

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE BOARD OF TEACHING

In the Matter of Denial of the Licensure  
Application of Gary J. Axford

**ORDER DENYING MOTION  
FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Amy J. Chantry pursuant to Gary J. Axford's (Respondent) Motion for Summary Disposition which was filed on January 24, 2013. Bernard E. Johnson, Assistant Attorney General, filed a response in opposition to the Respondent's Motion on February 12, 2013, on behalf of the Disciplinary Committee of the Minnesota Board of Teaching (Board). The hearing record closed on February 12, 2013.

Based upon all of the filings in this matter, and for the reasons set out in the accompanying Memorandum,

**IT IS HEREBY ORDERED:** that the Motion for Summary Disposition is DENIED.

Dated: March 13, 2013

s/Amy J. Chantry  
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AMY J. CHANTRY  
Administrative Law Judge

**MEMORANDUM**

The request for summary disposition is analogous to a motion for summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. Summary disposition of a claim is appropriate when there is no genuine issue of material fact and one party is entitled to a favorable decision as a matter of law.<sup>1</sup> A material fact is one that is substantial and will affect the result or outcome of the proceeding, depending upon the determination of that fact.<sup>2</sup> In considering the Motion for Summary

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<sup>1</sup> Minnesota Rules of Civil Procedure, Rule 56.03.

<sup>2</sup> *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W. 2d 804 (Minn. Ct. App. 1984).

Disposition, an Administrative Law Judge must view the evidence in the light most favorable to the nonmoving party.<sup>3</sup>

To obtain summary disposition, the moving party must establish that there is no genuine issue of material fact. The initial burden is on the moving party to establish a *prima facie* case for the absence of material facts at issue.<sup>4</sup> Once the moving party has established a *prima facie* case, the burden shifts to the nonmoving party.<sup>5</sup> When the movant also bears the burden of persuasion on the merits at trial, as the movant does in this case, its burden on summary disposition is to present “credible evidence” that would entitle it to a directed verdict if not controverted at trial.<sup>6</sup> To defeat a motion for summary disposition successfully, the nonmoving party must show that specific facts are in dispute that have a bearing on the outcome of the case.<sup>7</sup> The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party’s burden.<sup>8</sup>

## **MATERIAL FACTS IN DISPUTE**

Summary Disposition is not appropriate in this case because there are factual issues in dispute that are material to the outcome of the case. The basis of the denial of Respondent’s licensure application is based on allegations that Respondent engaged in sexual contact with a 13-year-old student. The Respondent denies these allegations. While the Board cannot rely on mere speculation or general assertions to create a general issue of material fact, the allegation of inappropriate sexual contact with an underage student is supported by substantial evidence that warrants a hearing in this matter.

Minn. Stat. § 122A. 20, subd. 1(a)(1), gives the Board the authority to refuse to issue a license based on immoral conduct. While the term “immoral conduct” is not defined in the statute, it has been defined in case law. In *Falgren v. State Bd. of Teaching*, the Minnesota Supreme Court affirmed the revocation of a teacher’s license for engaging in immoral conduct after a teacher was terminated for improper sexual contact with a student. The Supreme Court recognized that the phrase “immoral conduct” is nebulous and should be construed according to its common and approved usage and the rule of grammar.<sup>9</sup> The Court must apply its plain meaning if the phrase, so construed, is not ambiguous; in other words, is not susceptible to more than one

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<sup>3</sup> *Grandahl v. Bulluck*, 318 N.W. 2d 240 (Minn. 1982); *Nord v. Herreid*, 305 N.W. 2d 337 (Minn. 1981); *American Druggists Insurance v. Thompson Lumber Co.*, 349 N.W. 2d 569 (Minn. 1989).

<sup>4</sup> *Thiele v. Stich*, 424 N.W.2d 580, 583 (Minn. 1988).

<sup>5</sup> *Minnesota Mutual Fire and Casualty Company v. Retrum*, 456 N.W. 2d 719, 723 (Minn. Ct. App. 1990).

<sup>6</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2557, 91 L. Ed. 265 (1986) (dissenting opinion restating majority opinion); *Thiele*, 425 N.W. 2d at 583, n. 1.

<sup>7</sup> *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W. 2d 853, 855 (Minn. 1986).

<sup>8</sup> *Id.*; *Murphy v. Country House, Inc.*, 240 N.W. 2d 507, 512 (Minn. 1986).

<sup>9</sup> Minn. Stat. § 645.08 (1).

meaning.<sup>10</sup> The term “immoral” is defined in Webster’s New Universal Unabridged Dictionary to mean “not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the accepted standards of proper sexual behavior; unchaste; lewd; licentious; obscene.”

The *Falgren* court also noted that conduct that what one community might find immoral may not be so labeled in another location in the state. The Court stated that the Board was not required to revoke a license upon a finding of immoral conduct and that that the Administrative Law Judge must consider any additional evidence that the licensee wishes to present concerning the alleged immorality of his or her conduct. Thus, under *Falgren*, it is necessary to consider on a case-by-case basis whether particular conduct constitutes “immoral conduct” within the meaning of the statute. The surrounding circumstances must also be considered both with respect to whether immoral conduct occurred and with respect to the appropriate discipline to be imposed.

While there is no dispute that the Respondent was acquitted of the charge of criminal sexual conduct in the third degree, there is a dispute as to whether Respondent engaged in “immoral conduct.” The fact that the Respondent was acquitted, does not mean that he did not engage in “immoral conduct” under Minn. Stat. § 122A. 20. Here, the Board has the burden of proof to establish the facts at issue by a preponderance of the evidence. This is different than in a criminal case where the standard of proof is beyond a reasonable doubt. Thus, a person can be acquitted of a criminal charge, yet still be found to have committed the alleged conduct by a preponderance of the evidence.

## **NO VIOLATION OF RESPONDENT’S RIGHT TO PROCEDURAL DUE PROCESS**

Respondent asserts in his Motion that the Board’s failure to suspend or revoke any of his teaching licenses at the time that the allegations of inappropriate sexual contact that arose back in 1979, violated his right to due process.<sup>11</sup> The Administrative Law Judge does not agree. There was no evidence presented that the Disciplinary Committee was made aware of the allegations of Respondent’s sexual misconduct or the fact that the Respondent had been charged with criminal sexual conduct in the third degree, before he applied for a teaching license in the spring of 2012. Mandatory reporting by school districts to the Board regarding resignations or terminations which follow allegations of misconduct was not required until 1989.<sup>12</sup>

In addition, when Respondent renewed his teaching license in 1984, the only pertinent questions on the application were:

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<sup>10</sup> *Current Tech. Concepts, Inc. v. Irie Enters, Inc.*, 530 N.W. 2d 539, 543 (Minn. 1995).

<sup>11</sup> Respondent had three types of license: (1) Grades 7-12 Full Time-Social Studies-all-Expiration date 06/30/1981; (2) Grades Kindergarten – 12 Full Time-Learning Disabilities-Expiration date 06/30/1989; and Grades 7-12-Mild to Moderate Mentally Handicap-Expiration date 06/30/1981. See Committee Ex.1.

<sup>12</sup> Minn. Laws ch. 97; Aff. of Bernard E. Johnson.

- 11a. Have you even had a certificate or license revoked? Which he answered “no”; and
- 11b. Have you ever been denied a certificate or license in another state? Which he answered “no.”

The Board could not be expected to take action when it was not made aware of the allegations of Respondent’s sexual misconduct, and his subsequent charge of third degree criminal sexual conduct. Respondent was employed as a teacher for six years with the Lake of the Woods School from 1974 through the spring of 1980. Respondent resigned from his teaching position in 1980 following allegations of sexual misconduct made by then student, M.H. The Lake of the Woods County Sheriff’s Department investigated the allegations and filed a criminal complaint in March of 1980, charging Respondent with Criminal Sexual Conduct in the Third Degree. In fact, as part of the Board’s application process back in 1984, Respondent was never asked about any allegations of sexual misconduct or whether he had ever been charged with a crime. The Respondent has also not alleged that he ever provided information to the Board regarding the allegations or the charge of criminal sexual conduct in the third degree before he applied for licensure on February 16, 2012.

There is no evidence that the Board delayed this matter in any way. Once Respondent’s application was received by the Committee, he was sent a letter asking him to provide additional information. On June 12, 2012, the Committee reviewed the additional information submitted by the Respondent. On June 19, 2012, the Committee denied Respondent’s licensure application because: he sexually fondled a 13-year-old student; even though he was acquitted of the criminal charges, his letter to the Board indicated he made a mistake, which the Board considered an omission of the allegations<sup>13</sup>; and sexual contact with a 13-year-old student constitutes immoral conduct in violation of Minn. Stat. § 122A.20, subd. 1(a)(1).<sup>14</sup> The Board acted on Respondent’s license application in a timely manner. There is also no statute of limitations regarding sexual conduct between a teacher and student.<sup>15</sup>

Respondent is also guaranteed due process by having the right to a hearing, the right to cross-examine witnesses, make objections to the Board’s exhibits, call witnesses to testify on his behalf and offer exhibits on his own behalf. While the passage of time makes it difficult for both Respondent and the Board to proceed to hearing, the Minnesota Court of Appeals noted in *Fischer v. Ind. Sch. Dist. No. 622*, “By virtue nature of the offense-sexual intercourse with a minor of the district - it may be considered doubtful whether such conduct could ever be remote in time.”<sup>16</sup>

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<sup>13</sup> The Committee now realizes that the apology was for Respondent’s statement that he had actually been charged with Third Degree Criminal Sexual Conduct and not Fourth Degree Criminal Sexual Conduct. Thus, the Committee does not interpret Respondent’s statement as an admission to the allegations of sexual contact with a student. See Ex. A.

<sup>14</sup> Notice and Order of Hearing dated August 23, 2012.

<sup>15</sup> *Fischer v. Ind. Sch. Dist. No. 622*, 357 N.W. 2d 152, 156 (Minn. Ct. App. 1984).

<sup>16</sup> *Fischer*, at 357 N.W. 2d 152, 156 (Minn. Ct. App. 1984).

Since there is a factual dispute over whether Respondent engaged in immoral conduct and whether Respondent should be denied a teaching license if he is found to have engaged in immoral conduct, summary disposition is not appropriate in this case. There was also no violation of Respondent's right to procedural due process.

**A. J. C.**