

BEFORE THE TEACHER STANDARDS AND PRACTICES COMMISSION
OF THE STATE OF OREGON

In the Matter of the)
Teaching License of) FINAL ORDER
)
DAVID J. MARSHALL) Case No. 800704

On June 19, 2009, Administrative Law Judge (ALJ) John Mann issued a Proposed Order in this case.


The Teacher Standards and Practices Commission adopts in its entirety the Findings of Fact, Conclusions of Law and Order contained in the attached Proposed Order.

ORDER

The Commission adopts the Proposed Order in its entirety and revokes the Oregon teaching license of David J. Marshall.

Dated this 14th day of May 2010.

TEACHER STANDARD AND PRACTICES COMMISSION

By: 
Victoria Chamberlain, Executive Director
Teacher Standards and Practices Commission

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days of the service of this order. Judicial review is pursuant to the provision of ORS 183.482 to the Oregon Court of Appeals.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order by mailing a true copy thereof certified by me as such by U.S. First Class Mail and U.S. Certified Mail—Return Receipt Requested to the address below:

David Jerome Marshall
4309 NE Morrow Road
Vancouver WA 98682

Dated this 4th day of June, 2010.

By: Melody Hanson
Melody Hanson, Executive Assistant

RECEIVED

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**Teacher Standards &
Practices Commission**

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

IN THE MATTER OF THE TEACHING) **PROPOSED ORDER**
LICENSE OF:)
)
DAVID J. MARSHALL) OAH Case No: 800704
)

HISTORY OF THE CASE

On July 22, 2008, the Teacher Standards and Practices Commission (Commission) issued a Notice of Opportunity for Hearing (Notice) to David J. Marshall alleging that Mr. Marshall had committed an act of misconduct that could provide a basis for discipline. On August 8, 2008, Mr. Marshall requested an administrative hearing. On August 26, 2008, the matter was referred to the Office of Administrative Hearings (OAH).

Senior Administrative Law Judge (ALJ) John Mann of the OAH was assigned to preside over the matter. On October 9, 2008, a pre-hearing telephone conference was held. ALJ Mann presided. Assistant Attorney General (AAG) Jeff Dover represented the Commission. Mr. Marshall represented himself. At the conference, Mr. Dover advised Mr. Marshall that the Commission intended to file a Motion for Summary Determination. ALJ Mann explained the significance of such a motion and also informed Mr. Marshall of his right to file a response if the motion was filed.

On October 30, 2008, the Commission filed a Motion for Summary Determination. Mr. Marshall did not file a Response. On February 9, 2009, ALJ Mann issued a Ruling on Summary Determination which denied the Commission's motion.

On February 13, 2009, the Commission issued an Amended Notice of Opportunity for Hearing to Mr. Marshall. The Amended Notice did not include any additional factual allegations, but added an allegation that the alleged conduct constituted gross neglect of duty in violation of ORS 342.175(1)(a) and OAR 584-020-0040(4).

On February 20, 2009, a hearing was held at the Tualatin, Oregon office of the OAH. Mr. Marshall represented himself at the hearing and testified. Mr. Marshall also presented testimony from Ricky Allen, the Principal of Jefferson High School, Robert Goldsby, and Melody Marshall, Mr. Marshall's wife. The Commission was represented by Assistant Attorney General Jeff Dover. Board investigator George Finch appeared for the Commission and also testified. The record closed at the end of the hearing.

Proposed Order

In the Matter of the Teaching License of David J. Marshall, OAH Case No. 800704

Page 1 of 12

ISSUE

1. Whether Mr. Marshall's conviction for Assault in the Third Degree constitutes gross unfitness pursuant to ORS 342.175(1)(c).
2. Whether the Commission may discipline Mr. Marshall based on his conviction of Assault in the Third Degree pursuant to ORS 342.175(1)(a).
3. Whether Mr. Marshall's conviction for Assault in the Third Degree constitutes gross neglect of duty pursuant to ORS 342.175(1)(b).

EVIDENTIARY RULINGS

Exhibits A1 through A7, offered by the Commission, were admitted into evidence without objection. The documentary record also includes procedural documents P1 through P8.

FINDINGS OF FACT

1. David Marshall has been licensed as a substitute teacher since January 2005. He has taught at a number of schools for the Portland Public School District, including Victory Middle School and Jefferson High School. (Test. of Marshall.)
2. On January 27, 2006, Officer Lee Jundt, of the Gladstone Police Department, met with Mr. Marshall to investigate an allegation that Mr. Marshall struck his nine year old son, DM.¹ Officer Jundt interviewed DM along with an investigator from the Department of Human Services (DHS). DM told the officer that on the previous evening he was playing with another child in his room, doing back-flips off of a bunk bed, when the other child fell and hit his back. DM stated that Mr. Marshall came into the room, asked the other child to leave, and then asked DM to do push-ups. DM stated that as he did the push-ups, Mr. Marshall struck him with a belt four or five times. DM reported that he then went with his father to the living room, but later returned to the room where his father again hit him with the belt. Officer Jundt observed an oval-shaped bruise on DM's left buttocks. The bruise was approximately 1 and a-half inches wide, and two inches long with a small scab in the center. He also observed a second larger scab below the bruise. (Ex. A2 at 3-4.)
3. Officer Jundt also interviewed Mr. Marshall, who confirmed that he struck DM with a belt while having DM do push-ups. Mr. Marshall explained that he entered DM's room after he heard DM and another child making noise when they were supposed to be sleeping. Mr. Marshall stated that he sent the other child out of the room and had DM get into the push up position. Mr. Marshall explained that he was just swinging the belt above DM's buttocks intending to "break the wind," but that he accidentally hit DM on the second swing, breaking the skin. (Ex. A2 at 4.) Mr. Marshall told the officer that he told DM to get up and that he put cocoa butter on the wound. Mr. Marshall denied knowing what caused the bruise, but suggested it could have happened as a result of DM's horseplay with the other child. (Ex. A2 at 4.)

¹ The name of Mr. Marshall's son is not relevant to this case. He is therefore identified solely by initials.

4. In June 2006, Mr. Marshall was arrested for the January incident and was in jail for approximately one week. Mr. Marshall had never been incarcerated in the past. (Test. of Marshall; Ex. A7 at 2.) On July 26, 2006, following the advice of his court-appointed attorney, Mr. Marshall pled guilty to a charge of Assault in the Third Degree, in violation of ORS 163.165, a Class C felony. (Ex. A1 at 1.) He agreed to plead guilty in exchange for a sentence that did not include additional jail time. In addition, the court dismissed an unrelated charge of forgery as part of the plea agreement. (Test. of Marshall; Ex. A7 at 2.) Mr. Marshall was sentenced to 36 months of probation with the condition that he complete parenting classes approved by his probation officer. In addition, the court ordered that Mr. Marshall have no contact with DM until approved by the probation officer. The court also granted the probation officer the authority to approve early termination of the probation. (Ex. A7 at 2.)

5. On November 3, 2006, the Portland Public School District notified the Commission, by letter, that Mr. Marshall may have been convicted of a crime. (Ex. A4.)

6. On April 19, 2007, Mr. Marshall was interviewed by two Commission investigators, Robert Cimino and George Finch. Mr. Finch believed that Mr. Marshall was not truthful in the interview and that Mr. Marshall did not acknowledge responsibility for his conduct. Instead, Mr. Finch believed that Mr. Marshall was trying to minimize his conduct, placing most of the blame on a troubled relationship with his ex-wife. (Test. of Finch.)

7. Mr. Marshall provided a letter to the Commission, dated April 19, 2007, explaining the circumstances that led to his conviction. He wrote that he had disciplined DM on January 26, 2007 for not wiping correctly after using the toilet. Mr. Marshall wrote that he had told DM that he would need to remember to wipe himself correctly as a condition of taking karate classes. Mr. Marshall explained that he told DM to get into the push-up position while Mr. Marshall took care of DM's sister, who had just taken a bath. Mr. Marshall wrote that after he had taken care of his daughter, he went back into DM's room and suggested that he should spank him with a belt for not wiping correctly. He then wrote that he called DM's mother and told her that DM would be getting his first spanking with a belt. Mr. Marshall wrote "It was at that time that I took the belt and tried attempted [*sic*] to strike him on the butt as flicking a towel at someone in a playful manner. After 1-2 flicks I noticed that was a bruise and stopped because I was not trying to actually hit him just wanted to scare him a little." (Ex. A6 at 1.) Mr. Marshall also wrote that he later went into DM's room, after DM and another child "were doing flips on the bed." (*Id.* at 2.) Mr. Marshall wrote that he told DM "[Y]ou just got a spanking with a belt I can make a real one this time * * * ." (*Id.*)

8. In late 2008, Mr. Marshall worked as a substitute teacher at Jefferson High School for approximately 30 days. Ricky Allen, Jefferson's principal, believed that Mr. Marshall was a good teacher and was popular with the students. Many of the students wanted Mr. Marshall to return to the school. One or two weeks after he began working at Jefferson, Mr. Marshall informed Mr. Allen of the Commission's investigation. Mr. Allen did not previously know of Mr. Marshall's conviction. Mr. Allen has no concerns about Mr. Marshall's conduct in the classroom or his ability to manage a class. (Test. of Allen.)

9. Mr. Marshall has been a mentor to Brendan Dean, who is now 18 years old, for approximately three years. Brendan's mother, Elonia Dean, believes that Mr. Marshall has been a very positive influence on Brendan. Ms. Dean was aware of Mr. Marshall's conviction, but has no concerns about Mr. Marshall's relationship with her son. (Test. of Dean.)

10. Mr. Marshall married his current wife approximately two years ago. They have two children together. At the time of the hearing, the older child was one-year old and the other child was two-months. Ms. Marshall's eight year old son also lives with the couple. Ms. Marshall describes her husband as a "super dad" who is very involved with his four children as well as his step-son. She has also observed former students of Mr. Marshall, all of whom appear to love him. (Test. of M. Marshall.)

11. Mr. Marshall completed parenting classes acceptable to his probation officer in March 2007. In July 2007, the probation officer allowed Mr. Marshall to resume contact with DM. Mr. Marshall's probation officer agreed to end Mr. Marshall's probation after 18 months, half of the original sentence. (Test. of Marshall.)

12. Mr. Marshall has never been accused of behaving violently with any child other than during the incident that led to his conviction. He has never been accused of inappropriate behavior with any child other than the January 2006 incident with DM.

13. Mr. Marshall regrets the January 2006 incident, but is not sure that DM's injuries were from his belt. Mr. Marshall now believes that DM may have injured himself in a fall. However, Mr. Marshall regrets that he was not able to see his son for approximately one-year due to his conviction. He believes that he and DM are now closer. Mr. Marshall and his wife have agreed that they will not spank their children. (Test. of Marshall.)

14. At the time of the hearing, Mr. Marshall was employed by Self Enhancement, Inc., a Charter School with the Portland Public School District. (Test. of Marshall.)

15. The Commission believes that a teacher's professional obligations extend beyond the classroom. Because a teacher is charged with maintaining order in the classroom with minor children, the Commission believes that an act of violence against a child outside of the classroom reflects on the teacher's ability to maintain such order in a safe and professional manner. (Test. of Finch.) Mr. Marshall agrees that a teacher's professional duties extend beyond the classroom. Mr. Marshall would be concerned if one of his children's teachers was convicted of a crime of violence against a child. (Test. of Marshall.)

CONCLUSIONS OF LAW

1. Mr. Marshall's conviction for Assault in the Third Degree does not constitute gross unfitness pursuant to ORS 342.175(1)(c).

2. The Commission may not discipline Mr. Marshall based on his conviction of Assault in the Third Degree pursuant to ORS 342.175(1)(a).

3. Mr. Marshall's conviction for Assault in the Third Degree constitutes gross neglect of duty pursuant to ORS 342.175(1)(b).

OPINION

The Commission has alleged that Mr. Marshall is subject to discipline based on a criminal conviction for assaulting his minor son. The Commission bears the burden of proving the allegations by a preponderance of the evidence. See ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

On July 26, 2006 David Marshall, a licensed teacher, pled guilty to Assault in the Third Degree, a Class C Felony. The conviction resulted from an incident in January 2006 when Mr. Marshall struck his then-nine-year-old son, DM, with a belt. Mr. Marshall questions whether he actually injured DM, but acknowledges that he was swinging the belt over DM after he asked him to get into the push-up position.

Mr. Marshall has given conflicting explanations of exactly what occurred on the night in question. On January 27, 2006, Mr. Marshall told a police officer that he was swinging his belt over his son, much like flicking a towel, but that he did not intend to strike him. He asserted that he did so after DM and another child were making noise in DM's bedroom when they were supposed to be asleep. This version of events, with some minor variations, is consistent with DM's statement to the police on the same day.

However, in April 2007 Mr. Marshall wrote a letter to the Commission asserting that he disciplined his son for failing to wipe appropriately after using the toilet. In addition, Mr. Marshall asserted that, prior to swinging the belt, he called DM's mother and told her that DM was going to get his first spanking with a belt. The letter thus strongly suggests that Mr. Marshall intentionally hit his son with a belt. However, in the same letter he wrote that he merely attempted to strike his son in a "playful manner" and that he was "not trying to actually hit him."

Regardless of the precise circumstances however, the evidence established that Mr. Marshall struck his son with a belt as a form of discipline. At the time of the event, Mr. Marshall believed that he had struck his son with sufficient force to cause an open wound. In July 2007, Mr. Marshall pled guilty to Assault in the Third Degree, a Class C Felony, for striking his son. Mr. Marshall has attempted to explain away DM's injury as the possible result of a fall earlier on the same day. He explains his guilty plea as the result of reliance on legal advice so that he could stay out of jail. While it is understandable that Mr. Marshall did not want to go to jail, it is apparent that he has not fully accepted responsibility for his actions on January 26, 2006. Mr. Marshall did not allege that he had seen a wound on his son earlier in the day. He did not see it until after he had begun swinging a

belt. As soon as he saw the wound, he concluded that he had caused it and treated the wound with cocoa butter. He told the police the next day that the wound was caused by the belt. Although Mr. Marshall has consistently asserted that he did not intentionally strike his son, that assertion is inconsistent with his alleged call to DM's mother, prior to the incident, when he told her that DM was going to get his first spanking. The evidence established, more likely than not, that Mr. Marshall intentionally disciplined his son with a belt and that he struck him with sufficient force to cause an open wound.

The Commission contends that Mr. Marshall's conduct constituted Gross Unfitness, in violation of ORS 342.175(1)(c), violation of ORS 342.175(1)(a), which allows the Commission to impose discipline based on violation of a crime, and Gross Neglect of Duty, in violation of ORS 342.175(1)(b). Each statutory provision is addressed separately below.

1. Gross Unfitness

ORS 342.175 (1)(c) allows the Commission to discipline a licensed teacher based on "Any gross unfitness." The Commission has adopted an administrative rule that, in part, defines the term "gross unfitness." OAR 584-020-0040(5) provides, in relevant part:

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:

* * * * *

(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.

The evidence established that Mr. Marshall was convicted of assaulting his minor son with a belt. Given that Mr. Marshall is a teacher, and is in daily contact with minor students, such a conviction does bear a "demonstrable relationship" to Mr. Marshall's ability to fulfill his professional responsibilities effectively. The Commission asserted that, as a teacher, Mr. Marshall could regularly be expected to maintain order and discipline as the only adult in the classroom. The Commission can, and should, consider whether a person entrusted with the care and supervision of children has a history of criminal assaults against children.

However, the events that gave rise to the conviction took place in January 2006, more than three years ago. Mr. Marshall's conviction occurred in July 2006, more than two years ago. In *Teacher Standard and Practices Commission v. Bergerson*, 342 Or 301 (2007) the Oregon Supreme Court reversed an order in which the Commission suspended a teacher's license for 60 days based, in part, on a teacher's conviction for off-duty conduct related to a marital dispute. The Commission,

rejecting a proposed order by an administrative law judge, found, among other things, that the teacher's conviction, and subsequent notoriety, constituted "gross unfitness" under OAR 584-020-0040(5). The Court rejected that conclusion for several reasons. Most notably, for purposes of the present case, the court held that OAR 584-020-0040(5) allows the Commission to impose discipline only if the evidence established that *at the time of the hearing* the teacher possessed a trait or status that was incompatible with the licensee's professional responsibilities. The Court noted that the term "unfitness," as used in ORS 342.175, "suggests a disqualifying status or trait, rather than a single, simple instance of undesirable conduct." (*Id.* at 315.) In light of that interpretation, the Court held that OAR 584-020-0040(5) must be read to focus on conduct *only to the extent* that the conduct "demonstrates or causes a disqualifying character trait or status." (*Id.* at 316.) Thus, while conviction of a crime may be *evidence* of gross unfitness, such a conviction, by itself, is not enough to constitute current gross unfitness. Summarizing its reasoning, the Court wrote:

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 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*.

(*Id.*) (Emphasis added.)

However, as the Commission noted in the present case, the court in *Bergerson* acknowledged that a single act could, in extreme circumstances, demonstrate gross unfitness. The court wrote:

Obviously, there could be single instances of conduct – shooting the principal over a teaching assignment comes to mind – that would be disqualifying. But this case is nothing like that extreme example.

(*Id.* fn 5.)

The Commission argued that Mr. Marshall's conduct was the kind of extreme example contemplated by the Court. Although the Commission has shown only a single incident, the Commission asserts that the conduct was sufficiently extreme as to be disqualifying. Unlike in *Bergerson*, the Commission has established that Mr. Marshall's criminal conduct bears a substantial relationship to his job duties. Furthermore, the Commission is rightfully concerned that Mr. Marshall has been convicted of a felony charge of violence against a child.

Nevertheless, the Court's exception for extreme examples must be read in light of the rationale expressed in the opinion. The Court interpreted the Commission's own rule to require a showing of a disqualifying trait or characteristic at the time of the hearing. Nothing in the language of the rule, or in the court's rationale, suggests that an extreme example would be sufficient to eliminate the requirement of a disqualifying status or trait that exists at the time of the hearing. In that context, the court's reference to an "extreme example" is best understood to mean that where the

conduct involved is extreme and bears directly on a teacher's professional duties, there is a strong inference that the individual presently possesses a character trait incompatible with the person's present ability to teach effectively.

Other than the single event in January 2006, Mr. Marshall has never been accused of inappropriate conduct with children. During the last three years he has taught in the public schools and served as a mentor. Those who have observed his work and his interaction with children over the last three years have no concerns about his conduct. Since the time of his conviction, Mr. Marshall has been married and has had two children. He has reestablished a relationship with DM following a court-ordered period of no-contact. His stepson has moved into his home. There has been no allegation that Mr. Marshall has behaved inappropriately with any of his children since January 2006. In short, there is no evidence that the incident in January 2006 was anything other than a one-time occurrence.

The Commission argued that Mr. Marshall has not accepted full responsibility for his actions and that his attitude toward the events has not changed or improved over time. In essence, the Commission asserted that Mr. Marshall's lack of remorse constituted a continuing character trait that was incompatible with teaching. While the evidence did show that Mr. Marshall has consistently tried to minimize his responsibility for DM's injury, the evidence did not show that this was symptomatic of an underlying character trait incompatible with teaching. In fact, the evidence demonstrated that Mr. Marshall is well regarded as both a teacher and a parent over the last three years. While Mr. Marshall may attempt to minimize his own responsibility, I am persuaded that he is committed not to use physical discipline against his son, or any other child, in the future. His experience with being incarcerated and his pro-longed separation from his son clearly made an impression. While Mr. Marshall may not have internalized his own responsibility for his actions, he does appear to have accepted the fact that he cannot engage in acts of violence against his son without incurring fairly severe legal and personal consequences.

To demonstrate that Mr. Marshall was grossly unfit, the Commission had to establish, more likely than not, that Mr. Marshall currently has a status or trait that interferes with his present ability to teach effectively. The Commission has not made that showing. The Commission may not, therefore, impose discipline on Mr. Marshall for violation of ORS 342.175(1)(c).

2. Conviction of a Crime

ORS 342.175(1)(a) allows the Commission to discipline a licensed teacher based on conviction of a crime which is not specifically listed in ORS 342.143(3). Assault in the Third Degree, is not a listed crime under ORS 342.143(3). Pursuant to ORS 342.175(1)(a), the Commission adopted OAR 584-020-0040(3)(a) which provides:

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.²

(Emphasis added.)

As explained in the earlier ruling on the Commission's Motion for Summary Determination, the reasoning of the court in *Bergerson* applies with equal force to the Commission's authority to impose discipline under ORS 342.175(1)(a). OAR 584-020-0040(3)(a) allows the Commission to impose discipline only if the nature of the acts that led to the conviction "render the educator unfit to hold a license." The rule is written in the present tense and focuses on conduct that renders the teacher "unfit." As explained by the court in *Bergerson*, the term "unfit" suggests a trait or status incompatible with teaching. (342 Or at 315). Thus, the Commission may not discipline a teacher under OAR 584-020-0040(3)(a) based solely on a showing of a conviction. Rather, the rule requires the Commission to demonstrate that the acts that led to the conviction *currently* renders the educator unfit to hold a license.

In *Bergerson*, the Commission argued, on policy grounds, that an interpretation of its rule that focused only on current fitness would make it extremely difficult to impose discipline where there has been "rehabilitat[ive] progress" between the time of the conduct and the time of the hearing. (*Id.* at 316.) While the Court acknowledged that concern, it held that it could not ignore the rule's use of the present tense. (*Id.*) Thus, I am compelled by the *Bergerson* case to hold that the Commission may not impose discipline on Mr. Marshall under OAR 584-020-0040(3)(a) unless the evidence established that the conviction makes Mr. Marshall currently unfit to serve as an educator. For the reasons explained above in connection with the allegation of Gross Unfitness, the Commission failed to make that showing.

3. Gross Neglect of Duty

ORS 342.175(1)(b) allows the Commission to discipline a licensed teacher based upon "gross neglect of duty." The Commission has adopted an administrative rule that, in part, defines the term "gross neglect of duty." OAR 584-020-0040(4) provides, in relevant part:

(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:

* * * * *

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

OAR 584-020-0035, titled "The Ethical Educator," provides, in relevant part:

² OAR 584-020-0040(1) lists 61 specific crimes contained in ORS 342.143(3). The Commission is required to revoke the license of any teacher convicted of such a crime. Assault in the Third Degree is not included in that list.

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.

* * * * *

(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[.]

The court in *Bergerson*, however, held that a violation of the law is insufficient to constitute gross neglect of duty where the violation is purely personal. The court interpreted ORS 342.175(1)(b) to apply only when a teacher engages in acts that violate a professional duty; criminal conduct that is not related to a teacher's professional obligations, the court held, was insufficient. However, the court noted:

Depending on the profession at issue, there may be some areas where professional responsibilities and universally applicable moral and civil obligations may overlap[.]

(342 Or at 312.)

The Commission argues that this is a case where Mr. Marshall's professional, moral, and civil obligations overlap. The Commission asserts that Mr. Marshall's professional duties extended beyond the classroom. Mr. Marshall concurred in that assessment and conceded that he would be concerned if a teacher for one of his children had been convicted of a crime of violence against a child.³ Mr. Marshall is a teacher. He is regularly charged with maintaining order in the classroom which may, from time to time, require him to impose discipline. Parents rely on teachers to maintain a safe and professional atmosphere.

In *Bergerson* the court found that a teacher's conviction for deliberately crashing into her estranged husband's automobile was not a breach of a professional duty, but involved purely private conduct. However, unlike the present case, in *Bergerson* there was no allegation of harm to a child. Given the professional obligations of a teacher toward minor students, an act of violence against a child cannot be construed as a purely private act.

It is reasonable for the Commission to conclude that a teacher's professional obligations include the duty to avoid engaging in felony assaults against children, whether at work or at home. That conclusion is consistent with the legislative policy set forth in the statute and as interpreted by the Court in *Bergerson*. While Mr. Marshall does appear to have made positive changes in his life

³ In *Bergerson*, the Commission was concerned, in part, by the adverse consequences to the teacher's reputation occasioned by news coverage of the teacher's criminal conduct. (*Id.* at 313.) That is not the case here. Indeed, there is no evidence that Mr. Marshall's conviction has gained widespread publicity. However, the Commission properly concluded that Mr. Marshall's conviction, even if not widely known, was a violation of his professional obligations as a teacher.

over the last three years, the fact remains that he pled guilty to a felony assault against his young son. Unlike the rules, quoted above, governing gross unfitness and criminal convictions, the Commission's rule interpreting the term "gross neglect of duty" is not limited to a status or trait that persists over time. Rather, the term focuses on "any serious and material inattention to or breach of professional responsibilities." That definition is necessarily backward looking and requires a past incident or incidents that constitute a "serious and material . . . breach of professional responsibilities." Mr. Marshall's criminal conduct constitutes precisely such a breach.

The Commission has established that Mr. Marshall committed an act of gross neglect of duty. The Commission is therefore entitled to impose discipline on that basis.

ORDER

The Commission may suspend or revoke the teaching license of David J. Marshall or otherwise impose discipline for conduct constituting gross neglect of duty in violation of ORS 342.175(1)(a) and OAR 584-020-0040(4) as set forth in the February 13, 2009 Amended Notice of Opportunity for Hearing. The Commission may not impose discipline based on the allegation of gross unfitness under ORS 342.175(1)(c) or for conviction of a crime under ORS 342.175(1)(a).

John Mann

Senior Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: June 19, 2009

EXCEPTIONS

The proposed order is the Administrative Law Judge's recommendation to the Teacher Standards and Practices Commission. If you disagree with any part of this proposed order, you may file written objections, called "exceptions," to the proposed order and present written argument in support of your exceptions. Written argument and exceptions must be filed **within fourteen (14) days after mailing of the proposed order** with the:

Teacher Standards and Practices Commission
465 Commercial Street, NE
Salem, Oregon 97301

The Commission need not allow oral argument. The Executive Director may permit oral argument in those cases in which the Director believes oral argument may be appropriate or helpful to the Commissioners in making a final determination. If oral argument is allowed, the Commission will inform you of the time and place for presenting oral argument.

CERTIFICATE OF MAILING

On June 19, 2009, I mailed the foregoing Proposed Order in OAH Case No. 800704.

By: First Class and Certified Mail

Certified Mail Receipt #7008 1830 0003 4609 7499

David Marshall
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