

BEFORE THE KANSAS STATE BOARD OF EDUCATION

In the Matter of the License of
GAGE McGARRY

Case No. 15-PPC-52
OAH No. 16ED0012

FINAL ORDER

NOW, on this 21st day of September, 2016, the above-captioned matter comes before the Kansas State Board of Education (State Board) for consideration of the status of the professional license of Gage McGarry. Appearing for the Board are Chairman, Jim McNiece, and members, John Bacon, Kathy Busch, Carolyn Wims-Campbell, Sally Cauble, Deena Horst, Jim Porter, Steve Roberts, Janet Waugh, and Ken Willard.

Procedural History

On October 22, 2015, the Kansas State Department of Education (KSDE) filed a complaint against the professional license of Gage McGarry based upon his criminal activity. Mr. McGarry requested a hearing on the matter and a hearing was convened before the Professional Practices Commission (PPC) on March 29, 2016. Mr. McGarry and KSDE were represented by counsel. Both parties presented evidence and Mr. McGarry testified on his own behalf.

At the conclusion of the hearing, the PPC ordered the matter continued to the first meeting/hearing date after Mr. McGarry completed diversion. The PPC also ordered Mr. McGarry to submit two hair follicle tests. The first test was to be completed within one week of the March 29, 2016, hearing. Mr. McGarry refused to submit a hair follicle test and opted to submit a voluntary surrender of his license for the PPC's consideration.

With Mr. McGarry's agreement, the PPC took up the matter at its April 25, 2016, meeting. Mr. McGarry did not appear. After reviewing the evidence, the PPC voted 7 – 0 to recommend to the Kansas State Board of Education (State Board) that it not accept Mr. McGarry's voluntary surrender and that his license and all associated endorsements be revoked.

The parties briefed the matter for the State Board. Mr. McGarry requested oral argument, a request the State Board considered and denied at its August 9, 2016, meeting. The State Board heard the entire matter at its September 21, 2016, meeting. Mr. McGarry had notice of both meetings. In advance of the meetings, the State Board was provided all exhibits admitted at the evidentiary hearings, a recording of the evidentiary hearings, and the parties' briefs.

Now, after again having the opportunity to review all the evidence in this matter, the State Board adopts the following findings of fact and conclusion of law and enters a Final Order as set forth below which cancels and revokes the professional teaching license of Gage McGarry:

Findings of Fact

1. Mr. McGarry became a licensed educator in 2003, teaching in Kansas City, Missouri, for two years.
2. Thereafter, he had several jobs, but eventually returned to teaching.
3. Mr. McGarry currently holds a professional teaching license and an initial school leadership license. He has been continuously licensed in Kansas since 2012.
4. On June 27, 2015, Mr. McGarry was ticketed for DUI, Refusal of Preliminary Breath Test, Possession of Drug Paraphernalia, and Possession of Controlled Substances in the City of Merriam, Kansas.
5. On September 17, 2015, Mr. McGarry entered into a diversion agreement in the Municipal Court of the City of Merriam wherein he stipulated to the charges and the facts as contained in the complaint, police reports, written, oral, or visual recorded witness statements, and videos. He further stipulated he was the individual arrested and charged.
6. Mr. McGarry was placed on diversion for 12 months.
7. On October 22, 2015, the KSDE filed the Complaint at issue.
8. Mr. McGarry timely requested a hearing in this matter.

9. As previously stated Mr. McGarry and his counsel appeared and the Commission heard testimony.

10. At the time, Mr. McGarry had not completed his diversion.

11. When questioned as to his use of marijuana, Mr. McGarry stated that he began using marijuana in 1999 and continued using marijuana until June 2015. He stated that he used marijuana for insomnia and would also occasionally use marijuana for recreational purposes.

12. When asked where he got the marijuana, Mr. McGarry stated that he played soccer and ran trails and would just "ask around."

13. When asked, he also testified that he was still in contact with the people from whom he had obtained the marijuana.

14. There was also testimony by Mr. McGarry indicating that he kept the marijuana and pipe in his car during times when it could have been parked on school property.

15. Mr. McGarry specifically testified that he had not used marijuana since the incident giving rise to his diversion in June 2015.

16. The crux of Mr. McGarry's argument was that he had an unblemished teaching record and that suspension would create a hardship on his family and do a disservice to his students. He also claimed that the incident giving rise to his diversion was "one night of poor judgment."

17. Based on Mr. McGarry's testimony, the Commission took the matter under advisement and continued Mr. McGarry's hearing to the first hearing/meeting date after the date of completion of his diversion. To confirm that Mr. McGarry was still not using marijuana as he had testified and to assure that he would not do so during this time period, the Commission ordered two hair follicle drug tests.

18. Mr. McGarry made no objection to the order.

19. Mr. McGarry declined to take the first hair follicle drug test as required by the Commission and, instead, submitted a voluntary surrender for the PPC's consideration.

20. Mr. McGarry argued to the State Board regarding the legality and reliability of hair follicle tests, arguments he did not raise to the PPC.

Conclusions of Law

1. Any license issued by the State Board may be cancelled by the State Board in the manner provided by law. K.S.A. 72-1383.

2. The PPC conducted a full evidentiary hearing on the matter and the parties were represented by legal counsel. K.S.A. 72-8507; K.A.R. 91-22-1a(h).

3. The Initial Order of the PPC is not a Final Order and is required to be reviewed by the State Board in accordance with the provisions of the Kansas Administrative Procedure Act, K.S.A. 72-8506, 77-501, et. seq.; K.A.R. 91-22-25(b).

4. The State Board is responsible for the general supervision of education, including the certification and licensure of teachers, in Kansas. K.S.A. 72-7513 and Kan. Const., Art. VI.

5. The State Board may revoke a license for misconduct or other just cause including entering into a diversion agreement after being charged with misdemeanor drug-related conduct. K.A.R. 91-22-1a. Thus, Mr. McGarry's entry into a diversion agreement after having been charged with misdemeanor possession of drug paraphernalia and possession of controlled substances, standing alone, are grounds for revocation of his teaching license.

6. Additionally, regardless of the outcome of Mr. McGarry's criminal charges, when ordered to submit a hair follicle test, he declined. Hair follicle tests are considered legal and reliable in Kansas. Furthermore, the refusal to take a hair follicle test can be used to establish clear and convincing evidence. See In re J.A.F., 2015 WL 7192418 (Kan. Ct. App. 2015); In re A.F.,

2014 WL 6676225 (Kan. Ct. App. 2014), review denied (Feb. 19, 2015); In re A.M., 2014 WL 6676181 (Kan. Ct. App. 2014); In re C.N., 2013 WL 6726129 (Kan. Ct. App. 2013).

7. The PPC concluded that refusal meant Mr. McGarry provided false testimony regarding when he last used marijuana. While Mr. McGarry expressed his remorse for his behavior and recognition of the wrongfulness of his conduct, the State Board agrees with the PPC. It is not now convinced of the truthfulness of such statements. Mr. McGarry's questionable credibility, his admitted chronic use of marijuana, including use while licensed and employed as a teacher, and the possibility that Mr. McGarry possessed drugs and paraphernalia on school grounds, constitutes just cause for the revocation of Mr. McGarry's license. K.A.R. 91-22-1a.

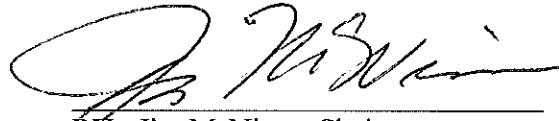
8. The Legislature has declared teaching and school administration to be professions in Kansas with all the similar rights, responsibilities and privileges accorded other legally recognized professions. An educator is in a position of public trust. K.S.A. 72-8501.

9. Mr. McGarry's entry into a diversion agreement after having been charged with misdemeanor drug-related conduct, his criminal activity, and his questionable credibility is inconsistent with the commonly-held perceptions and expectations of a member of the teaching profession. Such conduct violates the public trust and confidence placed in members of the profession. Furthermore, it demonstrates a lack of fitness to perform the duties and responsibilities of a member of the teaching and school administration professions and is sufficient and just cause for revoking his license.

IT IS THEREFORE CONCLUDED by the Kansas State Board of Education that there is substantial competent evidence to support the cancellation and revocation of Gage McGarry's license and his license shall hereby be cancelled and revoked immediately.

This Final Order is made and entered this 21st day of September, 2016.

KANSAS STATE BOARD OF EDUCATION



BY: Jim McNiece, Chairman
Signed October 18, 2016

NOTICE TO LICENSEE

This is a Final Order and is effective upon service.

To request reconsideration of this order, you must file a Petition for Reconsideration with the Secretary to the State Board of Education, at the address below, within 15 days after service of this Final Order. The Petition must state the specific grounds upon which relief is requested.

To request a stay of effectiveness of this order, you must file a Petition for Stay with the Secretary to the State Board of Education at the address below. A petition can be filed until the time which a petition for judicial review would no longer be timely.

To seek judicial review of a Final Order, you must file a petition in the District Court as authorized by K.S.A. 77-601, *et seq.* within 30 days following the service of the Final Order. Filing a Petition for Reconsideration is not a prerequisite for seeking judicial review. A copy of any Petition for Judicial Review must be served upon the Secretary to the State Board of Education at the address below.

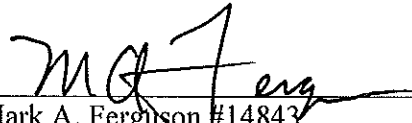
Peggy Hill
Secretary, Kansas State Board of Education
Landon State Office Building
900 SW Jackson Ave. Suite 600N
Topeka, Kansas 66612

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2016, a true and correct copy of the above and foregoing was filed with the Secretary for the Kansas State Board of Education and one (1) copy was mailed by U.S. Mail to:

Ted Lickteig
Greystone Office Plaza, Ste. 112
12760 W. 87th Street
Lenexa, Kansas 66215

Kelli Broers
Assistant General Counsel
900 SW Jackson Street, Ste. 102
Topeka, Kansas 66612



Mark A. Ferguson #14843
Attorney for the Kansas State
Board of Education
Gates Shields Ferguson Hammond, P.A
10990 Quivira, Suite 200
Overland Park, KS 66210
(913) 661-0222 Office
(913) 491-6398 Facsimile
markferguson@gsfhlegal.com