

**BEFORE THE
TEACHER STANDARDS AND PRACTICES COMMISSION**

IN THE MATTER OF THE LICENSE) **FINAL ORDER**
OF:)
)
WADE A. SMITH) OAH Case No. 2017-ABC-00227
)

This matter came before the Teacher Standards and Practices Commission during its meeting of April 6, and June 20, 2018 to consider the Proposed Order issued by Administrative Law Judge Monica Whitaker on February 26, 2018. Nancy J. Hungerford filed exceptions on behalf of Licensee on March 10, 2018. The Commission has reviewed the Proposed Order and considered Licensee’s exceptions. The Commission does not find Licensee’s exceptions persuasive. The Commission adopts the ALJ’s credibility determination, Findings of Fact and Conclusions of Law as explained below, and now enters this Final Order of suspension:

HISTORY OF THE CASE

On November 28, 2016, the Teacher Standards and Practices Commission (TSPC or the Commission) issued a Notice of Opportunity for Hearing to Wade A. Smith, proposing to take disciplinary action against him. On or about December 5, 2016, attorney Nancy J. Hungerford filed a request for a contested case hearing on Mr. Smith’s behalf. On January 5, 2017, the Commission referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Monica A. Whitaker to preside over the matter.

ALJ Whitaker held a telephone prehearing conference on February 7, 2017. Ms. Hungerford represented Mr. Smith, who also appeared. Senior Assistant Attorney General Raul Ramirez represented the Commission. Commission investigator Jeff VanLaanen appeared on the Commission’s behalf. During the prehearing conference, ALJ Whitaker established deadlines for filing prehearing motions, exhibits, and witness lists, and scheduled the hearing for August 16 through 18, 2017.

On July 5, 2017, Ms. Hungerford filed Licensee’s Motion to Compel (Motion). On July 10, 2017, Mr. Ramirez filed the Commission’s Response to Licensee’s Motion to Compel (Response). On July 19, 2017, the OAH issued a Ruling on Motion to Compel Discovery, denying the Motion.

On August 9, 2017, Mr. Ramirez requested that the ALJ postpone the scheduled hearing. ALJ Whitaker held a telephone prehearing conference on August 10, 2017. Mr. Ramirez represented the Commission. Mr. VanLaanen appeared on the Commission’s behalf. Ms. Hungerford represented Mr. Smith, who also appeared. ALJ Whitaker granted the request to postpone the hearing and rescheduled the hearing to December 13 through 15, 2017. ALJ Whitaker also established new deadlines for filing prehearing motions, exhibits, and witness lists.

On November 3, 2017, Mr. Ramirez filed the Commission's Motion for a Protective Order. On November 13, 2017, the OAH issued a Protective Order.

On December 8, 2017, Mr. Ramirez filed the Commission's Motion to Compel. ALJ Whitaker convened a telephone prehearing conference on December 11, 2017 to address various matters, including the Commission's Motion to Compel. Mr. Ramirez represented the Commission. Mr. VanLaanen appeared on the Commission's behalf. Ms. Hungerford represented Mr. Smith. The ALJ postponed ruling on the Motion until after the hearing convened.

ALJ Whitaker held the hearing in this matter from December 13 through 15, 2017, in Tualatin, Oregon. Mr. Ramirez represented the Commission. Mr. VanLaanen appeared on the Commission's behalf. Ms. Hungerford represented Mr. Smith, who participated in the hearing and testified as a witness. The following individuals also testified as witnesses: retired Morrow County Sheriff's Office (MCSO) Detective Karen Dike; Hermiston Police Department Chief Jason Edmiston; UniServ representative David Fiore; and former Commission investigator Burney Krauger.

During the hearing, Ms. Hungerford moved to compel the Commission to produce investigator Krauger's notes as they related to this matter.

At the conclusion of the hearing, ALJ Whitaker left the evidentiary record open for receipt of Ms. Hungerford's response to the Commission's Motion to Compel; for Mr. Ramirez to provide Ms. Hungerford with documents that were responsive to her motion to compel the investigator's notes, or, in the alternative, to provide information as to why the documents were not discoverable; and for Mr. Ramirez and Ms. Hungerford to provide the ALJ with their positions on their respective motions to compel. ALJ Whitaker also established deadlines for filing closing arguments.

In a December 19, 2017 email, Mr. Ramirez indicated that the Commission was not in possession of any additional notes from the investigator as they related to this matter. In response, on December 26, 2017, Ms. Hungerford requested that Mr. Ramirez's email communication be made a part of the hearing record. In response to Ms. Hungerford's request, the ALJ noted that the email was made a part of the hearing, but not evidentiary, record.

On December 27, 2017, Mr. Ramirez withdrew the Commission's Motion to Compel discovery. Also on December 27, 2017, ALJ Whitaker closed the evidentiary portion of the hearing record.

On January 12, 2017, Mr. Ramirez filed the Commission's Closing Argument. On January 26, 2018, Ms. Hungerford filed Respondent's Closing Statement. On February 2, 2018, Mr. Ramirez filed the Commission's Reply Brief. ALJ Whitaker closed the record upon receipt of the Commission's Reply Brief and took the matter under advisement.

ISSUES

1. Whether Mr. Smith engaged in gross neglect of duty by:
 - a. Failing to use professional judgment;
 - b. Failing to use district lawful and reasonable rules and regulations; and
 - c. Failing to demonstrate leadership skills in managing the school, its students, staff and programs as required by lawful and reasonable district rules and regulations, state and federal laws and regulations, and other programs as assigned.

OAR 584-020-0005,¹ OAR 584-020-0010, and OAR 584-020-0025.

2. If so, whether the Commission should suspend Mr. Smith's Continuing Administrator License for one year. ORS 342.175(1)(b)² and OAR 584-020-0040(4)(n).³

EVIDENTIARY RULINGS

The following exhibits were admitted into the record without objection:

- The Commission's Exhibits A1 through A15.
- Mr. Smith's Exhibits R1 at 1-52 and 53-209; R2 at 1-191; R6 at 2-3; R7 at 2-3; R17 at 4; R18 at 2-5; R19 at 2-4; R27 at 2-4; R28 at 3-5; R30 at 2-3; R31 at 2-3; R33 at 2-4; R34 at 2-3; R35 at 2-4 and 6-8; R36 at 2-7; R41 at 2; R44; and R45 at 2-21.⁴

The Commission's objections to the following exhibits were overruled and the following were admitted into the record: R1 at 210-215 and 216-254 and R37 at 2-8.

The Commission's objections to the following exhibits were sustained and the following were not admitted into the record: R38 at 2-3; R40 at 2-8; and R42 at 3.

¹ The version of the rule cited herein was effective July 1, 2017. The current version of the rule made no changes to the portions of the former rule as cited herein.

² The version of the statute herein was effective in 2017. The current version of the statute cited herein is the same as the prior version in effect at the time the Commission issued the Notice in this matter.

³ The version of the rule cited herein was effective July 1, 2017. The current version of the rule made no changes to the portions of the former rule as cited herein.

⁴ Mr. Smith offered only portions of the exhibits he filed with the ALJ.

CREDIBILITY DETERMINATION

To reconcile any conflicts in the record and determine which evidence is more likely than not correct, it is necessary in this case to assess the credibility and reliability of the various witnesses offering testimony. ORS 44.370 provides, in part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of witness credibility can be based on a number of factors, other than the manner of testifying. These factors include the inherent probability of the evidence, whether the evidence is corroborated, whether the evidence is contradicted by other testimony or evidence, whether there are internal inconsistencies, and “whether human experience demonstrates that the evidence is logically incredible.” *Tew v. DMV*, 179 Or App 443, 449 (2002), citing *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part).

Contact with the Morrow County Sheriff's Office

At hearing, Mr. Smith testified that he left voice messages for Detective Dike of the MCSO on December 5 and 8, 2014, and that as of December 10, 2014, Detective Dike had not returned his phone calls. Mr. Smith testified that he “was sure” he had spoken to someone at the MCSO in order to leave Detective Dike the voice messages and that he must have called Detective Dike from his work phone because his cell phone records did not reflect the calls. When asked to indicate what records he relied on to corroborate his account of leaving messages for Detective Dike, Mr. Smith referred to two lines of notes that he created as part of his investigative timeline. Mr. Smith created that timeline between the afternoon of September 2 and 3, 2015, after Mr. Smith learned that he was under investigation by the Commission. Mr. Smith’s records are internally inconsistent. His notes for December 5, 2014 reflect that he left one voicemail for Detective Dike on December 5, 2014 and that as of December 10, 2014, he had not received a call back. His timeline notes do not reference a call to Detective Dike on December 8, 2014. (Ex. A5 at 3.)

In contrast to Mr. Smith’s testimony, Detective Dike testified that she had no record of receiving any phone calls from Mr. Smith. When she learned of Mr. Smith’s assertions that he attempted to contact her, Detective Dike arranged for the Morrow County dispatch office to review and search phone records for the relevant time period to determine if Mr. Smith had made any calls to her. Morrow County dispatch found no evidence that Mr. Smith had made any calls to Detective Dike.

Detective Dike also testified that the investigation involving JM⁵ was a high profile case, so any contact regarding the case would have been a flag; that the nature of the case was concerning to her because the case involved sexual misconduct with a student; and that she was

⁵ Because there is a protective order in place, only the initials of the alleged perpetrator and victim are used.

sensitive to the importance of returning phone calls, especially in a case where law enforcement could not proceed with criminal charges due to the age of the victim at the time the conduct was discovered.

Mr. Smith could not offer any evidence to corroborate his claims that he contacted Detective Dike. The record does not support a finding that he made “multiple attempts,” as he claims, to reach the Detective. Moreover, given the nature of Detective Dike’s investigation and the importance of the case, it is highly unlikely she would have ignored Mr. Smith’s messages. Overall, Mr. Smith’s testimony was self-serving and implausible.

For these reasons, where Mr. Smith’s testimony conflicts with the testimony of Detective Dike, findings are made in accordance with Detective Dike’s testimony.

Contact with the Hermiston Police Department

Mr. Smith testified that he made contact with Hermiston Police Department (HPD) Chief Jason Edmiston after Detective Dike failed to return his phone calls. Mr. Smith contended that he contacted the Chief as part of his investigation into the JM allegations.

In the investigative timeline prepared by Mr. Smith, he notes that he contacted Chief Edmiston, who allegedly confirmed that the MCSO had “dropped charges” regarding JM due to lack of evidence. (Ex. A4 at 2.) However, Mr. Smith could not corroborate this assertion, aside from a handwritten “Suspected Abuse of a Child Report Form” that purported to document a contact with Chief Edmiston on December 8, 2014 at 3:00 p.m. (Ex. A4 at 35-36.)

In his interview with Commission investigator Krauger, Mr. Smith stated that Chief Edmiston told Mr. Smith that he was aware of the MCSO investigation; that the MCSO had closed its investigation because there was no violation of the law; and that the Chief was aware that MC had denied the allegations involving JM.

Later, in a June 21, 2017 email to Chief Edmiston, Mr. Smith attempted to refresh the Chief’s recollection of the alleged December 8, 2014 phone call. In the email, he wrote that he “[j]ust wanted you to have access to refresh your memory as I assume you probably vaguely even remember the phone call.” (Ex. A14 at 1.) That same day, in response to the email, Chief Edmiston informed Mr. Smith that:

I do not recall any conversation about this matter between you and I. I did have a phone conversation with Mike Kay regarding the whole thing (that I definitely remember) and on that same day, I did contact Morrow County Sheriff’s Office (via phone) to inquire about their “investigation” before I returned back to Mike with the limited info[rmat]ion (again, via phone).

(*Id.* at 3.)

In response to the Chief’s email, Mr. Smith wrote that he was not surprised the Chief did not recall the conversation because it “wasn’t a lengthy call. We chatted for only about five

minutes.” (Ex. A14 at 5.) Mr. Smith attached a cell phone record in an attempt to show Chief Edmiston that he had called the Chief from his cell phone.

On September 14, 2017, Mr. Smith again emailed the Chief, asking if he had any documentation of his contact with the MCSO from December 2014. Chief Edmiston responded that he did not have any such documentation. Then, in November 2017, Mr. Smith again emailed Chief Edmiston, asserting that he and Mike Kay had spoken and that “He [Mike] reminded me that we were both in my office when we made the call and you were on speaker phone over his phone with the both of us. The mystery is finally solved!” (Ex. A14 at 10.)

At hearing, Mr. Smith testified that he had two conversations with Chief Edmiston, on December 8 and 10, 2014. This contradicted his notes that alleged contact with the Chief once – on December 8, 2014.

In similar fashion to Detective Dike, Chief Edmiston testified succinctly, rebutting Mr. Smith’s claims of phone conversations with him in 2014 regarding the JM allegations. Chief Edmiston testified that he first learned that Dan Byrd and MC were involved in connection with the JM allegations on June 21, 2017 through Mr. Smith’s email. Chief Edmiston also testified that he would have remembered conversations involving these individuals because their names were familiar to him. Moreover, he denied providing the information attributed to him in Mr. Smith’s December 8, 2014 handwritten notes because he was not aware of that information at that time. Chief Edmiston recalled having two conversations with Mike Kay, but those conversations occurred on October 7, 2014, the same day he conducted a records search for Undersheriff Myren’s contact information.⁶ Chief Edmiston also testified that he called Mr. Kay back that same day, explaining only general information about the pending MCSO criminal investigation he had learned of from his contact with Undersheriff Myren, and that he told Mr. Kay that “where there’s smoke, there’s fire.” (Test. of Edmiston.)

Mr. Smith’s testimony cannot be resolved with Chief Edmiston’s testimony. Chief Edmiston has consistently maintained that Mr. Smith did not contact him regarding the JM investigation. Mr. Smith’s testimony was internally inconsistent with the evidence in the record, and contrary to Chief Edmiston’s testimony. As such, where Mr. Smith’s testimony contradicts that of Chief Edmiston, facts are made in accordance with Chief Edmiston’s testimony.

FINDINGS OF FACT

1. The Commission has licensed Mr. Smith since June 28, 1999. Mr. Smith currently holds a Continuing Administrator License with an endorsement in Administrator (all grade levels), valid from April 30, 2011 through April 29, 2016. Mr. Smith has no prior disciplinary history with the Commission. (Ex. R1 at 3.)

2. On November 20, 2015, Mr. Smith filed an application to renew his license. (Pleading 1 at 2.) At that time, he was employed as the Deputy Superintendent of the Hermiston School

⁶ Chief Edmiston conducted a search for Undersheriff Myren’s contact information after being contacted by Mr. Kay regarding the JM allegations.

District (HSD). (Test. of Smith.)

3. Mr. Smith was previously employed by the Morrow County School District (MCSD) as the principal at Heppner Elementary and Heppner High School. The HSD first employed Mr. Smith in or about July 2007 in the position of Assistant Superintendent/Human Resources. Mr. Smith served in that position for approximately five years. Thereafter, he served as the Interim Superintendent from approximately April 2011 through October 2012, after which time he was promoted to the position of Deputy Superintendent. Mr. Smith served as the Deputy Superintendent until March 2016. Mr. Smith currently serves as the Superintendent for the Walla Walla Public Schools. (Test. of Smith.)

4. As the Deputy Superintendent for the HSD, Mr. Smith oversaw the Director of Athletics and Support Services, the Director of Technology Services, and the Director of Operations and Business Services.⁷ (Ex. A13 at 7.) In addition, Mr. Smith also oversaw the Budget Officer; Negotiations and Union Relations; District Policies; Student Expulsions; Patron Complaints; Risk Management; Employee Evaluations and Support Personnel Allocations and Assignment; and the Hermiston Online Program. (*Id.*) Mr. Smith was responsible for handling patron complaints, personnel matters, placing employees on administrative leave, and reviewing and revising district policies. (Test. of Smith.) As the Deputy Superintendent, Mr. Smith also led the district board's policy committee. (*Id.*)

5. While Mr. Smith was the Deputy Superintendent for the HSD, the following individuals held these positions: Fred Maiocco, Ed.D., Superintendent; Jon Mishra, Ed.D., Director of Operations and Business Services; Mike Kay, Director of Athletics and Support Services; and Tom Spoo, Armand Larive Middle School Principal. (Ex. A4 at 5; test. of Smith.)

6. Over the course of his career, Mr. Smith has reported approximately 17 teachers to the Commission for possible ethical violations. Of the 17, Mr. Smith placed 7 on administrative leave pending the completions of the associated investigations. (Test. of Smith.)

7. On or about July 21, 2013, the HSD hired JM, a former teacher and coach from the MCSD. The HSD hired JM to teach sixth grade math and science at the Armand Larive Middle School.⁸ His first day of employment with the HSD was August 20, 2013. (Exs. A4 at 6 and 19; test. of Smith.)

8. During the hiring process, the HSD used its normal hiring and review process, which included using a Shared Point reference check prior to actually hiring JM. Shared Point includes checking with past employers and in JM's case, that included checking with the MCSD. During the review process, the HSD did not discover anything that would have indicated that JM was "not a good teacher." (Ex. R1 at 8.) In addition, the HSD completed three reference checks from JM's previous employers or work associates. Principal Spoo completed reference checks in June 2013

⁷ The Director of Operations and Business Services oversaw the Human Resources Manager and the Financial Manager. (Ex. A13 at 7.)

⁸ JM was later hired as the Hermiston Boys Varsity Basketball coach for the 2014-15 school year in a comprehensive hiring process. (Test. of Smith.)

with JM's principal, the athletic director, and one of JM's co-teachers with whom JM had worked for five to six years. All three individuals submitted positive letters of reference and answered "yes" to the question, "Give the opportunity, would you re-employ this person without any hesitation?" and "no" to the question, "Is there any reason why this candidate should not be seriously considered for a position?" (*Id.* at 25-27.)

9. As part of the hiring process, the HSD required JM to complete a form titled "Previous Educational Employer Disclosure Release." JM identified the MCSD as his former employer and, by signing the form, authorized the MCSD to release to the HSD "any substantiated reports of child abuse, sexual conduct or crimes listed in ORS 342.143." (Ex. A4 at 28.) On September 11, 2013, the MCSD's Human Resources Director Julie Ashbeck signed the form and checked the box indicating that JM "was not the subject of a substantiated report of child abuse or sexual conduct related to the applicant's employment with the education provider." (*Id.*)

10. The HSD has a policy called JHFF, which is titled "Reporting Requirements Regarding Sexual Conduct with Students," which was initially adopted in December 2009 and readopted in March 2010, December 2012, and November 2013. (Ex. A6.) Policy JHFF provides, in pertinent part:

Sexual conduct by district/school employees as defined by Oregon law will not be tolerated. All district employees are subject to this policy.

*"Sexual conduct" as defined by Oregon law is any verbal or physical conduct by a school employee that is sexual in nature; directed toward a kindergarten through 12 student; unreasonably interferes with a student's educational performance; and creates an intimidating, hostile or offensive educational environment. The definition for sexual conduct does not include behavior that would be considered child abuse as outlined by Oregon law and district Board policy * * *.*

Any district/school employee who has reasonable cause to believe that another district/school employee has engaged in sexual conduct with a student must immediately notify his/her immediate supervisor.

When the district receives a report of suspected sexual conduct by a district employee, the district may decide to place the employee on paid administrative leave or in a position that does not involve direct, unsupervised contact with students while conducting an investigation. An investigation is a detailed inquiry into the factual allegations of a report of suspected sexual conduct that is based on interviews with the complainant, witnesses, the district employee or student who is the subject of the report. If the subject of the report is a school employee the investigation must meet any negotiated standards of an employment contract or agreement.

* * * * *

The district will provide annual training to district employees, parents and students regarding the prevention and identification of sexual conduct. The district will provide to employees at the time of hire a description of conduct that may constitute sexual conduct and a description of records subject to disclosure if a sexual conduct report is substantiated[.]

(Id. at 1-2; emphasis in original.)

11. Mr. Smith created a brochure for the HSD titled “Reporting Requirements Regarding Sexual Conduct With Students (Effective July 1, 2010),” that states, in pertinent part:

House Bill 2062, was passed by the Oregon State Legislature in its regular 2009 legislative session. The bill’s provisions, now included in ORS 339.370, require that district boards adopt a policy on reporting sexual conduct by a district that is directed toward a student. * * * * *. The law and this policy take effect July 1, 2010.

The Hermiston School District is committed to providing a learning environment free of all forms of abuse, assault, harassment, and coercive conduct, including sexual misconduct. All employees of the district have an obligation to know what sexual conduct is, to discourage it at all times, and to report to supervisors when the employee becomes knowledgeable that such conduct has occurred or is occurring.

(Test. of Smith; Ex. R45 at 5-6.) The brochure outlines what constitutes sexual conduct and discusses Policy JHFF. (Ex. R45 at 6.)

12. Mr. Smith attended a training prepared by PACE (Property and Casualty Coverage for Education) regarding HB 2062’s requirements. The training outlined what a district should do in the event a report of sexual conduct was made. (Ex. R45 at 8-21.)

13. The HSD’s July 2013 Staff Handbook contains a section titled “Sexual Conduct (Reporting Requirements),” which provides, in pertinent part:

Sexual conduct by district/school employees as defined by Oregon law will not be tolerated. All district employees are subject to this policy.

* * * * *

Any district/school employee who has reasonable cause to believe that another district/school employee has engaged in sexual conduct with a student must immediately notify his/her immediate supervisor.

When a district receives a report of suspected sexual conduct by a district employee, the district may decide to place the employee on paid administrative leave or in a position that does not involve direct,

unsupervised contact with students while conducting an investigation. An investigation is a detailed inquiry into the factual allegations of a report of suspected sexual conduct that is based on interviews with the complainant, witnesses and the district employee who is the subject of the report. The investigation must meet any negotiated standards of an employment contract or agreement.

(Ex. A13 at 1, 32-33.)

14. On August 20, 2013, Mr. Smith received an email from Dr. Mishra, which stated, in part:

Follow up email.⁹ Tom Spoo and I met with [JM] [to] address concerns that were brought up. [JM] said there was a past incident which was addressed in his previous district with no findings. According to [JM] there are no pending matters.

(Ex. A4 at 27.) In response, that same day, Mr. Smith wrote:

Sounds like there is no reasonable suspicion on your part requiring any TSPC notification or further investigation.

Thanks for looking into this matter promptly and thoroughly.

(*Id.*)

15. Prior to responding to Dr. Mishra's August 20, 2013 email, Mr. Smith was aware that Principal Spoo and Dr. Mishra had questioned JM, but Mr. Smith did not know the extent of the questioning. Mr. Smith told Dr. Mishra that he would contact the MCSD's superintendent, Dirk Dirksen, about the allegations surrounding JM.¹⁰ (Test. of Smith.)

16. On September 4, 2014, Mr. Dirksen advised Detective Dike¹¹ that he had received information from the principal of Irrigon High School that a teacher's aide, Nicole Goforth, had been involved in a conversation with a former student, MC, who admitted to having a sexual relationship with JM. (Ex. A2 at 3.) That same day, Detective Dike interviewed Ms. Goforth, who reported that approximately two weeks earlier, MC admitted to her that she had been sexually involved with JM. (*Id.* at 3-4.)

17. Detective Dike contacted MC and the two met at the Irrigon Sheriff's Annex on the evening of September 4, 2014. MC told Detective Dike that she became sexually involved with

⁹ Dr. Mishra had a conversation with Mr. Smith about this matter and followed-up in an email to confirm their discussion. (Test. of Smith.)

¹⁰ In the timeline Mr. Smith prepared regarding this matter, he notes that Dr. Mishra and Principal Spoo met with JM regarding "community gossip." (Ex. A4 at 2.)

¹¹ Detective Dike retired on July 1, 2015. (Test. of Dike.)

JM during the beginning of 2014 when she was 19 years old, home from college on a break, and no longer a high school student. (Ex. A2 at 4.)

18. On September 8, 2014, Detective Dike received a phone call from an Irrigon High School employee, Michelle Luna, who informed Detective Dike that MC admitted to Ms. Luna that she had been dishonest with Detective Dike during the September 4, 2014 interview. (Ex. A2 at 4.)

19. Thereafter, Detective Dike again interviewed MC. During the second interview, MC admitted that she had been in love with JM most of her senior year in high school, but JM had refused to talk to her about it or allow her to express how she felt for him. She also admitted that on the morning of her high school graduation, May 31, 2013, at approximately 2:30 a.m., she went to JM's house to convince him to have sex with her. MC reported that JM tried to tell her no, but she kept "kissing on him" and pushing the issue until JM finally gave in. (Exs. A2 at 4; A7.) MC reported that she and JM were in a relationship that lasted through the summer, until MC went away to college. The two got back together when MC came home from college on Christmas break. (Ex. A2 at 4.)

20. After finishing her investigation, Detective Dike concluded that there was no allegation of criminal conduct. She recommended that her written report be forwarded to the Commission for an investigation of JM's conduct. (Ex. A2 at 5.)

21. On October 7, 2014, Principal Spoo emailed Mr. Smith and stated:

David Melville, a former teach in Morrow County SD and current employee of ours, came to me this morning to relay information he had heard. Apparently, in a conversation with a former MCSD colleague, there is a rumor that [JM], one of our teachers, is under investigation by the Morrow County Sherriff's Department for an incident that may have occurred several years ago involving the potential grooming of a minor female. David did not have additional information and none of the information he had was firsthand knowledge.¹² He and I discussed possible reporting requirements. We both agree that since this information was a "rumor," and he had no additional information or other credible evidence, that this rumor did not rise to the level of "reasonable suspicion," and that reporting is not required or advised in this situation.

I want to relay this information to you. As I have no additional information, other than that provided to me by David Melville, I also do not have reasonable suspension to believe that this incident occurred, and thus do not believe that I have a duty to report.¹³

¹² Mr. Melville also informed Principal Spoo that two of JM's former colleagues, either Nicole Goforth or Michelle Luna, told him that JM had slept with one of his former students but Principal Spoo did not include that information in his email to Mr. Smith. (Exs. A4 at 29; R1 at 11.)

¹³ The "duty to report" was in reference to reporting suspected child abuse. (Test. of Smith.)

(Ex. A4 at 29.) In response, that same day, Mr. Smith wrote:

Thank you for bringing this to my attention.

I agree with you, in that there is no basis to report this situation at this time. It appears, from your email, that the accusations are based on hearsay and rumor, and you have no reasonable suspicion to believe that this event occurred. However, should you or David receive additional information in the future that may change your level of suspicion/consideration, I would recommend that you contact me and make a report to TSPC if necessary.

(Ex. R7 at 3.) Prior to responding to Principal Spoo's email, Mr. Smith did not direct Principal Spoo to contact the MCSO to determine if there was an investigation into JM's conduct; did not direct Principal Spoo to inquire on the identity of the "former colleague" from whom Mr. Melville had learned of the allegations; or to interview any other individuals. (Test. of Smith.)

22. On November 4, 2014, after learning from Mr. Dirksen that JM might be under investigation by the MCSO, Mr. Smith emailed Elizabeth Keller of the Commission. (Ex. A4 at 2, 30-31.) In his email to Ms. Keller, Mr. Smith wrote, in part:

My name is Wade Smith, Deputy Superintendent for the Hermiston School District. I am contact you regarding a licensed employee; [JM] * * *.

He currently serves as a middle school teacher and was recently hired as our Varsity Boys' Basketball Coach. Over the last few weeks we have been bombarded with "community gossip" and inquiry notifying us that he is currently under investigation for inappropriate sexual relations with a high school student while he was employed in a previous neighboring school district (Morrow County SD). I contacted their superintendent and he did inform me that they filed a complaint with TSPC regarding alleged inappropriate behaviors.

I know that you/TSPC are very limited on what you can inform me regarding ongoing investigations. I was wondering, however, if you would be able to confirm if indeed he is under investigation or any additional information that would help us support him and provide us with intelligible responses regarding the inquiries we are receiving[.]

(*Id.* at 31.) In response, Ms. Keller informed Mr. Smith that the only information with which she could provide him was that there was an active investigation. (*Id.*)

23. As of November 4, 2014, Mr. Smith had not directed anyone in the HSD to conduct an investigation into the information he had learned regarding JM, nor had Mr. Smith investigated the matter. (Test. of Smith.)

24. On November 24, 2014, MC's stepfather, Dan Byrd, contacted Mr. Smith and requested a meeting to discuss JM. Mr. Smith met with Mr. Byrd on November 25, 2014. During the meeting, Mr. Byrd informed Mr. Smith that he had been in touch with Detective Dike of the MCSO regarding MC and JM. Mr. Byrd disclosed that MC had confessed to Detective Dike that she had a sexual relationship with JM on the day of her graduation. Mr. Byrd explained that MC first met JM when he was her fourth grade math teacher. Mr. Byrd believed that JM had been grooming MC, and that he intentionally waited for MC to graduate before having sex with her. Mr. Byrd further informed Mr. Smith that there had been allegations of JM engaging in inappropriate conduct with other female students. (Ex. A4 at 32-33.) After speaking to Mr. Byrd, Mr. Smith did not interview MC, nor did he place JM on administrative leave or place JM in a position that did not require direct, unsupervised contact with students. During this time period, JM was actively working at the middle school and had unsupervised access to students. (Test. of Smith.)

25. On December 2, 2014, Mr. Smith had a telephone conversation with Mr. Krauger. During the conversation, Mr. Smith informed Mr. Krauger that he had "no reasonable/credible [*sic*] suspicion regarding [JM]." Mr. Krauger told Mr. Smith that the HSD should conduct an investigation as it normally would for a complaint of this type, to consult with the HSD's legal counsel for advice and direction regarding the JM matter, and to "do their due diligence." (Ex. R11 at 4; test. of Smith; test. of Krauger.) Mr. Smith did not consult with the HSD's legal counsel regarding the JM complaint because he did not see the need to do so since the matter was "pretty straightforward." (Ex. A12 TSPC000408 beginning at 11:00.)

26. In a December 4, 2014 email to Superintendent Maiocco, Mr. Smith wrote, in part:

As I shared with you and Mike Kay on Tuesday, I received a report prior to Thanksgiving Break from a stepfather of a student that claimed that one of our teachers, [JM], had sexual relations with his stepdaughter on the day she graduated. This alleged incident occurred in 2012¹⁴ while JM worked in a former district.

According to the complainant, he learned about this action not from his step daughter, but rather directly from a third party.

At this time, based on pre-employment screening performed prior to hiring JM, as well as the step father's lack of first[hand] knowledge, I have no reasonable or credible suspicion to believe that this incident occurred.

I have contacted the UniServ Rep and will be questioning JM next week. If, during the investigation, I gain additional information that raises [*sic*] to a threshold of reasonable suspicion to believe that the incident occurred, I will be required, by law, to immediately report the allegation to DHS/law enforcement and place JM on paid administrative leave.

(Ex. A4 at 37.)

¹⁴ The evidence in the record establishes that the incident actually occurred in 2013.

27. On December 8, 2014, Mr. Smith interviewed Blaine Ganvoa, the former athletic director of Irrigon High School where JM had previously worked. Mr. Ganvoa stated that he did not know anything specific about the allegations involving MC and JM. He did, however, disclose knowledge of a prior investigation involving JM and another girl during the 2008-09 school year, after which time Mr. Ganvoa counseled JM on boundaries with female students. (Ex. A5 at 3.)

28. Also on December 8, 2014, Mr. Smith interviewed Principal Spoo. In response to the question "Was there any evidence of any wrongdoing by JM when you interviewed and hired him to teach math at ALMS in the summer of 2013," Mr. Spoo stated that he had "heard a rumor a few years back" but that he specifically asked JM about that in the interview and he denied all accusation. (Ex. A5 at 4.) Mr. Spoo also indicated that he contacted staff at Irrigon High School regarding these rumors and they "also confirmed that they were just rumors." (*Id.*)

29. In a December 8, 2014 email from Mr. Smith to JM, Mr. Smith wrote, in part:

On 11-24-14 I was contacted by phone by an Irrigon community member who requested to talk with me regarding a matter involving one of our teachers. At their request, I met with them the following day in my office. During this meeting, a gentlemen [*sic*] by the name of Dan Byrd alleged inappropriate actions between you and a former student while you were a teacher for the Morrow County School District. During this meeting he informed me that he had contacted TSPC and reported this allegation.

The following day I contacted TSPC to inquire about the status of their investigation and whether or not they wanted me to proceed with an internal inquiry into the matter.

On 12-2-14, TSPC returned my call and directed me, in accordance with the statute, to perform an internal inquiry into the allegation.

I have been in contact with Dave Fiore, your regional UniServ representative, and informed him of the direction received from TSPC.

I would like to meet with you this Wednesday, December 10th in my office.
I have arranged two times for you to choose from[.]

(Ex. A8 at 2; emphasis in original.)

30. On December 9, 2014, Mr. Smith met with community member Stuart Dick.¹⁵ During the meeting, Mr. Dick reported that he suspected JM had engaged in grooming behavior involving female students. Mr. Dick also reported that on August 23, 2011, he reported his concerns to the MCSD. Mr. Dick specifically mentioned MC and SV as two students he suspected JM had groomed, and indicated that MC had a "special relationship" with JM. (Ex. A5 at 5.) During the

¹⁵ Mr. Dick had contacted Mr. Smith on December 8, 2014 and arranged for this meeting. (Ex. A5 at 5.)

meeting, Mr. Dick provided Mr. Smith with a copy of a report he previously made under HB 2062 in connection with JM, MC, and SV. (*Id.*; Ex. R1 at 137-141.)

31. On December 10, 2014, Mr. Smith contacted Mr. Dirksen, who confirmed that he was aware of a report that JM had engaged in a sexual relationship with MC on the day of graduation in 2013. (Ex. A5 at 6.) Mr. Dirksen informed Mr. Smith that the report was made during the 2014-15 school year, and that he had reported the allegations to TSPC and to the MCSO. (*Id.*)

32. On December 10, 2014, Mr. Smith interviewed JM in his office. The interview lasted approximately 24 minutes. During the course of the interview, Mr. Smith acknowledged that he was required to investigate the allegations against JM and that he was required to conduct a thorough investigation. JM denied the allegations against him, and attributed them to an issue surrounding MC's brother, who had played basketball for JM. (Ex. R44 recorded interview with JM.) Mr. Smith did not interview MC during this process. (Test. of Smith.)

33. By letter dated April 30, 2015, the Commission notified Superintendent Maiocco that the Commission had considered an investigation report and recommendation regarding JM and concluded that there was sufficient cause to charge JM with misconduct, in violation of the Standards for Competent and Ethical Performance of Oregon Educators. (Ex. A4 at 45.)

34. By letter dated August 4, 2015, Mr. Smith notified JM, in part, of the following:

We have been notified by the Oregon Teachers Standards and Practices Commission, following an investigative inquiry, they have concluded there was sufficient cause to charge you with misconduct in violation of the Standards for Competent and Ethical Performance of Oregon Educators.

As a result of TSPC's initial findings, you are hereby placed on paid administrative leave effective immediately until the outcome of the investigation is complete[.]

(Ex. A4 at 48.)

35. By letter dated November 16, 2015, Mr. Smith notified JM that the HSD was placing JM on unpaid administrative leave, effective November 23, 2015. (Ex. A4 at 55.)

36. On November 20, 2015, JM resigned from his teaching position with the HSD.¹⁶ (Ex. A4 at 56.)

37. On November 28, 2016, the Commission issued the Notice in this matter, proposing to impose discipline on Mr. Smith for alleged misconduct. The Notice alleged, in part:

¹⁶ On December 22, 2016, JM entered into a Stipulation of Facts, Final Order of Revocation of Right to Apply for Licensure with the Commission. In the Stipulation, JM stipulated to engaging in sexual conduct with MC on or about the early morning hours of May 31, 2013 (graduation day) and further engaging in a sexual relationship with MC a few more times over the next year. (Ex. A7.)

(2)(b)(vii). You did not conduct or direct an appropriate investigation to determine the veracity of the allegations or whether any of HSD students may be at risk given the nature of the allegations regarding JM. You did not place JM on administrative leave after receiving credible information he engaged in sexual conduct with at least one female student. You did not take proactive steps to ensure that HSD students were not at risk of possible offenses from JM. On August 4, 2015, you placed JM on administrative leave. Prior to this date, JM had been allowed full access to students despite the information and allegations you had received.

(3) The conduct described in section (2) constitutes gross neglect of duty in violation of ORS 342.175(1)(b); OAR 584-020-0040(4)(n) as it incorporates OAR 584-020-0010(5) (*Use professional judgment*), OAR 584-020-0025(2)(e) (*Using district lawful and reasonable rules and regulations*); and OAR 584-020-0025(3)(a) (*The competent administrator demonstrates, Leadership skills in managing the school, its students, staff, and programs as required by lawful and reasonable district policies, rules, and regulations, state and federal laws and regulations, and other programs as assigned, and assures that staff is informed of these requirements.*)

(Pleading 1 at 3-4; emphasis in original.)

CONCLUSIONS OF LAW

1. Mr. Smith engaged in gross neglect of duty by:
 - a. Failing to use professional judgment;
 - b. Failing to use district lawful and reasonable rules and regulations; and
 - c. Failing to demonstrate leadership skills in managing the school, its students, staff and programs as required by lawful and reasonable district rules and regulations, state and federal laws and regulations, and other programs as assigned.
2. The Commission should suspend Mr. Smith's Continuing Administrator License for one year.

OPINION

The Commission alleges that Mr. Smith did not conduct or direct an appropriate investigation to determine the veracity of the allegations regarding JM, or whether any of the HSD students were at risk given the nature of the allegations. This, the Commission alleges, constitutes gross neglect of duty. Specifically, the Commission alleges that Mr. Smith failed to use professional judgment; failed to use district lawful and reasonable rules and regulations; and failed to demonstrate that he was a competent administrator.

Burden of Proof

Mr. Smith argues that “[t]he burden of proof includes the obligation to produce evidence substantiating each of the charges – the ‘burden of going forward.’” Licensee’s Closing Argument at 5. Mr. Smith contends that because the Commission is seeking a one-year suspension of his license, he would be deprived of the opportunity to work as an educator for one year, that his career as a school administrator could end, and that the Commission must prove all allegations by clear and convincing evidence.¹⁷ *Id.* Mr. Smith cites to the Oregon Administrative Procedures Act in support of his argument.

Under ORS 183.450(2), the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position. The Commission contends that the general preponderance of the evidence standard controls in administrative cases, a position which was recently upheld in *Dixon v. Oregon State Board of Nursing*, 291 Or App 207(2018).¹⁸

Here, the Commission does not allege that Mr. Smith engaged in fraud or deceit. Mr. Smith has not identified an “expressly contrary legislative objective” requiring a clear and convincing standard of proof as to the Commission’s allegations. As such, the general standard of proof for all allegations in this proceeding is a preponderance of the evidence. Therefore, the Commission bears the burden of proving its allegations by a preponderance of the evidence. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Cook*, 47 Or App at 437 (in the absence of legislation adopting a different standard, the standard of proof in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Gross Neglect of Duty

OAR 584-020-0040, titled “Ground for Disciplinary Action,” provides, in relevant part:

(4) Gross neglect of duty is any serious and material inattention to or breach of professional responsibilities. The following may be admissible as evidence of gross neglect of duty. Consideration may include but is not limited to:

* * * * *

(n) Substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030[.]

¹⁷ To be “clear and convincing,” evidence must establish that the truth of the facts asserted is “highly probable.” *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987), citing to *Cook v. Michael*, 214 Or 513, 526-527 (1958).

¹⁸ The Commission has omitted the historical discussion on the burden of proof in administrative proceedings. The Commission’s analysis on this issue is otherwise unchanged,

OAR 584-020-0010, titled “The Competent Educator,” provides, in relevant part:

The educator demonstrates a commitment to:

- (1) Recognize the worth and dignity of all persons and respect for each individual;
- (2) Encourage scholarship;
- (3) Promote democratic and inclusive citizenship;
- (4) Raise educational standards;
- (5) Use professional judgment; and
- (6) Promote equitable learning opportunities.

The Commission has promulgated rules relating to management skills for educators. OAR 584-020-0025 provides, in relevant part:

- (1) The competent educator is a person who understands students and is able to relate to them in constructive and culturally competent ways. The competent educator establishes and maintains good rapport. The competent educator maintains and uses records as required, and as needed to assist the growth of students.
- (2) The competent teacher demonstrates skills in:
 - (a) Establishing and maintaining classroom management that is conducive to learning;
 - (b) Using and maintaining district property, equipment, and materials appropriately;
 - (c) Using and maintaining student records as required by federal and state law and district policies and procedures;
 - (d) Using district and school business and financial procedures; and
 - (e) Using district lawful and reasonable rules and regulations.
- (3) The competent administrator demonstrates:
 - (a) Leadership skills in managing the school, its students, staff, and programs as required by lawful and reasonable district policies, rules, and

regulations, state and federal laws and regulations, and other programs as assigned, and assures that staff is informed of these requirements[.]

At hearing, and in his closing argument, Mr. Smith argued that OAR 584-020-0025(2) does not apply to him because he is not licensed as a teacher by the Commission. However, OAR 584-020-0005 provides, in part:

(1) "Administrator:" Any educator who holds a valid Oregon Administrative License or registration and who works in a position requiring an administrative license pursuant to OAR 584-005-0005(1).

(2) "Competent:" Discharging required duties as set forth in these rules.

(3) "Educator:" Any licensed or registered, or certified person who is authorized to engage in an instructional program including teaching, counseling, school psychology, administering, and supervising.

* * * * *

(7) "Teacher:" Any person who holds a teacher's license as provided in ORS 342.125.¹⁹

As stated above, a "teacher" is any person who holds a teacher's license as provided in ORS 342.125. Under ORS 342.125, that includes an individual who holds an administrative license. As such, the provisions of OAR 584-020-0025(2)(e) apply to Mr. Smith.

The record establishes that in August 2013, Mr. Smith received a report from Dr. Mishra and Principal Spoo that JM may have engaged in sexual misconduct with a student from the MCSD. Mr. Smith referred to this report as "community gossip" and did not conduct an investigation into the matter. Mr. Smith was aware that Principal Spoo and Dr. Mishra had interviewed JM regarding the allegations, but he took no action to learn of the nature of the interview or what information they had learned during the interview. Instead, Mr. Smith

¹⁹ ORS 342.125 provides, in part:

(1)(a) Teaching licenses shall be issued and renewed by the Teacher Standards and Practices Commission by the authority of the State of Oregon, subject to ORS 342.120 to 342.430 and the rules of the commission.

* * * * *

(2) Subject to ORS 342.130 and to subsection (3) of this section, licenses shall be of the following types:

* * * * *

(f) Preliminary administrative license[.]

concluded that there was nothing requiring “TSPC notification” and did nothing more regarding the report.

On October 7, 2014, Mr. Smith received an additional report from Principal Spoo indicating that JM may be under investigation by the MCSO for grooming a minor female. The nature of the report, which Principal Spoo received from Mr. Melville, was a report of suspected sexual conduct by JM that specifically referenced grooming of a minor female student. Rather than conducting an investigation into the matter, Mr. Smith dismissed the report as “hearsay and rumor,” indicating that there was no basis to report the matter.

On November 4, 2014, Mr. Smith emailed Ms. Keller, acknowledging that he was being “bombarded” with “community gossip” involving allegations of sexual misconduct between JM and a student while JM was employed by the MCSO. However, up until this point, Mr. Smith had not investigated the allegations, and had not directed anyone in the HSD to conduct an investigation.

On November 25, 2014, Mr. Smith met with MC’s stepfather, Mr. Byrd, a meeting that was initiated by Mr. Byrd as Mr. Smith had yet to begin an investigation. During the course of the meeting, Mr. Byrd provided Mr. Smith with detailed information regarding a confession MC made to Detective Dike. Mr. Byrd reported that he believed JM had been grooming MC. Even after meeting with Mr. Byrd and receiving a detailed report regarding JM’s alleged conduct that had been provided to law enforcement, Mr. Smith did not contact MCSO or interview MC. Mr. Smith did not place JM on administrative leave or place him in a position in which he would not have direct, unsupervised conduct with students.

On December 2, 2014, Mr. Smith informed Mr. Krauger that he had “no reasonable suspicion” regarding JM’s alleged conduct. During the course of their conversation, Mr. Krauger told Mr. Smith to conduct an investigation as the HSD normally would for a complaint of this nature, and to consult with the district’s legal counsel for advice, and to “do their due diligence.” Ex. A11 at 4; test. of Krauger. Although Mr. Smith testified at hearing that Mr. Krauger never suggested that he contact the district’s legal counsel for advice, Mr. Smith admitted otherwise during his March 8, 2016 interview with Mr. Krauger. During that interview, he admitted he had not contacted the district’s legal counsel because, in his opinion, the matter was “pretty straightforward.” Ex. A12 TSPC000408 beginning at 11:00. Despite Mr. Krauger’s recommendations, Mr. Smith did not contact the HSD’s legal counsel.

In a December 4, 2014 email to Dr. Maiocco, Mr. Smith wrote that he had “no reasonable or credible suspicion to believe that this incident occurred.” Ex. A4 at 37. Mr. Smith reached this conclusion *before* conducting a detailed investigation into the allegations involving JM.

On December 9, 2014, Mr. Smith met with Mr. Dick. Mr. Dick reported that he suspected JM had engaged in grooming behaviors with female students and specifically mentioned MC as a student he suspected JM had groomed. Also on December 8, 2014, Mr. Smith spoke with Mr. Ganvoa, who reported that he had previously counseled JM on boundaries with female students. On December 10, 2014, Mr. Smith contacted Mr. Dirksen, who confirmed he was aware of a report JM had engaged in a sexual relationship with MC on the day of graduation in 2013. Mr.

Dirksen also informed Mr. Smith that he had reported the allegations to the Commission and to the MCSO. Even after receiving this information, Mr. Smith did not interview or attempt to interview MC, nor did he contact the MCSO. He did not place JM on paid administrative leave, or place JM in a position that did not require direct, unsupervised contact with students.

Mr. Smith did not interview JM until December 10, 2014. The entire interview lasted just under 24 minutes. During the interview, JM denied the allegations, attributing them to an issue involving MC's brother. Mr. Smith did not interview or attempt to interview MC. He accepted JM's denial of the allegations as the truth, and did nothing more to investigate the matter, despite the multiple reports that had been made to him of concerns of JM engaging in grooming behavior and despite his knowledge that MCSO and the Commission had opened investigations regarding JM.

Mr. Smith waited until August 4, 2015 to notify JM that he was placing JM on paid administrative leave. Mr. Smith placed JM on paid administrative leave because the Commission had concluded that there was sufficient cause to charge JM with misconduct in violation of the Standards for Competent and Ethical Performance of Oregon Educators.

As a licensed administrator, Mr. Smith has a duty to use professional judgment; to use district lawful and reasonable rules and regulations; and to demonstrate leadership skills in the management of the school, students, staff and programs as required by applicable district policies, state and federal laws, and other programs as assigned. Mr. Smith was responsible for the management of the HSD's Human Resources department, which included handling patron complaints; placement of employees on administrative leave; and review and revision of district policies. Mr. Smith also directly supervised Principal Spoo, who was the principal at the school where JM worked.

Beginning on the first day of JM's employment with the HSD – August 20, 2013 – Mr. Smith received a report from Dr. Mishra and Principal Spoo that JM may have engaged in sexual conduct with a student from the MCSO. Although Mr. Smith referred to this report as "community gossip," the report was the first of many he received regarding JM's conduct. Mr. Smith made no attempt to find out what Principal Spoo and Dr. Mishra had asked JM during their interview with him. Rather than conduct or direct an investigation into the reported allegations as required under Policy JHFF, Mr. Smith dismissed the report and indicated that no further investigation was needed. Mr. Smith reached this conclusion despite Policy JHFF's clear directive that a *detailed inquiry* needed to be made into the report of sexual misconduct.

When Mr. Smith received a report from Principal Spoo in October 2014 that JM may be under investigation by the MCSO for grooming a minor female, Mr. Smith dismissed the report as "hearsay and rumor" rather than conducting a detailed inquiry into the report of alleged sexual misconduct, as required by Policy JHFF. Mr. Smith did not direct Principal Spoo or anyone else from the HSD to investigate the matter. Mr. Smith did not obtain information from Mr. Melville, the MCSO, JM, or MC.

Even when Mr. Smith contacted Ms. Keller on November 4, 2014 with information that he was being "bombarded" with "community gossip" involving allegations of misconduct between

JM and a student from the MCSD, Mr. Smith had not initiated an investigation into the reports he received, nor had he contacted the MCSO to find out about a possible criminal investigation into the matter. Again, Mr. Smith failed to comply with Policy JHFF by failing to conduct a detailed inquiry into the matter.

This is also true of Mr. Smith's failure to comply with Policy JHFF after meeting with Mr. Byrd on November 25, 2014. During the meeting, Mr. Byrd reported that MC had confessed to the MCSO detective that she had a sexual relationship with JM. Mr. Byrd also reported his belief that JM had been grooming MC. Even after receiving this information, Mr. Smith did not conduct a detailed inquiry into the allegations. He did not attempt to interview MC, did not contact the MCSO about the investigation, did not contact the HSD's legal counsel, and did not interview JM until December 10, 2014, at which time he simply accepted JM's self-serving and unsubstantiated denials.

Instead of fulfilling his duty to conduct a detailed inquiry into the multiple reports of sexual misconduct by JM, Mr. Smith allowed JM to have direct, unsupervised access to students in the HSD. The access and length of time JM had with these students would have allowed him the opportunity to potentially groom female students – precisely the type of behavior by JM that was consistently reported to Mr. Smith by multiple individuals.

The aforementioned establishes that Mr. Smith failed to demonstrate the management skills required for his position. He failed to use district lawful and reasonable rules to conduct a detailed inquiry into the allegations involving JM. The aforementioned also establish that Mr. Smith failed to use professional judgment. Mr. Smith received multiple reports of sexual misconduct by JM, each of which should have triggered an investigation under Policy JHFF. He dismissed each of the reports as “community gossip” and “rumors,” because he never sought to discover what the HSD's own policy – a policy Mr. Smith helped develop – required: a detailed inquiry into the allegations. Even after Mr. Krauger recommended that Mr. Smith do his due diligence and contact the district's counsel, Mr. Smith did not because he believed the matter was straightforward. The only reason for Mr. Smith to believe that the matter was straightforward was because of his unquestioning acceptance of JM's denials. Mr. Smith did not comply with his responsibilities as an administrator, and he failed to show a commitment to use professional judgment in this matter.

Policy JHFF is clear, and requires specific action to be taken upon receipt of a report of potential sexual misconduct by a district employee. Policy JHFF makes no distinction on whether the alleged conduct occurred in or outside of the Hermiston School District in order for an investigation to be triggered. To allow this distinction to control would undermine the underlying purpose of the policy and the law on which it was based (HB 2062) – protecting students.²⁰

It is also clear that once a report was received under Policy JHFF, the policy did not provide for weighing the merits of the report before conducting an investigation, something that Mr. Smith appeared to do on more than one occasion when he referred to reports as “community gossip,” or when he commented on what he considered to be the lack of veracity in the reports.²¹

²⁰ The Commission has added this paragraph to this order as part of its reasoning.

²¹ See Ex A4 at p 27, R7 at 3

Mr. Smith appeared to confound his duties under Policy JHFF with his duty as a mandatory reporter of suspected child abuse or as a district reporter of potential misconduct under OAR 584-020-0041.²² By failing to recognize his duties under Policy JHFF, Mr. Smith failed to comply with Policy JHFF's specific requirements.²³

At hearing, Mr. Smith argued that he conducted a "limited investigation" into this matter because the Commission's investigator told him to do so. There is no basis for Mr. Smith's proposition that the Commission was authorized to direct his day-to-day decision making as the HSD's Deputy Superintendent. The HSD had its own policies that Mr. Smith helped implement and on which he received training. As a licensee, Mr. Smith has a duty to use professional judgment in performing his duties. His own testimony establishes that in the nine years he worked for the HSD as the Deputy Superintendent, he reported 17 educators as a result of substantiated sexual conduct investigations; that he has received and provided extensive training on the subject of sexual misconduct investigations; and that he has placed several employees on administrative leave as a result of his own investigations. To argue that, in this case, he abandoned his knowledge and experience because Mr. Krauger directed him to do so is simply not believable.

For these reasons, the Commission has established that Mr. Smith engaged in gross neglect of duty.

Suspension of License

The Commission is authorized to sanction licensed educators under ORS 342.175(1)(b), which provides:

The Teacher Standards and Practices Commission may suspend or revoke the license or registration of a teacher or administrator, discipline a teacher or administrator, or suspend or revoke the right of any person to apply for a license or registration, if the licensee, registrant or applicant has held a license or registration at any time within five years prior to issuance of the notice of charges under ORS 342.176 based on the following:

* * * * *

(b) Gross neglect of duty[.]

OAR 584-020-0040, titled "Ground for Disciplinary Action," provides, in relevant part:

(4) Gross neglect of duty is any serious and material inattention to or breach of professional responsibilities. The following may be admissible as evidence of gross neglect of duty. Consideration may include but is not limited to:

* * * * *

²² *Id.*

²³ The Commission has added this paragraph to this order as part of its reasoning

(n) Substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030[.]

The Commission proposes suspending Mr. Smith's Continuing Administrator License for one year for his gross neglect of duty. Mr. Smith argues that suspension is not warranted, in part because the Commission cannot show that his conduct was a substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030.

The applicable statutes and administrative rules do not contain a definition for "substantial." Therefore, the plain meaning of the terms must be examined. Merriam-Webster defines "substantial" as "consisting of, relating to, sharing the nature of, or constituting substance." *Webster's Third New Int'l Dictionary*, 2280 (unabridged ed 2002). Mr. Smith was the Deputy Superintendent and in charge of handling patron complaints and personnel matters. He led the district board's policy committee and had a duty to conduct, or direct employees to conduct, detailed investigations into allegations of sexual misconduct as they related to school employees.

However, in this case, Mr. Smith demonstrated a remarkable lack of interest in taking any steps to protect the students in his district. He attempted to minimize the allegations brought to his attention about JM as "community gossip." His lack of initiating any contact with witnesses such as MC and Detective Dike, who would have provided him with unfavorable information regarding JM, and his willingness to blindly accept JM's self-serving denials of the allegations demonstrate his utter disregard to the danger that JM, an alleged sexual predator who targeted students, posed to the HSD's students. Mr. Smith's conduct allowed JM to have direct, unsupervised access to students in the HSD, and allowed JM to potentially engage in the same sexual misconduct that had been reported to Mr. Smith on multiple occasions. Mr. Smith's conduct was a serious and material failure of his professional responsibilities that substantially deviated from the professional standards of competency expected of him and potentially placed students' safety in jeopardy. His failure to perform a detailed investigation into the allegations against JM and his apparent inability to understand the depth of his failure, and how that failure placed students in jeopardy, further support the Commission's conclusion that a one-year suspension of Mr. Smith's license is appropriate.


A one year suspension is appropriate in this matter for several reasons, including the clear and unambiguous district policy Mr. Smith failed to follow; the nature of the alleged conduct that Mr. Smith failed to investigate, the number of reports Mr. Smith received regarding JM; the length of time Mr. Smith allowed JM to continue having direct contact with students in the Hermiston School District; as well as Mr. Smith's years of experience as an administrator. Mr. Smith received several reports of potential sexual conduct or grooming behavior by JM. Each of the reports discussed above required an investigation under applicable policy. A one year suspension would be appropriate on each of the reports regarding JM. The one year suspension is appropriate even if it is determined that Mr. Smith's conduct did not violate all the rules cited by the Commission.

ORDER

For the foregoing reasons, Wade A. Smith's Oregon Continuing Administrator License is hereby SUSPENDED for a period of one year from the date this order is signed.

IT IS SO ORDERED THIS 27 day of June, 2018.

TEACHER STANDARDS AND PRACTICES COMMISSION

By: 
Dr. Anthony Rosilez, Executive Director

NOTICE OF APPEAL OR RIGHTS

YOU ARE ENTITLED TO JUDICIAL REVIEW OF THIS ORDER. JUDICIAL REVIEW MAY BE OBTAINED BY FILING A PETITION FOR REVIEW WITHIN 60 DAYS FROM THE SERVICE OF THIS ORDER. JUDICIAL REVIEW IS PURSUANT TO THE PROVISIONS OF ORS 183.482 TO THE OREGON COURT OF APPEALS.