STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAPPI ARROYO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-2799
	)	
DR. ERIC J. SMITH, AS COMMISSIONER OF EDUCATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On December 6, 2011, a duly-noticed hearing was held in Ocala, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Peter J. Caldwell, Esquire
Florida Education Association
300 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Ron Weaver, Esquire
Post Office Box 5675
Douglasville, Georgia 30154

STATEMENT OF THE ISSUE

Whether Petitioner's application for a Florida Educator's Certificate should be granted or denied for the reasons set forth in the Notice of Reasons issued by Respondent on December 13, 2010.

PRELIMINARY STATEMENT

Respondent notified Petitioner on December 13, 2010, that the Department of Education intended to deny her application for a Florida Educator's Certificate. The Notice of Reasons cited six alleged statutory violations as grounds for the denial, as discussed below.

Petitioner requested formal hearing and on June 3, 2011, the matter was referred to the Division of Administrative Hearings. The hearing was originally set for August 9, 2011. The hearing was continued, a change of venue was granted, and the case was placed in abeyance.

On October 7, 2011, Respondent's unopposed Request for Judicial Notice of the judgment in the underlying criminal case relevant to this hearing was granted.

The final hearing was re-scheduled for December 6, 2011.

At hearing, Petitioner requested official recognition of Chapter 2008-108, Laws of Florida, two District Court of Appeal cases, and an Educational Practices Commission case, which was granted. At Respondent's request, official recognition was also given to the Federal Controlled Substances Act, 21 U.S.C. §§ 841(a)(1) and 21 U.S.C. s. 846 (1986), and Rule 11 of the Federal Rules of Criminal Procedure. Petitioner testified on her own behalf and presented the testimony of Miriam Needham, Troy Sanford, Marian Lambeth and Elinor Evans. Petitioner's

Exhibits P-1 through P-9 were admitted without objection. Respondent offered the testimony of Elinor Evans and Marian Lambeth, and offered Respondents Exhibits R-1 through R-4, which were admitted without objection. Exhibit R-3 was admitted as evidence of the guilty plea and essential elements, but not as evidence of specific facts peculiar to Petitioner's case, as discussed below. Requests to take official recognition of the Public Access to Court Electronic Documents (PACER) website and a printed page from the PACER website containing case history information on the criminal case pertinent to this hearing were denied, as discussed below. Respondent was granted permission to late-file a transcript of the plea colloquy for Petitioner's underlying criminal case as Exhibit R-7. On January 3, 2012, Respondent filed a Request for Official Recognition of an 83-page court file of Petitioner's federal criminal case, noting that the transcript of the plea colloquy was not available. Petitioner filed no objection to the request, but argued in her Proposed Recommended Order that it should not be considered. The 83-page court record is not admitted, as discussed below.

The Transcript of the hearing was filed on January 10, 2012. Petitioner filed two unopposed motions to extend the time to file Proposed Recommended Orders, which were granted. Proposed Recommended Orders were filed by the parties on

March 23, 2012, and were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the following Findings of Fact are made:

1. Ms. Cappi Cay Arroyo[1/] was born in Boulder, Colorado, on September 16, 1964.

2. On or about August 22, 1986, Ms. Arroyo knowingly and intentionally distributed cocaine to another person, knowing that what was distributed was cocaine or some other prohibited drug. From 1984 until in or about December 1986, she willfully and knowingly entered into an agreement to accomplish the illegal objective of the distribution of cocaine, with the intent to commit the offense of distribution of cocaine.

3. Ms. Arroyo pled guilty pursuant to a plea agreement and was convicted of the offenses of distributing cocaine under 21 U.S.C. § 841(a)(1) and of conspiracy to distribute cocaine under 21 U.S.C. § 846 in the United States District Court for the District of Hawaii.

4. Ms. Arroyo committed acts involving moral turpitude.

5. On January 28, 1988, Ms. Arroyo was sentenced to two years imprisonment with a Special Parole Term of three years, with the execution of the sentence suspended and Ms. Arroyo placed on probation for a period of five years, on the condition

that she pay a fine of $500.00 and serve 100 hours of community service.

6. On April 3, 1991, Ms. Arroyo was discharged from probation.

7. Ms. Arroyo later returned to Colorado. She attended Colorado Christian University and received her Bachelor's Degree in Computer Information Systems in 2002. She began working at Grand Junction High School in 2005 as a Library Media Specialist, where she worked until 2010. She received her Master's Degree in Educational Media in 2006 from the University of Northern Colorado. She received an Outstanding Educator for 2007 award given by the Grand Junction Area Chamber of Commerce, and was selected as the Outstanding Teacher by the students of the Class of 2009.

8. The Ethics in Education Act, creating section 1012.315, Florida Statutes, and adding the phrase "as defined by rule of the State Board of Education" to section 1012.795(1)(d), became effective on July 1, 2008.

9. On June 3, 2010, Ms. Arroyo submitted an on-line application for a Florida Educator's Certificate as an Educational Media Specialist. On the application, she provided her social security number and answered "Yes" to a question asking if she had ever been convicted of a criminal offense. She filled in the "Charges" block with the words "Drug Charges"

and the "Disposition" block with the word "Probation." By June 9, 2010, the Bureau of Educator's Certification had received the application, the evidence of her bachelor's degree, the grades transcript, and the fee.

10. Ms. Arroyo meets the basic requirements for licensure. She was at least 18 years of age at the time of her application; she submitted an electronically authenticated affidavit that stated she would uphold the principles incorporated in the Constitution of the United States and the Constitution of the State of Florida and that the information provided in her application was true, accurate, and complete; she documented her receipt of a bachelor's degree from an accredited institution and a master's degree; she submitted to background screening; she is of good moral character; she is competent and capable of performing the duties, functions, and responsibilities of an educator; she holds a valid professional standard teaching certificate issued by the State of Colorado, demonstrating her mastery of general knowledge, mastery of subject area knowledge, and mastery of professional preparation and education competence.

11. The Department of Education is the state agency responsible for licensure of instructional personnel for the public schools.

12. On or about July 7, 2010, the Bureau of Educator Certification of the Department of Education issued Ms. Arroyo an Official Statement of Status of Eligibility. This statement advised Ms. Arroyo that she was eligible for a three-year nonrenewable Temporary Certificate upon receipt by the Bureau of: 1) documentation showing verification of employment; 2) a request for issuance of certificate on the appropriate certification form from a Florida public school; and 3) results of her fingerprint processing, noting that if there was a criminal offense, her file would be referred to Professional Practices Services for further review and that issuance of her Temporary Certificate would be contingent on the results of that review. The Statement included some additional requirements for the issuance of a Florida Educator's Certificate valid for five years covering Educational Media Specialist (Prekindergarten-Grade 12).

13. Mr. Troy Sanford, the principal at Horizon Academy at Marion Oaks, a school in the Marion County School District, interviewed Ms. Arroyo for a media specialist position at the school in August of 2010. At the end of that interview, she began to tell Mr. Sanford of her conviction, but he stopped her and told her that it was the Human Resources Department that checked into applicant's backgrounds.

14. When Mr. Sanford later talked to the Human Resources Department, he advised them that he was recommending someone for the position who had indicated she had something in her background, and asked to be told if it would hinder her appointment. The Human Resources Department had further conversations with Mr. Sanford, telling him about a criminal conviction, but stating that because it had occurred over ten years ago, it should not be a limiting factor.

15. Ms. Arroyo was hired at Horizon Academy and worked there during the 2010-2011 and 2011-2012 academic years as a library media specialist.

16. Ms. Arroyo has excellent knowledge of her subject area and exhibits great enthusiasm in encouraging students to become life-long readers.

17. Ms. Arroyo has effectively become a "co-teacher" with many of the classroom teachers and has helped them craft research projects that are meaningful to students.

18. Horizon Academy has a high percentage of minority students, some of whom are underprivileged. Ms. Arroyo has made special efforts to get books into the hands of students who have never read a book before. She has created a culture of reading at Horizon Academy. Her efforts at her school have caused the library circulation to dramatically increase, which has had an effect on the district-wide data. Ms. Arroyo re-arranged the

library to accommodate more students. Ms. Arroyo was selected as the Horizon Academy teacher of the year.

19. Ms. Arroyo became a member of the Library of Congress Teaching with Primary Sources Mentor Program, one of only 19 educators from across the United States with such membership.

20. Ms. Arroyo has helped children with lost or overdue books who are not permitted to withdraw books from the library by loaning them her personal books. She has purchased books from the Book Fair and given them to underprivileged students. She has given Christmas gifts to needy children who might otherwise not receive any gifts.

21. When Ms. Arroyo came to Horizon Academy, it was a "C" school, but it is now an "A" school. The principal believes that there was a direct link between Ms. Arroyo's efforts and the improvement of the school.

22. On October 13, 2010, the Department of Education received background check information on Ms. Arroyo from the Federal Bureau of Investigation and the Florida Department of Law Enforcement.

23. On October 19, 2010, Ms. Arroyo's file was referred to the Bureau of Professional Practice Services for consideration of the background information regarding her conviction.

24. On October 22, 2010, Ms. Arroyo was sent a letter from Ms. Ellie Evans, Applicant Investigator of the Bureau, advising

Ms. Arroyo that her application had been referred to the Bureau of Professional Practices Services because of her criminal history, and requesting further information regarding Ms. Arroyo's conviction.

25. On November 16, 2010, the Department received from Ms. Arroyo copies of a judgment in her criminal case, United States v. Cappi C. Eminger, Case No. CR87-01061-03, from the United States District Court for the District of Hawaii, dated January 28, 1988, consisting of three pages, and including an Order Terminating Probation Prior to Original Expiration Date in the same case filed April 8, 1991, consisting of one page.

26. On December 13, 2010, Commissioner of Education Eric Smith sent Ms. Arroyo a letter advising her that her application for a Florida Educator's Certificate was denied, attaching a Notice of Reasons, and advising her of her right to a hearing on the intended action. Ms. Arroyo requested a formal hearing.

27. Ms. Arroyo will be unable to pursue a career teaching students in Florida without educator certification. Ms. Arroyo is substantially affected by the intended decision to deny her certification.

28. On or about March 23, 2011, the Bureau issued Ms. Arroyo a second Official Statement of Status of Eligibility. This statement advised Ms. Arroyo that her Colorado Teaching Certificate had been received and that she was eligible for a

Florida Educator's Certificate valid for five years upon receipt of clearance to issue the certificate from the Bureau of Professional Practices Services.

29. On or about June 8, 2011, Ms. Arroyo applied to the Florida Office of Executive Clemency for a pardon of her convictions. Ms. Arroyo also applied to the President of the United States for a pardon.

30. On October 28, 2011, the Department received from Petitioner a notice of intent to rely on the default license provision in section 120.60(1), Florida Statutes.

31. Although the charges of statutory violations drafted by Respondent as grounds for the denial of her application could have been crafted with more care, Petitioner was not prejudiced in preparing her defense.

32. Hearing was held on December 6, 2011.

33. At hearing, Petitioner testified that she did not distribute cocaine and that she did not conspire to distribute cocaine, maintaining that her guilty plea was the result of coercion and intimidation by Drug Enforcement Administration (DEA) agents. Her testimony on these points was not credible. She testified that the DEA agents took her vehicle and showed up at her house with guns. She testified that there were 33 charges in the indictment. She testified that she told the DEA agents that it was her ex-boyfriend who had distributed cocaine.

She said that the DEA agents told her that she was guilty simply because she was aware of what he did, even if she did not distribute cocaine herself. Petitioner testified that she could not remember whether her attorney advised her about entering into the plea agreement. At another point in her testimony she testified that her attorney did not advise her as to the guilty plea. She was somewhat evasive during cross-examination as to her appearance before the judge when pleading guilty. She later said that she did not remember that appearance at all. She testified she did not remember the judge asking her if she knowingly and intentionally distributed 55.2 grams of cocaine. Petitioner did testify that she believed what the DEA agents had told her and signed a plea agreement that she was guilty of 2 of the 33 charges, based only upon this mistaken belief.

34. Ms. Arroyo's testimony and selective memories about these long-ago events seemed to be shaped more by convenience than candor. Ms. Arroyo failed to prove her guilty plea resulted from threats, coercion, or fraudulent means.

35. Despite the fact that Ms. Arroyo distributed cocaine and conspired to distribute cocaine and her selective memories and lack of credibility concerning those events, she is of good moral character. A few isolated events are not determinative of her character today. Ms. Arroyo's actions since her youthful criminal activity show a consistent pattern of personal

accomplishment and public service over a very long period of time, with no evidence of any other criminal activity. Ms. Arroyo has substantially rehabilitated herself. Her receipt of several education awards demonstrates that she is a dedicated and accomplished professional. Testimony at hearing established that Ms. Arroyo exhibits a compassionate and generous attitude toward students, especially the underprivileged.

36. On January 3, 2012, Respondent filed certified copies of records of the United States District Court for the District of Hawaii, including sentencing minutes, the indictment, a superseding indictment, sentencing memorandum, and other documents, requesting their official recognition and admission as a late-filed exhibit.

37. The State Board of Education has not defined the term "gross immorality" by rule, and there was no evidence presented that Ms. Arroyo's behavior met any rule definition of that term.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

39. The Department of Education is the state agency responsible for licensure of instructional personnel for the public schools. § 1012.55, Fla. Stat. (2011).[2/]

40. The Commissioner is the state agent responsible for investigating and prosecuting allegations of misconduct against teachers. See § 1012.796(6).

41. Under section 1012.55(1), educational media specialists must hold educator certification from the Department of Education.

42. Media specialists are defined as instructional personnel under section 1012.01(2)(c). Under section 1012.32(1), instructional personnel must not be ineligible for employment under section 1012.315.

43. The Department of Education may deny an applicant an educator's certificate if the Department finds that an applicant is ineligible for licensure or if it possesses evidence that the applicant committed an act for which the Education Practices Commission (EPC) could revoke a teaching certificate. §§ 1012.315, 1012.56(12).

44. Petitioner is substantially affected by the Department's intended decision to deny her a Florida Educator's Certificate and she has standing to maintain this proceeding.

45. As the party seeking certification, Petitioner has the burden of proving by a preponderance of evidence that she satisfies the statutory requirements for a teaching certificate. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). However, Respondent has the burden of presenting

evidence of any statutory violations alleged in the Notice of Reasons as sufficient to warrant denial of the application. Osborne Stern & Co., 670 So. 2d at 934; Comprehensive Medical Access, Inc. v. Off. of Ins. Reg., 983 So. 2d 45 (Fla. 1st DCA 2008).

46. Although it is not entirely clear that all of the counts alleged in the Notice of Reasons constitute statutory violations within the meaning of Osborne Stern, this Recommended Order will consider whether Petitioner meets the basic statutory requirements for a teaching certificate without regard to the allegations contained in Respondent's Notice of Reasons, followed by examination of each count alleged by the Department. First, however, there are three preliminary matters to be considered: the admissibility of the late-filed court records, Petitioner's guilty plea as an admission of elements of the offenses, and the default licensure provisions of chapter 120.

Court Records

47. At hearing, a print-out of an internet page from the Public Access to Court Electronic Documents (PACER) website that contained case history notations relating to Petitioner's federal criminal case, including the fact that Petitioner was sworn, advised of rights, and "voir dired" by the Court, as well as a statement that "The Court finds that the deft is competent to enter pleas of guilty" was denied official recognition.

Official recognition was also denied to a description of the PACER site.

48. The PACER web page was offered not to establish court dates and events, but rather for the purpose of establishing that Petitioner's guilty plea was done knowingly. Any sworn testimony of Petitioner before the court that was contrary to her testimony at the December 6, 2011, hearing would be admissible to impeach Petitioner's testimony at trial. However, simple notations on a website, not a court document, that Petitioner was "voir dired" and "competent to enter a plea" are hearsay statements that are not admissible to impeach Petitioner.

49. Respondent was granted the opportunity to obtain, if available, and submit as late-filed Exhibit R-7, the plea colloquy from Petitioner's case. Under section 90.202(6), Florida Statutes, a court may take judicial notice of records of any court of the United States. Administrative law judges may give such records official recognition. A transcript of the plea colloquy would also be hearsay, but would constitute statements by Petitioner herself, and so would be admissible as a hearsay exception. Dufour v. State, 69 So. 3d 235 (Fla. 2011)(judicial recognition of court record does not render all that is in the record admissible, and documents in the file still subject to rules of evidence); Simcox v. City of Hollywood

Police Officers' Ret. Sys., 988 So. 2d 731, 734 (Fla. 4th DCA 2008)(defendant's admissions during plea colloquy admissible in subsequent administrative proceeding on forfeiture of retirement).

50. The plea colloquy was unavailable, however. Respondent instead offered as late-filed Exhibit R-7 some 83 pages contained in the court record of Petitioner's criminal case, including the grand jury indictment, a superseding indictment, a sentencing memorandum, and sentencing minutes, in addition to the judgment itself, which was already admitted at hearing.

51. Admission of these 83 pages as Exhibit R-7 is denied, and these documents will not be considered in this Recommended Order. First, as noted earlier, documents contained within a court file are subject to the same rules of evidence to which all other evidence must adhere. These documents are hearsay, and no exception appears applicable, so they would not be sufficient in themselves to support a finding. Second, the documents go far beyond the limited authorization at hearing to file a late-filed exhibit in lieu of the PACER information regarding the voir dire.

Guilty Plea as Admission

52. The website statement that "deft is competent to enter pleas of guilty" was offered by Respondent to counter

Petitioner's testimony at hearing that she did not distribute cocaine or conspire to distribute cocaine. Although this effort was not successful, and further there was no testimony from any person present at the commission of the offenses some 26 years ago, competent evidence of the essential facts necessarily underlying the offenses was admitted.

53. The general rule is that a judgment of conviction from a criminal case is inadmissible as evidence in a civil case to establish the truth of the facts upon which that conviction was based. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984)(criminal jury conviction for fraud and misrepresentation not admissible in subsequent civil action for breach of fiduciary duty and conspiracy to defraud to prove truth of the underlying facts); Stevens v. Duke, 42 So. 2d 361 (Fla. 1949)(conviction for violation of traffic law in connection with accident not admissible in subsequent civil trial).

54. Petitioner argues this general rule applies even when the judgment is based upon a guilty plea, quoting Williams v. Commissioner of Education, 613 So. 2d 97, 99 (Fla. 1st DCA 1993): "The law is well established that a judgment of conviction on a criminal offense, whether based on a plea of guilty or nolo contendere, is not admissible in a subsequent civil proceeding as proof of the facts on which it is based."

Although this reference in the Williams case to "a plea of guilty" appears to be dicta because only a plea of nolo contendere was involved there, other cases have cited this statement in Williams as authority to apply the general rule to cases involving a guilty plea. See Russell S. Lawler v. DMS, Case No. 07-2192 (Fla. DOAH Jan. 30, 2008); Winn v. Stewart, Case No. 06-3527PL (Fla. DOAH Jan. 24, 2007; Fla. EPC May 25, 2007).

55. However, the greater weight of Florida authority allows a judgment of conviction based upon a guilty plea to be admitted as evidence in a civil case to establish the truth of the facts upon which the conviction was based. As noted by the Florida Supreme Court in Boshnack v. World Wide Rent-A-Car, Inc., 195 So. 2d 216, 218 (Fla. 1967), "[A] judgment of conviction in a criminal prosecution cannot be given in evidence in a civil action to establish the truth of the facts on which it is rendered, but . . . [there are] certain recognized exceptions to said rule, one of which is that a judgment entered in a criminal prosecution on a plea of guilty may be introduced in a civil action to establish an admission against interest." Accord Chimerakis v. Evans, 221 So. 2d 735, 736 (Fla. 1969).

56. All of the District Courts have recognized this exception to the general rule. Carter v. Rukab, 437 So. 2d 761, 763 (Fla. 1st DCA 1983)(while admission of guilt to

decriminalized traffic offense through payment of civil penalty by mail could not be used as evidence in any subsequent proceeding, this was due to statutory exception; usually a plea of guilty in another proceeding constitutes an admission); Nunez v. Gonzalez, 456 So. 2d 1336, 1338 (Fla. 2d DCA 1984)(general rule is that a judgment of conviction in a criminal prosecution cannot be considered as evidence in a civil action to establish truth of the facts upon which it was rendered, but if a judgment is based upon a guilty plea, the judgment may be considered as evidence of these facts because it is an admission); Metro. Dade County v. Wilkey, 414 So. 2d 269, 271 (Fla. 3d DCA 1982)(while judgment based upon guilty plea is admissible, that is because it is an admission against interest, and if a guilty verdict is not admissible, neither is an indictment, which is less substantial); Nell v. Int'l Union, Local # 675, 427 So. 2d 798, 800 (Fla. 4th DCA 1983) (evidence of a prior guilty plea in a criminal proceeding is permitted as an admission against interest in a civil action, but prior criminal judgment not based on a plea of guilty is not admission); Estate of Wallace v. Fisher, 567 So. 2d 505, 508 (Fla. 5th DCA 1990)(voluntary and knowing guilty plea to traffic ordinance admissible in civil action as an admission, by implication, of the conduct prohibited by the ordinance, but police citation is not admissible). See also Charles W. Ehrhardt, Florida Evidence

§ 803.22a (2011 ed.)("A plea of guilty is usually admissible under section 90.803(18) as an admission by a party-opponent when offered against the party who made the plea.")

57. This "guilty plea exception" created in Boshnack is the current law in Florida[3/] and is evidently consistent with the rule in most states. See the updated cases and discussion in the annotation at 18 A.L.R.2d 1287 (1951), Conviction or Acquittal as Evidence of the Facts on which it was Based in Civil Action ("In civil actions where one of the issues is the guilt of a person convicted of a criminal offense, or some fact necessarily involved in the determination of such guilt, the courts are agreed that it is proper to admit evidence of the person's plea of guilty to the criminal offense.").

58. There are limitations on use of a guilty plea. While a judgment on a guilty plea provides evidence of the facts necessary to prove the elements of the conviction, it is not evidence of any fact except those necessarily involved in the determination of guilt, and does not establish even the necessary facts conclusively. Hatfield v. York, 354 So. 2d 426, 427 (Fla. 4th DCA 1978)(guilty plea does not establish the truth of facts necessarily involved in the determination of guilt as a matter of law, but is competent evidence as an admission against interest that can be considered by the trier of fact).

59. In the instant case, the guilty plea admission is the more convincing evidence of those facts necessarily involved in the determination of guilt, because Petitioner's countervailing testimony that she did not distribute cocaine or conspire to do so was not credible and is rejected.

Default Licensure

60. On or about October 28, 2011, the agency clerk of Respondent received from Petitioner a notice that Petitioner intended to rely on the default license provisions of chapter 120.

61. Section 120.60(1), Florida Statutes, provides in relevant part:

> An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period is tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license which is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any applicant for

> licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and may not take any action based upon the default license until after receipt of such notice by the agency clerk.

62. However, section 1012.56(1), entitled Educator certification requirements, somewhat modifies the provisions of section 120.60 with respect to default licensure. It provides in relevant part:

> (1) APPLICATION.— Each person seeking certification pursuant to this chapter shall submit a completed application containing the applicant's social security number to the Department of Education and remit the fee required pursuant to s. 1012.59 and rules of the State Board of Education.
>
> * * *
>
> Pursuant to s. 120.60, the department shall issue within 90 calendar days after the stamped receipted date of the completed application:
>
> (a) If the applicant meets the requirements, a professional certificate covering the classification, level, and area for which the applicant is deemed qualified and a document explaining the requirements for renewal of the professional certificate;
>
> (b) If the applicant meets the requirements and if requested by an employing school district or an employing private school with a professional education competence demonstration program pursuant to paragraphs (6)(f) and (8)(b), a temporary certificate covering the classification, level, and area for which the applicant is deemed qualified

> and an official statement of status of eligibility; or
>
> (c) If an applicant does not meet the requirements for either certificate, an official statement of status of eligibility.
>
> The statement of status of eligibility must advise the applicant of any qualifications that must be completed to qualify for certification. Each statement of status of eligibility is valid for 3 years after its date of issuance, except as provided in paragraph (2)(d).

63. Trumping the more general default licensure provision of section 120.60(1), section 1012.56(1) thus does not require the issuance of a Teaching Certificate within ninety days of receipt of a completed application, but instead only requires that the Department issue one of three documents within that time frame: a Professional Certificate; a Temporary Certificate; or a Statement of Status of Eligibility. Even if Petitioner's application is deemed complete as of June 3, 2010, the earliest possible date, the Statement of Status of Eligibility was issued to Petitioner by the Department on or about July 7, 2010, well within 90 days. The Department subsequently issued a Revised Statement of Status of Eligibility on or about March 23, 2011, indicating that a Professional Certificate could be issued upon clearance from the Bureau of Professional Practices Services. Under the Education Code, issuance of a Statement of Status of Eligibility permits the Department and the applicant to continue

working toward certification for a period of up to three years, unless the applicant fails to provide background screening information within 90 days of request under section 1012.56(2)(d).

64. Petitioner is not entitled to issuance of a default Florida Educator's Certificate under section 120.60(1).

Basic Eligibility Requirements

65. Petitioner applied for certification as an Educational Media Specialist. The eligibility requirements for this position are found in section 1012.56(2). It is undisputed that Petitioner meets almost all of these requirements. The Department asserts that Petitioner did not prove that she is of good moral character.

66. The Florida Supreme Court, in the case of In re Fla. Bd. of Bar Examiners, 373 So. 2d 890, 891 (Fla. 1979) considered the standard of "good moral character" noting:

> The inherent defects of a standard of "good moral character" standing alone, and the saving grace of a history of judicial construction have each been recognized by the United States Supreme Court. In Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957), the court described the term "good moral character" as "unusually ambiguous" and held in pertinent part: It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.

> Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

67. While the parties cited no judicial decisions interpreting "good moral character" for purposes of section 1012.56(2)(e), and research revealed none, several administrative orders in educator certification cases have relied upon the discussion in Zemour, Inc. v. State Div. of Beverage, 347 So. 2d 1102, 1105 (Fla. 1st DCA 1977), which stated:

> Moral character, as used in this statute, means not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence. An isolated unlawful act or acts of indiscretion wherever committed do not necessarily establish bad moral character. But, as shown by the evidence here, repeated acts in violation of law wherever committed and generally condemned by law abiding people, over a long period of time, evinces the sort of mind and establishes the sort of character that . . . should not be entrusted . . . .

Hodge v. Smith, Case No. 11-3318 (Fla. DOAH Sept. 29, 2011; Fla. EPC Jan. 11, 2012); Housley v. Smith, Case No. 08-714 (Fla. DOAH Aug. 11, 2008); Grant v. Blomberg, Case No. 06-5297 (Fla. DOAH Aug. 30, 2007; Fla. EPC Dec. 7, 2007);

Santana v. Winn, Case No. 05-1302 (Fla. DOAH Aug 22, 2005; Fla. EPC Feb. 21, 2006).

68. The Florida Supreme Court has recognized that acts of moral turpitude can indicate a lack of good moral character. Fla. Bd. of Bar Examiners, 364 So. 2d 454, 458 (Fla. 1978)(while acts which historically constitute an act of moral turpitude justify a finding of a lack of good moral character, other conduct that does not involve moral turpitude may also demonstrate lack of good moral character). As discussed below under Count 4, Petitioner's acts of distributing cocaine and conspiring to distribute cocaine were acts involving moral turpitude.

69. Also troubling is Petitioner's testimony at hearing. Petitioner was evasive, had convenient lapses of memory, and failed to accept responsibility for her prior acts of distribution of cocaine and conspiracy to distribute cocaine.

70. The fact that Petitioner only indicated "probation" in the small "disposition" block on her application form and did not provide more detailed information about her suspended sentence and that she had to pay a $500 fine and perform 100 hours of community service is not further evidence of lack of good moral character. Petitioner disclosed the fact of her prior criminal conviction, indicated that she was convicted on drug charges, and described the fundamental element of its

disposition. She was not required to do more. Petitioner also disclosed that she had a criminal conviction in her job interviews and she cooperated fully in providing the Department all requested information about her convictions.

71. The apparently isolated criminal acts that took place over 25 years ago, and Petitioner's failure to completely acknowledge them, are not conclusive evidence that Petitioner lacks good moral character, however. Bachynsky v. Dep't of Prof'l Reg., 471 So. 2d 1305, 1311 (Fla. 1st DCA 1985)(isolated unlawful acts of indiscretion do not necessarily establish bad moral character).

72. These crimes were committed when Petitioner was 21 years old or younger, and there is no evidence indicating any subsequent criminal activity of any kind.

73. Substantial evidence of Petitioner's good moral character was introduced at hearing. Her actions since her youthful criminal activity show a consistent pattern of personal accomplishment and public service over a very long period of time, indicating rehabilitation. Petitioner's receipt of several education awards demonstrates that she is a dedicated and accomplished professional. Testimony at hearing established that Petitioner exhibits a compassionate and generous attitude toward students, especially the underprivileged.

74. Petitioner proved that she is of good moral character.

75. Petitioner has thus proven her basic entitlement to licensure, but for the six counts alleging statutory violations said to justify denial of Petitioner's application.

Count 1

76. Count 1 charges, "The Applicant is in violation of Section 1012.315, Florida Statutes, and Section 1012.56(10), Florida Statutes, which require the Department of Education to deny an Applicant a Florida Educator's Certificate if the Applicant has been convicted of a disqualifying offense."

77. Section 1012.315 provides in relevant part:

> Disqualification from employment. —A person is ineligible for educator certification, and instructional personnel and school administrators, as defined in s. 1012.01, are ineligible for employment in any position that requires direct contact with students in a district school system, charter school, or private school that accepts scholarship students under s. 1002.39 or s. 1002.395, if the person, instructional personnel, or school administrator has been convicted of:
>
> (1) Any felony offense prohibited under any of the following statutes:
>
> * * *
>
> (qq) Chapter 893, relating to drug abuse prevention and control, if the offense was a felony of the second degree or greater severity.
>
> * * *

> (3) Any criminal act committed in another state or under federal law which, if committed in this state, constitutes an offense prohibited under any statute listed in subsection (1) or subsection (2).

78. Section 1012.56(10) similarly provides that each person who seeks certification must not be ineligible for such certification under section 1012.315.

79. Petitioner applied for certification as an Educational Media Specialist. As noted earlier, under section 1012.01(2)(c), these positions are instructional personnel, therefore Petitioner is subject to the requirements of sections 1012.315 and 1012.56(10).

80. No evidence was presented that Petitioner has been convicted of a felony offense under chapter 893. The issue for determination is whether or not Petitioner's 1988 conviction under federal law comes within the prohibition of subsection (3), that is, whether Petitioner has been convicted of a criminal act committed under federal law which, if committed in this state, constitutes a felony offense under chapter 893.

81. Petitioner first argues that her actual conduct in 1988 did not constitute an offense under federal law, and, more importantly for current purposes, under Florida law. She testified that it was her boyfriend who in fact was distributing cocaine. She testified that she was never guilty of either distributing cocaine or conspiring to do so, and that she only

pled guilty based upon her mistaken belief, coerced by the police, that her knowledge of his criminal activity made her guilty of these criminal acts. Petitioner asserts that Respondent offered no competent evidence of her actual conduct in 1988, and asserts that Respondent therefore failed to prove that her actions at that time would constitute an offense under Florida law.

82. Section 1012.315(3) does not require that the specific facts underlying Petitioner's federal criminal conviction be re-proven in a miniature criminal trial conducted within an administrative hearing. When statutes require the examination of foreign judgments in comparison with Florida crimes, it is the elements of the federal criminal acts which are compared with those of the Florida Statute, not the specific historical facts peculiar to the particular defendant's case. See, e.g., Carpenter v. State, 785 So. 2d 1182, 1204-1205 (Fla. 2001)(in considering previous out-of-state conviction as aggravating circumstance, inappropriate to review underlying facts to determine if they would constitute felony under Florida law, only conviction for offense that was felony in foreign state may be considered); Robinson v. State, 692 So. 2d 883, 886-87 (Fla. 1997)(for purposes of qualifying as a predicate offense under habitual offender statute, elements of out-of-state offense must be identical or functionally equivalent to the elements of an

enumerated Florida offense); Dautel v. State, 658 So. 2d 88, 91 (Fla. 1995)(for purposes of calculating points for sentencing guidelines scoresheet, only elements of an out-of-state crime, not underlying facts, are used to determine applicable Florida crime); Hankins v. State, 42 So. 3d 871, 872 (Fla. 2nd DCA 2010)(for purposes of prison release reoffender statute, only elements of New York offense should be considered, not a factual description of defendant's acts in New York); Dawson v. Dep't of High. Saf. & Motor Veh., 19 So. 3d 1001 (Fla. 4th DCA 2009), rev. den., 33 So. 3d 35 (Fla. 2010)(for purposes of revoking Florida Driver's license on basis of New York DWAI conviction, the elements of the out-of-state conviction must satisfy the statutory elements of the Florida's DUI statute).

83. In any event, in the instant case Petitioner's judgment was based upon a guilty plea which was admitted into evidence. Therefore, as discussed above, the guilty plea itself constitutes competent evidence of the essential facts necessary to prove the elements of the crime. Under either analysis, it is the elements of the offenses which must be examined.

84. Petitioner was convicted of violating section 841(a)(1) of Title 21 of the United States Code, for knowingly or intentionally distributing cocaine, and also of violating section 846 of Title 21, United States Code, for willfully and knowingly conspiring to commit the same offense.

85. At the time of her offense in 1986, the crime of distribution of cocaine in violation of section 841(a)(1) contained two elements: (1) knowingly distributing cocaine to another person and (2) knowing that what was distributed was cocaine or some other prohibited drug. "Distributing" means delivering or transferring possession of the cocaine to another person, with or without any financial interest in that transaction. United States v. Houston, 406 F.3d 1121, 1122 (9th Cir. Mont. 2005) cert. denied, 546 U.S. 914 (2005).

86. At the time of her offense in 1986, to establish a drug conspiracy the government had to prove: (1) an agreement to accomplish an illegal objective; and (2) the intent to commit the underlying offense. United States v. Reed, 575 F.3d 900, 923 (9th Cir. Cal. 2009). In order to establish a violation of section 846, the government did not have to prove the commission of any overt acts in furtherance of the conspiracy. United States v. Shabani, 513 U.S. 10, 15 (1994).

87. The elements of these federal crimes must next be compared with the elements of relevant offenses prohibited under the statutes listed in subsection (1) or subsection (2) of section 1012.315.

88. The first Florida offense which must be considered with regard to Petitioner's distribution conviction is delivery

of cocaine. Section 893.13, Florida Statutes, provides in relevant part:

> Prohibited acts; penalties.—
>
> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to . . . deliver . . . a controlled substance. Any person who violates this provision with respect to:
>
> * * *
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

89. Section 893.02, entitled Definitions, defines some of the terms used in section 893.13 as follows:

> (4) "Controlled substance" means any substance named or described in Schedules I-V of s. 893.03. Laws controlling the manufacture, distribution, preparation, dispensing, or administration of such substances are drug abuse laws.
>
> (6) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.
>
> (8) "Distribute" means to deliver, other than by administering or dispensing, a controlled substance.

90. Section 893.03(2)(a)4. goes on to provide that cocaine is a schedule II drug. Cocaine is therefore a controlled substance in Florida, the distribution or delivery of which is a

second-degree felony. Knowledge of a controlled substance's illicit nature is not an element of any offense under chapter 893.[4/] Instead, the lack of such knowledge may be raised as an affirmative defense. See § 893.101(2); Hernandez v. State, 56 So. 3d 752, 759 (Fla. 2010).

91. Petitioner's conviction for distribution of cocaine in violation of Title 21, U.S.C. § 841(a)(1) therefore required proof of every element necessary for conviction of a second degree felony under section 893.13(1)(a)1. of the Florida Statutes. Under section 1012.315(3), Petitioner's criminal act of distribution of cocaine in violation of federal law, if committed in Florida, would be an offense prohibited by 1012.315(1)(qq). Petitioner is therefore ineligible for employment in any position that requires direct contact with students.

92. Petitioner argues that a violation of section 893.13 cannot make Petitioner ineligible for a Florida Teaching Certificate under Shelton v. Department of Corrections, 802 F. Supp. 2d 1289, 1294 (M.D. Fla. 2011), which found that this statute violated the due process clause and was unconstitutional on its face because it lacked the element of knowledge or intent. Florida courts have disagreed with the Shelton case, however, and the Florida Supreme Court is now considering the issue.[5/] The constitutionality of this statute is not a question

that the Division of Administrative Hearings can decide. In the instant case, it is noted that Petitioner's federal conviction did require proof beyond a reasonable doubt that she knew the substance she distributed was illicit.

93. A second offense which must be considered with regard to Petitioner's distribution conviction is trafficking in cocaine. Section 893.135(1)(b)1., provides in relevant part:

> Any person who knowingly . . . delivers . . . 28 grams or more of cocaine, as described in s. 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

94. This offense is quite similar to section 893.13, but adds one new element. In order to be convicted of trafficking in cocaine, an additional element that the quantity of the cocaine delivered was 28 grams or more must be proved. State v. Dominguez, 509 So. 2d 917 (Fla. 1987).

95. While Count 1 of the indictment, to which Petitioner pled guilty, alleged that the amount of cocaine Petitioner delivered was 55.2 grams, this was not actually an element of the federal crime of distribution of cocaine for which she was convicted. As noted earlier, in interpreting 1012.315(3), it is the necessary elements of the offenses which must be compared, not the specific underlying facts of Petitioner's case, even if

Petitioner admitted those facts. Therefore, Petitioner's conviction for distribution of cocaine in violation of Title 21, U.S.C. § 841(a)(1.) did not require proof of every element necessary for conviction of the first-degree felony of trafficking in cocaine under section 893.135(1)(b)1., Florida Statutes.

96. In light of Petitioner's federal conviction for conspiracy to distribute cocaine, another Florida offense which must be considered is conspiracy to deliver cocaine. Under section 777.04(3), Florida Statutes, any person who conspires with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing under chapter 921, Florida Statutes, as one level below the ranking of the basic offense. § 777.04(4)(a). Since delivery of cocaine is a second-degree felony, a conviction of criminal conspiracy to deliver cocaine becomes a third-degree felony. § 777.04(4)(d). Cf. Hernandez v. State, 56 So. 3d 752 (Fla. 2010)(attempt to commit a second-degree felony is classified as a felony in the third degree).

97. Conviction of criminal conspiracy to deliver cocaine is not a disqualifying offense under section 1012.315(1) because a conspiracy conviction under section 777.04 is not separately listed, and if considered as an offense under chapter 893, it still constitutes only a third-degree felony.

98. Petitioner next asserts that section 1012.315(3) cannot be applied to her, citing Smith v. Faublas, 69 So. 3d 1075 (Fla. 1st DCA 2011) and Presmy v. Smith, 69 So. 3d 383 (Fla. 1st DCA 2011). These cases held that the Legislature did not intend for section 1012.795(1)(n), authorizing the Educational Practices Commission to permanently revoke the educator certificate of any person who has been disqualified from educator certification under section 1012.315, to apply retroactively. Section 1012.795(1)(n) applies to persons who already hold an educator certificate. Mr. Presmy and Mr. Faublas held teaching certificates when the law was enacted. Petitioner, by contrast, has never held a Florida Educator's Certificate. She filed her application on June 3, 2010, well after the effective date of section 1012.315 on July 1, 2008, setting forth the requirements for all future applicants to be eligible for educator certification. The statute is not being applied retroactively to Petitioner.

99. In summary, Petitioner's criminal act of distribution of cocaine in violation of federal law, if committed in Florida, would be an offense prohibited by section 1012.315(1)(qq), that is, the second-degree felony of delivery of cocaine prohibited by section 893.13(1)(a)1. Petitioner is therefore ineligible for employment in any position that requires direct contact with students.

100. The disqualification from employment established by section 1012.315 is conclusive; there are no provisions affording an applicant the opportunity to demonstrate rehabilitation or the Department an opportunity to exercise discretion.

Count 2

101. Count 2 charges, "The Applicant is in violation of Section 1012.56(2)(e), Florida Statutes, which requires that the holder of a Florida Educator's Certificate be of good moral character."

102. In initial licensure proceedings, the burden is upon Petitioner to prove her eligibility, including her "good moral character." § 1012.56(2)(e). As discussed above under Basic Eligibility Requirements, Petitioner met her burden to prove that she is of good moral character.

Count 3

103. Count 3 charges, "The Applicant is in violation of Section 1012.56(12)(a), Florida Statutes, which provides that the Department of Education may deny an Applicant a certificate 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."

104. Section 1012.56(12)(a) incorporates by general reference the acts and situations for which the EPC could revoke an educator's certificate, and makes these also grounds for denial of an application. The specific acts and situations are listed in section 1012.795(1).

105. Although listed as a separate count, it is clear that no specific act or situation is alleged as a part of Count 3 itself. Conversely, although Counts 4, 5, and 6 do not mention section 1012.56(12)(a), the specific acts alleged in these counts are grounds for denial of an application for certificate, if at all, only through the operation of section 1012.56(12)(a).

Count 4

106. Count 4 charges, "The Applicant is in violation of Section 1012.795(1)(d), Florida Statutes, in that she has been guilty of gross immorality or an act involving moral turpitude as defined by rule of the State Board of Education."

107. Although on its face Count 4 alleges Petitioner violated section 1012.795(1)(d), an applicant who does not yet hold an educator's certificate cannot actually violate that provision, but instead is subject to application denial under section 1012.56(12)(a) for the same act or situation that could lead to revocation under section 1012.795(1)(d), as just discussed under Count 3.

108. Although Count 4, as well as Counts 5 and 6, is technically deficient for this reason, it is well settled that an administrative complaint need not be cast with that degree of technical nicety required in a criminal prosecution. Libby Investigations v. Dep't of State, 685 S. 2d 69 (Fla. 1st DCA 1996). An administrative complaint must only state the acts complained of with sufficient specificity to allow an applicant a fair chance to prepare a defense. Davis v. Dep't of Prof. Reg., 457 So. 2d 1074 (Fla. 1st DCA 1984). These Counts certainly might have been crafted with more care, but the allegations were clear and Petitioner was not prejudiced in preparing her defense.

109. The Ethics in Education Act, Chapter 2008-108, Laws of Florida, added the phrase "as defined by rule of the State Board of Education" to what now appears as section 1012.795(1)(d). It is unclear whether this new language modifies only "an act involving moral turpitude" or if it instead modifies the entire phrase "gross immorality or an act involving moral turpitude." The absence of a comma after the word "immorality" suggests that it modifies the entire phrase. In any event, when construing penal statutes, any statutory ambiguity should be resolved in favor of Petitioner. Cilento v. State, 377 So. 2d 663, 668 (Fla. 1979)(where criminal statute is ambiguous, construction most favorable to accused should be

adopted). See also § 775.021, Fla. Stat. ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."). This portion of the statute is thus only violated if an educator is guilty of gross immorality as defined by rule of the State Board of Education.

110. The State Board of Education has not defined the term "gross immorality" by rule. No evidence was presented that Petitioner's behavior met any such rule definition. No evidence shows that Petitioner was guilty of gross immorality as defined by rule of the State Board of Education.

111. The State Board of Education has defined the term "moral turpitude." Florida Administrative Code Rule 6A-5.056(6), entitled "Criteria for Suspension and Dismissal" has long provided:

> (6) Moral turpitude is 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.

112. This is almost identical to the definition of moral turpitude adopted by the Florida Supreme Court in Florida Bar v. Davis, 361 So. 2d 159 (Fla. 1978)("A crime

involves moral turpitude if it is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general. Unless the offense is one which by its very commission implies a base and depraved nature, the question of moral turpitude depends not only on the nature of the offense, but also on the attendant circumstances . . . .").

113. Florida courts have noted that because attendant circumstances must be considered, it is difficult to simply compose a list of crimes that involve moral turpitude. Milliken v. Dep't of Bus. & Prof'l Reg., 709 So. 2d 595 (Fla. 5th DCA 1998).

114. The very fact that the perpetrator of a crime is an educator working with students is one such circumstance. It has been held that mere purchase or possession of cocaine by an educator, even without distribution, can constitute a crime of moral turpitude, because the moral standards educators must uphold to provide leadership to their students exceed those of other professionals. Castor v. Pelaez, Case No. 90-1395 (Fla. DOAH May 31, 1990). Accord Feldman v. Brogan, Case No. 98-2909 (Fla. DOAH Sept. 16, 1998) (purchase of cocaine and possession of pipe used for smoking cocaine by teacher was crime of moral turpitude); Castor v. Thurston, Case No. 92-7063 (Fla. DOAH July 27, 1993)(purchase of crack cocaine by teacher is act of

gross immorality and moral turpitude); Castor v. Williams, Case No. 89-506 (Fla. DOAH July 17, 1989)(purchase of cocaine by teacher was act involving gross immorality and moral turpitude).

115. Delivery of cocaine, or intent to deliver cocaine, is a more serious offense than simple possession. Offenses involving delivery have been held to constitute a crime of moral turpitude even within professions not working directly with students. Milliken v. Dep't of Bus. & Prof'l Reg., 709 So. 2d 595 (Fla. 5th DCA 1998)(possession of cocaine with intent to distribute by real estate agent was crime of moral turpitude); Dep't of Ins. v. Barker, Case No. 99-2478 (Fla. DOAH Sept. 9, 1999)(delivery of cocaine by insurance agent was crime of moral turpitude).

116. Section 1012.795(2) provides that a guilty plea to a crime involving moral turpitude is prima facie proof of grounds for revocation of the certificate in the absence of proof by the certificate holder that the plea of guilty was caused by threats, coercion, or fraudulent means. Petitioner failed to prove her guilty plea resulted from threats, coercion, or fraudulent means.

117. In distributing cocaine and conspiring to distribute cocaine, Petitioner committed acts involving moral turpitude as defined by rule of the State Board of Education in violation of section 1012.795(1)(d). As noted

above, this gives the Department of Education the authority to deny Petitioner's application under section 1012.56(12)(a).

118. However, section 1012.56(12)(a) provides that the Department of Education may deny an Applicant a certificate for such acts, not that it must do so. In the case of Petitioner, who committed these offenses over 25 years prior to applying for certification, has apparently committed no further criminal offenses, has received two college degrees, has been certified as an educator in another state, and has been lauded for her performance as an educator in both Colorado and Florida, the Educational Practices Commission should not exercise its discretion to deny Petitioner certification on the basis that Petitioner committed an act of moral turpitude as defined by rule of the State Board of Education.

Count 5

119. Count 5 charges, "The Applicant is in violation of Section 1012.795(1)(f), Florida Statutes, in that the Applicant has been convicted or found guilty of, or entered a plea of guilty to, regardless of adjudication of guilt, a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation."

120. As discussed above under Count 3, although on its face Count 5 alleges that Petitioner violated section 1012.795(1)(f), an applicant who does not hold an educator's certificate cannot actually violate that provision, but instead is subject to application denial under section 1012.56(12)(a) for the same act or situation that could lead to revocation under section 1012.795(1)(d). Again, while the complaint might have been drafted more precisely, the allegation was clear and Petitioner was not prejudiced in preparing her defense.

121. Respondent proved that Petitioner entered a plea of guilty and was convicted of the federal crimes of distribution of cocaine and conspiracy to distribute cocaine, grounds for suspension or revocation of a Florida Educator's Certificate under section 1012.795(1)(f).

122. Section 1012.795(2) provides that a guilty plea to a felony is prima facie proof of grounds for revocation of the certificate in the absence of proof by the certificate holder that the plea of guilty was caused by threats, coercion, or fraudulent means. Petitioner failed to prove her guilty plea was caused by threats, coercion, or fraudulent means.

123. Again, denial of certification under section 1012.56(12)(a) is discretionary, however. Petitioner's offenses and guilty plea took place over 25 years ago. In light of the evidence that Petitioner has long since turned her life around

and is now a responsible educator, the EPC should not exercise its discretion to deny Petitioner certification on the basis that Petitioner pled guilty to these offenses.

Count 6

124. Count 6 charges, "The Applicant is subject to Section 1012.795(1)(n), Florida Statutes, in that Applicant has been disqualified from educator certification under 1012.315, Florida Statutes."

125. It is true, as noted above in Count 3, that the grounds for denial of an application for an educator's certificate do incorporate by reference those grounds which would cause an existing certificate to be revoked. It is also true that the grounds for revocation of an existing certificate incorporate by reference the ineligibility statute for new applicants. However, it goes too far to read these two provisions together in a circular fashion to multiply the charges against an applicant. The charge that Petitioner is ineligible under section 1012.315 has already been fully addressed in Count 1. It adds nothing but confusion to charge as a separate count that Petitioner's application for an educator's certificate should also be denied because an existing certificate holder would be subject to revocation for ineligibility under exactly the same statute.

126. In summary, Petitioner is ineligible for an educator's certificate under the provisions of section 1012.315(3), as alleged in Count 1.

RECOMMENDATION

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

RECOMMENDED that the Education Practices Commission enter a final order denying Petitioner's application for a Florida Educator's Certificate, without prejudice to her reapplication should she later become eligible.

DONE AND ENTERED this 31st day of May, 2012, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 2012.

ENDNOTES

[1/] Petitioner was unmarried at the time and she appears in the court documents as Cappi C. Eminger. In other documents relating to later events, Petitioner is listed as Ms. Cappi Castro. Petitioner testified as to her conviction, there is no

issue arising as a result of these different names, and Petitioner is referred to throughout this Recommended Order using her current name.

[2/] All statutory references are to the 2011 Florida Statutes, except as otherwise indicated. Since a final order has not yet been issued in this case, Petitioner's application for licensure is governed by the law in effect at the time the final licensure decision is made. See Agency for Health Care Admin. v. Mount Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997). No changes from the 2012 regular session appear relevant.

[3/] Boshnack and other case law on this issue may be cited less frequently in favor of statutory citation to sections 772.14 and 775.089(8), Florida Statutes, which allow a judgment based on a guilty plea to be considered as evidence in certain civil proceedings and estop the defendant from challenging in the subsequent civil action those matters that were actually and necessarily adjudicated in the earlier criminal proceeding. Cf. City of Orlando v. Pineiro, 66 So. 3d 1064, 1074 (Fla. 5th DCA 2011)(citing both § 772.14, Fla. Stat. as well as the Boshnack case for the proposition that in civil actions where some fact necessarily involved in the determination of such guilt is at issue, plea of guilty is admissible).

[4/] The Florida Supreme Court in McMillon v. State, 813 So. 2d 56 (Fla. 2002), held that knowledge of the illicit nature of a substance is an element of the crime of sale of cocaine under 893.13(1)(a)1., even though this element is not explicitly stated, and that the failure to instruct the jury on this element when requested was error. In 2002, the Legislature enacted section 893.101, Florida Statutes, eliminating knowledge of a controlled substance's illicit nature as an element of any offense under chapter 893.

[5/] The Shelton decision interpreted section 893.13, Florida Statutes, as creating a strict liability felony by requiring a defendant to prove lack of knowledge of the contraband substance. Some Florida courts have disagreed, see Flagg v. State, 74 So. 3d 138 (Fla. 1st DCA 2011) and cases cited therein. The Second District case of State v. Adkins, 71 So. 3d 184 (Fla. 2d DCA 2011), certified the question to the Florida Supreme Court, where it is pending. State v. Adkins, No. SC11-1878 (Fla., filed Sept. 28, 2011).

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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.