STATE OF NORTH CAROLINA

COUNTY OF CABARRUS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 EDC 02398

Marcy L. Buri, Petitioner, v. Public Schools of North Carolina, Department of Public Instruction, Respondent.	**FINAL DECISION**

THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on June 16, 2016, in Charlotte, on the Petitioner's appeal of the denial of her application for a North Carolina teaching license. Following preparation of a transcript, and the opportunity for the parties to submit additional written arguments and proposed decisions, this Decision was prepared.

APPEARANCES

For the Petitioner: Marcy L. Buri, *pro se*
Kannapolis, N.C.

For the Respondent: Tiffany Y. Lucas
Assistant Attorney General
North Carolina Department of Justice
Raleigh, N.C.

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights, and acted erroneously, arbitrarily or capriciously, or failed to act as required by law or rule, when denying Petitioner's application for a North Carolina teaching license.

WITNESSES

For Petitioner: Marcy L. Buri
Peter Gentile, Jr.

For Respondent: Katie Cornetto
Anita Alpenfels

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: Exhibits 1 and 2

For Respondent: Exhibits 1 through 19

POST-HEARING REDACTION OF EXHIBIT

Following the closing of the record in this matter, the Clerk's Office noted that Petitioner's Exhibit 1 had been received into evidence with a legible social security number. Upon due notice to the parties, the assent of the Respondent, and without objection by the Petitioner, IT IS ORDERED pursuant to N.C. Gen. Stat. § 132-1.10(b)(5), that Petitioner's Exhibit 1 is REPLACED with an otherwise identical copy of that exhibit with the exposed social security number REDACTED.

EVIDENTIARY RULING

Admitted exhibits not meeting the standards of the specific exceptions to the hearsay rule in N.C. Gen. Stat. Chapter 8C, Article 8, or equivalent circumstantial guarantees of trustworthiness, were received for the purpose of showing the issues and allegations considered and influencing decision-makers in the administrative process preceding this hearing, when acknowledged; and as an aid, in the absence of official records, in assembling a narrative of surrounding events otherwise proven, and not for the truth of the facts relied on in making the decision in this case.

UPON DUE CONSIDERATION of the arguments and stipulations of the parties; the exhibits admitted; and the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole, in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. On January 8, 2016, the State Superintendent of Public Instruction, acting on information gathered by the State Superintendent's Ethics Committee, denied Petitioner's application for a North Carolina teaching license.

2. The notice of the decision to deny the teaching license, addressed to Petitioner, was based on two stated reasons. First, documents obtained "from Kannapolis City Schools indicating that you resigned from Kannapolis City Schools when it was shown that you had provided false and misleading statements on your employment application;" and secondly, because an October 2009 "Notice of Substantial Question of Moral Character charge brought against you by the New

York Education Department stated that 'in or about January, 2008' you had 'taught her fourth grade class in an intoxicated condition.'" *See* Respondent's Exhibit number 19 (hereinafter, "R Ex 19").

3. Petitioner is a 1997 graduate of Niagara University, with high honors in Education. She began teaching shortly after graduation, and obtained additional Masters level degrees while in service. The New York State Education Department issued Petitioner her current teaching certificate to conduct classes at the Pre-Kindergarten, Kindergarten and Grades 1-6 levels, on September 1, 2001. (R Ex 17, p 1.) During the school year prior to the hearing, she taught "reading specialty with technology integration" classes at one the North Carolina charter schools, which are permitted to hire up to 50% of their faculty from among teachers without licenses who are qualified by experience or education in their subject areas. *See*, Transcript of the Hearing, page 17, line 11 through page 18, line 12 ("Tr 17:11-18:12").

4. Petitioner was employed as a general education teacher in the Lockport City School District in Lockport, New York, from August 1999 until her resignation effective July 1, 2008. (R Ex 4, p 2; R Ex 8, p 2.) Lockport is a small town near Niagara Falls. A blogger in an adjacent community wrote that the area's "rural way of life and great people make [it] a perfect slice of old-fashioned Americana." (R Ex 13, p 5.) Petitioner and her husband were "very well known" in the community. (Tr 150:15-23.)

5. In 2007 and 2008, Petitioner went through what she described as a "very nasty, ugly, public divorce," featuring "domestic issues," and her own uncharacteristic heavy drinking, which led to her arrest on four occasions for driving while impaired ("DWI"). (Tr 9:19-23; R Ex 8, p 1.) Her colorfully belligerent statements to police helped fuel tabloid-style coverage of the incidents, which she testified sometimes included false statements of fact. (R Ex 13; Tr 150:13-156:24.) When she responded to an officer asking her name with the answer, "Britney Spears," she was charged with "Criminal Impersonation." (Tr 104:24-105:6; R Ex 5, p 3.)

6. Petitioner testified that she was arrested four times for DWI. (Tr 12:22-13:4.) On or about November 15, 2007, Petitioner pled guilty to a DWI in April 2007, and was fined. (14:8-9; R 8, p 1; R 17, p 1.) The Petitioner's second DWI arrest was on October 7, 2007, according to news reports, and may have also been disposed of along with the April charge. (R Ex 13, p 5.)

7. Petitioner was arrested on January 10, 2008, and charged with driving under the influence with a previous DWI conviction within 10 years, a felony. (R Ex 5, p 2; R Ex 17, p 1.) Her fourth DWI arrest, resulting in another felony charge, came on June 16, 2008. (R Ex 13, p 5; R Ex 17, p 1.) These and a group of lesser charges were disposed of with a plea entered on September 23, 2008, resulting in a sentence of one to three years imprisonment. (R Ex 5, p 5.) She was released after eight months in Albion State Prison. (Tr. 15:3-6.)

8. Petitioner was suspended from the classroom, with pay, in January 2008, coinciding with her third DWI arrest on January 10, 2008. (R Ex 5, p 2; R 13, p5.) She resigned from Lockport City Schools effective July 1, 2008. (R Ex 8, p 2; R 13, p 2.)

9. Following her release from prison, the Petitioner worked for overlapping periods as an administrative assistant at a church, and a hotel hospitality front desk manager. Subsequently, she began teaching overseas, briefly in Bosnia-Herzegovina and, beginning in September 2014, at the Meten International School of Foreign Language in China, where she was nominated for "Teacher of the Year." (Tr 10:12-18; R Ex 4, p 10.)

10. In October 2009, the New York State Education Department initiated proceedings against the Petitioner's teaching license, initially proposing to revoke it based on a list of "charges," some of which Petitioner denied. The matter was resolved with an agreement that Petitioner's license would be in suspension for a period of five years from the date of its execution, ending in May 2015. A condition of the agreement was that another alcohol-related conviction would extend the suspension for five years from the date of that conviction. The primary stipulations of the agreement were that the Department would "withdraw, with prejudice, the … charges," and that conversely, Petitioner "admit[ed] the conduct alleged in the charges," effectively immunizing each other from future liable or disciplinary actions, respectively. This agreement is not, and specifically does not purport to be, a statement or competent evidence that the "charges" are true. (R Ex 17.)

11. In early 2015, Petitioner was made aware of opportunities at Kannapolis City Schools ("KCS") by a relative employed with that system, and provided credentials and test scores to their human resources employees and an elementary school principal. (Tr 18:23-19:18.) She sent her "original application," which is not in the record, on March 4, 2015. (R Ex 7, p 1.) In an email dated March 25, 2015, she wrote that her "license is currently on suspension due to the DWI I eluded to in the application. It's not something I'm proud of … However, everything will be defaulted back to 'Active' and good-standing status on May 25th …." (R Ex 2, p 2.)

12. While Petitioner informed KCS as early as March 4, 2015 about the suspension of her teaching license, and the fact that it resulted from "the" DWI arrest, she made no mention of serving time at Albion State Prison, and concealed the gap in her work history that would have invited questions. Specifically, she listed her period of employment at Lockwood City School District as "08/1999 – 08/2009" in her resume and application, although she had been suspended from teaching in January 2008, and resigned her employment there effective July 1, 2008. Her references to her legal problem also gave the impression that there was a single DWI. The contemporaneous documents suggest that her statements about these matters inspired confidence that she was being forthcoming. (R Ex 2, p 2; R Ex 7, p 1; R Ex 8, p 9.)

13. It seems clear that Petitioner never formed the intent or expectation that she would or could keep her imprisonment and the depths of her problems in 2007-08 a secret from KCS, because she supplied the school system with information that would lead to those facts. In particular, she faxed KCS the "Certificate of Relief from Disabilities" issued by the State of New York, listing her sentence of "1 to 3 three years [in] prison," on July 23, 2015, a month before she received her employment contract. (R Ex 5, p 5; R Ex 7, p 4.) She apparently felt that if she could present the worst facts "in person" – as she requested in her July application -- KCS's hiring manager would be persuaded, as previous employers were, that with the passage of time, and her commendable record during that time, her history was no longer disqualifying. (R Ex 4, p 10.) That conversation never took place.

14. When Petitioner prepared her application at KCS offices on July 21, 2015, KCS's human resources personnel insisted that she provide her criminal records as soon as possible. She returned to New York, and faxed the "Certificate of Relief from Disabilities," and possibly other court transcripts not in this record, on July 23, 2015. (P Ex 2; R Ex 8. p 2; Tr 95:3-16; R Ex 18, p 1-3.) The notes of KCS personnel confronting Petitioner about her convictions on September 8, 2015, and her testimony at hearing, suggests that she believed she had made full disclosure, and that KCS knew all the details of her criminal history after the New York records were faxed to KCS on July 23, 2015. (R Ex 8, p 2; Tr 20:1-21:6, 28:14-29:13 & 144:15-146:3.)

15. The impression KCS gave Respondent, and their notes of the September 8, 2015 meeting with Petitioner, suggests that they were surprised to learn on that date that Petitioner had served time in prison. (Tr 73:8-13; Tr 98:19-23; R Ex 8, p 1.) The transcript with the "Certificate of Relief from Disabilities" listed only the single DWI she pled guilty to at the September 23, 2008 court appearance, although if "- EF – DWI – PREV CONVICTION IN 10 YRS -N-003" was deciphered, it would have been understood that she had at least one other DWI within the previous 10 years. (R Ex 5, p 2.) It appears that the prior information they had received predisposed KCS personnel to assume that the "1 to 3 years" sentence referenced in the transcript had been suspended. The meeting of September 8, 2015 was held in reaction to parents of children in the Kannapolis City Schools who had seen articles on the internet about the Petitioner's convictions, and complained to Petitioner's principal and the school district. (Tr 79:22-80:9.)

16. Petitioner also stated on her KCS employment application that she had never failed a drug or alcohol test. (R Ex 4, p. 11.) However, in the September 8, 2015 meeting, she recalled failing one breathalyzer test (and refusing all others). (R Ex 8, p. 2.) One newspaper articles quoted an Assistant District Attorney as saying that Petitioner had failed alcohol tests required by a probation officer. (R Ex 13, p. 4.) Petitioner's testimony inferred that she felt the question concerned only employment related "alcohol and drug" tests.

17. Petitioner adamantly and credibly testified that she had not "taught her fourth grade class in an intoxicated condition" at Lockwood. (Tr 151:16-24.) The allegation first appears in the New York State Education Department's "Notice of Substantial Question of Moral Character," prepared after Petitioner had been discharged from prison, some 10 months after the alleged event, and is not attributed to any specific source. (R Ex 17, p 2.) While it was suggested that this claim appeared in newspaper reports, the two statements in the admitted articles concerning complaints about her presence in the classroom following DWIs each omitted any mention of alcohol, in contexts where at least some reference would be expected. (R 13, pp 3 & 4.)

18. Petitioner appealed the decision not to grant her application for a teaching license by timely filing a Petition for a contested case hearing in the Office of Administrative Hearings on February 29, 2016.

19. The Petition alleged that Respondent's denial of Petitioner's application for a North Carolina teaching license deprived her of property, ordered her to pay a fine or civil penalty, or otherwise substantially prejudiced her rights; and, that in doing so, the Respondent exceeded its

authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule.

20. No evidence was received which tended to show that Petitioner was deprived of any vested property right by Respondent; that Respondent fined or assessed a civil penalty against the Petitioner; or, that Respondent used improper procedure, or exceeded its authority or jurisdiction, when determining whether to issue Petitioner the North Carolina teaching license.

21. The preponderance of the competent evidence of record shows that the Petitioner concealed material facts when completing her application for a teaching position with Kannapolis city schools in July 2015.

22. The preponderance of the competent evidence of record does not support a finding that the Petitioner taught her fourth grade class in Lockport, New York while intoxicated.

23. The Office of Administrative Hearings gave the parties due notice of the hearing on May 11, 2016.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. §§ 115C-12(9)a.; 150B-1(c); 150B-23(b) and (f); 16 NCAC 6C .0312(c).

2. To the extent the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

3. An administrative law judge shall "examine witnesses when deemed necessary to make a complete record and to aid in the full development of material facts in the case." 26 NCAC 03 .0105(4).

4. Except in cases of automatic revocations due to conviction of serious felonies or the abuse of minors, the North Carolina State Board of Education is authorized to deny an application for a teaching license, or suspend or revoke a teaching license, for specified reasons at 16 NCAC 06C .0312(a). The State Board of Education has delegated this duty to the Superintendent of Public Instruction, who leads the Respondent North Carolina Department of Public Instruction. N.C. Gen. Stat. §§ 115C-12(9)a.; 115C-21(a)(5); 16 NCAC 06C .0312; *Richardson v. N.C. Dept. of Pub. Instr*., 199 N.C.App. 219, 681 S.E.2d 479, 482-85 (2009).

5. In teacher licensure cases, the Petitioner bears the burden of proving at an administrative hearing, by a preponderance of the evidence, that she is entitled to relief from the action of the administrative agency, even if she must prove a negative. *Richardson v. N.C. Dept. of Pub. Instr*., 199 N.C.App. 219, 681 S.E.2d 479, 485 (2009); *Overcash v. N.C. Dep't of Env't &*

Natural Res., 179 N.C.App. 697, 635 S.E.2d 442 (2006); N.C. Gen. Stat. §§ 150B-25.1(a); 150B-34(a).

6. The Superintendent of Public Instruction may deny an application for a North Carolina teaching license if the applicant has concealed material facts when completing an application for a teaching position. 16 NCAC 06C .0312(a)(8).

7. Petitioner failed to carry her burden of proof that Respondent's denial of her application for a North Carolina teaching license deprived her of property, ordered her to pay a fine or civil penalty, or otherwise substantially prejudiced her rights; and, that in doing so, the Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. N.C. Gen. Stat. §§ 150B-23(a); 150B-25.1(a).

Based on the foregoing, the undersigned makes the following:

DECISION

The Respondent's decision to deny Petitioner's application for a North Carolina teaching license must be, and hereby is, **UPHELD**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 4th day of October, 2016.

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J Randolph Ward
Administrative Law Judge