STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ORANGE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-6719
	)	
MARIA GARRISON,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on June 10, 2010. The ALJ conducted the hearing by video teleconference in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: John C. Palmerini, Esquire
Orange County School Board
445 West Amelia Street
Orlando, Florida 32801

For Respondent: Tobe M. Lev, Esquire
Egan, Lev & Siwica, P.A.
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STATEMENT OF THE ISSUES

The issues are whether Petitioner has just cause, within the meaning of Subsection 1012.33(1)(a), Florida Statutes (2007),[1] to terminate Respondent's professional service contract

as an instructional employee, and, if so, whether termination of the contract is reasonable under the facts and circumstances of this case.

PRELIMINARY STATEMENT

On September 21, 2009, Petitioner filed an Administrative Complaint against Respondent. Respondent requested an administrative hearing.

At the hearing, Petitioner presented the testimony of four witnesses and submitted 15 exhibits for admission into evidence. Respondent presented the testimony of two witnesses and submitted two exhibits.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the Transcript of the hearing filed with DOAH on June 25, 2010. Petitioner and Respondent filed their respective Proposed Recommended Orders on July 6, 2010.

FINDINGS OF FACT

1. Petitioner employed Respondent as a classroom teacher from some time in 1998 until September 8, 2009, pursuant to a professional service contract. Petitioner relieved Respondent from the duties of her employment without pay on September 8, 2009.

2. On September 21, 2009, Petitioner filed an Administrative Complaint against Respondent. Most of the material facts in the Administrative Complaint are undisputed.

3. On December 12, 1999, Respondent was arrested for cocaine possession, a third-degree felony, and narcotic equipment possession, a first-degree misdemeanor. Respondent successfully completed a pretrial diversion program, and the charges were nolle prossed and expunged.

4. Respondent did not report the criminal matter to Petitioner. The failure to report the criminal matter violated the self-reporting requirements in Management Directive A-10, Guidelines on Self-Reporting of Arrest and Convictions by Employees (the self-reporting requirements).

5. On July 10, 2000, Respondent was arrested for driving under the influence (DUI), which was a first conviction. Respondent pled nolo contendere to a reduced charge of reckless driving and entered and successfully completed a pretrial diversion program.

6. Respondent did not report the DUI matter to Petitioner. The failure to report the DUI matter violated applicable self-reporting requirements.

7. On June 18, 2002, Respondent was arrested on a misdemeanor battery charge. The alleged victim dropped the

charge, but Respondent did not report the incident to Petitioner in violation of the applicable self-reporting requirements.

8. On July 6, 2006, Respondent violated Petitioner's Drug Free Workplace Policy by reporting to work at Rolling Hills Elementary School under the influence of alcohol. On July 9, 2006, Respondent entered into an agreement with Petitioner identified in the record as a Last Chance Agreement.

9. The Last Chance Agreement was in effect for the 2006-2007 and 2007-2008 school years. The Last Chance Agreement provides, in relevant part, that if justifiable grounds of discipline, rising to the level of a written reprimand or dismissal, occur during the school year, Respondent shall forfeit her right to be employed by Petitioner, and the Last Chance Agreement shall constitute a voluntary resignation from employment.

10. The 2007-2008 school year ended on June 6, 2008. On May 30, 2008, Respondent failed to disclose on the renewal application for her Florida Educator's Certificate the expunged criminal record, pretrial diversion program, and plea of nolo contendere previously discussed. Respondent checked "no" to the following question:

> Have you ever had any record sealed or expunged in which you were convicted, found guilty, had adjudication withheld, entered a pretrial diversion program or pled guilty or nolo contendere (no contest) to a criminal

offense other than a minor traffic violation (DUI is not a minor traffic violation)?

10. On March 20, 2009, the Education Practices Commission imposed several penalties against Respondent's teaching certificate for the violations that occurred during the 2007-2008 school year. The Commission issued a written reprimand, imposed administrative fines in undisclosed amounts, and placed Respondent on two years' probation.

11. The disputed issue is whether Respondent's failure to disclose her criminal history on the renewal application for her Florida Educator's Certificate was intentional. Respondent claims the failure was not intentional, but was induced by post-traumatic stress syndrome (PTSS) caused by two statutory rapes that occurred when Respondent was 13 and 15 years old.

12. When Respondent was 13 years old, a man who was approximately 33 years old "took her virginity." Respondent had an abortion, experienced a great deal of shame and guilt, and began self-medicating with alcohol and drugs.

13. When Respondent was 15 years old, one of Respondent's high school teachers molested her. Respondent again experienced guilt and shame, did not disclose the incident, and continued using alcohol and drugs.

14. Respondent presented expert testimony concerning the effects of PTSS. The expert testimony concludes that PTSS could

have caused Respondent to drink excessively and fail to disclose her criminal history on the renewal application for her Florida Educator's Certificate. However, the expert testimony fell short of concluding that PTSS in fact induced Respondent to fail to disclose the criminal history on her application.

15. Respondent's own testimony is that she had five or six glasses of wine the night she completed the application. Respondent completed the application without giving it much thought. On balance, a preponderance of the evidence does not support a finding that PTSS caused Respondent to fail to disclose her criminal history on the renewal application for her Florida Educator's Certificate.

16. Several mitigating facts support a penalty less than termination of the professional service contract. The non-disclosure of facts was a harmless error to Petitioner. Petitioner had actual prior knowledge of all of the facts that Petitioner complains Respondent omitted from the application.

17. The state licensing authority has knowledge of the non-disclosed facts. Respondent has already been disciplined for non-disclosure to the state licensing authority.

18. When the Last Chance Agreement was entered into in 2006, Respondent was incorrectly diagnosed and treated for bipolar disorder. The treatment for bipolar disorder was ineffective during the term of the Last Chance Agreement.

19. Respondent has been alcohol-free since September 2008, when she placed herself in a residential alcohol treatment program in Clearwater, Florida. Beginning in the early part of 2010, Respondent has been correctly diagnosed and treated for PTSS by Joseph L. Trim, Ed.D, a licensed mental health counselor and addiction specialist. That diagnosis and treatment appears to be effective for Respondent.

20. Based on the testimony of the school principal who testified for Respondent, Respondent is an experienced and competent teacher who has not lost her effectiveness in the classroom. For each school year from 1998-1999 through 2004-2005, Petitioner evaluated Respondent as effective in the classroom.

21. Respondent has already received a reasonable penalty for violating the Last Chance Agreement, when Respondent was improperly diagnosed and treated for bipolar disorder. Petitioner has suspended Respondent from her employment without pay from September 8, 2009, to the present.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569, 120.57(1), Fla. Stat. (2009). DOAH provided the parties with adequate notice of the final hearing.

23. The burden of proof is on Petitioner. Petitioner must show by a preponderance of the evidence that just cause exists to terminate Respondent's professional service contract for the reasons stated in the Administrative Complaint and that termination is an appropriate penalty. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

24. Petitioner satisfied its burden of proof that just cause exists to impose discipline against Respondent's professional service contract. However, a preponderance of the evidence does not support a finding that termination of the contract is reasonable under the circumstances.

25. The failure of Respondent to disclose her criminal history on the renewal application for her Florida Educator's Certificate was not an intentional attempt to deceive the licensing authority. The fact-finder must resolve conflicts in the evidence and decide fact questions one way or the other. Dunham v. Highlands County School Board, 652 So. 2d 894, 896 (Fla. 2d DCA 1995); Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Department of Professional Regulation v. Wagner, 405 So. 2d 471, 473 (Fla. 1st DCA 1981).

26. The trier of fact resolved the evidential conflict in favor of Respondent. The fact-finder is the sole arbiter of

credibility. Bejarano v. State, Department of Education, Division of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA 2005); Hoover, M.D. v. Agency for Health Care Administration, 676 So. 2d 1380, 1384 (Fla. 3d DCA 1996); Goss v. District School Board of St. Johns County, 601 So. 2d 1232, 1234 (Fla. 5th DCA 1992).

27. A preponderance of evidence does not support a finding of dishonesty. The adequacy of Respondent's conduct is not infused with agency expertise. The evaluation of Respondent's conduct is a question of fact to be determined by the trier of fact. See Yeoman v. Construction Industry Licensing Board, 919 So. 2d 542 (Fla. 1st DCA 2005); Palamara v. State, Department of Professional Regulation, 855 So. 2d 706 (Fla. 4th DCA 2003); Bush v. Brogan, 725 So. 2d 1237, 1239-1240 (Fla. 2d DCA 1999); Dunham v. Highlands County School Board, 652 So. 2d 894, 896 (Fla. 2d DCA 1995); Albert v. Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission, 573 So. 2d 187 (Fla. 3d DCA 1991).

28. In assessing conduct involving the non-disclosure of criminal history, the ALJ has been guided by analogous judicial precedent involving applicants for admission to the Florida Bar. As officers of the court, licensed attorneys are not held to a lesser standard of conduct than classroom teachers. The Florida Supreme Court has held that an attorney who omitted a prior

criminal conviction for possession of marijuana from his application to the Florida Bar is not precluded from practicing law in the state. In Re: Application of VMF For Admission To The Florida Bar, 491 So. 2d 1104 (Fla. 1986).

29. Some cases stand for the proposition that the trier of fact may draw an inference of impaired effectiveness from the nature of the offense. Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000); Walker v. Highland County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000); Summers v. School Board of Marion County, 666 So. 2d 175 (Fla. 5th DCA 1996). Unlike the cited cases, this proceeding includes direct evidence in the testimony of Respondent's principal that Respondent continues to be an effective educator. An inference authorized in the cited cases would require the fact-finder to ignore the direct evidence of unimpaired effectiveness.

RECOMMENDATION

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

RECOMMENDED that the Orange County School Board enter a final order reinstating Respondent's employment with her current principal, requiring Respondent to continue her current therapy with Dr. Trim, requiring Respondent to submit to random drug screening, and extending the term of the Last Chance Agreement for another two years.

DONE AND ENTERED this 23rd day of July, 2010, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of July, 2010.

ENDNOTE

[1/] References to subsections, sections, and chapters are to Florida Statutes (2007), unless otherwise stated.

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.