

SOAH DOCKET NO. 701-06-2992.EC

**ESMAIL KHALILI,
Petitioner**

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BEFORE THE STATE OFFICE

V.

OF

**STATE BOARD FOR
EDUCATOR CERTIFICATION,
Respondent**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Petitioner Esmail Khalili seeks to have overturned the denial of his application for a Texas teaching certificate by staff of the State Board for Educator Certification¹ (Staff/Board). Staff denied Petitioner's application based on an alleged lack of fitness due to an internet relationship he had with a minor female. Staff asserts that such conduct demonstrates that Petitioner lacks good moral character and is unworthy to instruct or supervise the youth of this state. After having heard and considered the evidence, the Administrative Law Judge (ALJ) recommends that Petitioner's application be denied at this time.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

The hearing convened on May 23, 2007, before ALJ Carol S. Birch, at the State Office of Administrative Hearings (SOAH), 300 W. 15th Street, Austin, Texas. Staff appeared and was represented by Staff attorney Andrew Allen. Petitioner appeared and was represented by his father, Ali Khalili. After the parties presented their respective cases, the hearing was recessed to allow them an opportunity to obtain and submit additional evidence, including one or more psychological evaluations. The record was closed August 8, 2007, after receipt of additional evidence² and written closing arguments.

¹ The Board is a division of the Texas Education Agency.

² Neither party offered a psychological evaluation. The deposition testimony of Detective Joel Pridgeon is hereby admitted in evidence, and all objections are overruled, although limited weight has been given to certain of his opinions.

There were no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters will be addressed in the findings of fact and conclusions of law without further discussion here.

II. DISCUSSION

A. Background

Petitioner earned his undergraduate degree in music from the University of Texas at Austin in 2003, and planned to teach. He completed his student teaching and all other requirements for certification, including 18 hours of post-graduate credit, and then applied for teacher certification in the spring of 2006.

In processing the application, Staff received information indicating that, although no criminal charges were filed, Petitioner had been the subject of an investigation by the Austin Police Department (APD) earlier that year in connection with a complaint alleging that he had engaged in the on-line solicitation of a minor. The results of its own investigation led Staff to deny the application in June 2006, based on the inappropriateness of Petitioner's on-line communications with a 15-year-old girl at a time when Petitioner was 27 years old and a student teacher with the Austin Independent School District (AISD). Petitioner appealed the denial and requested this hearing.

B. Applicable Law

The Board's rules relating to administrative denials provide that the Board may deny certification based on satisfactory evidence that the applicant: (1) has committed a crime or an offense relating directly to the duties and responsibilities of the education profession; (2) lacks good moral character; or (3) is unworthy to instruct or to supervise the youth of this state.³

³ 19 TEX. ADMIN. CODE (TAC) § 249.12(a), (b).

The Board's rules also establish discretionary decision-making guidelines for Staff, ALJs, and the Board to use when evaluating matters concerning teacher certification.⁴ The guidelines consist of a list of factors to be considered in weighing an applicant's conduct, including: misconduct; motive; attempted concealment of misconduct; disciplinary or criminal history; the severity of actual physical or mental harm to a student and the potential for continuing harm; the likelihood of future misconduct of a similar or related nature (as shown by lack of remorse, failure to implement remedial measures to correct or alleviate harm arising from the misconduct, or lack of rehabilitative motivation or potential); and any other relevant facts or circumstances.⁵

As the party seeking certification, Petitioner has the burden of proof under the Board's rules.⁶ He must show by a preponderance of the evidence that Staff incorrectly concluded he lacks good moral character and is not worthy to instruct the youth of this state.

C. Summary of Evidence

The record in this case consists generally of documents submitted by both parties, and the testimony of Raymond Glynn, Ph.D., an associate commissioner with the Board; Scott Byram, a staff investigator; the father of the minor girl;⁷ and Petitioner. Although the parties disagree about the significance of the facts, they were essentially undisputed and are summarized below.⁸

⁴ 19 TAC § 249.17.

⁵ 19 TAC § 249.17(c).

⁶ 19 TAC § 249.22(b).

⁷ In order to protect the minor's identity, her father is referred to in this proposal as "the complainant."

⁸ This is not an exhaustive recitation of all evidence presented but rather a summary of the evidence considered to be relevant by the ALJ to her analysis and recommendation.

In the fall of 2005, Petitioner began using the website “MySpace” to communicate with his co-workers and to meet new people. MySpace is a social networking site where users can create their own webpages and, among other things, post profiles, pictures, and other information. The website also allows users to search for other people in its database by using specified criteria. Because Petitioner was 26 at the time, the age-range he used as part of his search criteria was 18 to 26. The girl’s profile, with a stated age of 18, was included in the search results received by Petitioner.

Between approximately November 2005 and April 2006, Petitioner communicated with the minor via instant messaging and their MySpace webpages, and also by cell phone. According to Petitioner, he believed the girl to be 18 until sometime in February 2006, when she told him that she was only 15. He testified that he was surprised and disappointed because he had developed a rapport with her based on who he believed her to be. He testified that he continued communicating with the minor because he enjoyed talking to her and had sympathy for her. To Petitioner, it was “not a cut and dried issue.” Because he had developed an impression of her over a period of time, he was not sure that she really was 15, and, in addition, he did not want to hurt her feelings by simply dropping her after she had disclosed personal things to him.

The complainant became aware of the on-line communications between his daughter and Petitioner through information provided by a software program installed on the family’s home computers that monitors internet activities and instant messaging conversations. The program captured the conversations, created a log that includes the date the conversations occurred, and stored the conversations in files that were reviewed periodically by the complainant. Some, but not all, of the captured conversations, or “chats,” between Petitioner and the minor were admitted in evidence.⁹

⁹ Respondent’s Exhibits 1-9, copies of actual chats that occurred between December 2006 and April 2007. It appears that these exhibits are not a complete record of the conversations that took place between Petitioner and the minor. The exhibits seem to be comprised of eight or nine separate conversations and Petitioner testified that there were many more that occurred. Furthermore, the complainant apparently deleted some chats that he thought were innocuous, and it is apparent that the first chat in evidence is not the first conversation between the two.

The following are excerpts from chats that occurred after Petitioner learned that the minor was only 15.¹⁰

◆ After some period of time without communication, Petitioner told the minor: “[I] remember telling you I loved you...and then I never heard from you again[.] [I] really do care about you[.] [I] still have a crush on you, crazy I know[.]”

◆ After asking her how old she was now, to which she responded that she was still 15, Petitioner stated: “well I just turned 27 in February.” She said, “I know, insane.”

◆ After both stating that they did not really care about his age, Petitioner stated that he was sure she had a boyfriend, but she said she did not and implied that her former boyfriend had not been faithful: “[I] could never do that to you; why would anyone cheat on you! [W]ell I’m so sorry . . . makes me mad when guys do that[;] gives the rest of us a bad name[;] did he feel like you weren’t giving him enough?”

◆ Petitioner asked where and when she worked, and stated that he would love to come to visit but was sure she would be busy. When she told him that she had a lunch break, he responded, “awesome,” and asked if she could leave. When she expressed concern about how she would look at work, he said: “don’t worry, I’ve seen enough pics to know how beautiful you are, to me anyway.” When they figured out that their schedules would not allow them to meet at her job, they

¹⁰ Although some of the topics were initiated by the minor, references to her statements are included only to the extent necessary to provide sufficient context, and nothing the minor said should be considered to excuse Petitioner’s conduct. Because the evidence demonstrates that the minor initially represented herself to be 18, the ALJ concludes the content of the earlier chats is not relevant.

began a discussion about meeting at a park or somewhere on the weekend. She mentioned that she was going camping the next weekend and stated that he should go because her parents would not be there. Petitioner asked where she was going to be camping and who else would be there, and after learning that her younger sister and at least one adult would be with her, he stated that “it’s very unlikely you’d run into an adult friend randomly at the park[;] might seem fishy; unless no one knew you were hanging with me[.]” Petitioner then stated that he would sleep in her tent and he typed a smiley face symbol with a halo above.

◆ “I’m so glad my age doesn’t bother you[.] [W]ell, if this weekend doesn’t work, then next weekend we can plan something[.]”

◆ “[I] really hope I can see [you] on Sunday; I very much want to make out...but not in public...gotta be somewhat private[.] [O]k, maybe too much info . . . but I like LOTS of tongue[;] [I] like it when a girl sucks on my tongue, strange I know[;] I’m just fascinated with tongue[;] it’s a very expressive muscle; that’s one thing I’m not innocent with[.]”

◆ “I think we will figure each other out[;] I am still trying to be a perfect gentleman with you[;] most girls don’t make me want to be[;] you make me want to[.] [L]ike I want to figure out when to be the innocent gentleman, and when to be the not so innocent guy[;] and I can’t lie, there are other things that I’m interested in that I’m trying to keep down lol; and that’s just me being a guy[.]”

◆ “[W]ould you be offended if I said that I had intimate thoughts about you?”

◆ After viewing a picture of her apparently doing the splits: “that looks hard...and you look...ummmm. HOT!!! I’m just staring at it, your legs are amazing.”

◆ After commenting that her last boyfriend “lost a great chick”: “well I’m standing in line...pick me pick me!!! I will totally make it worth your while; well, as often as I can see you. Any other pics I can see?”

◆ After seeing some more pictures: “wow...you really do have big _____ ! [W]ell these pics are hot; I wouldn't mind one that's you in a bikini showing you standing from the front[.]”

◆ “Indeed [you are special]. You are 15 and you have my attention lol and my interest.”

Although he had been reviewing the chat logs periodically, the complainant was not overly concerned about the content of the conversations until the threat of physical contact arose sometime in April 2006. At that point, the complainant became alarmed about his daughter's safety, and he intervened. He confronted his daughter about the chats, and he sent an anonymous e-mail to Petitioner, telling him to “stop with the 15-year-old girls.” When the Petitioner denied knowing what the complainant was talking about, he sent another e-mail containing cut-and-pasted portions of the chats to Petitioner, who then responded that he would stop. The complainant stated that his daughter was very relieved when he confronted her, because she had been fearful about the situation and did not know how to get out of it.

The complainant also contacted APD and reported the incident. He spoke to Detective Joel Pridgeon and provided him the chat logs of the conversations. Detective Pridgeon investigated and spoke to Petitioner who told him that the complainant's contact had merely confirmed his idea to break off the relationship with the minor. Detective Pridgeon testified that no criminal charges were filed because, although the conversations were sexually oriented, they had to have been sexually gratifying for at least one party in order to constitute on-line solicitation. According to Detective Pridgeon, although the conversations appeared to be leading to an offense, they did not quite rise to that level. He also testified that Petitioner's use of compliments and his criticism of the boyfriend's behavior appeared to be grooming behavior commonly used by sexual predators to foster relationships with their victims.

Scott Byram, who investigated the incident for the Board, also opined that Petitioner

appeared to solicit and foster a relationship with the minor. Mr. Byram stated that Petitioner's communications were a textbook progression from innocent banter to sexual innuendo, another indication of grooming behavior. Mr. Byram recommended denial of Petitioner's application because, although no criminal charges were filed, he was concerned about the inappropriateness of the communications and the fact that Petitioner did not seem to understand that his conduct was inappropriate.

As part of its investigation, Staff requested from Petitioner a written statement explaining the events surrounding the incident in question. Petitioner provided his response in May 2006, stating, in part:

I have had numerous conversations through instant messaging with many people. One of them happened to be a 15-year-old female, but I did not feel that the conversations were inappropriate, nor did they involve any sexual or illegal topics.

I told the [detective] . . . that I was not intending to cross any lines and that I did not think I had done so. He then told me that I should err on the side of caution and not converse online with anyone under the age of 17, and I told him I understood the importance of this. I have made every attempt since this time to only have conversations with people who I know are over the age of 18.

Being granted a teaching certificate is extremely important to my future. I realize that I must keep a professional demeanor not only in the classroom, but also outside of it, particularly when speaking with strangers online. I have never had any intentions of committing any kind of wrongdoing and I have learned a valuable lesson from this experience.

Petitioner explained at hearing that he did not have a copy of the chats when he wrote his response and did not remember the substance of the conversations.

Petitioner acknowledged that he should have discontinued communications once he discovered that she was a minor. In hindsight, he feels stupid for allowing himself to continue chatting with her, but he rationalized at the time that it was no big deal. Petitioner now realizes that

he made a major mistake, but believes that his behavior has been misconstrued. He was not looking for a minor or anyone to take advantage of when he began communicating with the girl, and he had no intention of victimizing her. He believed her to be 18 for a significant period of time, during which he developed an impression of her that was inconsistent with her being a 15-year-old girl.

Petitioner believes that he is not a threat to students. He was employed by AISD as a substitute teacher during the 2006-2007 school year. He completed the year without incident or any report of misconduct. He has also taught students in various capacities, including private lessons, for the last five years without incident. According to Petitioner, his students' maturity levels are readily apparent in the classroom, and he would never even consider having similar conversations with students he is teaching. On the internet, everything is less tangible and can be deceiving. He characterized his conduct as a lapse in judgment and acknowledged that he was unable to disassociate himself as thoroughly as he needed to after he learned the girl's real age.

Petitioner appreciates and understands the Board's concern, but he does not feel that he deserves to be punished indefinitely. He has learned his lesson and hopes to eventually be given an opportunity to teach again.

D. Analysis and Recommendation

This is a difficult case due, in part, to the lack of sufficient, reliable evidence upon which to base a decision of this magnitude. That lack of evidence directly affects Petitioner's ability to demonstrate that he possesses good moral character and is worthy to supervise and instruct the youth of this state. It is apparent that Petitioner worked hard to become eligible for a teaching certificate, and wants nothing more than to be able to teach. But certification is a privilege, not a right, and the Board's duty to protect the schoolchildren of Texas is no small thing.

Petitioner argues that the issue to be decided is whether he intentionally and knowingly targeted a minor with the intent to take advantage of her. The ALJ agrees that the evidence does not

establish that Petitioner intentionally and knowingly targeted a minor for sexual gratification; neither does it clearly establish that he did not. The ALJ believes that Petitioner's argument is too narrowly drawn. His actions may or may not have been predatory in nature, but in any event, they were inconsistent with the standards to which teachers must be held.

The broader issue is whether Petitioner poses a continued risk to students. At a minimum, Petitioner failed to maintain, or perhaps even recognize, appropriate boundaries with a minor with whom he chose to communicate, which is a serious matter. Even if this incident was the result of inadequate boundaries and not a more serious pathology, Petitioner offered no evidence that he sought professional counseling to deal with the issue. Neither did he avail himself of the opportunity afforded by the ALJ to obtain a psychological evaluation to help determine the scope of the problem.

Furthermore, even though the relationship did not result in actual sexual misconduct, there is some evidence that it caused emotional harm to the minor, and at the very least, it had the potential to do so, the import of which seemed lost on Petitioner. Although he was purportedly concerned about her feelings, he seemed oblivious of the effect such conversations might have on a child of 15.

Petitioner's explanation about the difference in his awareness of students in real-life situations and of students online is plausible and demonstrates some insight into his behavior. However, such distinctions are ultimately meaningless, because one simply cannot blur reality under any circumstances where minors are involved.

Somewhat to his credit, Petitioner resisted the temptation to meet the minor in person, but it is unclear if he would have continued to resist had her father not intervened. Although Petitioner declined to meet her while camping, his statement about the next weekend indicates that he was keeping the door open to that possibility in the future. And although he had rational thoughts at times, he continued to indulge the fantasy.

It is a positive factor that Petitioner taught school on a regular basis for the 2006-2007 term without any complaints and it is some evidence that the problem stemmed from boundary failure

rather than a more serious problem. However, Petitioner's "lapse in judgment" was not momentary nor fleeting. While Petitioner may have learned a valuable lesson as he claims, and it may have been enough to prevent future problems, without more evidence there is simply no way to determine if he poses a continued risk to students.

The evidence in this case fails to establish Petitioner's fitness to hold a Texas teaching certificate. It was his burden to demonstrate that he is fit despite the conduct established by the evidence, and he failed to do so. For these reasons, the ALJ finds that Petitioner has failed to prove that he is worthy to instruct the youth of this state at this time. The ALJ recommends that the Board deny Mr. Khalili's application at this time.

III. FINDINGS OF FACT

1. Esmail Khalili (Petitioner) applied for teacher certification from the State Board for Educator Certification (Board) in 2006.
2. In processing Petitioner's application, the Board's staff (Staff) learned that Petitioner had been the subject of a police investigation relating to allegations of on-line solicitation of a minor. The results of its investigation of the allegations led Staff to deny the application. Petitioner appealed the denial and requested a hearing.
3. On August 9, 2006, Staff sent a notice of hearing indicating the reasons why Petitioner's application for certification should be denied. The notice informed Petitioner of Staff's allegations, of the date, time, and place of the hearing, and of the applicable rules and statutes.
4. The hearing convened on May 23, 2007, before Administrative Law Judge Carol S. Birch at the State Office of Administrative Hearings (SOAH), William P. Clements Building, 300 W. 15th Street, Austin, Texas. Staff appeared and was represented by attorney Andrew Allen. Respondent appeared and was represented by his father. The hearing recessed the same day, but the record did not close until August 8, 2007, after the submission of additional evidence and written closing arguments.
5. Between November 2005 and April 2006, Petitioner engaged in internet communications with a 15-year-old girl (the minor).
6. At the time the communications began, Petitioner was 26 years' old and the minor represented herself to be 18 years' old.

7. In February 2006, at a time when Petitioner was 27 and a student teacher, the minor told him that she was only 15 years' old.
8. After learning that the girl was a minor, Petitioner continued to communicate with her via the internet and by cell phone.
9. Among other things, Petitioner told the minor at various times that: he loved her; he had a crush on her; she was beautiful; he wanted to meet her; he wanted to make out with her; and she was special.
10. Petitioner's communications with the minor after he knew her real age were clearly inappropriate.
11. Petitioner did not stop communicating with the minor until directed to do so by her father.
12. Petitioner's on-line relationship with the minor caused her emotional harm.
13. After the incident, Petitioner did not seek professional counseling or obtain a psychological evaluation to help determine the scope of his problem.
14. Without additional evidence, there is no way to determine if Petitioner poses a continued risk to students.

IV. CONCLUSIONS OF LAW

1. The State Board for Educator Certification (SBEC) has authority to bring this action and render a decision. TEX. EDUC. CODE ANN. §§ 21.031, 21.039, and 21.041.
2. The State Office of Administrative Hearings has authority to hear this matter and issue a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. The Board, acting through its Staff, may administratively deny teacher certification, and the Board may make the final decision in the matter based upon satisfactory evidence that the applicant for certification is unworthy to instruct or to supervise the youth in this state. 19 TEX. ADMIN. CODE § 249.12.
4. Petitioner received proper and timely notice of the administrative denial and the hearing. 19 TEX. ADMIN. CODE § 249.12(c); TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner has the burden to prove he is worthy to instruct or to supervise the youth in this state. 19 TEX. ADMIN. CODE § 249.22(b).
6. Based on Findings of Fact Nos. 5-14, Petitioner has failed to prove that he is worthy to

instruct or to supervise the youth in this state.

7. The Board should deny Petitioner's application for certification. 19 TEX. ADMIN. CODE §§ 249.12, 249.17.

SIGNED October 8, 2007.

**CAROL S. BIRCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**