SUPERINTENDENT OF PUBLIC INSTRUCTION

Chris Reykdal Old Capitol Building · PO BOX 47200 · Olympia, WA 98504-7200 · http://www.k12.wa.us

RE: Alex Garza
OSPI Case Number: D07-05-048
Document: Suspension

Regarding your request for information about the above-named educator; attached is a true and correct copy of the document on file with the State of Washington, Office of Superintendent of Public Instruction, Office of Professional Practices. These records are considered certified by the Office of Superintendent of Public Instruction.

Certain information may have been redacted pursuant to Washington state laws. While those laws require that most records be disclosed on request, they also state that certain information should not be disclosed.

The following information has been withheld:

> **Public employees – Address; Phone; Email; SSN; Driver's License - The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency. – RCW 42.56.250(3).**

If you have any questions or need additional information regarding the information that was redacted, if any, please contact:

> OSPI Public Records Office
> P.O. Box 47200
> Olympia, WA 98504-7200
> Phone: (360) 725-6372
> Email: PublicRecordsRequest@k12.wa.us

You may appeal the decision to withhold or redact any information by writing to the Superintendent of Public Instruction, OSPI P.O. Box 47200, Olympia, WA 98504-7200.

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF: ALEXSANDRO GARZA
CERTIFICATION NUMBER: 419541h
TEACHER CERTIFICATION CAUSE NUMBER: 2010-TCD-0005

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Janice E. Shave in Moses Lake, Washington, on May 18, 19 and 20, 2010. The hearing was reconvened and completed by telephone on May 21, 2010, when closing argument was heard. The Appellant, Alexsandro Garza, appeared and was represented by Lewis Card, attorney at law. The Superintendent of Public Instruction (OSPI) was represented by Anne Shaw and Kristen Byrd, assistant attorneys general. Charles Schreck, former director of OSPI's Office of Professional Practices (OPP), participated at the hearing. Catherine Slagle, OPP's current director, observed the proceeding. The record closed June 4, 2010, following submission of post-hearing briefing.

The written decision in this matter is due ninety (90) days after the close of the record. Revised Code of Washington (RCW) 34.05.461(8). Ninety days after the close of the record is September 2, 2010.

Evidence relied upon:

Exhibits: The following exhibits were admitted and considered: OSPI exhibits S1 – S46, with the exception of S18 (withdrawn) and S34 and S37 (not admitted), Appellant exhibits A1 – A8 (A9 not offered), and Court exhibits C1 – C2 (January 21, 2010, appeal of Final Order of Revocation filed by Appellant's attorney with the Superintendent of Public Instruction, and Final Order of Revocation issued December 23, 2009, respectively).

Witnesses: Testimony was taken under oath or affirmation from the following witnesses: Alexsandro Garza (Appellant), Stephen Chestnut, Ph.D. (former Moses Lake School

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District (MLSD) superintendent, current Selah School District superintendent), LL[1] (former MLSD high school student and friend of BN, another former MLSD high school student), ND (former MLSD high school student and friend of BN), BM (former MLSD high school student and friend of BN), SM (former MLSD high school student and friend of BN), Patricia Holloway (former MLSD high school Spanish teacher, current MLSD school counselor), AH (former MLSD high school student and friend of BN), Juan M. Loera (testimony by telephone, Moses Lake Police Department officer), Johanna West (MLSD high school teacher), Charles Schreck (former director OPP, current consultant/trainer with Canfield and Associates), Shaun Harmon (testimony by telephone, OSPI OPP investigator), CG (brother of Appellant).

The ALJ, having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

PROCEDURAL STATEMENT OF THE CASE

OSPI received a written complaint from MLSD's then-superintendent, Stephen Chestnut, Ph.D., on May 11, 2007. S1. The complaint alleged various violations of the standards of professional conduct by MLSD certificated teacher Alexsandro Garza, the Appellant herein. OSPI conducted an investigation of the Appellant, and issued a Proposed Order of Revocation dated July 14, 2009. S3. The Appellant submitted a written appeal to OSPI dated July 31, 2009, and received by OSPI August 3, 2009. S4. A hearing was held November 30, 2009, before the Admissions and Professional Conduct Advisory Committee (APCAC). A Final Order of Revocation was issued following the APCAC hearing, on December 23, 2009. S5. That order was appealed by letter dated January 21, 2010, and received by OSPI January 25, 2010. C1.

A prehearing conference was held February 9, 2010, as scheduled. The hearing was rescheduled to May 18, 19, 20 and 21, 2010.

[1] The names of former students are not used, in order to protect the students' privacy. Their initials are used instead. If a Public Records Request is made for this order, students' initials shall be redacted by OSPI prior to providing a copy of this order to a non-party.

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ISSUES

The issues and remedies stated in the February 9, 2010 Prehearing Order were as follows:

Whether clear and convincing evidence supports OSPI's determination that Appellant Alexsandro Garza demonstrated a lack of good moral character and personal fitness, and/or violated the Code of Professional Conduct, Chapter 181-87 Washington Administrative Code (WAC), warranting revocation of his teaching certificate.

At the hearing, the ancillary procedural issue of the admissibility of evidence of some of the Appellant's prior criminal history, and the answers he provided on various applications, was raised, as well as evidentiary issues about hearsay testimony.

FINDINGS OF FACT

1. Stephen Chestnut, Ph.D., then-MLSD superintendent, sent a letter to OSPI dated May 9, 2007. S1. It alleged a certificated MLSD employee, the Appellant herein, might not be of good moral character or personal fitness, or had committed an act of unprofessional conduct. That document was received by OSPI May 11, 2007. OSPI issued a letter to the Appellant on May 15, 2007, advising him it had received a complaint letter, and it was initiating an investigation. S2. The letter invited the Appellant to submit information on his own behalf.

2. Following its investigation, OSPI issued a Proposed Order of Revocation on July 14, 2009. S3. Among its Findings of Fact, OSPI found:

> . . .
>
> 4. On February 16 2002, Pullman Police Department officers investigated a report of [the Appellant] breaking a window at an apartment; Pullman Police Department Case #02-P01248.
>
> 5. On February 19, 2002, Alexsandro Garza was charged with Malicious Mischief 3rd Degree, Revised Code of Washington (RCW) 9A.48.090, in Whitman County District Court; Case Name C5412 PUL. On March 5, 2002, Alexsandro

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Garza was found guilty of Malicious Mischief 3rd Degree in Whitman County District court; Case Name C5412 PUL.

6. On April 14, 2003, Alexsandro Garza signed the "Character and Fitness Supplement" for a Washington State University Institutional Application for Teacher Certificate. On the Character and Witness Supplement, Alexsandro Garza answered "No" to the question of "In the last 10 years, have you ever been convicted of any crime or violation of law?" [Emphasis in original.]

7. On May 6, 2005, Alexsandro Garza signed an "Applicant Disclosure" form as part of an application for employment with the Pasco School District. On the application for certified employment form, Alexsandro Garza answered "yes" to the question of: "Have you ever been convicted of a crime?" In the explanation, Alexsandro Garza stated: "In 2001 I was convicted of Malicious Mischief in the 3rd degree for breaking a window. Everything was taken care of."

8. On June 29, 2006, Alexsandro Garza signed an application for certified employment with the [MLSD]. On the application's Pre-Employment Background Questionnaire, [the Appellant] answered "No" to the question of "Have you ever been convicted of any crime?…".

. . .

(Underline in original.)

3. No other findings were made in the Proposed Order of Revocation related to the Appellant's prior arrest or conviction record, or to his having provided incomplete or misleading information in order to obtain a teaching certificate or employment as a teacher.

4. The Proposed Order of Revocation also included findings about the Appellant's alleged inappropriate sexual relationship with student BN.

5. The Appellant grew up in a Mexican-American family near Pasco and the Tri-Cities. As a child, he worked for his mother's day care, and later for his father doing farm work. He graduated from high school in Connell, Washington. He was an undergraduate student at Washington State University (WSU), where he worked part time on campus at *Mujeres Unidas* (a women's resource center) as a receptionist. After graduating from WSU with degrees in Spanish language and education he continued at WSU in a Master's

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degree program. Prior to completion of his Master's degree, he left WSU because he obtained employment as a teacher.

6. The Appellant was convicted of Malicious Mischief in the Third Degree in 2002 for an incident when he was an undergraduate student at WSU. Pullman Police Department Case #02-P01248, Whitman County District Court Case Name C5412 PUL. S8.22. He was drinking alcohol at the time of the incident, had an argument with his girlfriend, and broke a neighbor's apartment window while banging on the door and window to be let in to the apartment.

7. The Appellant applied to OSPI for a teaching certificate on April 14, 2003, while he was a student at WSU. S8. Question 1 of the Character and Fitness Supplement, Section III – Criminal History, asked "In the last 10 years, have you ever been arrested for any crime or violation of the law?..." The Appellant checked the box "Yes." Question 2 of that Section asked "In the last 10 years, have you ever been fingerprinted as a result of any arrest for any crime or violation of the law?" The Appellant checked the box "Yes." Question 3 of the Criminal History section asked:

> In the last 10 years, have you ever been convicted of any crime or violation of any law? (Note: for the purpose of this question "convicted" included [1] all instances in which a plea of guilty or nolo contendere is the basis of conviction, [2] all proceedings in which a sentence has been suspended or deferred, [3] or bail forfeiture.) You need not list traffic violations or fines for which a fine or forfeiture of less than $150 was imposed.

8. The Appellant checked the box "No." This was not a correct or truthful response.

9. The Appellant provided additional explanation on the character and Fitness Supplement about an incident which occurred February 23, 2003, when he was at a bar drinking with friends and became involved in an altercation. S8.6. The Appellant pushed his girlfriend, and was handcuffed and arrested later that night for pushing her. His explanation was that his girlfriend was trying to get him away from the altercation, "but for some reason" he would not listen, so he pushed her out of the way. S8.6.

10. According to the police report filed about the February 23, 2003, incident, the Appellant initially told the investigating police officers that he was not involved in a physical confrontation with anyone that night. S8.7. The police initially let him go, but re-

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contacted the Appellant later that same evening after two witnesses identified the Appellant as the person who had shoved the woman (the Appellant's then-girlfriend). The Appellant was arrested, handcuffed, read his Miranda rights, placed in a police car, driven to the police station, finger printed, and held. When the Appellant's girlfriend was contacted by the police, at first she did not say the Appellant had pushed her, but admitted it later, when told there were witnesses. She also reported to the police that the Appellant "was drunk tonight and things were not going smoothly." S8.7. The Appellant pled not guilty. The charge against him was ultimately dismissed, but was still pending in April of 2003, when the Appellant completed the Character and Fitness Supplement of the application for a teacher certificate. S8.1.

11. The Appellant did not include information about the February 23, 2003, arrest and criminal charge in his various application materials for employment and certification. However, OSPI did not include any information about this arrest, or the Appellant's failure to list it, in its Proposed Order, or in the Final Order of Revocation issued December 23, 2009. The Final Order of Revocation exactly mirrored the Proposed Order Findings of Fact, Conclusions of Law and Order.

BN – 2006-2007 School Year

12. The Appellant was hired by MLSD on a provisional contract as a certificated employee in November 2006. S12. He taught 1st year Spanish at MLSD high school during the second semester of the 2006-2007 school year (06-07 SY).

13. In the 06-07 SY, BN was a 15 year-old student at MLSD High School. She was not enrolled in any class taught by the Appellant. She was enrolled in 1st year Spanish class taught by Patricia Holloway. BN was frequently tardy or absent from Ms. Holloway's class, and ultimately received a failing grade in the class, due primarily to her poor attendance.

14. BN did not behave well in Ms. Holloway's class. BN caused problems, and often made comments about her boyfriend, who was also in Ms. Holloway's 1st year Spanish class. The Appellant told Ms. Holloway on at least one occasion that BN reported to him that her boyfriend bullied her in Ms. Holloway's class. Ms. Holloway spoke to BN on more than one occasion about BN's disruptive behavior. Although BN told Ms. Holloway the

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boyfriend was the one who caused the trouble, Ms. Holloway did not witness that, and did not believe that.

15. The Appellant wrote several notes to Ms. Holloway excusing BN's tardiness to her class on several occasions. S15.20. He also wrote six to seven notes to MLHS teacher Johanna (Jodi) West excusing BN from her class, which was the first class after lunch.

16. The Appellant was on notice in the form a January 28, 2007, email from MLHS assistant principal Joshua Meek to all MLHS staff that a student who shows up in a class he is not assigned to was to be sent to the counseling office. S33. At the hearing, the Appellant denied understanding the MLHS procedure for dealing with non-assigned students in a class. He admitted he had probably not even looked at the email from the assistant principal.

17. At the hearing, the Appellant asserted he had sent fewer notes excusing BN than he actually sent, based on other evidence in the record. He acknowledges he and Ms. Holloway spoke about BN's presence in his class, and absence from her assigned class. Ms. Holloway informed the Appellant he was not to write a note for BN if she was not assigned to his class. He acknowledged this, and said he would not do it again. He did not write more notes to Ms. Holloway, but he did not send BN to the counseling office, either. The Appellant was aware MN was not assigned to his class, and knew she was not supposed to be in the class. He chose to allow her to remain in his classroom, because he believed no one else at MLHS cared about BN, except him. He had looked up her attendance record, and was aware she had "a million" tardies. He did not follow MLSD procedures, because he felt he knew better than others in the school district what to do.

18. The Appellant was invited to attend a Quinceañera, which is a coming-of-age party for a 15 year-old Latina. The party occurred in March 2007. The Appellant attended along with his younger brother, CG, who was then 16 years old. CG lived with his parents and attended school in their home district. CG knew some of the girls at the party because they attended MLHS, and CG helped the Appellant as the home-game statistician for an MLHS basketball team the Appellant coached.

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19. During the party, CG and the Appellant sat at a table with LL and her mother, a friend of LL's mother, and some of LL's friends. LL was a 16 year old MLHS student, and a friend of BN. LL knew the Appellant from school, and knew his brother CG because LL was the away-game statistician for the basketball team coached by the Appellant. The Appellant knew LL's mother, also. The Appellant drank at least seven or eight beers over the approximately two-hour course of the party. He was observed to be drunk, stumbling, and slurring his words. The Appellant danced with MLHS students while drunk. At least one of the MLHS students smelled alcohol on the Appellant while he was dancing.

20. The Appellant participated in an interview at the Attorney General's Office on July 9, 2009, with an OSPI investigator. He was represented by an attorney at the time. On July 13, 2009, he reviewed and signed a transcript of his statement to the investigator. In the statement he said he became "intoxicated" at the Quinceañera (S25.2, -.3), that he felt he was under the influence of alcohol when he danced with students, but that he was not affected by alcohol. In the 2009 interview he said that at the Quinceañera when he was dancing with students he felt he was under the influence of alcohol (S25.3) and in the very next question that he did not feel he was affected by alcohol. Witnesses present at the Quinceañera said the Appellant was slurring his words and stumbling, but the Appellant denied this. In his 2009 interview, he estimated his beer consumption at the Quinceañera at seven to eight. He provided testimony at the hearing that his beer consumption was seven to eight, but admitted he was only guessing at the number. According to the Appellant's brother, the Appellant was not falling down drunk and was not intoxicated, but "he was getting them down." However, he testified at the hearing that but that he was not intoxicated at the Quinceañera. However, the Appellant testified at the hearing that he was not intoxicated at the Quinceañera.

21. At or about 11:00 or 11:30 p.m., at the end of the party, the Appellant invited at least one MLHS teen girl (ND) over to his house, telling her he had beer. CG drove, because he had not been drinking, and the Appellant clearly had been. They dropped two MLHS students off someplace. Two MLHS female students, LL and BN, went to the Appellant's house with the Appellant and CG. Witnesses provided differing testimony about who invited the students to the Appellant's house. As it is not necessary to make

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a finding on that subject, it is not addressed further. The purposed of the girls' visit to the Appellant's house was to watch a "Saw" movie. CG put the movie on shortly after arriving at the Appellant's house. LL's mother called LL, to remind her of her curfew. CG left with LL and returned her to her house before her midnight curfew. At the time LL left the Appellant's house, the Appellant and BN were watching the movie, not sitting on the same couch. They were not touching.

22. LL did not see any sexual contact between BN and the Appellant the night of the Quinceañera, or ever. LL was aware that BN liked the Appellant a lot. BN talked about the Appellant quite a bit, and joked about her crush on him. BN sometimes referred to herself as Mrs. Garza. LL was in the Appellant's class. She thought he was a good teacher. She did not see the Appellant treat BN differently than other students. However, shortly after the Quinceañera, LL heard rumors that BN and the Appellant had sex the night of the Quinceañera at the Appellant's house. Some students believed BN made up a story that she had sex with the Appellant to gain attention.

23. The day after the Quinceañera, BN was observed with a hickey on her neck. The Appellant was observed by one of BN's friends, also a MLHS student, to have a hickey on his neck. He wore a collared shirt which partially covered the bruise. The hickey was not observed by CG the day after the Quinceañera. The evidence in the record at the hearing is not clear and convincing regarding who gave BN or the Appellant the hickeys.

24. At some point after the Quinceañera, BM, a friend of BN, overheard BN on the telephone. During the conversation, BN told the person on the phone she did not want to get that person in trouble. After she hung up, BN told BM the conversation had been with the Appellant, and the context involved the Appellant getting into trouble if BN had his baby. BM had no independent knowledge of who the person on the telephone was, or the actual context of not wanting to get that person in trouble.

25. BN had a reputation at MLHS for not being truthful or trustworthy. Even her friends did not believe all that she said. BN changed her story from time to time about her relationship with the Appellant. Her friends did not know whether to believe her, or when to believe her, or which version of what she said to believe. BN had a reputation for being sexually active with multiple partners during the 2006-2007 school year. During 2007,

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BN was at risk for dropping out or failing in school, due to her extremely poor attendance, apparent lack of effective parental oversight at home, and school conduct, including a significant lack of truthfulness. BN was subpoenaed by OSPI, but did not appear or testify.

26. Within a few weeks after the Quinceañera, BN was talking with the Appellant in his classroom one afternoon when no one else, except BN's friend AH, was present. BN blew a kiss to the Appellant. The Appellant smiled in response, and did not tell BN not to blow him a kiss.

27. It is undisputed that BN spent the night at the Appellant's residence after the Quinceañera in March 2007. It is undisputed that the Appellant attended that party with his brother, the Appellant admitted he drank between seven and eight beers in approximately two hours, and admitted he was intoxicated. Many of the rest of the details of that night and its consequences, however, are disputed.

28. BN handwrote notes to her friends, claiming to be pregnant as a result of the overnight at the Appellant's, and claiming to be scheduled for an abortion. S13.4-8. One of BN's friends told her mother about the rumors which were spreading in MLHS, and showed her mother BN's notes. That friend's mother was an employee of MLSD, and reported the rumor and notes to MLHS administrative staff in March 2007. MLHS administrative staff alerted MLSD Superintendent Steve Chestnut, who ordered an investigation.

29. MLSD's investigation was initially handled by MLSD staff. The investigation was transferred to Canfield and Associates, a private third party that handles school insurance and investigations, in May 2007. In late April or early May 2007, MLSD placed the Appellant on paid administrative leave pending the results of the investigations. S14.

30. The Moses Lake Police Department (MLPD) also conducted an investigation into the alleged sexual contact between the Appellant and BN. S15. Multiple witnesses were interviewed by the MLPD in May 2007. S15-S22. MLPD decided not to charge the Appellant with sexual misconduct with a minor, which is the charge it had investigated. On March 17, 2008, the prosecutor determined the charges could not be proved beyond

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a reasonable doubt as there was insufficient evidence. S24. MLPD determined it would review the matter again upon receipt of additional evidence.

31. On May 12, 2008, a MLPD detective interviewed BN. The detective was the same person who had interviewed the witnesses in 2007. A transcript was made of BN's 2008 interview. S16. BN was interviewed by OSPI (March 28, 2008,) and by the MLPD (May 7 and May 8, 2007, May 12, 2008.) She repeatedly changed her statement regarding whether she had sex with the Appellant as alleged, whether she became pregnant as a result, and whether she had an abortion. BN also changed her statement to her friends on the subject of whether she had sex with the Appellant.

32. On September 11, 2008, the prosecuting attorney in Grant County filed an Information accusing the Appellant of two crimes. They were: Count 1, Sexual Misconduct with a Minor in the First Degree – School Employee – under RCW 9A.44.093(1)(b), and Count 2, Tampering with a Witness – RCW 9A.72.120. The allegation was that the Appellant had sexual intercourse with BN and the Appellant had attempted to induce BN to falsify or withhold evidence. S30. The tampering allegation arose out of conversations between the Appellant and BN.

33. It is undisputed that the Appellant and BN had some conversations after the Quinceañera. The prosecuting attorney alleged the Appellant urged BN to deny any sexual intercourse occurred between them, and the Appellant alleges BN initiated the contact, and he merely told her to go away and have no further contact. The Appellant's explanation at the hearing – that he paid no attention to what BN said when she called him, is not credible. The Appellant was facing the loss of his teaching job at a minimum, plus the possibility of criminal charges at the time he alleges BN called him. It is not credible that he would not pay any attention to what BN said under those circumstances. No finding is made in this proceeding regarding who initiated the contact.

34. An Amended Information was filed by the prosecuting attorney in Grant County on June 15, 2009, accusing the Appellant of Assault in the Fourth Degree – RCW 9A.36.041: Sexual motivation RCW 9.94A.030(39). S31. The gist of this charge is assault for the purpose of the defendant's sexual gratification. The Appellant pleaded guilty, using an Alford plea, to the amended charge of Assault in the Fourth Degree with sexual

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motivation. He signed the following statement on the Statement of Defendant on Plea of Guilty to Non-Sex Offense:

> I wish to take advantage of the prosecutor's offer not because I believe I'm guilty but because I believe I may be found guilty if I proceed to trial and I do not want to take that risk.

35. A Judgment and Sentence on a gross misdemeanor or misdemeanor was entered June 15, 2009, finding the Appellant guilty of Assault in the Fourth Degree – With Sexual Motivation. S32. He was ordered to pay costs totaling $700.00 and to serve 180 days with 150 days suspended, for a total of 30 days, and was further allowed to serve 240 hours of community service in place of the jail time.

36. The Appellant incurred significant attorneys fees expenses defending himself against the criminal charges. He was motivated to put the criminal matter behind him to stop incurring more defense costs.

37. Subsequent to his termination from his MLSD employment, the Appellant has obtained non-teaching employment. He is currently engaged to be married, and would like to put the BN episode behind him.

CREDIBILITY

38. The Appellant's testimony that he was not present in his television room when LL and CG left to take LL home is not credible. His further testimony that he expected CG to drive BN home when CG took LL home, that he was alone in his bedroom behind a locked door and was surprised to awaken the next morning to see BN asleep on the couch in front of the television, is also not credible. CG and LL both testified the Appellant was in the room watching the Saw movie when CG and LL left. If the Appellant expected CG to drive BN home at the same time as LL, he could easily have instructed CG at the time CG left with LL. CG also testified the Appellant was still in front of the television when CG returned home after dropping LL off at her house. This testimony conflicts with the Appellant's. The Appellant's testimony regarding how many beers he drank is not credible. CG described the Appellant as bringing back two beers for himself when he went to get drinks. CG was sufficiently concerned about the Appellant's sobriety that CG

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made a point to be the driver, as the non-drinker, on the drive home from the Quinceañera.

39. Not all of CG's testimony was credible. The Appellant is CG's role model. CG would be upset if the Appellant lost his teaching certification. CG believes the Appellant has been awarded a Master's degree. CG clearly respects his older brother, and was motivated to assist the Appellant in the hearing. CG's testimony about the Appellant's level of intoxication differed from the testimony of other Quinceañera attendees/witnesses. CG minimized the effects of alcohol on the Appellant's functioning. CG's testimony was not wholly credible, in light of the other evidence of the amount of alcohol consumed in a relatively short time, the other witnesses' descriptions of the Appellant's appearance, and CG's own decision to do all the driving due to the Appellant's alcohol consumption. Clear and convincing evidence exists that the Appellant drank even more beer than either the Appellant or CG admitted to.

40. The Appellant has not been awarded a Master's degree, although initially during the hearing he claimed to have a Master's degree. The Appellant corrected his testimony, noting he left college a few credit hours short of earning the advanced degree, in order to accept offered employment as a teacher. CG's belief in his brother's accomplishments and conduct is understandable and laudable. The Appellant's parents do not have high school or college degrees, and the family is proud of the Appellant's academic achievements. There is no evidence CG purposely provided untruthful testimony; rather, he was strongly motivated to minimize negative aspects of the Appellant's testimony, and to put a positive spin on events. The evidence supports the determination that CG's testimony is not completely credible, not that he was purposely untruthful.

41. Clear and convincing evidence does not exist in this record to find that the Appellant and BN had sexual relations on March 2007, or at any time. Factors to consider in making this determination include BN's inconsistent statements to friends, school officials and the police, along with her failure to appear at the hearing to testify. High schools are often hotbeds of gossip and rumor. MLHS was no exception in 2007. BN's multiple conflicting statements in 2007 and 2008, taken in the context of a high school girl with a poor reputation for truthfulness and trustworthiness, were not the sort of evidence

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reasonably prudent people rely upon in the conduct of their affairs. Reasonably prudent people would want some further evidence or corroboration of sexual intercourse between a teacher and a troubled teenage girl prior to taking basing their business affairs based upon such information.

42. The Appellant was not credible on many points of his testimony. He minimized and rationalized his involvement with BN in his testimony. He testified both that he did write the excuse notes to Ms. Holloway in order to excuse BN from being tardy, and that he did not write them for that purpose. The notes were annotated by the Appellant with the word "EXCUSED" circled by him by hand. The other option was "UNEXCUSED."

43. The Appellant's testimony that he was behind a locked bedroom door, and unaware CG had not taken BN home along with LL, is not credible. CG and LL's testimony to the contrary is more credible.

STANDARD OF CONDUCT

44. Steve Chestnut, the former superintendent of MLSD and present superintendent of the Selah School District, provided expert witness testimony on the standard of conduct expected of certificated teaching staff. Dr. Chestnut earned an Ed. D. in educational leadership from Seattle University in 1989. He also holds a Master's in Education (curriculum/supervision major) from Central Washington University awarded in 1982, a Master's in Business Administration (MBA) degree from City University also awarded in 1982, and a Bachelor of Arts degree in history and education awarded in 1977 by Pacific Lutheran University. He holds the following Washington educational certificates: continuing education administrator, continuing elementary and secondary principal, and continuing elementary and secondary teacher. Dr. Chestnut has been an adjunct professor in the graduate schools of education at Heritage University (1991-1997) and at Eastern Washington University (1998-2009). He has received several awards, including the 2010 Washington State Superintendent of the Year by the Washington Association of School Administrators.

45. Dr. Chestnut provided testimony about the standard of conduct expected from a certificated teacher. In his opinion, the Appellant's conduct fell below the acceptable standard of care when the Appellant consumed excessive amounts of alcohol and was

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drunk or acting under the influence of alcohol in front of students at the Quinceañera. This conduct calls into question the teacher's judgment. The teacher is not acting as an appropriate role model for students.

46. In Dr. Chestnut's opinion, the Appellant showed a flagrant disregard or clear abandonment of generally recognized professional standards, as evidenced by the Appellant allowing a student (BN) who was not enrolled in his class to remain in the classroom, skip or be tardy to her own class, and provide excuse notes for the student. This appears as sexual grooming behavior, and is not appropriate supervision of students for an academic purpose. In Dr. Chestnut's opinion, it was a violation of acceptable standards for the Appellant to consume alcohol to excess in front of students, and to allow BN to stay at the Appellant's house overnight. Dr. Chestnut believes the Appellant's Alford plea to assault in the fourth degree with sexual motivation arising out of the BN Quinceañera incident materially and substantially affects the Appellant's ability to be a teacher in Washington. It creates a cloud of suspicion. Parents and students will know about the conviction. Dr. Chestnut would not hire a person with such a conviction as a certificated teacher, and does not believe the Appellant is a good role model or should serve as a teacher.

47. Charles Schreck was the director of OSPI's OPP for seven years, until Spring 2010. Prior to that, Mr. Schreck was employed by the Washington State Patrol for 29 years. While in that position, he received and provided specialized training in detecting alcohol offenses. Mr. Schreck was a fact witness regarding OSPI's investigation and also an expert witness regarding alcohol abuse and Washington State professional standards for certificated staff. In Mr. Schreck's opinion, a man consuming a minimum of seven to eight beers in a two to three-hour time period would be affected by the alcohol. This is consistent with several fact witnesses' testimony that the Appellant slurred his words, stumbled, and exhibited poor judgment at the Quinceañera.

48. As the former director of OPP, Mr. Schreck is familiar with standards of conduct for certificated education staff. In his opinion, the Appellant exhibited flagrant disregard for, or a clear abandonment of, generally recognized professional standards in his treatment of students when the Appellant: (1) repeatedly allowed BN to be in his

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classroom when she was not assigned to it, even after the Appellant received an email from the vice-principal and explicit instruction not to do this from a fellow teacher with more seniority, (2) chose to attend the Quinceañera where he socialized with students, drank alcohol in front of students to excess to the point of slurring his words, exhibiting impaired judgment, smelling of alcohol, stumbling, dancing with students, (3) invited or allowed two teen girls to be at his house late at night, and then allowed one of the teen girls to remain alone with him while CG took the other one home and, (4) allowed a female teenage student to stay overnight in his house.

49. Mr. Schreck's professional opinion is that the Appellant has behavioral problems in his supervision of students. The first alleged behavioral problem is alcohol abuse. The second is the Appellant's repeated inappropriate conduct in allowing a female student to spend time in his classroom instead of in her assigned class, despite directions from other MLSD staff not to engage in this behavior.

50. Mr. Schreck participated in OSPI's decision to revoke the Appellant's teaching certificate. In reaching the decision to recommend revocation, he considered the factors set forth in WAC 181-86-013.

51. Patricia Holloway is a certificated teacher and school counselor. She has taught for 11 years. Ms. Holloway believes it was inappropriate and a violation of MLSD expected conduct for the Appellant to write notes excusing BN from her class, since BN was not a student assigned to the Appellant's class.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action, and authority to issue a final decision by OSPI as authorized in Chapter 28A.410 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including Chapter 10-08 Washington Administrative Code (WAC), Chapter 181-86 WAC, and 392-101 WAC.

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2. The Professional Educator Standards Board (PESB) has the authority to develop regulations determining eligibility for and certification of personnel employed in the common schools of the state of Washington. OSPI is the administrator of those statutes and regulations and is empowered to issue, suspend, or revoke teaching certificates. RCW 28A.410.010.

3. Any certificate authorized under Chapter 28A.405 RCW may be revoked or suspended based upon the complaint of any school district superintendent for unprofessional conduct, among other categories of behavior. RCW 28A.410.090.

4. Fundamental notions of fair play and substantial justice in an administrative due process hearing require that the state agency provide the person whose interests are at issue timely and adequate notice of the reasons for its actions. *Goldberg v. Kelley*, 397 U.S. 254, 90 S. Ct. 1011; 25 L. Ed. 2d 287; 1970 Lexis 80 (U.S. Supreme Court, 1970). In the instant case, the notice provided to the Appellant was contained in the Proposed and Final Orders of Revocation. Those orders only identified one of the Appellant's failures to provide complete criminal history (malicious mischief – 3rd degree) to various governmental agencies. It is unfair to allow OSPI to expand the scope of the Appellant's alleged bad acts beyond those for which he was provided adequate notice. This is not to say OSPI must identify with minute precision each allegation. However, in the present case OSPI identified a particular instance; it did not include a general finding about failure to provide complete criminal history. Had OSPI provided more complete notice to the Appellant, it could have introduced more evidence at the hearing regarding the additional incomplete applications.

5. The standard for admission of hearsay evidence in an administrative proceeding is identified at RCW 34.05.452.

> (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.
>
> …
>
> If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

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6. Much of the evidence offered regarding the alleged sexual intercourse between BN and the Appellant was single, double, or triple hearsay. BN did not testify, but testimony of what BN said to others was offered. Testimony of what the Appellant allegedly said to BN, and what BN then said about those comments to others, was also offered. BN repeatedly changed her story on whether she had sexual intercourse with the Appellant, whether she was pregnant, and whether she was to have, or had obtained an abortion. No independent confirmation of BN's pregnancy was offered, or of her abortion. Such evidence would have proved BN's pregnancy, although not necessarily the Appellant's involvement.

7. The Administrative Procedure Act (APA) addresses use of hearsay evidence in the issuance of orders at WAC 34.05.461(4):

> Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunity to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

8. This type of single and multiple-level hearsay from and about high school girls is simply not the type of evidence upon which reasonably prudent persons rely in the conduct of their affairs. Rumor and speculation about such important matters are not sufficiently reliable sources of information to allow the hearsay evidence into the record, or to serve as the basis for a finding of fact. Even BN's friends did not know whether to believe her about the night she spent at the Appellant's residence. The fact that BN told the MLPD she had sex with the Appellant does not raise the level of reliability of the statement. She also told the MLPD she did not have sex with the Appellant. The statements of other witnesses to MLPD about BN's activities on the night she stayed at the Appellant's residence are not more reliable evidence of the activities of that night

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simply because they were told to the police. They all originated with BN's unreliable and contradictory statements.

9. Contrary to OSPI's assertion, reasonable people do not necessarily rely upon statements viewed as credible by experienced investigators. BN's statement in a telephone call allegedly with the Appellant, overheard by one of BN's friends regarding not wanting to get the other person on the telephone in trouble similarly is not evidence upon which reasonable persons rely in the conduct of their affairs. The person on the telephone might not have been the Appellant, or BN might have been talking about not getting the Appellant in trouble relative to her having stayed overnight, rather than having sex. The evidence about alleged sexual intercourse between BN and the Appellant may not serve as the basis for a finding of fact on that subject.

10. OSPI does not allege the Appellant committed sexual misconduct as defined at Chapter 181-88 WAC, which includes sexual misconduct with a student, defined as any sexually exploitive act with or to a student. The definition of sexual misconduct is lengthy, and includes any sexual advance or sexual contact.

11. Good moral character and personal fitness required of certificated personnel are a continuing requirement for holding a professional educational certificate under the regulations of the PESB. WAC 181-86-014. The terms are defined as follows:

> As used in this chapter, the terms 'good moral character and personal fitness' means character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington, including character and personal fitness to have contact with, to teach, and to perform supervision of children. Good moral character and personal fitness includes, but is not limited to, the following:
>
> ...
>
> (3) No behavioral problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting.

WAC 181-86-013.

12. Clear and convincing evidence exists that the Appellant did not possess good moral character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington sufficient to entrust him with the responsibility to have

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contact with, to teach, and to perform supervision of children. He repeatedly knowingly violated MLSD policy and allowed a truant student to go to his classroom when she was not supposed to be in that classroom. He set his own judgment as superior to that of MLSD when it came to BN. His determination that he and only he cared about BN, and only he knew what was in BN's best interests, was alarming. It puts the teacher in opposition to the school district, and imperils the student, who in this case, was already at risk.

13. The Appellant demonstrated he did not possess good moral character and personal fitness necessary to serve as a certificated employee in schools sufficient to entrust him with the responsibility to have contact with, to teach, and to supervise students when he consumed excess amounts of alcohol to the point of intoxication, including stumbling, slurring his words, smelling of alcohol, and dancing with students at the Quinceañera, and further by allowing two female students to return to his house while he was intoxicated, and one of those students to remain while CG and LL left, and in fact to remain the entire night.

14. A teacher who has a child or dependent residing with the teacher who allows the dependent to have a friend overnight might be acceptable, depending on the circumstances. Not every instance of a student staying overnight at a teacher's house is evidence of a lack of good moral character and personal fitness. A teacher who has a child or dependent residing with the teacher who allows the dependent to have a friend overnight might be acceptable, depending on the circumstances. Under the circumstances presented in the instant case, however, the drinking, opposite gender and lack of other adult presence were unacceptable conduct which evidenced a lack of good moral character and personal fitness.

15. Based upon the testimony of the professional educators at the hearing, during Spring 2007, the Appellant did not possess good moral character or personal fitness appropriate to supervise students. This was demonstrated by the Appellant drinking to excess in front of students, dancing with students while intoxicated, inviting or allowing two female teenage students to be at his house late at night, and in BN's case, allowing a teen girl to remain with him alone in the house for a period of time, and then to remain

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overnight. This was not a case of a child of a teacher inviting a same-sex friend over for a sleepover, as asserted by the Appellant. This was qualitatively different such that it demonstrated a lack of good moral character or personal fitness as a professional educator.

16. Unprofessional conduct is defined at WAC 181-87-050 through -095. Specifically, the disregard or abandonment of generally recognized professional standards is part of the definition of unprofessional conduct. WAC 181-87–060.

> Any performance of professional practice in flagrant disregard or clear abandonment of generally recognized professional standards in the course of any of the following professional practices is an act of unprofessional conduct:
>
> (1) Assessment, treatment, instruction, or supervision of students.
>
> . . .

17. Unprofessional conduct also includes misrepresentation or falsification in the course of professional practice. WAC 181-87-050. Criminal history is reasonably a significant factor considered by OSPI and by potential employer school districts. Failure to provide complete, accurate information about himself was a material misrepresentation of his qualifications. The criminal conduct itself was not grave, and would not have been a bar to certification or employment, likely. It was the failure to disclose, itself, that presents the problem. The one instance of failure to provide a complete criminal history which was proved by OSPI identified a particular instance (Malicious Mischief - 3rd degree). If this instance stood alone, it would not rise to the level of a falsified educational application sufficient to revoke certification. The conduct does not stand alone, however.

18. Determination of the commission of an act of unprofessional conduct, or of lack of good moral character and personal fitness, does not end the inquiry. The appropriate sanction for the discipline must be determined next. In order to determine the appropriate level and range of discipline, OSPI or its designee must consider certain specified factors prior to issuing any disciplinary order. WAC 180-86-080. These factors include the following:

> (1) The seriousness of the act(s) and the actual or potential harm to persons or property;

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(2) The person's criminal history including the seriousness and amount of activity;
(3) The age and maturity level of participant(s) at the time of the activity;
(4) The proximity of remoteness of time in which the acts occurred;
(5) Any activity that demonstrates a disregard for health, safety, or welfare;
(6) Any activity that demonstrates a behavioral problem;
(7) Any activity that demonstrates a lack of fitness;
(8) Any information submitted regarding discipline imposed by any governmental or private entity as a result of acts or omissions;
(9) Any information submitted that demonstrates aggravating or mitigating circumstances;
(10) Any information submitted to support character and fitness; and,
(11) Any other relevant information submitted.

19. In order to suspend or revoke certification, OSPI "must prove by clear and convincing evidence that the certificate holder is not of good moral character or personal fitness, or has committed an act of unprofessional conduct." WAC 181-86-170(2). In all other proceedings, "including reprimand, the standard of proof shall be a preponderance of evidence." WAC 181-86-170(3). (Emphasis added.)

20. The pertinent standard for suspension of a teaching certification is set forth at WAC 181-86-070(2) as follows:

. . .

(2) The certificate holder has committed an act of unprofessional conduct or lacks good moral character but the superintendent of public instruction has determined that a suspension as applied to the particular certificate holder will probably deter subsequent unprofessional or other conduct which evidences lack of good moral character or personal fitness by such certificate holder, and believes the interest of the state in protecting the health, safety, and general welfare of students, colleagues, and other affected persons is adequately served by a suspension. Such order may contain a requirement that a certificate holder fulfill certain conditions precedent to resuming professional practice and certain conditions to resuming practice.

21. The standard is somewhat different for a revocation. WAC 181-86-075 provides:

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Grounds for issuance of a revocation order. The superintendent of public instruction may issue a revocation order under one of the following conditions:

(1) The superintendent of public instruction has determined that the certificate holder has committed a felony crime under WAC 180-86-013(1), which bars the certificate holder from any future practice as an education practitioner.

(2) The certificate holder has not committed a felony crime under WAC 180-86-013(1) but the superintendent of public instruction has determined the certificate holder has committed an act of unprofessional conduct or lacks good moral character or personal fitness and revocation is appropriate.

22. Factor One - The first factor weighs in favor of a significant penalty. There are a multitude of acts to consider. The Appellant provided false information in his certification application. He substituted his personal opinion for those of school district officials and repeatedly allowed a student to be in his classroom instead of in class, or in the counselor's office, he drank to excess in front of students and their families, and he invited or allowed teen girls to be in his house, and in one case, overnight. The actual harm to that one student, and to the Appellant himself, is large. That one student has now been involved with the police, several other teen students have been interviewed repeatedly by the police, the school district and OSPI. The Appellant's conduct resulted in the loss of his job, and in a criminal conviction. The student failed a class. That student's reputation suffered further significant discussion and harm. The Appellant also provided testimony lacking in credibility at the hearing, including his assertion under penalty of perjury that he was in his room at the time CG and LL left and thought CG was taking BN home, and his assertion that he was behind a locked bedroom door all night. This caused further harm to the Appellant.

23. Factor Two - The Appellant's criminal history, including the seriousness and amount of activity, is significant. The Appellant had minimal criminal history previously, but now has a conviction to assault in the 4th degree with sexual motivation. This is a very damaging conviction for a certificated educational professional.

24. The Appellant's criminal conviction was obtained pursuant to an Alford plea, in which the defendant denies guilt, but enters a guilty plea nonetheless, conceding a judge or jury would likely find the defendant guilty. Alford pleas count as criminal convictions in

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Washington State for purposes of counting three strikes, but may not be used as an admission of guilt in a future criminal or civil proceeding. *Clark v. Baines,* 150 Wn.2d 905 (2004). Administrative hearings are governed by the APA, and are not considered criminal or civil proceedings. An Alford plea is appropriately considered an "admission" for purposes of Washington Rules of Evidence (ER) 801(d). This is because an Alford plea is considered to be a statement of the defendant for purposes of the hearsay rule. It is considered an admission by a defendant. Under *Clark,* the Alford plea does not establish that the Appellant did the act, but the plea and conviction may nonetheless be considered in the list of factors to determine a certificated educational professional's appropriate discipline.

25. Factor Three - The Appellant was in his early and mid-twenties at the time of the acts complained of – the misrepresentation of his criminal record and the events of the 2007 school year. He had obtained his Bachelor's degree, and earned almost enough credits to obtain a Master's degree. He had only taught a short time, substitute teaching and was in his first full year of teaching at MLSD. He had years of post-high school education, during which he should have learned significantly more about appropriate, professional educator conduct than he displayed.

26. Factor Four - The events in question took place in close proximity of time to each other, and to the time of the hearing. The Appellant's failure to provide a full criminal history is the most remote in time, and that dates only a few years back. This factor does not weigh in favor of the Appellant.

27. Factor Five - The Appellant's repeated actions in refusing to follow school district policy regarding an at risk student demonstrates at the very least extremely poor judgment, and more likely that, coupled with a disregard for health, safety, or welfare.

28. Factor Six - Because of the limited evidence about misrepresentation of criminal history allowed at the hearing, OSPI was not able to introduce sufficient evidence to support its claim of an alcohol-related behavior problem over a long term. The problems from the Appellant's excessive alcohol consumption at the Quinceañera were obvious and immediate. He exhibited extremely poor judgment which has understandably

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resulted in ongoing legal and employment difficulties for himself, as well as for students. This factor weighs against the Appellant.

29. Factor Seven - This factor is rather circular, in that fitness is already a part of the legal standard. The Appellant demonstrated a lack of fitness to be a certificated educational professional by placing his judgment over that of clearly stated school district policy in the treatment of an at-risk teen girl, and his subsequent legal and employment problems flow from that same poor judgment and excessive involvement with that teen girl. His failure to provide credible testimony at the hearing on crucial points is additional evidence of a lack of fitness to be entrusted with school children.

30. Factor Eight - The record contains evidence of discipline imposed by governmental entities as a result of the Appellant's acts. He was placed on administrative leave, and not retained as a teacher. This factor weighs against the Appellant.

31. Factor Nine - Mitigating circumstances include the fact that the Appellant was considered to be a good teacher and role model, prior to the events of the night of the Quinceañera becoming known. This is based upon testimony by Ms. Holloway, and by students, that the Appellant was well-liked and considered a good teacher. No evidence of aggravating circumstances was admitted.

32. The final factors do not weigh either for or against the discipline proposed. They have essentially already been considered.

33. Following consideration of the above factors, and of the lack of direct evidence of the alleged inappropriate sexual relationship between the Appellant and BN, the appropriate discipline is determined to be suspension for a period of four (4) years, with expiration of the suspension conditioned upon the Appellant obtaining and submitting to OSPI updated criminal history and an alcohol abuse evaluation. Any additional instance of alcohol abuse or excessive alcohol use, including any alcohol-related arrest or conviction (including traffic violations) or any additional conviction of assault or of improper or illegal conduct with a minor, will result in the Appellant needing to file an all-new application for certification with OSPI, rather than just providing proof of the additional items identified above.

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34. The basis for this disciplinary order is that although the Appellant has committed acts of unprofessional conduct and has demonstrated he lacks personal fitness, it appears the deficiencies may be correctable through remedial action, and the interests of the State in protecting the health, safety, and general welfare of students, colleagues, and other affected persons may be adequately served by suspension with conditions precedent to resuming professional practice.

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ORDER

1. The Appellant has committed acts of unprofessional conduct and demonstrated he lacks personal fitness to be a certificated educational professional. Revocation is a more extreme discipline than the facts support. The Appellant's teaching certificate is hereby revoked for a period of forty-eight months from the date of this order, or from the date this order becomes effective, if a petition for reconsideration or appeal is filed.

2. The Appellant must satisfy certain conditions precedent to resuming professional practice.

A. The Appellant must apply to OSPI at the conclusion of the suspension period and prior to resuming professional practice. He must demonstrate that he has satisfied the following conditions: file updated criminal history the form to be selected by OSPI.

B. No additional arrest or conviction involving excessive alcohol use or conviction of an alcohol-related crime (including traffic violations).

C. No additional conviction of assault or of a crime involving a minor.

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Provide alcohol abuse evaluation by certificated or licensed substance abuse professional showing no current substance abuse, and completion of any recommended treatment.

Dated at Seattle, Washington on August 17, 2010.

Signed: Janice E. Shave
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This is a final agency decision subject to a petition for reconsideration filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the ALJ at the address at OAH. The petition will be considered and disposed of by the ALJ. A copy of the petition must be served on each party to the proceeding. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The Petition for Judicial Review of this decision must be filed with the court and served on OSPI, the Office of the Attorney General, all parties of record, and OAH within thirty (30) days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

In accordance with WAC 181-86-150(3), the decision of the ALJ shall be sent by certified mail to the Appellant's last known address and if the decision is to reprimand, suspend, or revoke, the Appellant shall be notified that such order takes effect upon signing of the final order and that no stay of reprimand, suspension, or revocation shall exist until the Appellant files an appeal in a timely manner pursuant to WAC 181-86-155.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.

VIA CERTIFIED AND US MAIL

Alexsandro Garza
Address redacted

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