STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TORREYA LANDREA DAVIS,

Petitioner,

vs. Case No. 13-2501

PAM STEWART, AS COMMISSIONER OF EDUCATION,

Respondent.
______________________________/

RECOMMENDED ORDER

This case was heard on September 27, 2013, in Tallahassee, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: John M. Leace, Esquire
Brooks, LeBoeuf, Bennett, Foster
& Gwartney, P.A.
909 East Park Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Petitioner demonstrated entitlement to issuance of a Florida Educator's Certificate.

PRELIMINARY STATEMENT

On September 19, 2012, the Commissioner of Education entered a 10-count Notice of Reasons setting forth her determination that Petitioner was not entitled to issuance of a Florida Educator's Certificate, and identifying the statutory and regulatory violations warranting her determination.

On October 15, 2012, Respondent filed an election of rights by which she requested a formal hearing. The record is silent as to when the Notice of Reasons was served on Respondent, though there has been no suggestion that the request for hearing was not timely filed. The election of rights requested a period within which to explore settlement before the matter was referred to for a formal hearing.

On July 5, 2013, this case was referred to the Division of Administrative Hearings for a formal administrative hearing. The final hearing was noticed for August 23, 2013. On August 6, 2013, Petitioner, through her qualified representative, filed an unopposed Motion to Continue Final Hearing. The motion was granted, and the hearing was rescheduled for September 27, 2013.

On September 20, 2013, the parties filed their witness and exhibit lists in accordance with the Order of prehearing instructions. Thereafter, the hearing was held as scheduled.

At the final hearing, Respondent testified on her own behalf. Joint Exhibit 1, consisting of the Judgment in a

Criminal Case for the offense of Conspiracy to Distribute Marijuana, and Petitioner's Exhibit 2, consisting of Petitioner's Application for Florida Educator's Certificate, were received in evidence.

A one-volume Transcript of the proceedings was filed on October 23, 2013. A Joint Motion for Extension of Time to File Proposed Recommended Order was filed by the parties and granted by the undersigned. Both parties thereafter timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order.

Petitioner's application for licensure is governed by the law in effect at the time the final licensure decision is made. See Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53, 54 (Fla. 1st DCA 1993). Therefore, all references to the Florida Statutes shall be to the 2013 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. Respondent, as Commissioner of the Florida Department of Education, is charged with the duty to issue Florida Educator's Certificates to persons seeking authorization to become school teachers in the state of Florida.

2. Petitioner is a second-grade teacher. She is in her third year of teaching. Pending action on her application for an Educator's Certificate, Petitioner has taught under the

authority of temporary Statements of Eligibility. She currently teaches at George W. Monroe Elementary School in Quincy, Florida.

3. On or about April 17, 2012, Petitioner submitted an on-line application for a Florida Educator's Certificate in Elementary Education. The application included a field with the heading "CRIMINAL OFFENSE RECORD(S)(Report any record other than sealed or expunged in this section).

4. In her application, Petitioner disclosed the following criminal offenses, their dates, and their dispositions:

> Affray - June 2002 - Probation
>
> Conspiracy to Possess Marijuana - August 2006 - Guilty/Adjudicated
>
> Petty Theft - April 2000 - Pretrial Diversion
>
> Disorderly Conduct - February 2001 - Probation
>
> DWLS - February 2001 - Probation

5. In conjunction with her application, Petitioner submitted information to substantiate those offenses that she could remember, as well as a set of fingerprints.

6. Included in Petitioner's submittals to Respondent was a copy of the Judgment in a Criminal Case, United States of America v. Torreya Haynes, Case No. 4:06cr10-03(S), from the United States District Court for the Northern District of

Florida, dated August 3, 2006. Petitioner stipulated that she is the person identified in the Judgment as Torreya Haynes. The acts upon which the Judgment was based concluded on August 15, 2005. The Judgment established that Petitioner pled guilty to the offense of Conspiracy to Distribute Marijuana, and was sentenced to a three-year term of probation and payment of a special monetary assessment of one-hundred dollars.

7. The parties stipulated to the following facts regarding Petitioner's criminal record:

> a. On or about March 5, 2000, the Applicant was arrested and charged with Petit Theft in Leon County, Florida. The Applicant entered into a pre-trial diversion program and a "No Information" was filed on the charge.
>
> b. On or about July 20, 2000, the Applicant was arrested and charged with Affray in Leon County. The Applicant entered into a pre-trial diversion program and a "No Information" was filed on the charge.
>
> c. On or about August 20, 2001, the Applicant was arrested and charged with Disorderly Conduct/Affray in Leon County, Florida. The Applicant entered into a pre-trial diversion program and a "No Information" was filed on the charge.
>
> d. On or about June 9, 2004, the Applicant was arrested and charged with Battery in Leon County, Florida. On or about November 15, 2004, the Applicant pled nolo contendere to the charge and the court withheld adjudication.
>
> e. On or about August 4, 2004, the Applicant was arrested and charged with Possession of Marijuana in Leon County,

Florida. On or about November 15, 2004, the Applicant pled nolo contendere to the charge and the court withheld adjudication.

f. On or about February 2, 2005, the Applicant was arrested in Miami-Dade County, Florida, and charged with Possession of Cannabis. The Applicant entered into a pre-trial diversion program called "Court Options" and the charge was nolle prossed.

8. In addition to the foregoing, Petitioner testified that she did not list a 2001 arrest for passing a worthless bank check, to which she pled no contest and received probation.

9. Petitioner did not list the offenses in sub-paragraphs 7.b. through 7.f. and in paragraph 8. in the application.

10. On September 19, 2012, Respondent served Petitioner with a 10-count Notice of Reasons advising her that her application for a Florida Educator's Certificate was denied.

11. Petitioner timely filed an Election of Rights that requested a formal hearing.

12. Petitioner will be unable to continue to teach students in Florida without a valid Educator's Certificate. Thus, Petitioner is substantially affected by the intended decision to deny her certification, and has standing to contest the intended action.

13. From her March 5, 2000 arrest for Petit Theft, which occurred when she was 19 years of age, until the August 15, 2005, date of the conclusion of the offense of conspiracy to

distribute marijuana, which occurred when she had just turned 25 years of age, Petitioner was arrested and entered into some form of official disposition of the offenses on, at best count, twelve occasions. Despite the relatively light nature of the dispositions, generally consisting of pretrial diversion or probation, the charges were serious, including multiple drug charges, battery, and affray. “Chaotic” would be an apt description of those years of Petitioner’s life.

14. In her application for an Educator’s Certificate, Petitioner answered truthfully that she had criminal offenses in her background, and listed what she remembered. Petitioner testified that she completed the application from memory and thought she had answered the questions posed, but did not try to recover paperwork or records from the clerk of court. Petitioner understood that her fingerprints submitted with her application would provide the Department with access to her complete criminal record, and expected that the background check would disclose her record in the application process.

15. A review of the application form shows there to be five spaces for information to be entered. There was no evidence that additional spaces were provided. It is not known how offenses were to be listed if they numbered more than five.

16. Petitioner listed her federal conviction as “conspiracy to possess marijuana,” and indicated that she was

adjudicated guilty. Petitioner testified that she had originally been charged with conspiracy to both possess and distribute marijuana. She was convicted of conspiracy to distribute marijuana, but confused the charges when filling out the application. Petitioner provided Respondent with a copy of the conviction, which plainly identified the offense for which she was convicted. There was no effort to conceal or falsify the nature of the conviction. Rather, the error was just that, an error.

17. In the more than eight years that have passed since the conclusion of the last acts that constituted the conspiracy to distribute marijuana, Petitioner appears to have turned a corner. Petitioner’s actions since 2005 show a consistent pattern of personal stability and accomplishment, with no evidence of criminal activity. She married, and has a child with a second on the way. She is active with her school, her family, and her church. She went back to school and earned a Master’s Degree in Public Administration. She has taught for more than two years without incident or complaint. Petitioner expressed a sincere interest and concern for the children under her tutelage. Petitioner’s testimony that “I’ve grown up. I’m not the same person that I was before,” was convincing, and leads to the conclusion that she has substantially rehabilitated herself. Based on Petitioner’s demeanor and sincerity at the

hearing, the undersigned finds her testimony to be credible and worthy of belief.

CONCLUSIONS OF LAW

A. Jurisdiction.

18. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

19. The Department of Education is the state agency responsible for licensure of instructional personnel for the public schools. § 1012.55, Fla. Stat.

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

B. Burden of Proof

21. As the party seeking issuance of an Educator's Certificate, Petitioner has the burden of proving by a preponderance of evidence that she satisfies the applicable standards and requirements. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

22. Petitioner's ultimate burden notwithstanding, Respondent has the burden of presenting evidence of any statutory or regulatory 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).

23. Petitioner applied for an Educator's Certificate in Elementary Education. The criteria for licensure are found in section 1012.56(2). Except for the requirement in section 1012.56(2)(e) that a certificate holder "be of good moral character," there has been no allegation that Petitioner does not meet the basic requirements.

24. There is little dispute as to the offenses that form the basis for Counts 1 through 10. The application of the licensing standards to those facts remains for disposition.

C. Analysis

Count 1

25. Count 1 alleges that "[t]he 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."

26. Section 1012.315 provides in pertinent part:

> Disqualification from employment. — A person is ineligible for educator certification, . . . if the person . . . 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).

27. Section 1012.56(10)(a) provides that "[e]ach person who seeks certification . . . must not be ineligible for such certification under section 1012.315."

28. Petitioner was not convicted of a felony offense directly listed in chapter 893. Thus, the issue for determination is whether Petitioner's 2006 conviction for conspiracy to distribute marijuana under federal law would constitute a felony offense under chapter 893.

29. When statutes require the examination of foreign judgments in comparison with Florida crimes, the elements of the federal criminal acts must be compared with corresponding elements of the Florida Statute. See, e.g., 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 similar to the elements of an enumerated Florida offense); Dawson v. Dep't of High. Saf. & Motor Veh., 19 So. 3d 1001 (Fla. 4th DCA 2009), rev. denied, 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).

30. Petitioner was convicted of a conspiracy to violate 21 U.S.C. section 841(a)(1), which provides that:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;. . .[1/]

31. A "controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. 21 U.S.C. § 802(6).

32. Marijuana is a substance included in subsection (c)(10) of schedule I. 21 U.S.C. § 812(c).

33. Marijuana is defined, in pertinent part, as:

> all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin . . . .

21 U.S.C. § 802(16).

34. "The term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 U.S.C. § 802(11).

35. "The terms 'deliver' or 'delivery' mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship." 21 U.S.C. § 802(8).

36. In order to be considered as a disqualifying offense, the elements of the federal crime must next be compared with the elements of the corresponding offense in section 1012.315.

37. Section 893.13, Florida Statutes (2005), the statute in effect at the time of the offense,[2/] provides in pertinent part:

> Prohibited acts; penalties.—
>
> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to . . . deliver, or possess with intent 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.

38. A "controlled substance" is defined as "any substance named or described in Schedules I-V of s. 893.03." § 893.13(4), Fla. Stat. (2005).

39. Cannabis is a substance included in schedule I. § 893.03(1)(c)7., Fla. Stat. (2005).

40. "Cannabis" is defined as "all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." § 893.02(3), Fla. Stat. (2005). "Cannabis" and "marijuana" are synonymous.

41. "'Distribute' means to deliver, other than by administering or dispensing, a controlled substance." § 893.02(7), Fla. Stat. (2005).

42. "'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." § 893.02(5), Fla. Stat. (2005).

43. Based on the foregoing, the federal offense of distribution of marijuana is equivalent to the Florida offense of delivery of a controlled substance (cannabis) under chapter 893, and is therefore an offense prohibited by sections 1012.315(1)(qq) and 1012.315(3).

44. Petitioner was not convicted of distributing marijuana. Rather, she was convicted of a conspiracy to distribute marijuana.

45. Section 777.04(3), Florida Statutes (2005) provides that "[a] person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4)."[3/]

46. Section 777.04(4)(d), Florida Statutes (2005), provided, in pertinent part, that:

> (d) Except as otherwise provided in s. 104.091(2), s. 370.12(1), s. 828.125(2), or s. 849.25(4), if the offense attempted, solicited, or conspired to is a:
>
> 1. Felony of the second degree;
>
> * * *
>
> the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

47. Since delivery of marijuana is a second-degree felony in Florida, a conspiracy to deliver marijuana 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).

48. The federal conviction of conspiracy to deliver marijuana would be the equivalent of a third-degree felony if the case had been tried under Florida law, and is therefore not a disqualifying offense under section 1012.315(1).

49. In summary, Petitioner's conviction of conspiracy to distribute marijuana in violation of federal law is not an offense prohibited by section 1012.315(1)(qq), in that it is a felony of the third degree.

50. Based on the foregoing, Respondent failed to prove that denial of Petitioner's application for an Educator's Certificate was warranted for the reasons set forth in Count I.

Count 2

51. Section 1012.56(2)(e), provides that "[t]o be eligible to seek certification, a person must: (e) Be of good moral character."

52. The difficulty in fairly applying a subjective and imprecise standard as "good moral character" has been recognized by the Florida Supreme Court, which has held that:

> 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.

In re Fla. Bd. of Bar Examiners, 373 So. 2d 890, 891 (Fla. 1979).

53. The imprecision of the "good moral character" standard does not, however, restrict its application. In Florida Board of Bar Examiners, 364 So. 2d 454, 458 (Fla. 1978), the Florida Supreme Court held that:

> a finding of a lack of "good moral character" should not be restricted to those acts that reflect moral turpitude. A more appropriate definition of the phrase requires an inclusion of acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation.

54. In applying the term "good moral character," a number of recommended and final orders in educator certification cases have relied upon the standard set forth 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 . . . .

Cappi Arroyo v. Dr. Eric J. Smith, as Comm'r of Educ., Case No. 11-2799 (Fla. DOAH May 31, 2012; Fla. EPC Nov. 13, 2012); Natasha Hodge v. Dr. Eric J. Smith, as Comm'r of Educ., Case No. 11-3318 (Fla. DOAH Sept. 29, 2011; Fla. EPC Jan. 11, 2012); Anitra Grant v. John Winn, as Comm'r of Educ., Case No. 06-5297 (Fla. DOAH Aug. 30, 2007; Fla. EPC Dec. 7, 2007); Ana Santana v. John Winn, as Comm'r of Educ., Case No. 05-1302 (Fla. DOAH Aug 22, 2005; Fla. EPC Feb. 21, 2006).

55. Section 1012.56(2)(e), which requires that a person seeking certification "[b]e of good moral character" is written in the present tense. Thus, the issue for determination under section 1012.56(2)(e) is whether Petitioner is presently of good moral character, not whether she committed acts that would suggest a lack of moral character at the time of their commission.

56. As set forth in the findings of fact herein, the evidence is convincing that Petitioner has abandoned the way of life that led her to troubles during the years from 2000 to 2005, and that her conduct since that time demonstrates she has substantially rehabilitated herself.

57. Based on the record developed in this proceeding, Petitioner has proven, by a preponderance of the evidence, that she is currently of good moral character, and her past acts should not make her ineligible for an Educator's Certificate under section 1012.56(2)(e).

Count 3

58. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 3 alleges that:

> 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.

59. Although listed as a separate count, it is clear that no specific act is alleged as a part of Count 3 itself. Rather, Count 3 takes those acts listed as grounds for revocation in section 1012.795(1), which acts were made the bases for denial in Counts 4 through 7, and adopts them as grounds for denial of

an application. Thus, the substance of Count 3 is as set forth in Counts 4 through 7.

60. The basis for Count 3 being those standards set forth in Counts 4 through 7, the analysis of the substance of Counts 4 through 7 shall stand as being applicable to Count 3.

Count 4

61. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 4 alleges that:

> 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.

62. As set forth in the analysis of Count 3 above, although Count 4 alleges Petitioner violated section 1012.795(1)(d), an applicant who does not hold an Educator's Certificate cannot violate that provision, but rather is subject to denial of an application through the adoption of the revocation standards in section 1012.56(12)(a). Although Counts 4 through 7 may be technically deficient for failing to incorporate section 1012.56(12)(a), the substance of the bases for denial were clear, and Petitioner was not prejudiced in preparing her defense.

63. The Ethics in Education Act, Chapter 2008-108, §32, Laws of Florida, amended section 1012.795(1)(d) to add the

phrase "as defined by rule of the State Board of Education," creating the statute as it appears at present.

Gross Immorality

64. In Cappi Arroyo v. Dr. Eric J. Smith, as Commissioner of Education, Case No. 11-2799, ¶109 (Fla. DOAH May 31, 2012; Fla. EPC Nov. 13, 2012), Judge F. Scott Boyd analyzed the effect of the 2008 legislative amendment of section 1012.795(1)(d) as follows:

> 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. (emphasis added).

65. The Final Order in Arroyo v. Smith accepted Judge Boyd's recommended order, and it was "adopted in full and

becomes the Final Order of the Education Practices Commission." That Final Order, and the conclusions of the recommended order adopted thereby, will therefore be applied in this case.

66. Judge Boyd correctly noted that "[t]he State Board of Education has not defined the term 'gross immorality' by rule." Arroyo v. Smith at ¶110. The undersigned, having reviewed the relevant rules promulgated by the State Board of Education concurs with Judge Boyd, and finds that the State Board of Education has not defined "gross immorality" by rule.

67. Respondent admitted in its proposed recommended order, at paragraph 16, that "gross immorality" has not been defined by rule. However, Respondent suggests that the term should be applied in accordance with judicial and administrative cases construing "gross immorality" that were decided prior to the legislative mandate that the term be defined by rule. Given the 2008 amendment of the statute, those cases are inapplicable to the current standard established by the legislature.

68. Based on the foregoing, Respondent failed to prove that Petitioner was "guilty of gross immorality . . . as defined by rule of the State Board of Education" so as to warrant denial of Petitioner's application for an Educator's Certificate.

Moral Turpitude

69. The State Board of Education has, since the amendment of rule 6A-5.056 on July 8, 2012, defined "crimes involving moral turpitude" in pertinent part as:

> . . . offenses listed in Section 1012.315, Florida Statutes, and the following crimes:
>
> * * *
>
> (j) An out-of-state offense, federal offense or an offense in another nation, which, if committed in this state, constitutes an offense prohibited under Section 1012.315(6), Florida Statutes.[4/]

Fla. Admin. Code R. 6A-5.056(8).

70. As established in the analysis of Count 1 above, the offense of conspiracy to distribute marijuana is not a disqualifying offense because it is not a felony of the second degree or greater. Thus, section 1012.315(3) does not list a "crime involving moral turpitude" that would disqualify Petitioner from receiving an Educator's Certificate.

71. There was no evidence that any of the other offenses on Petitioner's record were specified in rule 6A-5.056(8). There was no evidence that any of the offenses on Petitioner's record were listed in section 1012.315(1), which lists disqualifying felonies; 1012.315(2), which lists disqualifying misdemeanors; or 1012.315(4), which lists disqualifying juvenile sex offenses. Thus, section 1012.315 does not list a "crime

involving moral turpitude" that would disqualify Petitioner from receiving an Educator's Certificate.

72. Since the amendment of rule 6A-5.056 to create a defined list of "crimes of moral turpitude," the more subjective definition contained in the rule prior to its amendment on July 8, 2012, and applied in earlier administrative recommended and final orders, is no longer applicable.

73. Based on the foregoing, Respondent failed to prove that Petitioner was "guilty of . . . an act involving moral turpitude as defined by rule of the State Board of Education" so as to warrant denial of Petitioner's application for an Educator's Certificate.

Count 5

74. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 5 alleges that:

> 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.

75. As set forth in the analysis of Count 3 above, offenses that could lead to revocation under section 1012.795(1)(f) are applicable in a licensing proceeding pursuant to section 1012.56(12)(a).

76. Respondent proved that Petitioner was convicted of the following offenses:

> A conviction for disorderly conduct, with an arrest date of February 2001, and which resulted in a sentence of probation.
>
> A conviction for driving while license suspended, with an arrest date of February 2001, and which resulted in a sentence of probation.
>
> A conviction for affray, with an arrest date of June 2002, and which resulted in a sentence of probation.
>
> A November 15, 2004 plea of nolo contendere to the charge of battery, for which adjudication was withheld.
>
> A November 15, 2004 plea of nolo contendere to the charge of Possession of Marijuana, for which adjudication was withheld.
>
> The previously discussed August 3, 2006 plea and judgment of guilty to conspiracy to distribute marijuana, resulting in a sentence of probation.

77. Petitioner did not argue or prove that her guilty plea or other convictions were the result of threats, coercion, or fraudulent means.

78. Based on the foregoing, the evidence supports a conclusion that Petitioner "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."

79. Section 1012.56(12)(a) provides that the Department of Education may deny an applicant a certificate for offenses described in section 1012.795(1), not that it must do so.

80. It is generally established that the role of the undersigned is "to provide findings of fact to inform EPC's exercise of its discretion, but not for the Administrative Law Judge to determine whether the intended agency action to deny is -- or, worse, a later, final agency action to deny would be -- an abuse of the discretion vested in DOE and EPC -- a matter that is left to judicial review, if any." Luther Rodrick Campbell v. Dr. Eric J. Smith, as Comm'r of Educ., Case No. 11-4533, ¶104 (Fla. DOAH May 15, 2012; Fla. EPC Sept. 4, 2012).

81. Petitioner demonstrated, by a preponderance of the evidence, that she has substantially rehabilitated herself, and that she is currently of good moral character. As set forth herein, there was a lack of proof to establish any intentional dishonesty, misrepresentation, or fraud in the application, gross immorality or moral turpitude as defined by rule of the Department, or other factors that would bear negatively upon the ability of Petitioner to perform the duties of an elementary school teacher.

82. For the reasons set forth herein, the Educational Practices Commission should not deny Petitioner certification under the broad auspices of section 1012.795(1)(f).

Count 6

83. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 6 alleges that:

> The Applicant is in violation of section 1012.795(1)(k), Florida Statutes, in that she has otherwise violated the provisions of law, the penalty for which is the revocation of the teaching certificate.

84. By this count Respondent has alleged a basis for denial of Petitioner's application in a broad and general count with little specificity. Thus, the undersigned concludes that the only way this count can be addressed, consistent with accepted tenets of due process, is to limit the "provisions of law" allegedly violated to those pled and identified with some meaningful degree of specificity elsewhere.

85. In addressing this count, the undersigned incorporates the findings of fact and conclusions of law as to each of the specific acts alleged elsewhere in the Notice of Discipline.

Count 7

86. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 7 alleges that:

> 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.

87. The allegation that Petitioner is subject to disqualification under section 1012.315 has been fully addressed

in Count 1. In short, Petitioner has not been convicted of any felony offense listed in that section. Thus, section 1012.315 does not, either on its own or by application of section 1012.56(10)(a), provide a basis for denial of Petitioner's application for an Educator's Certificate.

88. Based on the foregoing, Respondent failed to prove that Petitioner has been disqualified from educator certification under 1012.315, Florida Statutes, so as to warrant denial of Petitioner's application for an Educator's Certificate under section 1012.795(1)(n).

Count 8

89. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 8 alleges that:

> The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(5)(a), Florida Administrative Code, in that Applicant has failed to maintain honesty in all professional dealings.

90. Rule 6B-1.006 was transferred on or about January 11, 2013, and now appears in the Florida Administrative Code as rule 6A-10.081. The specified rule is now numbered as rule 6A-10.081(5)(a).

91. The basis for Count 8 is that Petitioner failed to list all of her offenses as set forth herein in her application, and that she misidentified her federal conviction for conspiracy to distribute marijuana as conspiracy to possess marijuana.

92. The flaws in the application do not demonstrate that Petitioner had any intent to conceal information or be less than honest in completing the application. She answered truthfully that she had criminal offenses in her background. Petitioner testified that she completed the application from memory and thought she had answered the questions posed, but did not try to recover paperwork or records from the clerk of court. Petitioner understood that Respondent would have access to her complete criminal history as a result of the submission of her fingerprints and the background check. Therefore, there is no evidence that she had any intent to answer less than honestly in the preparation of her application.

93. With regard to the identification of the federal conviction, Petitioner testified that she had originally been charged with conspiracy to both possess and distribute marijuana. She was convicted of conspiracy to distribute marijuana, but confused the charges when filling out the application. The fact that she provided a copy of the judgment demonstrates that she had no intent to be dishonest in the information provided to Respondent.

94. Petitioner had more than a few arrests that, for the most part, occurred more than a decade ago, so the potential for confusion or even omission exists. The offenses omitted from the application were ones for which a "no information" was

filed, a nolle prosequi of the charge was made, or for which adjudication was withheld. She testified generally that she attempted to list those offenses that she had "been held accountable for." On these facts, it is found only that Petitioner filed an inaccurate application, but not that she filed an application with dishonest intent.

Count 9

95. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 9 alleges that:

> The Applicant is in violation of Rule 6B-1.006(5)(g), Florida Administrative Code, in that she has misrepresented HIS/HER professional qualifications.

96. Rule 6B-1.006(5)(g) was transferred, and is now renumbered as rule 6A-10.081(5)(g).

97. As with Count 8, the basis for the allegation that Petitioner misrepresented her professional qualifications is that she failed to accurately list her criminal offenses in the application for her Educator's Certificate.

98. In general, misrepresentation requires an element of intent. See, e.g., Fla. Bar v. Forrester, 818 So. 2d 477, 483 (Fla. 2002)("This Court has held that 'in order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent.'" Further, this Court has held that 'in order to satisfy the

element of intent it must only be shown that the conduct was deliberate or knowing.'" (internal citations omitted)).

99. As set forth in the analysis of Count 8, Petitioner's application was based on memory, which was imperfect but not suggestive of a deliberative intent to conceal, withhold, or misrepresent the circumstances of her criminal background. Thus, rule 6A-10.081(5)(g) does not warrant denial of Petitioner's application for an Educator's Certificate.

Count 10

100. As a basis for the denial of Petitioner's application for an Educator's Certificate, Count 10 alleges that:

> The Applicant is in violation of Rule 6B-1.006(5)(g), Florida Administrative Code, in that she has submit[s] fraudulent information on any document in connection with professional activities.

101. Rule 6B-1.006(5)(h), was transferred, and is now renumbered as rule 6A-10.081(5)(h).

102. As with misrepresentation, in order to demonstrate that an individual performed an act fraudulently, there is a requisite degree of deliberative intent. See Fla. Bar v. Forrester, supra.

103. As set forth in the analysis of Counts 8 and 9, the errors in Petitioner's application were largely based on an imperfect memory. They were not suggestive of a deliberative intent to submit fraudulent information. Thus, rule 6A-

10.081(5)(h) does not warrant denial of Petitioner's application for an Educator's Certificate.

D. Conclusion

104. The application of the facts of this case to the pertinent law and standards fails to demonstrate that grounds exist for the denial of Petitioner's application for the reasons set forth in Counts 1 through 4 and 6 through 10.

105. As to Count 5, the evidence established that Petitioner "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." However, the evidence was equally convincing that Petitioner has substantially rehabilitated herself, and that she is currently of good moral character. Thus, the recommendation below to issue a certificate is based on Petitioner's current ability to comport herself in compliance with the high moral and ethical standards expected of a teacher in this state.

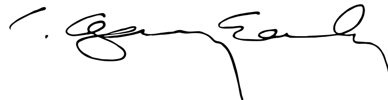
106. Given the errors in the application, regardless of the lack of intent, it is not unreasonable for the Education Practices Commission to impose such reasonable conditions on Petitioner's Educator's Certificate that will ensure her continued attention to and compliance with the standards necessary for maintaining the certificate in good standing, and

nothing in this recommended order should be construed as limiting the Commission's ability to impose such conditions.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Education Practices Commission enter a final order granting Petitioner, Torreya Landrea Davis's application for an Educator's Certificate, subject to such reasonable conditions as will allow the Commission to monitor and ensure Ms. Davis's continued attention to and compliance with the standards necessary for maintaining the Educator's Certificate in good standing.

DONE AND ENTERED this 13th day of December, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of December, 2013.

ENDNOTES

[1/] The Judgment also cites 21 U.S.C. § 841(b)(1)(C). That section establishes penalties for the offenses described in 21 U.S.C. § 841(a), and is not applicable to the elements of the offense.

[2/] A comparison of the relevant provisions of chapter 893 as it existed in 2005 with the current corresponding sections reveal no material differences.

[3/] As with chapter 893, a comparison of the relevant provisions of chapter 777 as it existed in 2005 with the current corresponding sections reveal no material differences.

[4/] There is no section 1012.315(6), Florida Statutes. The undersigned presumes that the Department intended to cite to section 1012.315(3) when it adopted the rule.

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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.