

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
TEACHER STANDARDS AND PRACTICES COMMISSION**

IN THE MATTER OF:

) **FINAL ORDER**

)

)

NANCY BAKER-KROFFT

) OAH Case No.: 800780

This matter came before the Teacher Standards and Practices Commission during its regularly scheduled meeting of August 7, 2009. The Commission considered the Proposed Order issued by Administrative Law Judge Rick Barber. Licensee filed exceptions to the Proposed Order. After review of the Proposed Order and the matter herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and proposed penalty. The Commission also adopts a supplement to the history of the case to indicate the issuance of an Amended Notice. The Commission also adopts a supplementary Issue, Conclusion of Law, and reasoning regarding OAR 584-020-0035(3)(a) that was part of the Amended Notice but was not addressed in the Proposed Order.

HISTORY OF THE CASE

On August 13, 2008, the Teacher Standards and Practices Commission (Commission) issued a Notice of Denial of Renewal of Basic Teaching License to Nancy Baker-Krofft (Licensee).¹ On August 15, 2008, Licensee requested a hearing. On March 6, 2009, the Commission issued an Amended Notice of Denial of Renewal of Basic Teaching License.

On October 28, 2008, the Commission referred the hearing request to the Office of Administrative Hearings (OAH), where it was initially assigned to Administrative Law Judge (ALJ) Monica Whitaker. The case was later reassigned to ALJ Rick Barber.

A hearing was held in Salem, Oregon² before ALJ Barber on March 25, 2009, and April 8, 2009. Licensee was present, represented by her attorney, Peter James. The Commission was represented by Assistant Attorney General Raul Ramirez. Licensee testified, and called the following witnesses: her pastor, Sue Owens; her friend, Leslie Polson, and fellow church member Marci Ling. Investigator George Finch appeared for the Commission and also testified. Other witnesses called by the Commission included Licensee and Salem Police Detective Justin Carney. The record closed on April 8, 2009.

¹ The Notice of Denial was amended on March 6, 2009 (Doc. P7). The decision in this case is based upon the Amended Notice of Denial.

² The first day of hearing was held in the Salem OAH office, and the second day was held at TSPC office in Salem.

ISSUES

1. Whether Licensee's conviction for Criminal Mistreatment II constitutes gross unfitness pursuant to ORS 342.175(1)(c).
2. Whether Licensee's conviction for Criminal Mistreatment II constitutes gross neglect of duty pursuant to ORS 342.175(1)(a).
3. Whether Licensee's statements in her Letter of Explanation, submitted with her license renewal application, constitute gross neglect of duty under ORS 342.175(1)(b), OAR 584-020-0040(4)(c) and OAR 584-020-0040(4)(o) as it incorporates OAR 584-020-0035(3)(a).³
4. Whether the statements in the Letter of Explanation constitute gross unfitness under ORS 342.175(1)(c).
5. Whether, if any of the above allegations are true, Licensee's renewal application for a Basic Teaching License should be denied.

EVIDENTIARY RULING

Exhibits A1 through A11, offered by the Commission, were admitted into evidence without objection. Exhibit A12 was admitted into evidence over Licensee's objection. Exhibits B1 through B8, offered by Licensee, were also admitted without objection. The documentary record also includes procedural documents P1 through P8.

FINDINGS OF FACT

1. Licensee had a Basic Teaching License (Certificate No. 272534), which was scheduled to expire on May 23, 2008. On May 14, 2008, she submitted an Application for Renewal of the license to the Commission. (Ex. A9, A10). On August 13, 2008, the Commission issued a Notice of Denial of Renewal of Basic Teaching License to Licensee. (Doc. P1).
2. At all times pertinent to this proceeding, Licensee resided at 825 15th Street NE, in Salem, Oregon. Also in the home were her son, Julian, and her estranged husband, Curtis Baker-Krofft. (Test. of Licensee).
3. On November 1, 2006, officers of the Salem Police Department and Salem Code Enforcement were called to Licensee's house because of complaints that the house was unfit for Julian, then eleven years old, to live in. Enforcement Officer Hedrick arrived at the property at 2:46 pm on November 1, and spoke with Curtis, who said he

³ The citation to the rules were added to correctly reflect the rules the Commission relied on in the charge outlined in this Issue.

was expecting a police officer to arrive shortly. Curtis invited Hedrick to come in and view the interior of the house. (Ex. A2).

4. When Hedrick entered the front room, it was full of stacks of various items, including clothing, bags of debris, paperwork, recyclables, broken appliances, baskets and bags full of various items, jars with liquid, and miscellaneous furniture. The stacks in the front room were approximately three feet high and covered all but a narrow path of carpet through the room and into the dining room. The carpet on the path was very dirty. The fireplace was covered with piles of debris as well, and the room smelled of mold and mildew. (*Id.*)

5. The path through the front room led to the dining room, and the path narrowed as it approached that room. The dining room was full of the same type of items, and stacks were placed on the table, the chairs, and the piano in the room. (*Id.*).

6. From the dining room, Hedrick followed a path into the kitchen where the odor of mold and mildew was stronger. The floor was filthy and covered with stacked boxes. The sink and countertops were full of dishes and debris, as well as open containers of perishable food, and there were flammable paper products sitting on top of the stove. Hedrick checked the refrigerator and found it full of food, but smelling of mold and mildew. (*Id.*)

7. Behind the kitchen, the officer took a hallway to an upstairs area adjacent to or in the garage area. The hallway to the back had a narrow path, with items stacked against the wall on both sides of the hall. At times, Hedrick had to walk on the top of boxes and bags in order to get to the back staircase. Curtis told Hedrick that no one had been up there in over a year. The stairs to the back bedroom were covered with canned goods, clothing, shoes, bags of debris, and a broken window frame. Hedrick concluded that, in the event of a fire, no one trying to get past this collection of debris would be able to exit the house in a timely fashion. (*Id.*).

8. Getting into the back bedroom via the back stairs, Hedrick encountered spider or cob webs sufficient to cause him to believe that no one had been there for awhile. In the room, he found several electric cords plugged into power strips and extending into the back yard. The plugs and power strips were warm to the touch, and many were resting on either paper or clothing in the bedroom. In the back of the house, Licensee was using the electricity to raise chickens. (*Id.*).

9. Hedrick came back downstairs, through the kitchen and into the front room so he could go up the front stairs to the main upstairs area (there were two separate upstairs areas in the house). The front stairs were also covered with items and bags of debris. Hedrick went up and observed the bedrooms and upstairs bathroom. Licensee's bedroom was full of clutter, and Julian's bedroom had clutter and debris on the floor. The sheets appeared dirty and the closet was full to overflowing with clothes, with a large pile of clothes in front of it. (*Id.*).

10. When Hedrick and Curtis came back downstairs, they found Julian sitting on the arm of a chair in the front room, watching a small TV that was perched on a pile of debris. They went outside because Salem Police detectives Carney and McCarley, among others, had arrived. (*Id.*).

11. Detectives McCarley and Carney also went through the house, finding the same problems that Hedrick had found. (Ex. A4, A5). The officers discussed their findings, and also met with a representative of the Department of Human Services (DHS) who came to the scene. By consensus, they decided that the home was unfit for Julian to live in. Julian was taken to a foster home by the DHS representative, and the house was posted as a public health hazard. (Ex. A4 at 6).

12. When Licensee arrived at home after work, she found the police and code enforcement officers there. When she saw Hedrick, who on a previous occasion had made her clear all of the debris out of her yard, she moved aggressively toward him swinging an umbrella. Detective Carney stopped her before she reached Hedrick. (Ex. A2). Licensee told Carney that she didn't think the house was very messy. (Test. of Carney).

13. Licensee was interviewed by Detective Carney at that time. She said she was thirsty and asked if she could go inside for a drink of water. Carney agreed and followed her into the house. On the way to the kitchen, Licensee stopped to pick up three small pieces of paper from the narrow path, then told Carney that the house had not been in this condition when she left for school that morning. She thought maybe Julian had caused the mess after school. Carney and McCarley, who had just entered the house, warned Licensee not to blame others for the state of the house (as McCarley had warned Curtis earlier, when he blamed Licensee). Licensee and Curtis were arrested, charged with Criminal Mistreatment II, and transported to the jail. (Ex. A5). Within days, Curtis filed for divorce, and eventually pleaded guilty to the criminal charge. (Test. of Licensee).

14. Curtis had told police and enforcement officers that Julian had suffered from head lice for more than a year as of November 1, 2006. (Ex. A4). On one occasion in March 2006, Licensee and Julian were both found to have head lice, a common occurrence for students, teachers, and parents. On the day the lice were discovered, Licensee took Julian home, treated both of their scalps, and returned Julian to school by the end of the day, lice-free. Julian did not have head lice on November 1, 2006. (Ex. B5; test. of Licensee). The furnace in Licensee's home was in working order, and the fuel bill had been paid. (Ex. B2, B3; test. of Licensee).

15. A few days before her arrest on November 1, 2006, Licensee had a disagreement with her son Julian. Julian wanted to visit a friend and left home without doing his chores. He wanted to spend the night with the friend, but Licensee did not want him to stay because she was concerned about possible drug use by that child's parents. She threatened to call the police if he was not home by dark. When Julian did not come home, Licensee contacted the police and asked them to bring him home. The police

picked up Julian and brought him home in handcuffs. The police officer took Julian up to his room and then asked Licensee to show him whether there was food in the refrigerator. Licensee complied, and the officer left. (Test. of Licensee).

16. After Julian was taken into foster care and the house was posted as a health hazard, Licensee and her friends and family spent several weeks cleaning and emptying the house of all the debris. After approximately two months away, Julian returned home from foster care. (Test. of Licensee).

17. Licensee remains very angry about her arrest and the removal of Julian from the home. On January 3, 2007, she wrote a letter to Detective McCarley advising him that she was bringing him before Internal Affairs as a first step toward getting the matter to the Police Review Board, because he had "severely damaged" Julian's life. (Ex. A7).

18. On May 2, 2007, a Marion County jury convicted Licensee of Criminal Mistreatment II. (Ex. A8). Licensee believes that she was convicted, and convicted quickly, because dinnertime was near and the jury was hungry. (Test. of Licensee; Ex. A10).

19. Licensee continued to work as a substitute teacher between the arrest in November 2006 and the time for renewal of her license in May 2008. (Test. of Licensee). The renewal application routinely asked if she had been convicted of a crime. She answered that she had, with "appeal pending" written below it. As requested, she provided a Letter of Explanation of the conviction on May 14, 2008. The letter included the following comments:

- "my former spouse created a diversion from his home responsibilities that put me in legal jeopardy"
- "the Marion County Asst. DA insisted on using the law to try and destroy my family"
- "It is known to me that Marion County has more cases of Messy House than all other counties combined."
- "I tried going through the Complaint Process of Salem that protects citizens from unreasonable police involvement in innocent citizens lives"
- "One day in October of 2006 my then 11-year-old son ran away from doing his chores"
- "Where was the boy's father? In Eugene carrying on an adulterous affair, but I did not know it at the time. I was experiencing something like being a single mom, and had no relief from the cooking and cleaning that often are shared by couples."
- "I made a Love and Logic parenting decision to force [my son] to come home when he insisted on staying the night by telling him I would have to call the police to return him as a runaway by dark if he did not come home of his own accord."

- "I felt I had to follow through. I had been raised to believe that 'the policeman is your friend, call on him in time of trouble'. I had never had any reason to deal with the law before, as I do not even believe in J-Walking."
- "To my shock and horror, my son was escorted home in handcuffs."
- "Two years before in his twisted rage my ex wrote to [DHS] on papers I filed to get him to financially support our child that there was lint all over the laundry room."
- "His business as a junk dealer was always filling our home and yard with his 'inventory' for sale, and neighbors complained so Code Enforcement ticketed us, and said all of it had to be indoors."
- "[My son] was much more traumatized by the intervention of authorities than the boxes in the living room."
- "my son was held captive in the Foster Care system."
- "I was shocked that as a Social Studies teacher who explains the American Judicial System to students that I was NOT "Innocent until proven guilty."
- "He finally ran away from his placement before the judge would listen to him that he NEVER felt danger from paper and the so called possibility of fire danger[.]"
- "the Jury was 5 minutes from dinner time and seemed to not spend much time considering. Suddenly, I was found guilty. It was astonishing."
- "I was given 2 years unsupervised Court Probation (in the paper I read of a man who stole thousands of dollars of farm equipment and he only had 1 year)."
- "Again, I have been a teacher for 20 years. I feel I was a victim of my ex-husband['s scam]."

(Ex. A10).

20. The Commission uses these letters of explanation as a sort of "test" to find out if the person seeking a license is willing to take responsibility for previous actions, especially criminal activity. When the Commission reviewed Licensee's Letter of Explanation in this case, and compared it with the police records and conviction, it concluded that Licensee had not been accurate or truthful in her explanation of the events leading to the conviction, and that she was not willing to take responsibility for her criminal actions. (Test. of Finch).

21. The Commission based its decision to deny the license renewal on Licensee's criminal conviction and on her statements in the Letter of Explanation accompanying the application. (Test. of Finch).

CONCLUSIONS OF LAW

1. Licensee's conviction for Criminal Mistreatment II does not constitute gross unfitness pursuant to ORS 342.175(1)(c).
2. Licensee's conviction for Criminal Mistreatment II does not constitute gross neglect of duty pursuant to ORS 342.175(1)(a).
3. Licensee's statements in her Letter of Explanation, submitted with her license renewal application, constituted gross neglect of duty under ORS 342.175(1)(b).
4. The Commission withdraws its charge that Licensee's statements in the Letter of Explanation constituted gross unfitness under ORS 342.175(1)(c), OAR 584-020-0040(4)(c) and OAR 584-020-0040(4)(o) as it incorporates OAR 584-020-0035(3)(a).⁴
5. Licensee's renewal application for a Basic Teaching License should be denied.

OPINION

The Commission's Allegations. The Teacher Standards and Practice Commission has the responsibility to regulate teachers and their fitness to teach, and the power to sanction a teacher when appropriate. ORS 342.175. The Commission requires applicants for a teaching license to furnish satisfactory evidence of good moral character, mental and physical health, and other evidence it may deem necessary to establish the applicant's fitness to serve as an educator. ORS 342.143(2). The Commission has denied license renewal in this case because of two events: the circumstances leading to Licensee's arrest and conviction for Criminal Mistreatment II, and the preparation and mailing of her Letter of Explanation that she submitted with her license renewal application.

Having withdrawn one charge, the Commission raises three remaining charges. According to the Amended Notice, Licensee's arrest and conviction constituted 1) "gross unfitness" under ORS 342.175(1)(c) and OAR 584-020-0040(5)(c); and 2) "gross neglect of duty" under ORS 342.175(1)(a) and OAR 584-020-0040(4)(n). In addition, the Commission contends that Licensee's Letter of Explanation contained misrepresentations that constituted 3) gross neglect of duty.

The Commission's denial contends that Licensee has failed to show the requisite moral character to be an educator. However, as the proponent of the position that Licensee is unfit to hold a teacher's certificate, it is the Commission that has the burden of presenting evidence in support of its position. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1980). The Commission must prove its case by a preponderance of the evidence.

⁴ The citation to the rules in this Conclusion of law were added to reflect the rules the Commission relied on in the Amended Notice.

Cook v. Employment Division, 47 Or App 437 (1980). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Applicable Statutes and Rules. Although each of the allegations below relies on different subsections of the statutes and rules, one statute and one administrative rule provide the basis for the charges against Licensee. The statute involved, ORS 342.175, states in part:

(1) 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 person 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:

(a) *Conviction of a crime not listed in ORS 342.143 (3);*

(b) *Gross neglect of duty;*

(c) *Any gross unfitness;*

* * * * *

(e) *Any false statement knowingly made in an application for issuance, renewal or reinstatement of a license or registration[.]*

(Emphasis added). The emphasized subsections of the statute are the ones upon which the Commission relies in this case.

The Commission also relies upon an administrative rule, OAR 584-020-0040, that states in pertinent part:

(1) The Commission will deny, revoke or deny the right to apply for a license or charter school registration to any applicant or educator who, has been convicted of any of the crimes listed in ORS 342.143, or the substantial equivalent of any of those crimes if convicted in another jurisdiction or convicted of attempt to commit such crimes as defined in 161.405. Evaluation of substantially equivalent crimes or attempts to commit crimes will be based on Oregon laws in effect at the time of the conviction, regardless of the jurisdiction in which the conviction occurred. The crimes listed in 342.143 are: [Citations to specific crimes omitted];

(2) An applicant fails to meet the requirement of ORS 342.143 "good moral character" if the applicant engages in gross neglect of duty, gross unfitness, in violation of section (4) of this rule or other acts which are in violation of sections (1) or (3) of this rule.

(3) The Commission may initiate proceedings to suspend or revoke the license or registration of an educator under ORS 342.175 or deny a license or registration to an applicant under ORS 342.143 who:

(a) Has been convicted of a crime not listed in section (1) of this rule, if the Commission finds that the nature of the act or acts constituting the crime for which the educator was convicted render the educator unfit to hold a license;

(b) Is charged with knowingly making any false statement in the application for a license or registration;

(c) Is charged with gross neglect of duty;

(d) Is charged with gross unfitness; or

(e) Is convicted of a crime involving the illegal use, sale or possession of controlled substances.

(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:

* * * * *

(c) Knowing falsification of any document or knowing misrepresentation directly related to licensure, employment, or professional duties;

* * * * *

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

(o) Substantial deviation from professional standards of ethics set forth in OAR 584-020-0035;

* * * * *

(5) Gross unfitness is any conduct which renders an educator unqualified to perform his or her professional responsibilities. Conduct constituting gross unfitness may include conduct occurring outside of school hours or off school premises when such conduct bears a demonstrable relationship

*to the educator's ability to fulfill professional responsibilities effectively.
The following may be admissible as evidence of gross unfitness.
Consideration may include but is not limited to:*

* * * * *

(b) Fraud or misrepresentation;

(c) Conviction of violating any federal, state, or local law. A conviction includes any final judgment of conviction by a court whether as the result of guilty plea, no contest plea or any other means.

(Emphasis added). As with the statute quoted above, the italicized portions of the rule are the ones upon which the Commission relies in this case.

Judicial Interpretation of the Statute and Rules. There are two basic charges that the Commission has made against Licensee—that she is grossly unfit to work as an educator, and that she committed acts constituting gross neglect of duty. The Commission’s rules involving both charges have been addressed and interpreted by the Oregon Supreme Court in *TSPC v. Bergerson*, 342 Or 301, 153 P3d 84 (2007).

In *Bergerson*, the Commission sought to suspend the license of a teacher who, while in a major depressive state, had rammed her estranged spouse’s vehicle during a domestic dispute. The Commission suspended the teacher, contending (as in the present case) that she was guilty of gross neglect of duty and gross unfitness to teach.⁵ The teacher argued that there must be some nexus or connection, under either category, between the criminal act and the licensee’s role as an educator.

When addressing “gross neglect of duty,” the Commission contended that it could require the licensee to behave ethically and lawfully “at all times,” because it had rules allowing it to do so. The rule, known as the Ethical Educator standard, states in part:

The Ethical Educator

The ethical educator is a person who accepts the requirements of membership in the teaching profession and acts at all times in ethical ways. In so doing the ethical educator considers the needs of the students, the district, and the profession.

* * * * *

⁵ The ALJ also addressed the question whether licensee’s actions would constitute a crime, and she found that the actions did constitute the crime of Criminal Mischief.

(3) The ethical educator, in fulfilling obligations to the profession, will:

(a) Maintain the dignity of the profession by respecting and obeying the law, exemplifying personal integrity and honesty;

OAR 584-020-0035.

Because the rule required educators to be ethical “at all times,” the Commission concluded that any ethical violation in a teacher’s personal life was sufficient to affect the teacher’s license. The Supreme Court disagreed:

In the present case, the TSPC relied on rules that define a teacher’s professional duties as including a requirement that teachers behave ethically and lawfully at all times and provide that any substantial deviation from that requirement is sanctionable as “gross neglect of duty.” Our task is to determine whether those definitions are consistent with the legislature’s intent. We conclude, with little difficulty, that they are not. In ordinary parlance, professional duties are specific to a profession and are distinct from the moral and civil obligations of all citizens to behave ethically and to obey the law at all times. There is nothing in the statutes to indicate that the legislature intended the term “professional duty,” * * * to have anything other than that ordinary meaning. * * * [T]he TSPC’s position that teachers have a *professional* obligation to behave ethically and lawfully “at all times” eradicates the boundary between private and professional obligations altogether. The rule, at least as the TSPC purports to employ it in its final order in the case, is inconsistent with the legislature’s intent.

153 P3d at 90 (italicized emphasis in original; underlined emphasis added).

When addressing the issue of gross neglect of duty in this case, the Commission views the rule (which is unchanged) under the *Bergerson* court’s interpretation. A criminal conviction outside the teacher’s professional capacity does not, by itself, justify professional discipline. The Commission concludes, as did the ALJ in *Bergerson*, that there must be some nexus between the illegal acts and Licensee’s professional duty.⁶

When considering the second allegation of “gross unfitness,” the definition itself requires a showing of the nexus between the act or acts constituting the crime and the teacher’s professional role. The definition states in part:

(5) Gross unfitness is any conduct which renders an educator unqualified to perform his or her professional responsibilities. *Conduct constituting gross unfitness may include conduct occurring outside of school hours or off school premises when such conduct bears a demonstrable relationship*

⁶ Without deciding the issue, the Supreme Court noted, in a footnote (fn 3) in *Bergerson*, that Judge Coburn’s interpretation might well be consistent with the legislative intent.

to the educator's ability to fulfill professional responsibilities effectively.
The following may be admissible as evidence of gross unfitness.
Consideration may include but is not limited to:

* * * * *

(c) Conviction of violating any federal, state, or local law. A conviction includes any final judgment of conviction by a court whether as the result of guilty plea, no contest plea or any other means.

OAR 584-020-0040(5)(c)(emphasis added). According to this rule, gross unfitness is "any conduct," at work or off of work that shows that Licensee is unqualified to perform her professional duties.⁷ Subsection (c) indicates that violation of a law can be a basis for finding gross unfitness.

There are some crimes that automatically disqualify an educator from licensure. ORS 342.143(3)(a)(A) contains a list of criminal statutes; if a licensee or applicant is convicted of any of those crimes, the Commission *must* deny a license. But the Criminal Mistreatment II statute is not included on that list. Therefore, the Commission has discretion whether to discipline a teacher for a conviction for those crimes. OAR 584-020-0040(3)(a) authorizes the Commission to deny a license to an applicant who:

(a) Has been convicted of a crime not listed in section (1) of this rule,⁸ *if the Commission finds that the nature of the act or acts constituting the crime for which the educator was convicted render the educator unfit to hold a license;*

(Emphasis added). Again, this rule requires a showing of a nexus between the criminal act and the teacher's profession.

The *Bergerson* court also addressed this concept of "gross unfitness," finding that the legislature's use of the term in ORS 342.175 was not intended to just duplicate the other sections dealing with teacher conduct. Rather, there must be a disqualifying character trait or status that disqualifies the teacher and it must persist:

In summary, OAR 584-020-0040(5) refers to a character trait or status that is incompatible with a teacher's professional responsibilities. Such a trait or characteristic may be demonstrated by the teacher's past conduct, but the trait or characteristic must exist at the time of the TSPC disciplinary

⁷ Based upon the language of the rule, as well as portions of the Standards for an Ethical Educator, the Commission rejects Licensee's notion that matters outside the schoolroom should not affect her licensure. The quoted rule clearly contemplates considering other matters, as long as it bears a demonstrable relationship to her ability to perform the duties. See discussion of *Bergerson*, *infra*.

⁸ Section (1) of OAR 584-020-0040 parallels the statute's requirement that conviction for certain crimes must lead to license denial.

hearing. To the extent that the TSPC seeks to show that such a trait or status exists through a teacher's past *off-duty* conduct, it must show that the conduct is substantially related to the teacher's *present* ability to teach effectively.

153 P3d at 92-93 (emphasis in original). Thus, the Commission must show that Licensee was not only grossly unfit to teach but that the unfitness persists as of the time of the hearing.

In summary, the effect of *Bergerson* in this present case is to require, in every instance, a showing by the Commission that there is some nexus between Licensee's action and her fitness for or neglect of her profession. Specifically with regard to allegations of gross unfitness, the Commission must further show that the unfitness continues at the time of the hearing. With those standards in mind, the Commission proceeds to review the charges made.

Charge #1: The arrest and conviction make Licensee grossly unfit to teach.
The Amended Notice alleges that:

On May 2, 2007, you were convicted by a jury, of one count of Criminal Mistreatment 2. The conviction stemmed from circumstances in the home you resided in with your 11-year-old son and your husband. The home was filled with garbage and other materials so that one could only navigate through the house by trails through the debris. There was no noticeable heat in the house. The home was a safety and health hazard for your son. Your son also had suffered from head lice. Your conviction, including the surrounding circumstances constitutes gross unfitness pursuant to ORS 342.175(1)(c); OAR 584-020-0040(5)(c) (*Conviction of violating any federal, state or local law*).

(Doc. P7; emphasis in original).

Most of the factual allegations in the first charge are accurate, but two are not. First, there is insufficient evidence to establish that Julian had head lice at the time of the arrest and conviction.⁹ Only Curtis Baker-Krofft asserted that Julian had head lice at that time, and the evidence from the school nurse and from Licensee rebut his statements to the police and code enforcement officers.

Second, although the furnace may not have been turned on at the time the officers arrested Licensee, she has established that the furnace was working at the time. (Ex. B2, B3). The distinction presented by Licensee's evidence is important. If there is no working furnace, it is potentially evidence that Licensee endangered her child. If the furnace is working but is just not turned on by those at home at a specific time, it is

⁹ Julian did not have head lice at the time he went into foster care. The only evidence of head lice, other than Curtis Baker-Krofft's unsupported assertion, was of an infestation several months earlier, and Licensee appropriately addressed the issue at that time. (Test. of Licensee, Ling).

difficult to implicate Licensee—who was working that day and was not at home—for failing to turn the furnace on.

The Commission's findings, however, are accurate concerning Licensee's conviction for Criminal Mistreatment II and the condition of the house at the time of the arrest. Therefore, the question remains whether that crime, and the circumstances surrounding it, constitutes gross unfitness.

The Commission bases its gross unfitness charge on Licensee's arrest and conviction for Criminal Mistreatment II. The Commission has shown that Licensee was convicted of the crime, and contends that she has "failed to furnish evidence satisfactory to the Commission of good moral character and such other evidence as the Commission considers necessary to establish fitness to serve as an educator." As noted above, this statement misstates the burden in the case. The Commission must establish that the nature of the criminal act makes the educator unfit to hold a license. *Bergerson, supra*. It has not done so in this case.

Licensee's crime arose from subjecting her son to a dangerously unsafe living situation in a home that was a fire hazard and was full of piles of debris of every sort. The enforcement and police officers clearly described the clutter in the house, to the extent that each room would only have a "path" approximately 20 inches wide running through it.

However, what the Commission has failed to establish is how that specific circumstance—the "act or acts constituting the crime"—makes Licensee unfit as a teacher. The connection between her crime and her alleged unfitness has not been shown. Moreover, remembering the *Bergerson* requirement that the trait or status constituting the gross unfitness must persist up to the time of the hearing, the record lacks any indication that the acts constituting the crime persist.

The Commission's argument in this instance appears to focus on Licensee's animosity toward the police and other agencies in the aftermath of the arrest, the removal of Julian from the home, and Licensee's ultimate conviction. However, Licensee's reaction and animosity *after* the fact are not the "act or acts constituting the crime" and may not be considered in this analysis.¹⁰

As will be seen, there are many questions about how Licensee's *reaction* to being convicted, and to having been arrested in the first place, affect her fitness to teach—but not in the context of this charge. The Commission will address these questions in the discussion of the Letter of Explanation, below. But Licensee's reaction to the arrest and conviction are not the "act or acts constituting the crime." Therefore, the Commission does not consider them in this first charge, under the rule cited.

¹⁰ The persistence of the acts or circumstances causing the crime must be considered up through the time of the hearing, but Licensee's response to being arrested and convicted are, by the definition set forth in the rule, not part of the review.

Charge #2: The arrest and conviction constituted gross neglect of duty. The Commission's gross neglect of duty charge arises from the exact same facts as the first, and my comments about the factual findings are the same. The Commission alleges:

The conduct alleged in paragraph 1 also constitutes gross neglect of duty pursuant to ORS 342.175(1)(a); OAR 584-020-0040(3)(a) (*if the Commission finds the nature of the act or acts constituting the crime for which the educator was convicted render the educator unfit to hold a license*); ORS 342.175(1)(b); OAR 584-020-0040(4)(n) as it incorporates OAR 584-020-0010(1)(*recognize the worth and dignity of all persons and respect for each individual*) and (5)(*Use professional judgment*).

(Doc. P7 at 1; emphasis in original).

Gross neglect of duty is also defined in the administrative rules quoted above. The Commission here relies upon just one part of the rule:

(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;

This rule, in turn, incorporates subsections of another rule, OAR 584-020-0010(1) and (5), which state:

The Competent Educator

The educator demonstrates a commitment to:

(1) Recognize the worth and dignity of all persons and respect for each individual;

* * * * *

(5) Use professional judgment[.]

For the same reasons set forth under the first charge, and keeping in mind the *Bergerson* requirement that there must be some nexus between the criminal act and the professional duties, the Commission has again failed to show any connection between Licensee's criminal act at home and her professional duties. The Commission has failed to prove gross neglect of duty in this instance.

Charge #3: The Letter of Explanation constitutes gross neglect of duty (*falsification and maintain dignity of the profession*). The Commission's third and fourth charges against Licensee are found in the third paragraph of the Amended Notice:

On May 15, 2008, you submitted an application for renewal of your Basic Teaching License. In that application you provided an explanation of the events leading up to your conviction. The facts stated in the explanation are inconsistent from the police reports documenting your arrest for Criminal Mistreatment. In your statement, you did not take responsibility for your conduct. You blamed the conditions in your house in part on your son not doing his chores; on worrying about your son being away over two weekends and not being there to help you clean; on your husband not telling you that police would be coming by the next day. These statements or misrepresentations on your application constitute gross neglect of duty in violation of ORS 342.175(1)(b); OAR 584-020-0040(4)(c) (Knowing falsification of any document or knowing misrepresentation directly related to licensure, employment or professional duties), OAR 584-020-0040(4)(o) as it incorporates OAR 584-020-0035(3)(a) (maintain the dignity of the profession by respecting and obeying the law, exemplifying personal integrity and honesty). This conduct also constitutes gross unfitness under ORS 342.175(1)(c); OAR 584-020-0040(5)(b) (Fraud or misrepresentation).

(Doc. P7 at 1-2). The Commission contends that Licensee demonstrated gross neglect of duty when she submitted her Letter of Explanation along with her license renewal application.

Licensee drafted a Letter of Explanation on May 14, 2008, and sent it to the Commission. (Ex. A10). The Commission contends that many of her comments in the letter show that she has been (and remains) unwilling to take responsibility for the circumstances that led to her conviction. The Commission is correct, as excerpts from the letter show:

- "my former spouse created a diversion from his home responsibilities that put me in legal jeopardy"
- "the Marion County Asst. DA insisted on using the law to try and destroy my family"
- "It is known to me that Marion County has more cases of Messy House than all other counties combined."
- "I tried going through the Complaint Process of Salem that protects citizens from unreasonable police involvement in innocent citizens lives"
- "One day in October of 2006 my then 11-year-old son ran away from doing his chores"

- “Where was the boy’s father? In Eugene carrying on an adulterous affair, but I did not know it at the time. I was experiencing something like being a single mom, and had no relief from the cooking and cleaning that often are shared by couples.”
- “I made a Love and Logic parenting decision to force [my son] to come home when he insisted on staying the night by telling him I would have to call the police to return him as a runaway by dark if he did not come home of his own accord.”
- “I felt I had to follow through. I had been raised to believe that ‘the policeman is your friend, call on him in time of trouble’. I had never had any reason to deal with the law before, as I do not even believe in J-Walking.”
- “To my shock and horror, my son was escorted home in handcuffs.”
- “Two years before in his twisted rage my ex wrote to [DHS] on papers I filed to get him to financially support our child that there was lint all over the laundry room.”
- “His business as a junk dealer was always filling our home and yard with his ‘inventory’ for sale, and neighbors complained so Code Enforcement ticketed us, and said all of it had to be indoors.”
- “[My son] was much more traumatized by the intervention of authorities than the boxes in the living room.”
- “my son was held captive in the Foster Care system.”
- “He finally ran away from his placement before the judge would listen to him that he NEVER felt danger from paper and the so called possibility of fire danger[.]”
- “the Jury was 5 minutes from dinner time and seemed to not spend much time considering. Suddenly, I was found guilty. It was astonishing.”
- “I was given 2 years unsupervised Court Probation (in the paper I read of a man who stole thousands of dollars of farm equipment and he only had 1 year).”
- “Again, I have been a teacher for 20 years. I feel I was a victim of my ex-husband[‘s scam].”

(Ex. A10).

These quotations from Licensee’s three-page letter demonstrate, as the Commission argues, that Licensee has not taken responsibility for her actions that led to the conviction. According to Licensee, she was only convicted because the jury was close to its dinnertime. She filed a police complaint because she, as an “innocent citizen,” felt their involvement was unreasonable. Her house was “messy” with just a “so called possibility of fire danger.” And the reason her house was messy was because of her husband’s scam.

Licensee's belief in her innocence is not troubling to me; she successfully appealed her conviction to the Oregon Supreme Court. Licensee violates no rules by continuing to believe that she was wrongly convicted of a crime. That her conduct and the objective circumstances of her home may not constitute criminal misconduct, however, does not negate her obligation to furnish the Commission with an accurate and honest assessment of what occurred.

What is troubling is Licensee's unwillingness to accept any of the blame for the condition of the house when Code Enforcement came. The piles of debris in her house on that date did not concern her. There were trails through the debris in the house, so narrow that a larger police officer had to turn sideways to move from room to room. There were combustibles sitting on the stove, and warm electrical cords sitting in piles of clothing and paper in rooms that had not been visited for months on end. Objectively, this was more than just a "so called possibility of fire danger."

Given these facts, the question is whether her representations in the Letter of Explanation constituted "gross neglect of duty" or "gross unfitness" under the Commission's definitions.

Gross neglect of duty (falsification). The Commission contends that Licensee's letter violated subsection (4)(c) of the administrative rule, which states:

(c) Knowing falsification of any document or knowing misrepresentation directly related to licensure, employment, or professional duties[.]

OAR 584-020-0040(4)(c). According to the cited rule, the contents of the letter were either a knowing falsification or a knowing misrepresentation of what happened at the time of Licensee's arrest and thereafter.

The Commission has not contended that the letter was a falsification, but instead contends that Licensee knowingly misrepresented her circumstances to the Commission. The ALJ agreed with the Commission's analysis.

Licensee contends that, in drafting her letter, she did not *intend* to deceive the Commission. The question thus becomes whether a "knowing" misrepresentation requires a specific intent to deceive or defraud, or whether a lesser mental state is sufficient. As explained below, the Commission concludes that a "knowing" misrepresentation only requires that the individual be aware of the facts and circumstances; it does not require a specific intent to deceive or defraud, as Licensee contends.

When examining the text of administrative rules, "words of common usage typically should be given their plain, natural, and ordinary meaning." See *Osborn v. PSRB*, 325 Or 135, 145-46, 934 P2d 391 (1997), relying on *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). The usual definition of "knowing" is:

1 a : having or reflecting knowledge, information, or insight : marked by understanding and intelligence : well informed and marked by a ready capacity for further learning[.]

Webster's Third New Int'l Dictionary 1252 (unabridged ed 1993). *Webster's* also defines "knowingly" as acting with an "awareness." Such a definition is consistent with the application in other licensing contexts. See, e.g., *In re Conduct of Fitzhenry*, 343 Or 86, 101, 162 P3d 260 (2007) ("Unlike violations that require a lawyer to act with intent, '[a] lawyer acts knowingly by being consciously aware of the nature or attendant circumstances of the conduct, but not having a conscious objective to accomplish a particular result.'").

Similarly, *Webster's* defines "misrepresentation" as "an untrue, incorrect, or misleading representation (as of a fact, event, or person); specifically : a representation by words or other means that under the existing circumstances amounts to an assertion not in accordance with the facts." *Webster's Third New Int'l Dictionary* 1445 (unabridged ed 2002).

Thus consistently with the plain meaning of the phrase, the Commission concludes that a "knowing misrepresentation" merely requires an "awareness"—not a deliberate intent to deceive—that the individual is providing misleading or incorrect information. This interpretation is consistent with the Commission's historical application of the rule.

For example, in *In re Glenna Marie Zarnekee*, TSPC Final Order No. 119059 (March 2005), the Commission determined that the license applicant had *not* "knowingly" misrepresented facts when she neglected to include a criminal charge against her because there was insufficient circumstantial evidence to demonstrate that applicant was "aware" of that charge. *In Re Glenna Marie Zarnekee* at 6; see also *In re Teaching License of Jerome Arthur Anderson*, TSPC Default Order (Jan 2006) (licensee's "failure to report" conviction constituted "knowing" misrepresentation of facts); *In the Matter of the Teaching License of Lori Jean Bacon*, Default Order of Revocation (July 2008) (licensee's falsification of circumstances leading to conviction constituted a knowing misrepresentation).

It is clear that Licensee was aware of the objective circumstances leading to her conviction, and that she misrepresented them in her Letter of Explanation.

1. Licensee was aware of the circumstances leading to her conviction.

Licensee's own testimony at the hearing demonstrated that she was aware of the actual circumstances of her home when she wrote the Letter. At the hearing, Licensee testified that, after her arrest, she realized that she had "missed the boat," and that she took responsibility by cleaning the house. She also testified that, within three months of her arrest—and over a year before she wrote her Letter of Explanation—she began to

realize the officers' concerns and addressed them. (Tr 59). Specifically, she acknowledged that the officers had discovered a room in her home that she had not visited for several months and that the room contained an electrical cord that was "slightly ajar" from the power strip, creating a fire hazard. And once she learned of the hazard, she "rectified the situation." (Tr 62).

When asked whether she disagreed with the officers' description of her home on November 1, 2006, Licensee responded, "Yes, with reservations." (Tr 86). But her "reservations" related primarily to the officers' characterization of the debris in her home as "junk" or "garbage," as opposed to salvaged items intended for resale—a business venture that, contrary to the assertions in her Letter, she jointly shared with her ex-husband. (Tr 71, 84, 86, 98, 106, 108).

2. Licensee misrepresented those circumstances in her Letter of Explanation.

With respect to the misrepresentation element, Licensee claimed in her Letter that she was the victim of her ex-husband's scam, strongly suggesting that her husband intentionally did not clean the house and allowed the police to view the home while it was unusually dirty. (Ex A10 at 2-3). She also explained that, for various reasons, neither she nor her son had cleaned the home in two weeks, implying that her home was normally safe and did not present any health hazards. In fact, when an officer escorted her son home (after she reported him as a runaway), the officer inquired about any reports to CSD, which Licensee ascribed in her Letter to the "in- the- middle- of- cleaning- and- dropped- it- to- deal- with- [her]- son state of [her] living room." Licensee also emphasizes her lack of responsibility, placing the blame squarely on her ex-husband and his business: "His business as a junk dealer was always filling our home and yard with his 'inventory' for sale, and neighbors complained so Code Enforcement ticketed us, and said all of it had to be indoors."

In short, in her Letter of Explanation, Licensee paints a picture of herself as a hapless victim to her ex-husband's "junk business"—a business she actually jointly shared with her ex-husband—and to an over zealous prosecutor. Through her Letter, she also created the impression that the condition of her home was nothing more than a little messy, since she had simply gotten a week or two behind in her cleaning, and that there was no possibility of fire danger.

The objective evidence of the state of Licensee's home, however, belies her characterization of the home. As described in the Findings of Fact above, the front room of the home was full of stacks of various items, including clothing, bags of debris, paperwork, recyclables, broken appliances, baskets and bags full of various items, jars with liquid, and miscellaneous furniture. The stacks in the front room were approximately three feet high and covered all but a narrow path of carpet through the room and into the dining room. The carpet on the path was very dirty. The fireplace was covered with piles of debris as well, and the room smelled of mold and mildew.

The path through the front room led to the dining room, and the path narrowed as it approached that room. The dining room was full of the same type of items, and stacks were placed on the table, the chairs, and the piano in the room.

From the dining room, a path led into the kitchen where the odor of mold and mildew was stronger. The floor was filthy and covered with stacked boxes. The sink and countertops were full of dishes and debris, as well as open containers of perishable food, and there were flammable paper products sitting on top of the stove. The refrigerator contained food, but smelled of mold and mildew.

Behind the kitchen, a hallway led to an upstairs area adjacent to or in the garage area. That hallway had a narrow path, with items stacked against the wall on both sides of the hall. At times, the officers had to walk on the top of boxes and bags in order to get to the back staircase. Apparently, no one had been up there in over a year. The stairs to the back bedroom were covered with canned goods, clothing, shoes, bags of debris, and a broken window frame. In the event of a fire, no one trying to get past this collection of debris would be able to exit the house in a timely fashion.

In the back bedroom, several electric cords were plugged into power strips and extending into the back yard. The plugs and power strips were warm to the touch, and many were resting on either paper or clothing in the bedroom. In the back of the house, Licensee was using the electricity to raise chickens.

In short, contrary to Licensee's characterization in her Letter of Explanation, the state of her home was not that of merely being "in- the- middle- of- cleaning- and- dropped- it- to- deal- with- [her]- son," nor was the fire hazard merely "so called." Rather, the objective evidence in the record demonstrates that the state of her home was far more serious than that portrayed in her Letter. And it had been that way for quite some time—not just the two weekends she had spent with her son doing scouting activities.

Yet almost a year before writing the Letter of Explanation, Licensee realized that she had "missed the boat" and, once she learned of the hazards, she rectified them. Rather than acknowledging those facts, and explaining to the Commission the changes she had made to her home, Licensee considerably downplayed the severity of the situation and blamed the state of the house on her husband's "scam" and the fact that she had to work to support the family. Indeed, despite the clear evidence and her stated awareness, Licensee could only write about the "so called possibility of fire danger" and the "clutter of [her ex-husband's] business."

In short, the Commission concludes that, at the time she wrote her Letter of Explanation, Licensee was aware of the facts and circumstances leading to her arrest and conviction, yet she misrepresented those facts in her Letter. And, while the act or acts leading to the conviction are not—as the Commission has previously decided—connected to her professional duties as an educator, the fact that she would make the

misrepresentations in this letter in an effort to obtain a license *is* connected to her profession. The Commission has shown that Licensee grossly neglected her duty when she misrepresented the status of her arrest and conviction in the Letter of Explanation.

Gross neglect of duty(maintain dignity of the profession).¹¹ The Commission also contended that Licensee's conduct as outlined in her letter to the Commission violated OAR 584-020-0040(4)(o) as it incorporates OAR 584-020-0035(3)(a).

OAR 584-020-0040(4)(o) lists the "substantial deviation from professional standards of ethics set forth in OAR 584-020-0035" as a manner of establishing gross neglect of duty under the rule. In turn, OAR 584-020-0035(3)(a), which the Commission relies on, provides that the ethical educator, in fulfilling obligations to the profession, will

"Maintain the dignity of the profession by respecting and obeying the law, exemplifying personal integrity and honesty"

At a minimum, the Commission expects licensees to be forthright in their communications with the Commission, particularly when directly related to the licensing process. As such, the Commission utilizes the letter of explanation as a way of testing an applicant's character—that is, his or her integrity—and honesty.

In this case, the Letter submitted by Licensee demonstrated that she lacked honesty or integrity because she continued to minimize her conduct and deflect responsibility for her acts leading to her conviction. To be sure, Licensee's Letter of Explanation gives the reader some idea of what occurred at the time of the arrest and subsequent conviction, but completely underplays her own involvement in the events. At no point in her Letter does Licensee accept any personal responsibility for the condition of her home.

Rather, she strongly implied that the condition of the home was not nearly as bad as others implied. And, to the extent there was a problem, she placed the blame on everyone from her son and her ex-husband, to the various law enforcement officers who worked on her criminal case. The objective evidence, as extensively outlined above, contradicts Licensee's description of the circumstances and of her own involvement.

To be clear, the fact that Licensee was—or was not—*criminally* responsible for the condition of her home is not the point. Indeed, Licensee was ultimately successful in having her conviction overturned on appeal. *State v. Baker-Krofft*, 348 Or 655, --- P3d --- (2010). But the fact that Licensee's conduct did not amount to a crime does not negate the impact that conduct had on herself and others around her. The Commission expects an honest rendition of what occurred and what steps she had taken to resolve the

¹¹ The following discussion on OAR 584-020-0035(3)(a) was added by the Commission because the proposed order did not discuss it. The Commission relies on the same facts and rationale used by the ALJ in discussing gross neglect of duty under OAR 584-020-0049(4)(c).

situation, thus demonstrating her character and integrity—as well as her ability to take responsibility for her actions and surroundings, including the safety of others, as would be expected of any teacher.

In short, when a licensee or applicant—during the licensing process—is unwilling to exemplify honesty and integrity with respect to past conduct, the Commission can properly determine, as it does here, that the person engages in gross neglect of duty under OAR 584-020-0035(3)(a). In the present case, the Commission finds that Licensee's minimizing of the conduct leading to her conviction and blaming others in her letter to the Commission also established that Licensee failed to maintain honesty and integrity in her communications to the Commission seeking renewal of her license.

Gross unfitness. The Commission withdraws this allegation.

Should Licensee's license be denied? As noted, ORS 342.175 gives the Commission the authority to discipline its licensees. The statute states in part:

(1) 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 person 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:

(a) Conviction of a crime not listed in ORS 342.143 (3);

(b) Gross neglect of duty;

(c) Any gross unfitness;

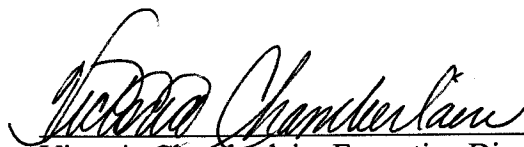
In the matters concerning the Letter of Explanation, the Commission has established gross neglect of duty on Licensee's part based on two separate allegations: a knowing misrepresentation directly related to licensure, OAR 584-020-0040(4)(c); and a failure to maintain the dignity of the profession, OAR 584-020-0040(4)(o) and OAR 584-020-0035(3)(a). The Commission has the discretion to refuse to renew Licensee's Basic Teaching License at this time. *Olson v. State Mortuary and Cemetery Bd.*, 230 Or App 376, 216 P3d 325 (2009) (The imposition and choice of penalty for violation of laws governing funeral service providers and funeral homes is a matter within the board's discretion). In this particular case, the Commission exercises its discretion to refuse to renew Licensee's Basic Teaching License. The Commission would reach that same result based on either of those two allegations, either alone or in combination. It is to be hoped that, in time, Licensee will address the issues preventing her licensure and be able to apply for reinstatement under ORS 342.175(3).

FINAL ORDER

Based on the foregoing, the Commission orders as follows:

1. Licensee's renewal application is hereby denied.

It is so Ordered this 15th day of November 2010.

A handwritten signature in cursive script, reading "Victoria Chamberlain", written over a horizontal line.

Victoria Chamberlain, Executive Director,
Teacher Standards and Practices Commission