STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COREY HODGES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-3048
	)	
DR. ERIC J. SMITH, AS COMMISSIONER OF EDUCATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by T. Kent Wetherell, II, the assigned Administrative Law Judge of the Division of Administrative Hearings, on September 1, 2009, in Bunnell, Florida. Upon Judge Wetherell's elevation to the District Court of Appeal, First District, this cause was transferred to Administrative Law Judge Linda M. Rigot for entry of a recommended order.

APPEARANCES

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For Respondent: Edward T. Bauer, Esquire
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STATEMENT OF THE ISSUE

The issue presented is whether Petitioner's application for an educator's certificate should be granted.

PRELIMINARY STATEMENT

In a Notice of Reasons dated March 30, 2009, the Department of Education (Department) gave notice of its intent to deny Petitioner's application for an educator's certificate. On April 24, 2009, Petitioner filed with the Department an Election of Rights form in which he requested an administrative hearing regarding that denial. On June 8, 2009, the Department transferred this matter to the Division of Administrative Hearings to conduct the hearing requested by Petitioner.

The final hearing was initially scheduled for July 30, 2009, but was re-scheduled for September 1, 2009, based upon the Department's unopposed motion. At the commencement of the hearing, the Department made an ore tenus motion to amend the Notice of Reasons to remove Counts 3 and 7 as grounds for denial of Petitioner's application. Petitioner had no objection, and the motion was granted. Similarly, the Department's ore tenus motion to correct the statutory citation in Count 2 was unopposed and granted.

Petitioner testified on his own behalf and also presented the testimony of Terry N. Thomas, Nicole Marine, Diane Thomas,

and Lawrence C. Smith. The Department presented the testimony of Darrel Grabner and Jerry N. Livingston, Jr. Petitioner's Exhibit numbered 1 was received in evidence, as were the Department's Exhibits numbered 1 through 10.

The parties were afforded 28 days from the date on which the Transcript of the final hearing was filed by which to file their proposed recommended orders. The Transcript was filed on September 16, 2009. A September 24, 2009, unopposed Motion to Extend Time to File Proposed Order until October 23, 2009, was granted by Order entered September 25, 2009. A subsequent unopposed Motion to Extend Time to File Proposed Order until November 2, 2009, was granted by Order entered October 21, 2009. Both parties timely filed their proposed recommended orders, and those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is 31 years old. He has lived in Florida for the past 11 years.

2. Petitioner works at a rehabilitation center that provides services to individuals with substance abuse problems. He has worked in that job for about a year. As a client advocate, he works with children 16 years of age and older.

3. For ten years Petitioner has served as a volunteer basketball coach in the Flagler County Police Athletic League

(PAL). He currently coaches the high-school-aged girls' travel team. Over the years he has coached boys and girls in the fourth grade through the twelfth grade.

4. For three or four years Petitioner has been a volunteer in a church-based youth ministry program. He supervises, mentors, and provides encouragement to the children in the program.

5. Petitioner applied for an educator’s certificate so that he can coach basketball at the high school level. He does not need the certificate to continue coaching in the PAL, but he needs the certificate to work or even volunteer as a high school coach.

6. Petitioner was employed as a certified correctional officer at Tomoka Correctional Institution (TCI) for about four years, until September 23, 2007. TCI is a state prison in Volusia County, Florida, operated by the Florida Department of Corrections (DOC).

7. As Petitioner was driving to work at TCI on September 23, 2007, he saw a team of DOC investigators conducting a drug interdiction at the facility. He pulled his car over to the side of the facility’s entrance road and threw a small package out of the car window before proceeding to the parking lot. TCI staff saw Petitioner throw the package from

his car and informed the DOC investigators. The DOC investigators went to the area and recovered the package.

8. The package contained marijuana. It was in a plastic baggie and had been tightly wrapped in paper towels and then covered with medical tape.

9. The manner in which the marijuana was wrapped is consistent with the most common way that drugs are packaged when they are smuggled into a prison. The package was small enough and flat enough to be hidden in a man's boot or around his crotch area and not be detected during a cursory pat-down search.

10. After Petitioner was told by DOC investigators that a drug-sniffing dog alerted to his car, he voluntarily spoke to the investigators and admitted that the package found next to the entrance road was thrown there by him, that he knew it contained marijuana, and that he threw it out of his car when he saw the drug interdiction team at the facility. However, Petitioner denied that he planned to sell or give the marijuana to an inmate or anyone else “inside the walls” of the facility.

11. Petitioner told the DOC investigators, and he testified at the final hearing, that he received the marijuana the day before the incident while he was at a fundraising car wash for his PAL basketball team. The children on the

basketball team were at the car wash when the marijuana was delivered, as were Petitioner's children.

12. Petitioner told the DOC investigators, and he testified at the final hearing, that his sister-in-law called him before the car wash and asked him to help her by allowing a friend to bring marijuana for her to Petitioner at the car wash. She said she would later pick it up from Petitioner.

13. Petitioner told the DOC investigators, and he testified at the final hearing, that he did not give much thought to her request because she was a family member and one should always help out family members. When the marijuana was delivered, Petitioner was at his car which was a distance away from where the cars were being washed. He wrapped the marijuana in paper towels and medical tape, which he had in his car from a prior injury, so that his children, who were helping wash the cars, would not see it when he drove them home in his car.

14. His sister-in-law did not come to pick up the marijuana after the car wash. He forgot that the marijuana was in his car until he was close to work the next day. When he saw the interdiction team at TCI, he stopped and threw the marijuana out of the car. He then drove into the parking lot, parked his car, and went in to work.

15. Petitioner was immediately arrested after his confession to the DOC investigators. He was charged with

possession of more than 20 grams of marijuana and introduction of contraband into a state prison. Both of those charges are felonies, but for reasons not explained in the record, the State Attorney elected not to prosecute either of the charges.

16. Petitioner was immediately fired from TCI after his arrest, and he subsequently lost his certification as a correctional officer.

17. Petitioner testified that he understands that what he did was wrong, that he is sorry for what he did, and that he will never do it again. This testimony appeared to be sincere.

18. The character witnesses who testified on Petitioner's behalf at the final hearing all testified that Petitioner is a good person and a good role model for the children that he coaches and mentors; that this incident was out of character for Petitioner; and that they have no concerns about Petitioner working with children. This testimony was sincere and clearly heartfelt.

19. Although the DOC investigators weighed the marijuana while it was still wrapped and determined that it weighed 37.8 grams, they did not weigh the marijuana itself after removing it from its packaging. There is no competent evidence in this record as to the weight of the marijuana. Accordingly, it cannot be determined whether the amount of marijuana Petitioner

threw from his car would have constituted a felony or a misdemeanor.

20. Similarly, there is no competent evidence in this record as to whether Petitioner was on the grounds of a state prison when he threw the marijuana from his car. There are no security fences, no checkpoints, and no security towers before one reaches the signage for the correctional facility and its attendant structures. Petitioner believed that he would have been on prison property if he had passed by the signage for the facility and had crossed the road surrounding the perimeter of the prison. One of the DOC investigators testified that the property boundary was several hundred yards before the entrance sign. The photographs admitted in evidence visually suggest that the correctional facility's property commences beyond the sign and beyond the location where Petitioner threw out the marijuana. There is no competent evidence as to whether Petitioner was on state property with the marijuana in his possession.

21. Petitioner denies that he intended to introduce contraband into the correctional facility. Rather, his actions in throwing the marijuana out of his car at a location he believed to be outside of the facility's property suggest he did not intend to bring the contraband onto the grounds of the facility.

22. Petitioner has met the qualifications for obtaining an educator's certificate to enable him to coach basketball on the high-school level.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

24. Section 1012.56, Florida Statutes, provides that the Department is the state agency responsible for determining eligibility for an educator's certificate.

25. Petitioner has the burden to prove by a preponderance of the evidence that he meets the applicable requirements for certification. The Department has the burden to prove by a preponderance of the evidence that Petitioner fails to meet the criteria for the reasons set forth in its Notice of Reasons for denial of Petitioner's application. See Dept. of Banking & Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). Petitioner has met his burden of proving entitlement to an educator's certificate, and the Department has failed to prove that Petitioner's application should be denied.

26. The general criteria for certification are set forth in Section 1012.56(2)(a)-(i), Florida Statutes. The only criterion the Department contends that Petitioner does not meet

is paragraph (e), which requires the applicant to “[b]e of good moral character.”

27. Even if an applicant meets the criteria in Section 1012.56(2)(a)-(i), Florida Statutes, an application for certification may be denied “if the department possesses evidence satisfactory to it that the applicant has committed an act or acts, or that a situation exists, for which the Education Practices Commission would be authorized to revoke a teaching certificate.” § 1012.56(12)(a), Fla. Stat.

28. The Education Practices Commission is authorized to revoke an educator's certificate if the person:

> (d) Has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education.
>
> * * *
>
> (j) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

§ 1012.795(1), Fla. Stat.

29. The Department’s rules do not include a definition of “gross immorality." Instead, the rules define “immorality” as:

> conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public

> disgrace or disrespect and impair the individual’s service in the community.

Fla. Admin. Code R. 6B-4.009(2).

30. The Department’s rules define “moral turpitude” as:

> a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

Fla. Admin. Code R. 6B-4.009(6).

31. The Principles of Professional Conduct for the Education Profession in Florida provide in pertinent part:

> (5) Obligation to the profession of education requires that the individual:
>
> (a) Shall maintain honesty in all professional dealings.

Fla. Admin. Code R. 6B-1006.

32. The factual allegations forming the basis for the Department's denial of Petitioner's application were two-fold: (1) fraudulent information on Petitioner's application, and (2) Petitioner's possession of and introduction of marijuana into a correctional institution. At the commencement of the final hearing the Department admitted that Petitioner had submitted no fraudulent information and dismissed Count 3 and 7 of the Notice of Reasons.

33. Count 1 of the Notice of Reasons alleges that Petitioner lacks good moral character as required by Section 1012.56(2)(e), Florida Statutes. Petitioner has established his good moral character. The only evidence proven by the Department to show that Petitioner lacks good moral character is Petitioner's admission that for one day he possessed an unknown quantity of marijuana. Although Petitioner's agreement to do his sister-in-law that favor cannot be justified, it cannot be concluded that that single act defines his character.

34. Count 2, as amended, of the Notice of Reasons alleges that Petitioner has violated Section 1012.56(12)(a), Florida Statutes, because Petitioner has committed an act for which the Education Practices Commission would be authorized to revoke his certificate if he were certified. This Count is interrelated with Counts 4 and 5, which allege that Petitioner is guilty of violating Section 1012.795(d) and (j), Florida Statutes, because he is guilty of gross immorality or an act involving moral turpitude as defined by rule and/or of violating the Principles of Professional Conduct.

35. Petitioner cannot be found guilty of gross immorality as defined by rule since there is no rule providing a definition, as is required by the statute. Further, the definition of moral turpitude requires evidence of a crime or conduct that is base, vile, or depraved. There is no competent

evidence that Petitioner intended to introduce contraband into a correctional facility. Rather, the evidence indicates that Petitioner intended to not introduce the contraband since he threw it away. Further, only opinion testimony was offered as to the boundaries of the property where the correctional facility is located and as to whether Petitioner was within the boundaries. The State Attorney declined to prosecute Petitioner on this charge. Since neither the crime nor the conduct has been proven, it cannot be said that the crime or conduct was base, vile, or depraved.

36. Similarly, Petitioner was neither prosecuted for nor convicted of possessing marijuana. Although he admitted to the investigators at the time and during the final hearing in this cause that he possessed the marijuana from one afternoon until the next morning, that in and of itself cannot be considered base, vile, or depraved. The Department's failure to prove the quantity of marijuana must also be considered since the Department argued at page 85 of the Transcript that there is a big difference between felony possession and misdemeanor possession.

37. The Department has, accordingly, failed to prove by a preponderance of the evidence that Petitioner is guilty of gross immorality or an act involving moral turpitude, as alleged in Counts 2 and 4 of the Notice of Reasons.

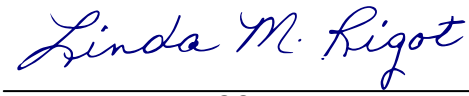
38. Counts 2 and 5 are also interrelated in that the Education Practices Commission would be authorized to revoke a certificate for a violation of the Principles of Professional Conduct. Count 6 provides the specific principle which the Department alleges Petitioner has violated, and that is the requirement that Petitioner maintain honesty in all professional dealings. The Department argues that Petitioner violated this principle by bringing contraband into a correctional institution. Since there is not a preponderance of evidence that Petitioner did so, then the Department has failed to prove the allegations of Counts 2, 5, and 6, as alleged in the Notice of Reasons.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order granting Petitioner’s application for an educator’s certificate.

DONE AND ENTERED this 2nd day of December, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.