

BEFORE THE ALASKA PROFESSIONAL TEACHING PRACTICES COMMISSION

In the Matter of)
)
 NICHOLAS J. GRUBICH, JR.,)
)
 Applicant for Administrative and)
 Teacher Certifications)

PTPC Case No. 06-14
OAH No. 06-0144-PTP

DECISION AND ORDER GRANTING SUMMARY ADJUDICATION

I. Introduction

Nicolas Grubich applied in the summer of 2005 for type Q and B Alaska teaching certificates. His applications were denied on a single ground: that he was untruthful when he responded “no” to Question 3 on the applications.

Question 3 asked, “Is there an action pending to revoke or suspend a certificate or license issued to you in another jurisdiction?” When Mr. Grubich answered that question in the negative, there was an investigation underway by Washington licensing authorities regarding his conduct. The Professional Teaching Practices Commission staff contends that the investigation was an “action . . . to revoke or suspend,” that Mr. Grubich’s answer was a misrepresentation.

The Professional Teaching Practices Commission heard this case on April 24, 2006. Prior to the hearing, Mr. Grubich had moved for summary adjudication, contending that undisputed facts established that he was entitled to prevail as a matter of law, without the need for an evidentiary hearing. The commission decided to take the motion under advisement and to hear the parties’ full evidentiary presentations.

After hearing the evidence and the arguments of the parties, the commission has decided that summary adjudication for Mr. Grubich is the appropriate resolution for this case. In the Commission’s view, the Washington investigation was not, by operation of Washington law, an “action . . . to revoke or suspend,” and therefore the answer to Question 3 was truthful.

Commissioners Curran and Lamal did not participate in the decision. Commissioner Peterson dissented.

II. Framework for Summary Adjudication

The purpose of a hearing of the type held in this case is to resolve disputed facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing

is not required.¹ Accordingly, if Mr. Grubich can show by motion—relying only on undisputed facts or on facts alleged by the staff—that he should prevail, he is entitled to a summary decision without the need to weigh additional evidence taken at the hearing.

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.² Where there is any room for differing interpretations of factual matters, all facts are to be viewed, and inferences drawn, in the light most favorable to the nonmoving party.³ With respect to legal interpretations, the deciding body may draw its own conclusions and need not accept the views of any witness or party.

This case is in the slightly uncommon posture that the motion for summary adjudication was held in abeyance while all of the evidence was heard. In deciding the motion, the commission does not artificially pretend that it has not heard the fuller evidentiary presentation made at the hearing. It relies on all of the evidence before it, including the testimony and the 27 exhibits admitted without objection at the hearing. However, the commission has resolved no issues of credibility, instead viewing the evidence in the light most favorable to the staff. Upon this record, the commission generally accepts the legal argument advanced in parts III-A and B of Grubich’s motion for summary adjudication, and concludes that Grubich must prevail.

III. Material Facts

The following facts are undisputed except where otherwise noted. Where a factual dispute is noted, the commission has assumed, without deciding, that the staff’s position is correct.

Mr. Grubich has been licensed in Washington State as a teacher for 19 years and as a school administrator for 13 years. His most recent employment in the teaching profession in Washington was a five-year term as principal of Tapteal Elementary School in the Richland School District.

In June of 2004, the Richland School District filed a complaint against Mr. Grubich with the Washington Office of Professional Practices (OPP), which serves as staff to the state’s Superintendent of Public Instruction. The complaint alleged that Mr. Grubich, “as principal of Tapteal Elementary School in the Richland School District, failed to properly observe and

¹ See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

² See, e.g. *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

³ *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000).

evaluate certificated employees in violation of WAC [Washington Administrative Code] 180-87-060.”⁴ Mr. Grubich received a copy of the complaint,⁵ with a cover letter from OPP informing him that he would be told of its future disposition, “including action that may affect the status” of his license.⁶ The complaint was never amended up to the time of Mr. Grubich’s applications in Alaska.

In March of 2005, Mr. Grubich and his attorney met with OPP’s Spokane-based investigator, Terrance Perkins, so that Perkins could interview him as part of the investigation of the complaint. The discussion covered the allegation in Richland’s 2004 complaint, as well as other allegations regarding Mr. Grubich’s conduct at Tapteal Elementary School.⁷ It is undisputed that Perkins told Grubich “that the results of complaints generally can range [from] dismissal of the complaint to revocation or suspension,” and that Perkins said he was not the final decisionmaker in the matter.⁸

There is a disagreement between the parties over what, if anything, Mr. Perkins may have said regarding the likely outcome of the investigation.⁹ For purposes of this motion, the dispute must be resolved in favor of the party resisting summary adjudication, that is, the PTPC staff. Accordingly, it must be assumed that Mr. Perkins offered no opinion about the likely outcome.¹⁰

Mr. Perkins subsequently completed his investigation and sent a report to OPP in Olympia. He made no recommendation regarding discipline.¹¹

In June of 2005, while visiting his brother in Fairbanks, Mr. Grubich interviewed for a job with the Lower Yukon School District. He disclosed the Washington investigation to the

⁴ Staff Exhibit 3.

⁵ *Id.*; Grubich testimony.

⁶ Testimony of Schreck. The “action” referred to is potential future action.

⁷ According to testimony at the hearing, the allegations that were outside the scope of Richland’s written complaint included assertions that Mr. Grubich used the nickname “Buckwheat” when he spoke to a child of partly Korean ancestry, and that he made inappropriate or sexist comments to staff in the context of hiring. “Buckwheat” was the name of a character played by African-American actor Billie Thomas in the 1930s film series “Little Rascals,” and is viewed by some who are familiar with this history as a racist stereotype. *See* http://en.wikipedia.org/wiki/Billie_%22Buckwheat%22_Thomas. Mr. Grubich testified that he was unaware of the racial association when he used the nickname.

⁸ The quotation is from the Grubich Affidavit, ¶ 4. Testimony at the hearing from Mssrs. Grubich and Perkins agreed with the affidavit on this point.

⁹ *Compare* Perkins Affidavit, ¶ 3 *with* Grubich Affidavit, ¶ 4.

¹⁰ Perkins testimony.

¹¹ Perkins testimony (cross examination). Staff witnesses were unclear about when the investigation concluded. The documentary record indicates that OPP was still awaiting witness statements in September of 2005. Grubich Exhibit I.

district, which made follow-up inquiries in Washington to learn more about it. The district offered him, and he accepted, a job as principal in one of its schools.

On July 22 and August 8, 2005, while the Washington investigation was still unresolved, Mr. Grubich applied for teacher and administrative certifications in Alaska. On each application, he checked “no” in response to Question 3, which asked, “Is there action pending to revoke or suspend a certificate or license issued to you by another jurisdiction?”¹²

On October 26, 2006, the Washington Superintendent of Public Instruction issued an “Order of Revocation” to Mr. Grubich.¹³ In keeping with Washington law, the order provided that it was not final when issued, but rather would “become final” if not appealed within 30 days.¹⁴ It is an order of a type that Washington regulations characterize as a “proposed order.”¹⁵ Mr. Grubich filed an appeal and a request for informal review within the 30-day period.¹⁶ Accordingly, his certificate was not revoked.¹⁷

On December 1, 2006, PTPC staff recommended that Mr. Grubich’s applications for Alaska certificates be denied.¹⁸ The single ground for the recommendation was the staff’s conclusion that Mr. Grubich’s answer to Question 3 was a “misrepresentation on a matter related to licensure.” This appeal followed.

IV. Analysis

The ultimate question in this case is whether Mr. Grubich should be denied licensure because of a misrepresentation in his response to Question 3. Mr. Grubich pursued two avenues in challenging the staff’s premise: first, that the answer was not a misrepresentation because it was true; and second, that if the answer were found to be false, the misrepresentation was an innocent one because Mr. Grubich did not know it to be false. Because the commission finds the first argument dispositive, it has no need to reach the second.

Question 3 asked whether, in another jurisdiction, there is “action pending to revoke or suspend.” As of the date of the hearing, there was certainly action pending to revoke or suspend

¹² Grubich Exhibits A and B.

¹³ Staff Exhibit 7.

¹⁴ *Id.* at 6; *see also* Washington Administrative Code (WAC) 181-86-135 (then codified as 180-86-135).

¹⁵ *See* WAC 181-86-135.

¹⁶ Grubich Exhibit M (“Acknowledgement of Appeal” by OPP, noting that the informal review is pending and advising that “a final or other disposition order will not be issued” until it is concluded).

¹⁷ The fact that the certificate was not actually revoked by the November action is a function of WAC 181-86-135. It was confirmed at the hearing by the testimony of OPP Director Charles Schreck in response to a question from Commissioner Baker.

Mr. Grubich’s certificate in Washington. In August of 2005, however—when he answered the question—what was pending was the investigation that preceded the October 26 proposed order. We must determine whether the pending investigation was “action” of the kind referred to in Question 3.

Washington has a two-tiered process leading toward discipline that is quite similar to Alaska’s. The first tier, preceding any sort of discipline, is an investigation.¹⁹ Washington’s Superintendent of Public Instruction may initiate these investigations in the case of certificate holders who have had certain formal actions taken against them by another body, such as a felony arrest or a professional license revocation.²⁰ Otherwise, the Superintendent may investigate only upon receiving a complaint from a school district or similar administrative authority.²¹ These complaints are parallel to complaints against educators in Alaska under one of this commission’s regulations, 20 AAC 10.200. Like its Alaska counterpart, a Washington complaint that leads to an investigation ultimately may be dismissed or may lead to the filing of formal disciplinary proceedings.

Washington law requires that the investigations precipitated by complaints be placed in one of four “levels” for purposes of prioritization. The levels are:

- I “allegations, if proven true, for which permanent mandatory revocation shall be the appropriate disciplinary action”
- II “allegations, if proven true, for which revocation may be the appropriate disciplinary action”
- III “allegations, if proven true, for which suspension may be the appropriate disciplinary action”
- IV “allegations, if proven true, for which a reprimand may be the appropriate disciplinary action”²²

An example of Level I activity is the sale or purchase of a minor child.²³ An example of Level II activity is sexual activity with children.²⁴ An example of Level III activity is use of illegal

¹⁸ Staff Exhibit 12.
¹⁹ WAC 181-86-100.
²⁰ WAC 181-86-100(1).
²¹ WAC 181-86-100(2).
²² WAC 181-86-116.
²³ WAC 181-86-116(1)(a)(vi).
²⁴ WAC 181-86-116(1)(b)(i).

drugs.²⁵ The complaint received from the Richland School District, which remained unamended in the summer of 2005, alleged that Mr. Grubich “failed to properly observe and evaluate certificated employees.”²⁶ Insofar as it is addressed in the Washington regulations, this is classed as a Level IV allegation.²⁷

The more formal tier of the process leading toward discipline in Washington is the issuance of a proposed order. The issuance of these documents is governed by Washington Administrative Code (WAC) 181-86-130, which reads, in relevant part:

Whenever the superintendent of public instruction takes action to suspend or revoke a certificate or reprimand a certificate holder, the superintendent of public instruction . . . shall issue an order of reprimand, suspension, or revocation to the affected certificate holder and shall provide such person a copy of applicable administrative appeal procedures

These “orders” are not effective when issued. A companion regulation, WAC 181-86-135, refers to them as “proposed” orders. They become final and effective (i) after 30 days if no appeal is filed or (ii) after the conclusion of the first stage of the review process, if they are appealed and upheld.²⁸ The October 26 order regarding Mr. Grubich followed this process, in that it provides: “This order will become final thirty days after it is received, unless it is appealed within the thirty day period.”²⁹

In Alaska, the formal process of discipline commences with an “accusation,” after which the certificate holder is afforded a formal hearing to present a defense.³⁰ The analogous step in the Washington process is the issuance of a WAC 181-86-130 proposed order, which, like an accusation in Alaska, triggers the right to a hearing.³¹ A Washington statute prohibits the Superintendent from actually revoking a certificate without first giving the certificate holder an opportunity for a hearing.³²

In Mr. Grubich’s view, the investigation that precedes a proposed order is simply that, an investigation, without any purpose “to” revoke, suspend, or impose some other kind of discipline. He points out that the Washington statute that gives the Superintendent authority to conduct investigations describes their purpose as “to establish the existence of any alleged

²⁵ WAC 181-86-116(1)(c)(i).

²⁶ Staff Exhibit 3.

²⁷ WAC 181-86-116(1)(d)(ii).

²⁸ WAC 181-86-135.

²⁹ Staff Exhibit 7 at 5.

³⁰ See AS 44.62.

³¹ WAC 181-86-140.

violations of or noncompliance with this chapter or any rules adopted under it.”³³ He argues that Washington law does not provide for conducting investigations for the narrower purpose of seeking to revoke or suspend a license, and therefore the investigation that followed the 2004 Richland complaint cannot have been an “action . . . to revoke or suspend.”

We agree with Mr. Grubich that a staff investigation, even one precipitated by a complaint of the kind allowed under our regulation, 20 AAC 10.200, or the Washington one, WAC 181-86-100, is too open-ended and informal to be an “action . . . to revoke or suspend.” We note that Washington does not appear to regard its investigations as “actions” against a certificate. Instead, the letter that OPP sends to a person who is the subject of a complaint says that the person will be notified—in the future—of any “action” against the certificate.³⁴ Moreover, WAC 181-86-130 mandates that a proposed order must be issued “whenever” action is taken against a certificate. No proposed order had been issued as of August of 2005.

In any event, to the extent that the Washington investigation had been made sufficiently formal that it might fairly be viewed as an “action,” it was an investigation only about failure to do employee evaluations. That was the only matter placed in issue by the Richland complaint. The Washington regulations do not suggest that a complaint about a lapse of this kind would ordinarily lead to suspension or revocation.

In our view, if the Office of Certification wished to be informed of investigations that might, in the future, lead to the initiation of formal action against a license, it needed to ask a different question on Alaska’s certificate applications. We note that, in partial response to this case, it has changed a number of the applications so that they now ask, “Are you currently or have you ever been the subject of any certificate or licensing investigation or inquiry by any certification or licensing agency for allegations of misconduct?”³⁵ Mr. Grubich was not asked that question, however. When he answered “no” to Question 3 on the old applications, his answer was accurate.

³² Revised Code of Washington (RCW) 28A.410.100.

³³ RCW 28A.410.095(1).

³⁴ We rely here upon the text of the letter as read into the record by Mr. Schreck.

³⁵ One example is found at Grubich Exhibit C. We take official notice of the incorporation of the new question into a number of certification applications, which are found on the teacher certification page linked to our own website, <http://www.eed.state.ak.us/ptpc/>.

V. Conclusion

Summary adjudication is granted on the basis that Mr. Grubich's answer to Question 3 on his certificate applications was not a misrepresentation. Pursuant to AS 14.20.460(4), the Professional Teaching Practices Commission recommends reversal of the decision to deny Mr. Grubich the Type B and Type Q certificates for which he has applied.

In addition to his motion for summary adjudication, Mr. Grubich advanced other grounds for reversal of the department's decision on certification. The commission does not address those contentions in this decision, because they do not appear to be necessary to resolution of the matter. Should the formal recommendation in this decision be rejected, this matter may be returned to the commission for additional findings.

DATED this 3rd day of May, 2006.

PROFESSIONAL TEACHING
PRACTICES COMMISSION

By: *Signed*
Mark Doner, Chair

[This document has been modified to conform to technical standards for publication.]