoked or suspended based on a previous criminal conviction, the hearing officer must apply the standards for denial of a license application set forth in Correction Law §752 and

³ Petitioner does not contest the hearing officer's recommendation that his application for a School Administrator and Supervisor certificate be denied.

consider the factors specified in Correction Law §753 (8 NYCRR §83.4[e]). Correction Law §752 provides:

No application for any license or employment ... shall be denied ... by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought ... or
- (2) the issuance ... of the license or the granting ... of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Correction Law §753 identifies eight factors that must be considered in determining whether to grant a license or employment to an individual with a previous criminal conviction. They are:

The public policy of this [S]tate ... to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

The specific duties and responsibilities necessarily related to the license or employment sought.....

The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or

ability to perform one or more such duties or responsibilities.

The time which has elapsed since the occurrence of the criminal offense or offenses.

The age of the person at the time of occurrence of the criminal offense or offenses.

The seriousness of the offense or offenses.

Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

(Correction Law §753[1][a] - [h]).

In addition, Correction Law §753(2) states that, in making a determination pursuant to Correction Law §752, "the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein." However, such certificate does not establish a prima facie entitlement to the license or employment sought. The presumption of rehabilitation also does not preclude any judicial, administrative, licensing or other body, board or authority from considering other factors, unrelated to rehabilitation, as a basis for the exercise of its discretionary power to suspend, revoke, or refuse to issue any license, permit or other authority or privilege (see Correction Law §701[3]; Arrocha v. Bd. of Educ. of the City of New York, et al., 93 NY2d 361, 365; Bonacorsa v. Van Lindt, 71 NY2d 605, 614).

The hearing officer specifically found, and petitioner does not dispute, that there was a "direct relationship" between petitioner's official misconduct conviction and his administrator's certificate and application. Rather, petitioner argues that there is no direct relationship between the underlying conduct and his teaching of mathematics. Petitioner claims that absent a direct relationship, the hearing officer had to have found an unreasonable risk to the property or to the safety and welfare of specific individuals or the general public and that he did not. The record supports a finding that a direct link exists between petitioner's certificate to teach Mathematics and his criminal conduct. The act of stealing the answers to any exam and giving them to any student is directly related to the role of a teacher. By his conduct, petitioner has evidenced a complete disregard for his responsibilities as a teacher.

Furthermore, petitioner's actions constitute a clear breach of his duty as a teacher to be a role model for students (see Ambach v. Norwick, 441 US 68, 78-79). Petitioner is a certified teacher and administrator who has admitted to exhibiting an extreme lack of judgment in his official capacity. Petitioner also admitted that he lied to the superintendent about his role in this incident. To continue to sanction his exposure to impressionable young students would indeed pose a grave risk to the welfare of such students.

Courts have upheld the termination of teachers who have been found guilty of improperly administering and/or scoring Regents Examinations (see Wohlleb v. Bd. of Educ. of the Bridgehampton UFSD, 231 AD2d 643; Carangelo v. Ambach, et al., 130 AD2d 898). The Regents Examination program is designed to measure students' attainment of the State learning standards and to ensure that students who are not meeting State standards receive the opportunity to participate in various programs and services designed to help improve academic performance. Both teachers and administrators are responsible for ensuring the integrity of the Regents Examination program: teachers are responsible for the proper administration and scoring of State assessments; school and district administrators are responsible for ensuring the validity and accuracy of the grades and examination scores recorded and reported by school districts for their students. Petitioner's conduct not only interfered with the security and proper

administration of a Regents Examination, but also enabled more than one student to cheat on the examination. Such conduct on the part of a teacher or administrator cannot be tolerated under any circumstances.

Petitioner also argues that, in applying Correction Law §§752 and 753, the hearing officer erred "by failing to distinguish between [petitioner's] mathematics certificate and administrative license and application." As noted above, the record supports a finding that a direct relationship exists between both of petitioner's certificates and his criminal conduct and, furthermore, that allowing petitioner to retain such certificates would pose an unreasonable risk to the property, safety and welfare of public schools and their students. As to the factors to be considered enumerated in Correction Law §753, while the public policy of New York State encourages licensure of persons previously convicted of criminal activity, petitioner was a mature adult when he committed a serious offense that directly affected his son and another high school student, at least two school districts and their communities. The offense has a direct bearing on his fitness to perform the duties and responsibilities of both a teacher and an administrator.

Petitioner claims that the hearing officer erred in several respects in applying the factors listed in Corrections Law to the facts of his case. The hearing officer considered the fact that "very little time" has passed since petitioner's conviction, "an interval too brief for any meaningful rehabilitation to have occurred." Petitioner argues that, in referring to his criminal conviction rather than his conduct, the hearing officer misstated the law. Indeed, Correction Law §753 specifically states that it is the time since the "occurrence of the criminal offense" that is to be considered. In this case, there is a difference of approximately nine months between the date of petitioner's criminal conduct (June 2005) and his guilty plea (March 13, 2006). Thus, approximately two and a half years passed between petitioner's conviction and the hearing officer's decision, while approximately three years and two months passed between petitioner's conduct and the hearing officer's decision. Under the facts of this case, I find the hearing officer's misstatement to be harmless error.

In his decision, the hearing officer also incorrectly stated that "[n]o presumption of rehabilitation arises" with respect to petitioner's certificate of relief from disabilities. However, the certificate of relief from disabilities and the resulting presumption of rehabilitation is one of several factors to be considered as a basis for revoking petitioner's licenses. The hearing officer observed that petitioner's criminal conduct occurred when he was a "mature person" and "cannot be passed off as a youthful indiscretion." The hearing officer considered the seriousness of the offense and the fact that it "undermin[ed] public confidence in the school district and damag[ed] its reputation." Finally, the hearing officer considered the evidence submitted by petitioner, stating that, "[w]ith the exception of the [petitioner], no witnesses testified on his behalf. Numerous letters were introduced in support of [petitioner's] character but carry little evidentiary weight as the authors were not available for cross examination."

In addition, petitioner claims that the hearing officer failed to consider "the aberrant nature" of his conduct and the underlying reasons for his committing the offense. At the hearing, petitioner testified on his own behalf, detailing the events in his family situation leading up to his June 2005 conduct. Although petitioner contends that the information about his family's situation was intended not to excuse his conduct but rather to explain why revocation of his teacher's license is inappropriate under the circumstances, his repeated attempts to excuse and justify his actions belie this claim. For example, petitioner fails to acknowledge the impact his conduct had on his son, a struggling 10th-grade student to whom, instead of the guidance and mentorship required of a teacher and administrator, petitioner provided the answers to the Global History Regents Examination.

I note that petitioner has provided several unsworn statements to support his claim of good moral character. However, like the hearing officer, I find that these letters are insufficient to overcome the presumption that petitioner lacks good moral character. First, petitioner submits a letter from a parent dated March 30, 2005 - several weeks before petitioner engaged in the criminal conduct at issue in this case. Moreover, several other

letters submitted by petitioner were written to petitioner's sentencing judge in 2006 and are not directly relevant to the issue presented in this appeal - whether petitioner possesses the requisite moral character to retain his teaching and administrative certificates. Finally, petitioner submits a number of letters written on his behalf as part of this Part 83 proceeding, which describe him as a caring, dedicated, talented teacher. However, the majority of these letters refer to petitioner's actions not as criminal, but as a mere "mistake" from which he has "learned" and urge that petitioner be allowed to use this experience as a "teachable moment." While some of the letters indicate that petitioner continues to teach at the college level and engages in tutoring and mentoring activities, I find that they fail to demonstrate that petitioner possesses the good judgment and moral character necessary to serve in the public schools of New York State.

I also note that Part 83 of the Commissioner's regulations imposes good moral character as the standard for the fitness of all individuals who perform services in the public schools for which certification is required. While the day-to-day duties and specific responsibilities of certified teachers and administrators may differ, both perform services in public schools and come into regular contact with impressionable students. As noted above, because teachers and administrators have a duty to serve as role models for students, it is necessary that persons in both positions possess the requisite moral character to carry out such responsibilities. There exist no separate standards for moral character based on the type of certificate at issue, evincing the legislative and policy determination that certified individuals who serve in public schools must possess the highest level of moral character, regardless of the nature and/or level of their certification. Petitioner cites no legal authority to support his request for different standards of review for teaching and administrative certificates and indeed there is none.

Pursuant to §83.5(c) of the Commissioner's regulations, the Commissioner may affirm, adopt, reverse or modify the findings and recommendations of a hearing officer. I have examined all the papers, transcripts and evidence presented to the hearing officer and the submissions by petitioner and OSPRA. Based on this review,

I adopt the hearing officer's finding that petitioner lacks the requisite moral character to teach in the public schools of the State of New York. With respect to his School District Administrator certificate, petitioner urges that suspension, rather than revocation, is appropriate in this case. I disagree. Under the facts of this case, there is no indication that suspension for a definite term will ensure that petitioner's slackened moral character will be restored at the end of such suspension.

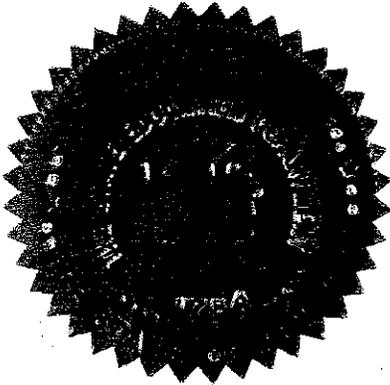
In light of this disposition, I need not address petitioner's remaining contentions.

THE APPEAL IS DISMISSED.

IT IS ORDERED that petitioner's application for a School Administrator and Supervisor certificate is denied;

IT IS FURTHER ORDERED that the teaching certificates of Isben Jeudy be and hereby are immediately revoked; and

IT IS FURTHER ORDERED that petitioner shall forthwith return to the State Education Department any copies of such certificates currently in petitioner's possession.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department at the City of Albany, this 26th day of May, 2009.

Richard P. Mills
Commissioner of Education

The University of the State of New York
Education  Department

In the matter of the certificate(s) held by
and/or the application for teaching
certificate(s) by

SURRENDER AGREEMENT

JERRY A. BURLISON

to teach in the public schools of the
State of New York

NYSED

JUN 17 2009

OSPRA

WHEREAS, JERRY A. BURLISON, (herein "Certificate Holder") holds the following permanent New York State certificates issued by the New York State Education Department (herein "Education Department"): as a teacher of Business and Distributive Education, effective September 1, 2008 and bearing the control number 211941081; and, as a teacher of Health, effective September 1, 2006 and bearing the control number 207866081; and

WHEREAS, the Education Department has initiated an investigation against Certificate Holder under Part 83 of the regulations of the Commissioner of Education; and

WHEREAS, Certificate Holder wishes to surrender the above-described certificates to the Education Department; and

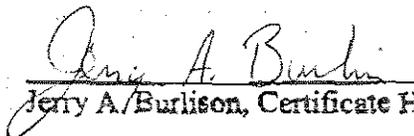
WHEREAS, the parties have held discussions and have had all the terms and conditions of this Surrender Agreement thoroughly explained and now freely consent to enter into this Surrender Agreement, such consent not having been induced by fraud, duress, or any other influence; and

WHEREAS, no other person not a party to this proceeding has an interest in its outcome; and

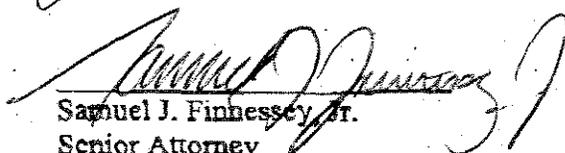
NOW IT IS HEREBY AGREED AND STIPULATED by and between said parties that this matter shall be fully resolved as follows:

- 1) Certificate holder admits that he engaged in an inappropriate relationship with a female student, who was over the age of seventeen, during the 2008-2009 school year which included: improper communications and correspondence; and improper physical, intimate and sexual contact; and
- 2) Certificate Holder hereby surrenders the above-described certificates to the Education Department; and
- 3) Certificate Holder permanently waives his right to apply for any New York State Education Department teaching, administrative or other school related certification at any future date; and
- 4) Certificate Holder shall forward the original teaching certificates to the Education Department within seven (7) business days of the signing of this Surrender Agreement to: the New York State Education Department, Office of School Personnel Review and Accountability, 89 Washington Ave., Room 981-EBA, Albany, New York 12234. *If Certificate Holder is unable to locate the original certificates, then Certificate Holder shall forward a signed statement to the Education Department indicating such within seven (7) business days of the signing of this Surrender Agreement;* and
- 5) Certificate Holder understands that the Education Department will notify all New York State school districts as well as all licensing and/or credentialing agencies and jurisdictions who participate in the National Association of State Directors of Teacher Education and Certification (NASDTEC) Educator Identification Clearinghouse and advise them as to the status of such certificates; and
- 6) The parties agree that they have entered into this Surrender Agreement freely, knowingly and openly, without coercion or duress, and that Certificate Holder has voluntarily waived all statutory or constitutional rights that he may have held in this matter in accordance with 8 NYCRR Part 83; and
- 7) Certificate Holder affirms that he has had access to counsel, James R. Sandner, Esq. (Marilyn Raskin-Ortiz, Esq., of counsel), regarding the terms of this Surrender Agreement and has entered into such with advice and consent; and
- 8) Nothing in this Surrender Agreement shall be deemed to be a practice or policy of the Education Department; and
- 9) This written Surrender Agreement contains all the terms and conditions agreed upon by the parties hereto and no other agreement, oral or otherwise, regarding said allegations and charges shall be deemed to exist or to bind any of the parties hereto or to vary any of the terms contained therein.

AGREED:


Jerry A. Burlison, Certificate Holder

6/16/09
Date


Samuel J. Finnessey Sr.
Senior Attorney
New York State Education Department
Office of School Personnel Review and Accountability
89 Washington Ave., Room 981 ERA
Albany, New York 12234
(518) 473-2998

6/17/09
Date

STATE OF NEW YORK
DEPARTMENT OF EDUCATION

In the Matter of the Certificate(s) held by

CHRISTOPHER L. MILLER

REPORT OF THE FINDINGS AND
RECOMMENDATIONS OF
THE HEARING PANEL

to Teach in the Public Schools of the
State of New York

APPEARANCES:

Daniel C. Harder, Esq.
State Education Department
5 North Education Building
Albany, New York 12234
Attorney for State Education Department

James Bilik, Esq.
Senior Counsel
NYSUT
800 Troy-Schenectady
Latham, NY 12110-2455
Attorney for Respondent

Hearing Panel: Peter Bassett, Stuart Horn, Bruce Loveys

Hearing Officer: Walter Donnaruma, Esq.

INTRODUCTION:

By Order dated October 11, 2005, the Hon. Richard P. Mills, Commissioner of Education of the State of New York, designated the undersigned to conduct a hearing pursuant to Section 305(7) of the Education Law and Part 83 of the Regulations of the Commissioner of Education (8 NYCRR Part 83) concerning the appropriateness of permitting Christopher L. Miller, hereinafter referred to as the Respondent, to teach in the public schools of the State of New York. The hearing, held before a three member panel in Albany, NY on December 12 and 13 of 2005. The State Education Department was represented by Daniel Harder, Esq., and Respondent by James Bilik, Esq.

DISCUSSION:

The Notice of Substantial Question introduced by the State Education Department states that the Respondent, the holder of a permanent New York State teaching certificate in English to Speakers of other Languages, effective September 1, 1996 and bearing the number 064409822 was, on or about April 3, 1985, convicted of Criminal Sale of a Controlled Substance, 2nd

Degree (Class A Felony) and was sentenced to a term of three years to life in state prison. The Notice further states that the Respondent, on January 10, 1993 and June 10, 2003, submitted employment applications stating that he had never been convicted of a crime.¹ The purpose of this proceeding is to determine whether the Respondent possesses the requisite moral character for teaching certification, and, if not, what action should be taken regarding his certification.

Respondent does not deny the allegations of the Notice of Substantial Question. In so doing, however, he does not concede that his bad conduct renders him morally unfit for certification. He contends, rather, that his character has been repaired by subsequent good works. On this subject, several witnesses were called to testify on Respondent's behalf: a migrant education recruitment coordinator employed by the SUNY Research Foundation, the Respondent's wife, a retired meat inspector, a BOCES migrant specialist, a recruiter employed by the Research Foundation, a retired teacher, and a clergyman.² Based upon their personal and professional associations with the Respondent and familiarity with his reputation, these witnesses vouched for the Respondent's sound moral character notwithstanding his conviction and falsifications. Particular emphasis was placed upon his work with the Columbia County migrant population.

It would be a better world indeed if no one had anything to hide. But as we go through life, most of us do or say things that we wish we hadn't, and when our resumé comes up for review, it is only human nature to omit items that cause us pain to disclose. If people readily fessed up to all of their derelictions and delinquencies, our public offices would be largely vacant. Thus, we tolerate dogcatchers of questionable integrity rather than have no dogcatchers at all. Teachers, however, are another matter. Teachers must serve as role models for impressionable youngsters, and supervise them after the fashion of a parent. Moral standards for teachers must, therefore, be higher. Truthfulness is an essential element in the mix of virtues that comprise moral character. In the absence of truthfulness, there can be no reliability, and without reliability, there can be no trust. The Respondent's failure in this regard, therefore, is troublesome.

Some 20 years have passed since Respondent's criminal conviction, and, while a serious matter, it is of less concern than his more recent falsifications, which indicate that his rehabilitation is incomplete in that he has not succeeded in coming to terms with his criminal history. On the other hand, he has demonstrated his worthiness as an employee, volunteer, and family man. He is well reputed and a respected member of his community. On balance, it would appear that his character is not altogether incompatible with teaching certification. But more work remains to be done. Implicit in Part 83 is the recognition that moral character is not a black and white issue. Shades of gray exist. Thus, various remedies are provided ranging from outright certificate revocation to continuing education. The apparent thinking behind Part 83 is that where circumstances do not warrant revocation, imposition of a lesser penalty will have a restorative effect on a slackened moral character. The Panel feels that this is one of those cases.

¹The proof at the hearing also established that in December of 1992 Respondent made a similar falsification on a certification application. As this was not included in the charges, it was not considered by the Panel.

²Several affidavits attesting to Respondent's good character were also submitted.

FINDINGS, CONCLUSIONS & RECOMMENDATION:

Based upon a preponderance of the credible evidence presented at the hearing, the Panel finds and concludes that a substantial question exists with respect to the Respondent's moral character, and recommends that the Commissioner suspend the Respondent's teaching certificate for a period of six months.

In witness whereof, the Panelist have affixed their signatures hereto.

s/ _____
Peter Bassett

Date: Feb. 19, 2006

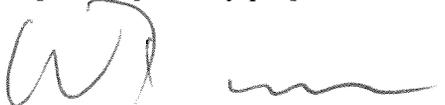
s/ _____
Stuart Horn

Date: Feb. 15, 2006

s/ _____
Bruce Loveys

Date: Feb. 18, 2006

Report respectfully prepared and submitted by



Walter Donnaruma, Hearing Officer

Date: 2/27/06

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificate held by CHRISTOPHER
MILLER to teach in the public
schools of the State of New York.

I initiated this proceeding pursuant to Part 83 of the Commissioner's regulations to review a hearing panel's findings and recommendations concerning the teaching certificate held by Christopher Miller ("respondent"). The hearing panel ("panel") concluded that a substantial question exists with respect to respondent's moral character and recommended that I suspend his teaching certificate for six months. Based upon the record, I affirm the panel's finding concerning respondent's moral character. However, I reject the recommended penalty and find instead that the record warrants the revocation of respondent's teaching certificate.

Respondent holds permanent New York State certification as a teacher of English to speakers of other languages. On April 3, 1985, respondent was convicted of Criminal Sale of a Controlled Substance (LSD), 2nd Degree, a Class A-II felony, and was sentenced to three years to life. He was awarded a certificate of relief from disabilities on December 31, 1987 and was discharged from parole on January 17, 1991.

On or about January 10, 1993, respondent submitted an application for employment to the Rensselaer-Columbia-Greene BOCES (also known as Questar III). The application asked whether the applicant had ever been convicted of a crime, to which respondent answered "No." On or about June 10, 2003, respondent submitted an application for

employment to the Oneida-Herkimer-Madison BOCES.¹ This application also asked whether the applicant had ever been convicted of a crime, to which respondent again answered "No."

Based on this information, on June 3, 2005, I issued a Notice of Substantial Question of Moral Character ("Notice") pursuant to Part 83 of the Commissioner's regulations. On December 5, 2005, I issued a Supplemental Notice of Substantial Question of Moral Character ("Supplemental Notice") pursuant to Part 83 of the Commissioner's regulations. This order was based on information received by the State Education Department ("Department") that on or about December 15, 1992, respondent submitted an application for a teaching certificate to the Department and answered "No" to the question, "Have you ever been convicted of any crime (felony or misdemeanor)?"

A hearing was held on December 12 and 13, 2005 before a three-member panel. The Department's exhibits included both the Notice and the Supplemental Notice, and the parties agreed to address respondent's criminal conviction as well as the three applications on which he lied about his criminal conviction. Respondent testified on his own behalf and introduced the testimony of several witnesses, including professional colleagues, his wife, a neighbor and a pastor in his community. The witnesses testified to respondent's commitment to teaching and to his extensive involvement in volunteer activities to help children and migrant families in his community. Each of the witnesses testified to having knowledge of respondent's past conviction.

By decision dated February 27, 2006, the panel concluded that a substantial question existed with respect to respondent's moral character. However, the panel found that the evidence of respondent's efforts at rehabilitation argued against a revocation of his teaching certificate. Therefore, the panel recommended that respondent's teaching certificate be suspended for six months. The panel reasoned,

On balance, it would appear that
[respondent's] character is not

¹ At the time respondent submitted this application, the Oneida-Herkimer-Madison BOCES was known as the Herkimer BOCES.

altogether incompatible with teaching certification. But more work remains to be done.... The apparent thinking behind Part 83 is that where circumstances do not warrant revocation, imposition of a lesser penalty will have a restorative effect on a slackened moral character. The Panel feels that this is one of those cases.

In a footnote, the panel noted that the "proof at the hearing also established that in December of 1992 Respondent made a ... falsification on a certification application. As this was not included in the charges, it was not considered"

On March 31, 2006, I issued a Notice of Intent to Review the panel's findings and recommendations to determine whether they should be adopted as the final determination of the Commissioner.

By letter dated May 1, 2006, the Department's Office of School Personnel Review and Accountability ("OSPRA") recommended that I reverse or modify the findings and recommendations of the panel. Specifically, OSPRA argues that although respondent introduced evidence regarding his good employment record and extensive volunteer activities, he had, as recently as 2003, submitted employment applications on which he lied regarding his conviction for a serious drug felony. OSPRA also contends that the panel erred in failing to consider respondent's falsification on his 1992 application to the Department for a teaching certificate. OSPRA maintains that respondent has not overcome the questions raised as to his moral character and that a six-month suspension is therefore insufficient.

I must first address OSPRA's claim that the hearing panel erred in failing to consider evidence that respondent lied on his 1992 application for a teaching certificate. The hearing transcript clearly indicates that the Department admitted as evidence both the Notice and the Supplemental Notice without objection from respondent. Indeed, the Department's attorney stated, "[I]t is my understanding after discussions with [respondent's attorney] that the respondent accepts service of the supplemental notice through his attorney, waives any 15-day

notice, and in all respects consents to going forward on both the original notice as well as the additional information contained in the supplemental notice." When asked by the hearing officer whether this statement was correct, respondent's attorney replied, "Yes." Further, respondent testified on his own behalf and admitted that he lied about his criminal conviction when he applied to the Department for a teaching certificate in 1992. Based on the record before me, I find that evidence of respondent's falsification on his teacher certification application was properly before the panel, which erred in failing to consider it.

Respondent argues that §83.5 of the regulations limits the Commissioner's review of the panel's determination to respondent's criminal conviction and does not permit review of respondent's employment and certification applications. I disagree. Section 83.5 of the regulations sets forth the grounds for an appeal of a hearing panel's determination. Section 83.5(b) provides that the Commissioner may initiate review of a hearing panel's determination in certain cases, including those involving convictions for "the criminal sale, possession or use of ... a controlled substance." Section 83.5 does not, as respondent urges, limit my review to his criminal conviction. Rather, it is respondent's criminal conviction for the sale of a controlled substance that allows me to review the panel's determination, which involves respondent's employment and certification applications as well as his criminal conviction.

Pursuant to §83.5(c) of the regulations, the Commissioner may affirm, adopt, reverse or modify the findings and recommendations of the hearing panel. In determining whether a certificate should be revoked or suspended based on a previous criminal conviction, the panel must apply the standards for denial of a license application set forth in Correction Law §752 and consider the factors specified in Correction Law §753 (8 NYCRR §83.4[e]). Correction Law §752 provides:

No application for any license or employment ... shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based

upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or
- (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Correction Law §753 identifies eight factors that must be considered in determining whether to grant a license or employment to an individual with a previous criminal conviction. They are:

The public policy of this [S]tate ... to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

The specific duties and responsibilities necessarily related to the license or employment sought.

The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

The time which has elapsed since the occurrence of the criminal offense or offenses.

The age of the person at the time of occurrence of the criminal offense or offenses.

The seriousness of the offense or offenses.

Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

(Correction Law §753[1][a] - [h]).

In addition, Correction Law §753(2) states that, in making a determination pursuant to Correction Law §752, "the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."

The panel considered the fact that more than 20 years have passed since respondent's conviction, which occurred when he was 20 years old. The panel also considered the substantial evidence submitted by respondent showing that he has spent the past 20 years engaging in educational, career and volunteer activities aimed at helping underserved populations in his area. Further, the panel deemed credible the witnesses who testified to respondent's good moral character and upstanding reputation in his community and among his professional colleagues, despite their knowledge of his criminal conviction.

The panel also considered evidence that respondent has provided false information on two employment applications in the 20 years since his conviction for a serious felony. On or about January 10, 1993, respondent submitted an employment application to the Rensselaer-Columbia-Greene BOCES. On this application, respondent answered "No" when asked whether he had ever been convicted of a crime. Respondent also admitted that on June 10, 2003, less than five years ago, he again lied when asked on an employment application to the Oneida-Herkimer-Madison BOCES whether he had ever been convicted of a crime.

Moreover, the record indicates that respondent lied on an application for a teaching certificate which he submitted to the Department on or about December 15, 1992. On this application, respondent answered "No" to the question, "Have you ever been convicted of any crime (felony or misdemeanor)?"

In its decision, the panel noted,

Teachers must serve as role models for impressionable youngsters, and supervise them after the fashion of a parent. Moral standards for teachers must, therefore, be higher. Truthfulness is an essential element in the mix of virtues that comprise moral character. In the absence of truthfulness, there can be no reliability, and without reliability, there can be no trust. The Respondent's failure in this regard, therefore, is troublesome.

While the panel was troubled by respondent's misrepresentations, it nevertheless recommended that respondent's certificate be revoked for only six months. The panel reasoned that "imposition of a lesser penalty will have a restorative effect on a slackened moral character." I disagree. Imposing a suspension for a definite term will not ensure that respondent will be rehabilitated with respect to truthfulness, and will therefore possess good moral character, when the certificate is restored at the end of six months. Despite respondent's certificate of relief from disabilities, which creates a presumption of rehabilitation in regard to the criminal offense, respondent's lack of truthfulness both to the Department and to several employers undermines his claim of good moral character. Moreover, his lack of truthfulness was not inconsequential. Indeed, it resulted in his employment under false pretenses by two BOCES, and direct contact with students, without any opportunity for a review of his fitness for such positions or for certification. Such conduct cannot be tolerated.

Based on the totality of the record before me, I find that respondent has failed to produce persuasive evidence

of his good moral character and that his certification must be revoked.

IT IS ORDERED that the panel's finding that respondent is not presently fit to return to teaching is affirmed. The panel's recommendation is hereby modified as stated herein; and

IT IS FURTHER ORDERED that the teaching certificate of Christopher Miller be and hereby is immediately revoked; and

IT IS FURTHER ORDERED that respondent shall forthwith return to the State Education Department any copies of such certificate currently in respondent's possession.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department at the City of Albany, this 7th day of March, 2008.

Richard P. Mills
Commissioner of Education

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
CHRISTOPHER L. MILLER,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
RJI NO.: 01-08-ST9086
INDEX NO.: 5702-08

-against-

RICHARD P. MILLS, as Commissioner of
Education, State Department of Education,
State of New York,

Respondent.

Supreme Court Albany County All Purpose Term, October 17, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

James R. Sanders, Esq.
Attorney for Petitioner
800 Troy-Schenectady Road
Latham, New York 12110

Andrew M. Cuomo, Esq.
Attorney General of the State of New York
Attorney for the Respondent
(Steven Schwartz, Esq. AAG)
The Capitol
Albany, New York 12224

TERESI, J.:

Petitioner commenced this Article 78 proceeding challenging respondent's revocation of his New York State Teaching Certificate. Respondent, Richard P. Mills as Commissioner of the Department of Education of the State of New York (hereinafter the "Commissioner") answered

and opposed the petition. Because the respondent applied an incorrect burden of proof in revoking petitioner's teaching certificate, the petition is granted and the matter is remanded to the respondent for further proceedings in accord with this Decision and Order.

On December 12th and 13th, 2005, the New York State Department of Education's Office of School Personnel Review and Accountability (hereinafter "OSPRA") held a hearing to determine if petitioner lacked good moral character, and if so the appropriate sanction. At such hearing petitioner admitted, and the hearing panel found, the following. In April 1985 petitioner pled guilty to Criminal Sale of a Controlled Substance in the Second Degree, a Class A-II felony. In December 1992, petitioner then, when asked on his application for his teaching certificate if he had ever been convicted of a crime (felony or misdemeanor), answered "No". Petitioner again answered "No", in January 1993 and June 2003, on two employment applications, when asked whether or not he had ever been convicted of a crime (felony or misdemeanor).

Based upon the above findings, and extensive evidence submitted by the petitioner relative to his good moral character, the hearing panel concluded that "a substantial question exists with respect to Respondent's moral character, and recommend[ed] that the Commissioner suspend the [petitioner's] teaching certificate for a period of six months". Petitioner took no appeal from this ruling. However, the Commissioner chose to review the "findings and recommendations" of the hearing panel pursuant to 8 NYCRR 83.5(b)(1). The Commissioner affirmed the hearing panel's finding with respect to petitioner's moral character, but rejected their proposed penalty. Instead, the Commissioner's revoked petitioner's teaching certificate. Petitioner now challenges such revocation.

"When reviewing a determination rendered by respondent, a court's function is limited to

determining whether it is arbitrary, capricious or irrational.” (Pearlman v. Mills, 24 AD3d 837 [3d Dept. 2005]). Closely related to such determination is whether the agency’s decision was “made in violation of lawful procedure, [or] was affected by an error of law” CPLR §7803(3).

Part 83 of the Regulations of the Commissioner (hereinafter “Part 83”), which applies to respondent’s revocation of petitioner’s certification, sets forth a comprehensive process by which petitioner was afforded notice of the accusations against him, a hearing to determine the validity of such accusations, the authorized penalties and an appeal process. (8 NYCRR §§ 83.1 - 83.6) Specifically, Part 83.4(c) states, in part: “[t]he department shall have the burden of proof of lack of good moral character.”

Here, the Commissioner failed to apply the correct burden of proof to the revocation of petitioner’s certification. The Commissioner specifically held that “[b]ased upon the totality of the record, I find that [petitioner] has failed to produce persuasive evidence of his good moral character and that his certification must be revoked.” Such holding is in direct contradiction of the above established burden of proof in this matter. While it is clear that the Commissioner reviewed the entire record, and amply considered the “totality” of the evidence presented, his holding failed to apply the correct burden of proof to such facts.

The Commissioner’s misapplication of the burden of proof in this matter causes his determination to be an “arbitrary and capricious” decision made “in violation of lawful procedure, and... affected by an error of law”. (Mills, supra, CPLR §7803[3]). As such, it is vacated.

Additionally, petitioner argued that due to 8 NYCRR §83.5(b)(1)’s restrictions on when the Commissioner may initiate a review of the hearing panel’s determination, his review should

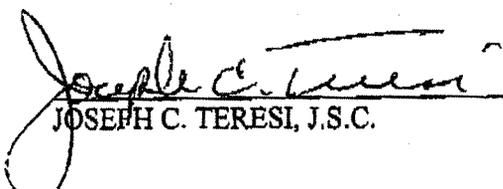
have been limited to petitioner's prior conviction. Such argument is not, however, supported by the plain language of the regulations. Part 83 does not specifically limit the Commissioner's review of the hearing panel's findings to the ground upon which he initiated his review. Rather, the statute specifically admonishes the Commissioner to affirm, adopt or reverse the hearing panel's decision "[b]ased upon the record". (8 NYCRR §83.5[c]). The Commissioner's interpretation of this regulation is "not unreasonable, [and] is entitled to deference by the courts". (Louis Harris and Associates, Inc. v. deLeon, 84 NY2d 698, 706 [1994]). As such, respondent's review of the entire record before the hearing panel is not arbitrary or capricious.

Accordingly, the Petition is granted only to the extent that this matter is remanded to the Commissioner for further administrative adjudication in accord with this Decision and Order.

All papers, including this Decision and Order, are being returned to the attorney for the Petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 28th 2008
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated July 3, 2008, Verified Petition of Christopher Miller, dated July 3, 2008, with accompanying Exhibits 1 - 54.
2. Answer, dated September 29, 2008, with attached Exhibits "A" - "C".

The University of the State of New York
Education  Department

In the Matter

of the

Certificate held by CHRISTOPHER
MILLER to teach in the public
schools of the State of New York.

On March 7, 2008, I issued a ruling pursuant to Part 83 of the Commissioner's regulations in which I concluded that a substantial question exists with respect to the moral character of Christopher Miller ("respondent") and ordered the revocation of his teaching certificate.¹

Pursuant to Article 78 of the Civil Practice Law and Rules, respondent appealed this ruling to Supreme Court, Albany County. By decision dated October 28, 2008, that court ruled that "[w]hile it is clear that the Commissioner reviewed the entire record, and amply considered the 'totality' of the evidence presented, his holding failed to apply the correct burden of proof to such facts." Thus, the court remanded the matter to me for "further administrative adjudication in accord with" its decision.

Although my prior decision in this matter does not specifically address the burden of proof in Part 83 proceedings, I note that Part 83 specifically indicates that the State Education Department ("Department") carries the burden of proof to establish an applicant's or certificate holder's lack of good moral character (8 NYCRR §83.4[c]). Thus, in this proceeding the burden of

¹ The facts and procedural history underlying this matter are set forth in the original decision.

establishing respondent's lack of good moral character was at all times on the Department.²

A hearing in this matter was held on December 12 and 13, 2005 before a three-member panel. The parties agreed to address respondent's criminal conviction as well as the three applications on which he lied about his criminal conviction. Respondent testified on his own behalf and introduced the testimony of several witnesses, including professional colleagues, his wife, a neighbor and a pastor in his community. The witnesses testified to respondent's commitment to teaching and to his extensive involvement in volunteer activities to help children and migrant families in his community. Each of the witnesses testified to having knowledge of respondent's past conviction.

By decision dated February 27, 2006, the panel concluded that a substantial question existed with respect to respondent's moral character. However, the panel found that the evidence of respondent's efforts at rehabilitation argued against a revocation of his teaching certificate. Therefore, the panel recommended that respondent's teaching certificate be suspended for six months.

On March 31, 2006, I issued a Notice of Intent to Review the panel's findings and recommendations to determine whether they should be adopted as the final determination of the Commissioner as permitted by §83.5(b) of the Commissioner's regulations.³ Upon such review, the Commissioner may affirm, adopt, reverse or modify the findings and recommendations of the hearing panel (8 NYCRR §83.5[c]).

As noted in my previous decision in this matter, in determining whether a certificate should be revoked or suspended based on a previous criminal conviction, the panel must apply the standards for denial of a license application set forth in Correction Law §752 and consider

² Under §83.4[d], a conviction for certain crimes committed subsequent to certification creates a rebuttable presumption that the individual lacks moral character. That section is inapplicable in this case where respondent's criminal conviction occurred prior to certification.

³ In its decision dated October 28, 2008, Supreme Court found that my review is not limited to respondent's prior conviction but rather a review of the entire record is appropriate.

the factors specified in Correction Law §753 (8 NYCRR §83.4[e]). Correction Law §752 provides:

No application for any license or employment ... shall be denied ... by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought ... or
- (2) the issuance ... of the license or the granting ... of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Correction Law §753 identifies eight factors that must be considered in determining whether to grant a license or employment to an individual with a previous criminal conviction. They are:

The public policy of this [S]tate ... to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

The specific duties and responsibilities necessarily related to the license or employment sought

The bearing, if any, the criminal offense or offenses for which the

person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

The time which has elapsed since the occurrence of the criminal offense or offenses.

The age of the person at the time of occurrence of the criminal offense or offenses.

The seriousness of the offense or offenses.

Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

(Correction Law §753[1][a] - [h]).

In addition, Correction Law §753(2) states that, in making a determination pursuant to Correction Law §752, "the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."

The panel considered the fact that more than 20 years have passed since respondent's conviction, which occurred when he was 20 years old. The panel also considered the substantial evidence submitted by respondent showing that he has spent the past 20 years engaging in educational, career and volunteer activities aimed at helping underserved populations in his area. Further, the panel

deemed credible the witnesses who testified to respondent's good moral character and upstanding reputation in his community and among his professional colleagues, despite their knowledge of his criminal conviction.

The panel also considered evidence that respondent provided false information on two employment applications in the 20 years since his conviction for a serious drug-related felony. Specifically, on or about January 10, 1993, respondent submitted an employment application to the Rensselaer-Columbia-Greene BOCES. On this application, respondent answered "No" when asked whether he had ever been convicted of a crime. Respondent also admitted that on June 10, 2003, less than six years ago, he again lied when asked on an employment application to the Oneida-Herkimer-Madison BOCES whether he had ever been convicted of a crime.

Moreover, the record indicates that respondent lied on an application for a teaching certificate which he submitted to the Department on or about December 15, 1992. On this application, respondent answered "No" to the question, "Have you ever been convicted of any crime (felony or misdemeanor)?"

In its decision, the panel noted:

Teachers must serve as role models for impressionable youngsters, and supervise them after the fashion of a parent. Moral standards for teachers must, therefore, be higher. Truthfulness is an essential element in the mix of virtues that comprise moral character. In the absence of truthfulness, there can be no reliability, and without reliability, there can be no trust. The Respondent's failure in this regard, therefore, is troublesome.

While the panel was disturbed by respondent's misrepresentations, it nevertheless recommended that

respondent's certificate be revoked for only six months. The panel reasoned that "imposition of a lesser penalty will have a restorative effect on a slackened moral character."

I disagree. Based on the totality of the record before me, I find that the Department has met its burden of producing persuasive evidence that respondent lacks the requisite moral character to teach in the schools of New York State. As noted above, Correction Law §753 requires consideration of several factors. Public policy encourages the licensure and employment of persons previously convicted of a criminal offense, and respondent has produced a certificate of relief from disabilities, which creates a presumption of rehabilitation in regard to his criminal offense, and witnesses who testified on his behalf. However, I find that the countervailing factors are more than sufficient to establish that respondent lacks good moral character.

Respondent's lack of truthfulness both to the Department and to two employers over an 11-year period after such certificate was issued undermines his claim of good moral character. His lack of truthfulness was not inconsequential. Indeed, it resulted in his employment under false pretenses by two BOCES, and direct contact with students, without any opportunity for a review of his fitness for such positions or for certification in light of these actions. Such conduct cannot be tolerated.

This lack of truthfulness is directly related to respondent's responsibilities as a teacher and his fitness to serve as one, both as a role model for students and as a public servant responsible for the welfare of children. Respondent was an adult who lied on these applications for public service on multiple occasions over a long period of time. This leads me to conclude that respondent presents a risk to the welfare of public school children and does not have the moral character to teach in New York State schools. Moreover, imposing a suspension for a definite term will not ensure that respondent will be rehabilitated with respect to truthfulness, and will therefore possess good moral character, when the certificate is restored at the end of six months. As a result, respondent's certification must be revoked.

IT IS ORDERED that the panel's finding that respondent is not presently fit to return to teaching is affirmed. The panel's recommendation is hereby modified as stated herein; and

IT IS FURTHER ORDERED that the teaching certificate of Christopher Miller be and hereby is immediately revoked; and

IT IS FURTHER ORDERED that respondent shall forthwith return to the State Education Department any copies of such certificate currently in respondent's possession.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 19th day of December, 2008.

Richard P. Mills
Commissioner of Education

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

CHRISTOPHER L. MILLER,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

DECISION and ORDER
INDEX NO. 2965-09
RJI NO. 01-09-ST0177

RICHARD P. MILLS, as Commissioner of Education,
STATE EDUCATION DEPARTMENT,
STATE OF NEW YORK,

Respondent.

Supreme Court Albany County All Purpose Term, March 19, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

James R. Sanders, Esq.
Attorneys for Petitioner
800 Troy-Schenectady Road
Latham, New York 12110

Andrew M. Cuomo, Esq.
Attorney General of the State of New York
Attorney for the Respondent
(Christopher Hall, Esq. AAG)
The Capitol
Albany, New York 12224

TERESI, J.:

In a closely related proceeding, on October 28, 2010 this Court reversed and remanded respondent Mills' (hereinafter "Respondent") revocation of Petitioner's teaching certificate (hereinafter "Decision and Order"). Upon remand, Respondent again revoked Petitioner's teaching certificate (hereinafter "remand determination"). Petitioner commenced this CPLR

Article 78 proceeding challenging Respondent's remand determination. Issue was joined by Respondents, who seek denial of the petition. Because Respondent's penalty is so disproportionate to the misconduct, the penalty imposed shocks this Court's sense of fairness and the petition is granted.

"[T]he penalty in a disciplinary proceeding governed by the Education Law rests within the discretion of the reviewing agency and will not be disturbed unless it is so disproportionate to the offense as to shock one's sense of fairness." (Genco v. Mills, 28 AD3d 966, 967 [3d Dept. 2006]). "This calculus involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general." (Kelly v. Safir, 96 NY2d 32, 38 [2001], Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 [1974]).

On this record, the following facts are uncontested. In 1985 Petitioner was convicted of Criminal Sale of a Controlled Substance in the Second Degree, a Class A-II felony. Thereafter, in or about 1993 Petitioner began teaching as a teacher of English to Speakers of Other Languages (hereinafter "ESOL"). He worked continuously as a teacher until 2005, when he was served with two "Notice of Substantial Question of Moral Character" charges. The charges stem from Petitioner's answering "no" to the question "Have you ever been convicted of a crime?" These clearly untruthful "no" answers were made in two employment applications and one teaching certificate application, with the last occurring almost seven years before this proceeding was commenced. The only evidence Respondent relied on to revoke Petitioner's teaching certificate were the above three untruthful "no" answers.

In contrast, also uncontested is the fact that Petitioner “has spent the past 20 years engaging in educational, career and volunteer activities aimed at helping underserved populations in his area.” (See remand determination, at 6) Petitioner submitted affidavits and testimony from his supervisors and colleagues, all of which attest to Petitioner’s high moral character and dedication to the children he taught. Demonstrative, but not exhaustive, of such evidence is an affidavit submitted by the principal of the school where Petitioner worked for twelve years, who is also the coordinator of the school district’s ESOL program. Such affidavit states that Petitioner “has consistently gone above and beyond the usual strictures of the job... [has] the highest moral character... [and] in light of [his] hard work and dedication, and his obvious compassion for the population he assists, I have no doubt as to his high moral character, and I hope for [his] speedy return to work in our school district”. On this record, such affidavit is not contradicted. Additionally, Petitioner’s 1993 through 2005 yearly teaching evaluations all demonstrate that he performed his teaching duties in a competent, proficient and consistent manner. Moreover, Petitioner offered the testimony and affidavits of numerous community members who recounted their observations of Mr. Miller’s charitable works. Each testified about Petitioner’s dedication to the migrant community, their impressions of his good moral character, and his positive reputation in the community. Respondent adopted the hearing panel’s finding that “the witnesses who testified to [Petitioner’s] good moral character and upstanding reputation in his community...” were credible.

Considering the record as a whole and not diminishing Petitioner’s three reprehensible lies, the penalty imposed is so disproportionate to his misconduct that it shocks this Court’s sense of fairness. The record demonstrates that Petitioner has devoted himself to serving an

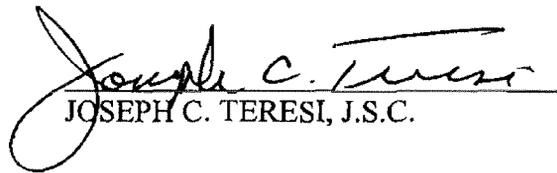
underserved population in desperate need of assistance. He opened himself up, far beyond the requirements of his employers, to truly serve those in need. He ably performed his teaching duties for twelve years, and engaged in charitable works well before being served with the instant "Notice of Substantial Question of Moral Character" charges. In applying the Kelly calculus, while the penalty of revocation would certainly have an adverse impact on Petitioner, the true harm would be felt by the underserved students and community who Petitioner has dedicated himself to over the past 20 years. As such, the revocation penalty is so severe that it is disproportionate to the misconduct and shocks this Court's sense of fairness.

Accordingly, the petition is granted. The matter is remanded to Respondent, who is directed to adopt the penalty recommended by the hearing panel.

This Decision and Order is being returned to the attorneys for the Petitioner. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 14, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated April 17, 2009, Petition of Christopher Miller, dated April 17, 2009, with accompanying Exhibits 1-57.
2. Answer, dated March 5, 2010.
3. Affirmation of James Bilik, dated February 11, 2010, with attached Exhibits A-B.

The
University of the
Education  State of New York
Department

In the Matter

of the

Certificate held by CHRISTOPHER
MILLER to teach in the public
schools of the State of New York.

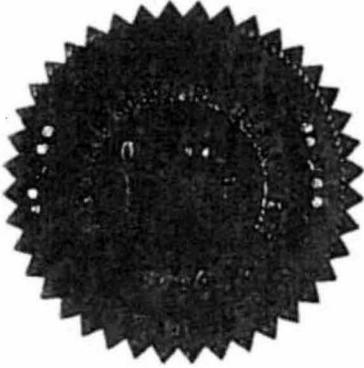
By decision dated December 19, 2008, the Commissioner found, pursuant to Part 83 of the Commissioner's regulations, that the State Education Department ("Department") had established that respondent lacked good moral character, and ordered the revocation of respondent's teaching certificate.¹

Pursuant to Article 78 of the Civil Practice Law and Rules, respondent appealed this decision to Supreme Court, Albany County. In an April 14, 2010 decision and order, that court granted the Article 78 petition and remanded the matter to me, directing that I "adopt the penalty recommended by the hearing panel."

As detailed in the previous decisions in this matter, the panel found that the evidence of respondent's efforts at rehabilitation argued against a revocation of his teaching certificate and recommended that respondent's teaching certificate be suspended for six months. In accordance with the court's decision, I now adopt the panel's recommendation.

¹ The facts and procedural history underlying this matter are set forth in the original decision.

IT IS ORDERED that the panel's recommendation that respondent's teaching certificate be suspended for six months is hereby adopted.



IN WITNESS WHEREOF, I, David M. Steiner, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 27 day of July 2010.

Handwritten signature of David M. Steiner, Commissioner of Education.

Commissioner of Education