

2. In the Complaint/Notice of Hearing issued by the PPC, the PPC stated that because Petitioner was convicted of five separate felonies stemming from his work as an attorney, Petitioner's previous conduct violated the public trust and confidence placed in teachers.
3. Petitioner's convictions consist of (1) Theft, a severity level 7, nonperson felony in violation of K.S.A. 21-3701(b)(1) in Case No. 03-CR-314; (2) Theft, a severity level 9, nonperson felony, in violation of K.S.A. 21-3701(a) in Case No. 03-CR-315; (3) Theft, a severity level 9, nonperson felony, in violation of K.S.A. 21-3701(a) in Case No. 03-CR-1070; (4) Theft, a severity level 7, nonperson felony, in violation of K.S.A. 21-3701(a) in Case No. 09-CR-1414; and (5) Perjury, a severity level 9, nonperson felony, in violation of K.S.A. 21-3805 in Case No. 09-CR-1414.
4. The convictions stem from several different incidents over a period of approximately four years. Petitioner was accused of stealing funds from his great-aunt, Vera Johnson, the Topeka Lawyers Club, and the David W. Husted Estate. Petitioner had a fiduciary relationship with all of the victims. Petitioner's perjury conviction stemmed from his testimony before the Kansas Board of Discipline for Attorneys.
5. Based on the American Bar Association Standards for Imposing Lawyer Sanctions, the Panel of the Kansas Board of Discipline of Attorneys recommended to the Kansas Supreme Court that Petitioner be suspended from the practice of law for a period of three (3) years and that the imposition of discipline be suspended while Petitioner

completed a five year probationary period, subject to certain restrictions.

6. On July 1, 2003, Petitioner entered into a plea bargain.
7. As part of the plea entered by Petitioner, the court sentenced Petitioner to one year in jail, even though his criminal history placed Petitioner within the presumptive probation zone on the sentencing grid. The court also sentenced Petitioner to one year of post-release supervision and one year of supervised probation.
8. Prior to entering his plea, Petitioner repaid the stolen funds to the victims. Therefore, the court did not order restitution.
9. After Petitioner's convictions, the Kansas Supreme Court rejected the Panel of the Kansas Board of Discipline of Attorneys' recommendations. Instead, the Court ordered disbarment.
10. At the suggestion of his probation officer, Petitioner applied for and received a discharge from probation six (6) months earlier than expected, in January 2006.
11. After his release from prison Petitioner was employed as a car salesman at two different dealerships. As a car salesman, Petitioner was required to obtain and maintain a car salesman's license through the Kansas Department of Revenue.
12. After Petitioner's wife died in 2006, Petitioner established and endowed a scholarship at Washburn in his wife's name.
13. In Summer 2007, Petitioner enrolled and completed classes at Washburn University in the area of education. While at Washburn, Petitioner was on the honor roll and

received a 4.0 GPA.

14. For two years, while at Washburn, Petitioner volunteered as a judge at History Day, a competitive event at Washburn involving middle school and high school students.
15. As part of his training in education, Petitioner completed a semester of student teaching at Highland Park High School in Topeka, Kansas.
16. While at Washburn, Petitioner was nominated and participated in the Kansas State Department of Education's program to develop the Kansas Performance Teaching Portfolio.
17. After completing his education at Washburn, Petitioner took the PRAXIS II exam and received recognition for his outstanding performance.
18. Petitioner submitted multiple letters of recommendation and letters of support from acquaintances to the PPC. Many of the letters focused on Petitioner's natural ability as a student and as a teacher.
19. Attorney Frank Sabatini wrote a letter recommending that Petitioner be granted a license because Petitioner voluntarily repaid the funds taken from the victims prior to his convictions. Mr. Sabatini also stated that Petitioner contacted Capital City Bank after his release from prison and paid back a loan extended to his law practice, which the bank wrote off as uncollectible when Petitioner was in prison.
20. Former District Attorney Robert Hecht, the prosecuting attorney in Petitioner's criminal cases, also wrote a letter in support of Petitioner without Petitioner's request

to do so. Robert Hecht stated that Petitioner demonstrated good character by acknowledging his wrongdoing and sparing the victims a trial. As a former attorney for school districts, while in private practice, Robert Hecht asserted that Petitioner's life lessons learned from his misconduct would benefit students. He also stated that Petitioner has taken full advantage of the opportunity to redeem himself in the community.

21. At the time of Petitioner's convictions, Petitioner was fifty-four (54) years old.
22. In Petitioner's Answer to the Complaint/Notice of Hearing, Petitioner asserted that the circumstances and events that existed in his life at the time of the improper conduct no longer exist because he is no longer in a position to handle anyone's money other than his own.
23. At the time of the PPC hearing, all parties to the matter anticipated that Petitioner would receive an expungement. Since that time, Petitioner has received an expungement of his convictions.
24. On March 14, 2009, the PPC denied Petitioner's application for a teaching license.
25. In the Initial Order, the PPC stated that
"The nature of the Applicant's misconduct in engaging in multiple and repeated acts of dishonesty while in a position of public trust as evidenced by the Applicant's felonious conduct and his actions that resulted in his disbarment from the practice of law is so serious that such conduct, in and of itself, demonstrates a lack of fitness to engage in the profession of teaching and is sufficient and just cause for denying his applications for licensure at this time."

26. The PPC also considered the factors listed in K.S.A. 72-1397(c). The PPC stated that Petitioner's actions were not youthful indiscretions of a young nonprofessional person; the Petitioner's actions involved multiple repeated acts of dishonesty; Petitioner clearly violated the public's trust and violated his fiduciary duties as a lawyer; Petitioner was only released from probation approximately three years ago; and even though Petitioner may receive an expungement of his convictions, the underlying conduct cannot be expunged or negated.
27. On March 23, 2009, Petitioner received an expungement of all five felonies. The court stated that Petitioner understood the expungement as a step toward his rehabilitation, and the court found that Petitioner did not exhibit a propensity to commit future criminal acts. The court also commended Petitioner for facing the stigma associated with his conduct head on.
28. On April 14, 2009, the Kansas State Board of Education ("Board") reviewed the PPC's denial of Petitioner's application consistent with K.S.A. 72-8506.
29. During a meeting on April 14, 2009, the Board discussed its policy regarding oral arguments in licensing cases. After initially voting to deny Petitioner an opportunity to present oral arguments, the Board voted again and granted Petitioner's request for oral arguments.
30. On May 12, 2009, Petitioner and the PPC's attorney presented oral arguments.

31. During oral arguments, Petitioner asserted that, because his convictions were expunged, his previous criminal conduct should not be the sole basis for denying him a license. Petitioner asserted that if he waited to apply until after his expungement, then he would not be required to disclose his convictions to the Board, according to K.S.A. 21-4619(i).
32. During the question and answer session before the Board, Mrs. Janet Waugh, who voted against granting Petitioner a teaching license, stated that she was “confident” that Petitioner probably was rehabilitated, but that her major concern was what parents would think of Petitioner teaching their children. (May 12, 2009, Hearing before the Board at 1:02:13-1:03:22.)
33. Subsequent to oral arguments, the Board voted, 8-2, to deny Petitioner a teaching license and adopted the findings of fact and conclusions of the PPC.

STANDARD OF REVIEW

The standard of judicial review of the Kansas State Board of Education’s decision is defined by the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.* The Court’s review is strictly limited by statute. K.S.A. 77-621(c) states that

“a court shall grant relief only if it determines . . . (3) the agency has not decided an issue requiring resolution; (4) the agency has erroneously interpreted or applied the law; . . . (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court; or (8)

the agency action is otherwise unreasonable, arbitrary or capricious.”

On judicial review of an agency action, the Court is limited to “ascertaining from the record if substantial competent evidence supports the agency findings.” *Jones v. K.S.U.*, 279 Kan. 128, 140, 106 P.3d 10 (2005).

Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. In applying the substantial evidence test under K.S.A. 77-621(c)(7), courts may not reweigh the facts, try the case de novo, or substitute their own judgment even if they would have found differently.

Blue Cross & Blue Shield of K.S., Inc. v. Praeger, 276 Kan. 232, 263, 75 P.3d 226 (2003).

CONCLUSIONS OF LAW

First, Petitioner asserts that the Board failed to properly apply the law, specifically the factors listed in K.S.A. 72-1397(c) and K.A.R. 91-22-1a(g)(1). According to K.S.A. 72-1397(c), the Board may only issue a teaching license to an individual convicted of felony theft, under article 37 of chapter 21 of the Kansas Statutes Annotated, if the Board determines, after a hearing, that the individual has been “rehabilitated for a period of at least five years from the date of the offense or commission of the act.” Petitioner’s misconduct resulted in four convictions of felony theft. When evaluating Petitioner’s rehabilitation for licensing purposes, the Board may consider factors including, but not limited to:

- “(1) [t]he nature and seriousness of the offense or act;
- (2) the conduct of the person subsequent to commission of the offense or act;
- (3) the time elapsed since the commission of the offense or act;
- (4) the age of the person at the time of the offense or act;

- (5) whether the offense or act was an isolated or recurring incident; and
- (6) discharge from probation, pardon or expungement.”

K.S.A. 72-1397(c).

All of the factors listed in K.S.A. 72-1397(c) are included in the list of factors in K.A.R. 91-22-1a(g)(1). K.A.R. 91-22-1a(g)(1) also requires the Board to consider the extent to which a license may offer an opportunity to engage in a similar type of misconduct and “the present fitness of the person to be a member of the profession.”

Petitioner asserts that the Board’s decision is based on a finding of fact that is not supported by substantial evidence when viewed in light of the record as a whole, and, therefore, the Board failed to properly apply the law. Petitioner argues that the Board failed to properly consider his rehabilitation and that there is substantial evidence in the agency record to support a finding of rehabilitation. When evaluating whether the Board properly applied the law, the Court must look to the PPC’s findings of fact and conclusions because the Board adopted the PPC’s findings of fact and conclusions when it reviewed the PPC’s decision.

While the PPC’s Initial Order does not clearly state the factors considered in evaluating Petitioner’s rehabilitation, several of the factual findings and conclusions are clearly based on several factors listed in K.S.A. 72-1397(c). After thoroughly reviewing the agency record, the Court finds that the PPC considered the nature and seriousness of the offense, the age of the Petitioner at the time of the offense, whether the offense or act was

an isolated or recurring incident, and Petitioner's discharge from probation and his anticipated expungement.

The PPC stated that the most important factor to consider is the nature and seriousness of the offense or act. The PPC then went on to find that the offense was very serious because Petitioner was in a fiduciary relationship with the victims and was related to one of the victims. The PPC found that Petitioner's actions were so serious that he was disbarred from the profession of law for being dishonest and for violating the public trust. The PPC stated that, because the teaching profession is accorded similar rights, responsibilities and privileges, an individual removed from another legally recognized profession should not be allowed a license as a teacher. See K.S.A. 72-8501.

In regard to the other factors considered by the PPC, the PPC found that Petitioner has only been discharged from his sentence since January of 2006, a little over three years. The PPC also stated that, while Petitioner's expungement was anticipated, an expungement does not expunge the underlying conduct. The PPC found that Petitioner's felonious conduct was not an isolated incident but, instead, was a series of repeated acts of dishonesty over a period of time. The PPC found that Petitioner's acts were not youthful indiscretions or lapses in judgment because Petitioner had been an attorney for almost thirty years when the felonious conduct occurred.

In the hearing before the Board, the PPC's attorney asserted that the nature and the seriousness of the offense may be enough to deny Petitioner a license. Before the Board the

PPC's attorney relied on the Kansas Supreme Court's holding in *Vakas v. Kansas Board of Healing Arts*, 248 Kan. 589, 608, 808 P.2d 1355 (1991). However, the holding in *Vakas* was limited to the reinstatement of a license to practice medicine. *Vakas*'s license was revoked for multiple instances of professional incompetence and professional misconduct stemming from his misuse and improper prescription of controlled substances. The court stated that "[t]he conduct [that] results in the revocation of a license to practice medicine may be so serious in and of itself as to preclude reinstatement." *Vakas*, 248 Kan. at 608.

Vakas's misconduct was directly related to his license to practice medicine, and *Vakas* was found to be professionally incompetent to practice medicine. Therefore, the Kansas Supreme Court limited the holding in *Vakas* to the reinstatement of a medical license. In this case, the Board based its decision to deny Petitioner a teaching license on misconduct committed while a licensed attorney. As a result, the Court finds that *Vakas* is not controlling nor persuasive.

While the Court takes note that K.S.A. 75-8201 states that the teaching profession is to have the same rights, responsibilities and duties as other legally recognized professions, different professions have different standards for licensing. Based on the American Bar Association Standards for Imposing Lawyer Sanctions, the Panel of the Kansas Board of Discipline of Attorneys recommended that Petitioner be suspended from the practice of law for a period of three (3) years and that the imposition of discipline be suspended while Petitioner completed a five year probationary period, subject to certain restrictions. *In re*

Wright, 276 Kan. 357, 368, 76 P.3d 1018 (2003).

However, while Petitioner's case was pending before the Kansas Supreme Court, Petitioner was charged and convicted of multiple felonies based on his misconduct. While the Board focused on the fact that Petitioner was disbarred from the practice of law, the Board ignored the fact that Petitioner may have been allowed to keep his license to practice law if he had not been convicted of multiple felonies after the Panel of the Kansas Board of Discipline of Attorneys made recommendations to the Kansas Supreme Court. Therefore, one may infer that Petitioner's conduct was not so serious in and of itself to revoke Petitioner's license to practice law.

Also, K.S.A. 72-1397(a) outright prevents the Board from issuing a license to individuals convicted of certain crimes, such as murder and indecent liberties with a child. One may infer that the Kansas Legislature deemed the crimes contained within K.S.A. 72-1397(a) to be so serious in nature that individuals convicted of those crimes are not rehabilitatable and should not be allowed an opportunity to request a teaching license. Because Petitioner's convictions for theft are not included within K.S.A. 72-1397(a), Petitioner's conduct was not so serious in nature as to allow the Board to deny him a teaching license without considering whether he is sufficiently rehabilitated.

Even though it is clear that the Board seriously reviewed Petitioner's convictions and the circumstances surrounding his convictions, it is unclear if the Board properly considered whether Petitioner is sufficiently rehabilitated and whether he is *presently* fit to receive a

teaching license. For instance, during the question and answer portion of the Board's hearing, Chairwoman Waugh, who voted to deny Petitioner a license, stated that she was confident that Petitioner was rehabilitated but was concerned about what parents of Petitioner's students may think of Petitioner's felonious conduct. (Board Hearing at 1:02:13-1:03:22.)

While it may be important for the Board to consider what parents may think about Petitioner teaching their children, the statute requires that the Board consider Petitioner's rehabilitation for licensing purposes only and not for hiring purposes. It is not the Board's duty to consider whether Petitioner should be given a job as a teacher but, instead, to evaluate whether Petitioner's previous conduct is no longer a factor in Petitioner's fitness to receive a teaching license. Based on a thorough review of the agency record and its orders, the Court finds the Board failed to clearly explain why Petitioner is not sufficiently rehabilitated at this time.

As a result, the Court must remand the matter to the Board for further written findings of fact and conclusions consistent with this Order. The Court instructs the Board to consider all of the evidence in the agency record when determining whether Petitioner has been rehabilitated and whether Petitioner's previous conduct is no longer a factor in Petitioner's fitness to receive a teaching license.

Petitioner requests that he be allowed discovery to determine whether the Board has ever knowingly issued a license to a convicted felon, even though the Board is given the

power to do so through statutes and regulations after a finding of rehabilitation. According to the Petitioner, the Board never makes a finding of rehabilitation when presented with an application from a convicted felon. Petitioner asserts that the Board's actions are unreasonable, arbitrary, and capricious because the Board always acts without regard to the benefit or harm to all interested parties. However, because the Court remands the matter for further findings of fact and conclusions related to Petitioner's rehabilitation, the issue is now moot. Petitioner also asserts that the Board attempted to punish him for his previous conduct; however, this issue is also moot.

CONCLUSION

For the reasons set forth in this Memorandum Decision and Order, the Court hereby remands the Board's Final Order issued May 12, 2009, for further written fact finding and conclusions regarding Petitioner's rehabilitation consistent with this Order. This Memorandum Decision and Order shall serve as the final judgment of the Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this ____ day of October, 2009.

Larry D. Hendricks
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in pick-up bin this ____ day of _____, **2009**, to the following:

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