4-2-2012

GREGORY PAYNE, Respondent.
BEFORE THE TENNESSEE STATE BOARD OF EDUCATION

IN THE MATTER OF: GREGORY PAYNE, Docket No. 07.01-115578J
Respondent.

INITIAL ORDER

This contested case came on to be heard on April 2, 2012, in Nashville, Tennessee before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Board of Education. Ms. Dannelle Walker, General Counsel for the Tennessee State Board of Education, represented the State. Ms. Virginia McCoy, Attorney, TEA Legal Services, represented the Respondent.

The only issue presented by this hearing is whether or not Respondent Payne’s teaching license should be revoked by the State of Tennessee due to the State of Georgia’s initiating teacher licensure proceedings against Respondent for “failing to disclose his prior revocation and disciplinary history on two applications for employment.”

The State seeks to revoke Respondent’s teaching license pursuant to Rule 0520-2-4-.01(9)(b)(5) of the RULES OF THE TENNESSEE STATE BOARD OF EDUCATION (Revised, July, 2010), which states that the Tennessee Board of Education may revoke, suspend or refuse to issue or renew a license due to “denial, suspension or revocation of a license or certificate in another jurisdiction for reasons which would justify denial, suspension or revocation under this rule.” (Emphasis added.)
At the end of the State’s proof, Respondent moved to dismiss the charges against him, as a matter of law, on the basis that the State had not met its burden of proof in this matter. Ruling on the motion to dismiss at the end of the State’s proof was reserved until later in the hearing, following introduction of two of Respondent’s exhibits and Respondent’s testimony.

For the reasons discussed below, it is determined that the State did not meet its burden of proof in this matter. Accordingly, the charges against Respondent must be DISMISSED.

This decision is based upon the following findings of fact and conclusions of law.

**Witnesses and Exhibits**

1. The State (“Tennessee Board of Education”) entered one exhibit into evidence during its case in chief, the “Order of Voluntary Surrender” entered by Respondent and the Georgia Professional Standards Commission on November 10, 2011. The State called one witness, Respondent Gregory Payne.¹

2. The Respondent entered two exhibits into evidence: (1) an Affidavit by Mark Griffith; and (2) a letter from Suzanne Smith. Respondent also called Respondent Payne as a witness.

¹ The State made an “offer of proof” for admission of the September 9, 2011 Georgia Notice of Hearing/Notice of Charges which was excluded from evidence at the hearing of this matter. The proposed exhibit and the basis for its exclusion will be discussed in detail, infra.
FINDINGS OF FACT

1. At all relevant times, Respondent was duly licensed by the Tennessee Board of Education as a teacher in the State of Tennessee. Additionally, Respondent was licensed as a teacher in the State of Georgia.

2. In 1991, when Respondent was twenty-two (22) years of age, Respondent was employed in his first teaching job with a school system in the state of Georgia.

3. At that time, over twenty years ago, Respondent engaged in a sexual relationship with a student.


5. In 1999, Respondent re-applied for his teaching license in Georgia. The State of Georgia reinstated Respondent’s teaching license at that time.

6. Thereafter, Respondent was employed with two school districts, respectively, in Georgia.

7. At Respondent’s employment with the two Georgia school districts in Georgia, Respondent did not disclose on the employment applications that his teaching license had been previously revoked.

8. Respondent was hired as a teacher by the Marion County School System in Marion County, Tennessee for the school year 2011-2012.

9. When Respondent applied for the position with the Marion County, Tennessee School system, he disclosed any past discipline which had been taken against his teaching license in Georgia.
10. At some point during 2011, after Respondent’s employment with the second Georgia school district (Calhoun City Schools) had ended, the Georgia Professional Standards Commission (“PSC”) received a report that Respondent had not disclosed the 1991 license revocation on Respondent’s applications for his employment with the two Georgia school districts in 2008 and 2009.


12. On October 12, 2011, Respondent entered an agreed order with the Georgia Professional Standards Commission which voluntarily surrendered Respondent’s Georgia teaching license.

13. The State (Tennessee Board of Education) has received no complaints against Respondent.

14. Rather, the current case before the State (Tennessee Board of Education) was initiated when the state of Georgia sent out notifications to other states’ teacher licensure databases. When the State (Tennessee Board of Education) received notice of the “surrender” of Respondent’s Georgia license, it instituted the present revocation action against him.

15. The State (Tennessee Board of Education) entered the Georgia agreed order of “Voluntary Surrender” of Respondent’s Georgia teaching license into evidence as its sole exhibit.

16. The Georgia agreed order of “Voluntary Surrender” states, in pertinent part, under its “Findings of Fact” No. 3:
Respondent failed to disclose his prior revocation and disciplinary history on two different school system’s employment applications completed in 2008 and 2009. Respondent denies having intentionally tried to mislead anyone.

17. The Georgia agreed order of “Voluntary Surrender” makes no mention of any allegations of misconduct following Respondent’s reinstatement of his teaching license in 1999, other than the above referenced failure to disclose the 1991 revocation and disciplinary history on two Georgia school system’s employment applications.

18. At the contested case hearing, Respondent testified credibly that he had not “checked” the “yes’ box” (on the employment applications at the two Georgia schools) regarding prior discipline against his teaching license, because he had been advised by the Georgia Board’s counsel that he could check “no” because his Georgia teaching license had been reinstated.

CONCLUSIONS OF LAW

1. The Tennessee Board of Education’s “Notice of Hearing and Charges”, filed on March 5, 2012, makes the following allegations of fact:

   Allegations of Fact

   1. Mr. Payne was at all times pertinent thereunto licensed by the State Board of Education to teach in Tennessee.

   2. Mr. Payne was at all times pertinent licensed by the Georgia Department of Education Professional Standards Board.

   3. On November 10, 2011, the Georgia Department of Education’s Professional Standards Board accepted Ms. (sic) Payne’s voluntary surrender for failing to disclose his prior revocation and disciplinary history on two applications for employment.

   2. The State’s “Notice of Hearing and Charges” alleges the following as its sole “conclusion of law” or “charge”: 
It is alleged that Mr. Payne’s conduct and voluntary surrender constitute good cause for the Board to revoke his teaching license pursuant to Board Rule 0520-2-4-.01(9)(b)(5).

3. **TENN. COMP. R. & REG. 0520-2-4-.01(9) of the RULES OF THE TENNESSEE STATE BOARD OF EDUCATION** (Revised, July, 2010) provides as follows:

Denial, Suspension and Revocation of License.

(a) Automatic Revocation of License.

The State Board of Education shall automatically revoke the license of a licensed teacher or administrator without the right to a hearing upon receiving verification of the identity of the teacher or administrator together with a certified copy of a criminal record showing that the teacher or school administrator has been convicted of any felony or offense listed at T.C.A. § 40-35-501(i)(2) or T.C.A. § 39-17-417 (including conviction on a plea of guilty or nolo contendere). The Board will notify persons whose licenses are subject to automatic revocation at least 30 days prior to the Board meeting at which such revocation shall occur.

(b) Denial, Suspension or Revocation of License.

The State Board of Education *may* revoke, suspend or refuse to issue or renew a license for the following reasons:

1. Conviction of a felony,
2. Conviction of possession of narcotics,
3. Being on school premises or at a school-related activity involving students while documented as being under the influence of, possessing or consuming alcohol or illegal drugs,
4. Falsification or alteration of a license or documentation required for licensure,
5. **Denial, suspension or revocation of a license or certificate in another jurisdiction for reasons which would justify denial, suspension or revocation under this rule,** or
6. Other good cause. Other good cause shall be construed to include noncompliance with security guidelines for TCAP or successor tests pursuant to Tenn. Code Ann. § 49-1-607, default on a student loan pursuant to Tenn. Code Ann. § 49-5-108(d)(2) or failure to report under part (e).

For purposes of this part (b), “conviction” includes entry of a plea of guilty or nolo contendere or entry of an order granting pre-trial or judicial diversion.

A person whose license has been denied, suspended or revoked may not serve as a volunteer or be employed, directly or indirectly, as an educator, paraprofessional, aide, substitute teacher or in any other position during the period of the denial, suspension or revocation.

(Emphasis added.)

4. The State seeks to revoke Respondent’s teaching license pursuant to Rule 0520-2-4-.01(9)(b)(5) of the Rules of the Tennessee State Board of Education (Revised, July, 2010), which states that the Tennessee Board of Education may revoke, suspend or refuse to issue or renew a license due to “denial, suspension or revocation of a license or certificate in another jurisdiction for reasons which would justify denial, suspension or revocation under this rule.” (Emphasis added.)

5. At the end of the State’s proof, Respondent moved for dismissal of the State’s case as a matter of law\(^2\), and argued that the State had not met its burden of proof. Specifically, Respondent argued that the State had failed to make a showing that Respondent’s license had been revoked in Georgia (another

\(^2\) Respondent actually moved for “summary judgment” at the end of the Tennessee Board of Education’s proof; however, Respondent’s motion would be more properly termed a “motion to dismiss as a matter of law”, or a motion to dismiss based upon the Tennessee Board of Education’s failure to meet its burden of proof during its case in chief.
jurisdiction) for reasons which would justify denial, suspension, or revocation under Tennessee State Board of Education Rules.

6. Rather, the Tennessee Board of Education’s Notice of Hearing relies solely on the Georgia agreed order of “voluntary surrender”.

7. There is no statement in the Tennessee Board of Education’s Notice of Hearing that Respondent has violated Tennessee State Board of Education Rules, or has violated teacher licensure rules in another jurisdiction (Georgia) which would “justify denial, suspension or revocation under Tennessee State Board of Education Rules.”

8. Respondent argued that the Tennessee Notice of Hearing did not contain allegations of any Tennessee Board of Education Rules being violated. Respondent also pointed out Rule 0520-2-4-.01(9)(b)(4) of the Rules of the Tennessee State Board of Education which addresses “falsification violations” limits such violations to “falsification or alteration of a license or documentation required for licensure”, and does not reference or apply to “employment applications”.

10. Additionally, Respondent argued that the Tennessee Board of Education did not assert a violation of Rule 0520-2-4-.01(9)(b)(6) in its Notice of Hearing, or “other good cause” for the State Board of Education to revoke,

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3 It is noted that the state of Georgia’s Code of Ethics for Educators, 505-6-.01, et seq., which defines unethical conduct justifying disciplinary actions against Georgia teaching licenses, contains “Standard 4: Honesty”. “Standard 4: Honesty” defines “unethical conduct” violations in six subparts. In subpart 2, Standard 4 specifically defines unethical conduct as including, but not limited to, falsifying, misrepresenting, or omitting “information submitted to federal, state, local school districts and other governmental agencies”. Tennessee does not have an analogous Rule.
suspend, or discipline Respondent’s Tennessee teacher’s license. Nor did the Tennessee Board of Education set forth any additional allegations of Respondent’s misconduct in its Notice of Hearing.

11. The Tennessee Board of Education opposed the Respondent’s Motion to Dismiss, and asserted that the Georgia agreed order of “Voluntary Surrender” regarding Respondent’s Georgia teaching license was sufficient for the Tennessee Board of Education to revoke Respondent’s teaching license.

12. Importantly, the Georgia agreed order of “voluntary surrender” states as one of its “Findings of Fact” that “Respondent [Payne] denies having intentionally tried to mislead anyone.”

13. The undersigned reserved ruling on Respondent’s Motion to Dismiss at the end of the Tennessee Board of Education’s case in chief, and instructed the Respondent to present his portion of the case.

14. Respondent entered into evidence, without objection, the Affidavit of the Director of Schools for Marion County, Tennessee. The Affidavit noted that the Director hired Respondent as a teacher in the Marion County School System for 2011-2012, and further noted that the Director was aware of the revocation proceedings against Respondent’s license.

15. Respondent also entered a “Character Letter” into evidence from the School Counselor at Respondent’s current school. The State objected to entry of the letter on the basis of “relevance”. While the objection was initially overruled on the basis that the Tennessee Board of Education had “opened the door” on the issue of “morals” and “honesty” during some of its argument, thus making the
letter “relevant”, it is determined that the “Character Reference” letter was not
given under oath nor was it in proper affidavit form. Accordingly, the “Character
Letter” entered as Exhibit 3 at the hearing is given no consideration or weight in
the determination of this matter.

16. As the hearing continued, the undersigned concluded that the
Tennessee Department of Education could not meet its burden of proof, and
further concluded that, as a matter of law, the charged violation of Rule 0520-2-
4-.01(9)(b)(4), did not state a claim because Tennessee does not have a Rule
similar to Georgia’s.

17. Accordingly, Respondent’s motion to dismiss was GRANTED.

18. When it became apparent that the case was going to be dismissed,
the Tennessee Board of Education then attempted to enter into evidence the
Georgia “Notice of Hearing/Charges” from the state of Georgia’s 2011 licensure
action against Respondent.

19. Respondent objected to the entry into evidence of Georgia’s 2011
“Notice of Hearing/Charges” as: (1) being “allegations” rather than being
competent evidence; and (2) being outside the scope of the State’s Notice of
Hearing.

20. Georgia’s 2011 “Notice of Hearing” was excluded from evidence. The
undersigned agrees with Respondent that the “allegations” set forth in a pleading
from another State are not competent evidence.
21. A fundamental rule of evidence requires that evidence must be factual, based upon personal knowledge, and admissible, in order to be competent evidence.

22. The 2011 Georgia “Notice of Hearing/Notice of Charges” which the State sought to admit into evidence at the hearing of this matter contains unsubstantiated allegations. It is not a certified copy. It is hearsay as defined by Rule 801 of the TENNESSEE RULES OF EVIDENCE, and fits no hearsay exceptions. For these reasons alone, such a document cannot be admitted into evidence or considered.

23. Additionally, the Pre-Hearing Order entered in this case on March 8, 2012 expressly ordered that at least seven (7) days prior to the hearing date, a list of all proposed exhibits would be furnished to opposing counsel. The Pre-Hearing Order warned: “Failure to supply requested exhibits for review or failure to disclose anticipated witnesses will likely result in the exclusion of a witness or exhibit that was not properly disclosed.”

24. The Tennessee Board of Education did not list the 2011 Georgia “Notice of Hearing/Notice of Charges” on its proposed Exhibit List.

25. Finally, the Tennessee Board of Education attempted to introduce Georgia’s 2011 “Notice of Hearing/Notice of Charges” for the purpose of showing alleged recent improper behavior toward a female student on the part of the Respondent.
26. The Tennessee Board of Education’s “Notice of Hearing” for this contested case makes NO allegations of improper behavior by Respondent toward a female student after his Georgia license was reinstated in 1999.

27. T.C.A. §4-5-307 states, in pertinent part:

Notice of hearing. ---

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) In all proceedings the notice shall include:

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(2) A statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the statutes and rules involved; and

(3) A short and plain statement of the matters asserted. [....]

(Emphasis added.)

28. In administrative hearings “the minimum requirements of due process must ... be satisfied when an agency’s decision could adversely affect vested property interests or other constitutional interests.” Martin v. Sizemore, 78 S.W. 3d 249, 267 (Tenn. Ct. App. 2001).

29. The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 8 of the Constitution of Tennessee, provide procedural protections to individuals in this State and this Nation. They provide such protection and prevent the government from interfering or infringing upon an individual’s significant property interests without first providing a hearing at a meaningful time and in a meaningful manner. (Emphasis added). Hayes and Thornton v. Civil Service Commission of the
30. Various types of interests are entitled to protection as “property interests” subject to Due Process Clause protections. Such interests share the common characteristic that they are “an individual entitlement, grounded in state law, that cannot be removed except ‘for cause’ ”. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Martin v. Sizemore*, 78 S.W. 3d 249, 262 (Tenn. Ct. App. 2001).

31. “A professional license, issued by a State, which can be suspended or revoked only upon a showing of cause is a constitutionally protectable property interest because the holder of the license has a clear expectation that he or she will be able to continue to hold the license absent proof of culpable conduct.” *Id.* at 262.

32. Respondent’s Tennessee license is a liberty or property interest that is entitled to protection under the Due Process Clause of the Fourteenth Amendment and the State Constitution.


34. If a Respondent in an administrative contested case hearing is not provided with adequate notice of the charges made against him, such a Respondent has been denied constitutional due process.
35. Proper notice, for minimum due process purposes, has been defined as “notice reasonably calculated under all the circumstances to apprise interested parties of the claims of the opposing parties.” *McClellan v. Bd. of Regents of State Univ.*, 921 S.W. 2d 684, 688 (Tenn. 1995); *Gluck v. Civil Service Commission*, 15 S.W. 3d 486, 491 (Tenn. Ct. App. 1999), App. for Perm. to Appeal Denied (Tenn. 2000); *McClellan v. Bd. of Regents of State Univ.*, 921 S.W. 2d 684, 688 (Tenn. 1995).


38. Allowing the Tennessee Board of Education to introduce new evidence outside the scope of its pleadings and to assert new causes of action or new charges, for the first time, at the contested case hearing would be a violation of Respondent’s constitutional procedural due process rights.

39. Accordingly, the Tennessee Board of Education was not allowed to introduce Georgia’s 2011 “Notice of Hearing” into evidence at the hearing, nor was the Tennessee Board of Education allowed to assert new charges/allegations or
causes of action (which were not stated in the Tennessee Board of Education’s Notice of Hearing) for the first time at the contested case hearing.

40. The State failed to meet its burden of proof in this matter. At the end of the State’s case in chief, the State failed to show, by a preponderance of the evidence, that Respondent had violated Rule 0520-2-4-.01(9)(b)(4) of the Rules of the Tennessee State Board of Education.

Accordingly, this case is **DISMISSED**.

It is so ordered.

This order entered and effective this 9 day of April, 2012

[Signature]

Thomas G. Stovall, Director
Administrative Procedures Division