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DIVISION II

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STATE OF WASHINGTON

DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JASON LEN,

No. 45534-0-II

Appellant,

v.

OFFICE OF THE SUPERINTENDENT OF  
PUBLIC INSTRUCTION,

UNPUBLISHED OPINION

Respondent.

SUTTON, J. —The Office of the Superintendent of Public Instruction (OSPI) suspended Jason Len’s teacher’s certificate for 12 months for unprofessional conduct with students, and required him to undergo a psychological examination and counseling as a condition for reinstatement. The superior court affirmed OSPI’s final order. Len appeals and argues that (1) substantial evidence does not support the findings of fact and that the findings do not support the conclusions of law that Len violated generally recognized professional standards for teachers, violated the principal’s no-contact directives, and lacked credibility, (2) the administrative law judge (ALJ) did not correctly weigh the evidence or apply the disciplinary factors in WAC 181-86-080, (3) the ALJ erred in concluding that Len must submit to a psychological evaluation and counseling as a condition for reinstatement, and (4) the ALJ erred by not requiring a higher burden of proof than clear and convincing evidence, by conducting the hearing de novo, and by allowing additional evidence. We hold that (1) substantial evidence supports the findings of fact and the findings support the conclusions of law that Len violated generally recognized professional

standards for teachers, violated the no-contact directives, and lacked credibility, (2) the ALJ correctly weighed the evidence and applied the relevant disciplinary factors, and (3) the appeal hearing complied with RCW 34.05.449(2) and WAC 181-86-150. We affirm OSPI's order that suspended Len's teacher's certificate for 12 months and required him to undergo a psychological examination and counseling as a condition for reinstatement.

### FACTS

The Bellevue School District (District) employed Len to teach grades 6 through 12 at its International School. During his 10-year tenure at the school, Len primarily taught math and science to middle-school-aged boys. He also served as an advisor to the school's math and science team for several years, advisor to the school's robotics team and student government for one year, and as a chaperone on school field trips and student social functions. Over a period of two years, from 2006 to 2008, Len spent a significant amount of time socializing with several students, mostly sophomores, outside of school. All of these boys met Len as students at the International School, and most of them had been his students when they were younger. Len's conduct from 2006 to 2008 is the focus of the 12 month suspension.

#### I. LEN'S SOCIAL INTERACTIONS WITH STUDENTS

Len socialized with these boys by taking them out to meals, giving them rides in his personal vehicle, and watching them play video games. Frequently, he spent time with the boys one-on-one. At other times, he socialized with groups of boys. Among other things, Len took the boys to local parks and malls, drove them on trips to the beach, and spent extended periods of time at some of their homes, often "until the small hours of the morning." Clerk's Papers (CP) at 7-8.

Len texted or called the boys to ask if they wanted to spend time together. With one exception, he had no social relationship with the boys' parents and socially interacted almost exclusively with the boys. When Len took the boys out, he did not inform the parents where they were going unless the parents specifically asked, and he seldom asked the parents' permission to spend time with the boys. Len's conduct caused some parents to talk to their sons about whether any sexual contact had occurred.

Len spent the most one-on-one time with one boy whom Len met socially on a nearly weekly basis for up to four hours at a time. The boy's mother and stepfather expressed their discomfort with this relationship, and the boy's mother wrote to Len asking him to confine his interactions with her son to school-related activities.

## II. LEN'S GIFTS AND LOANS TO STUDENTS

Len took the boys to restaurants, bought favored students gifts such as clothes, small souvenirs, and a toy helicopter, and loaned one student money to buy a pair of shoes. The boys often contacted Len and asked him to join in on their teenage activities, to drive them around town in his car, and to come to their homes to hang out. On one occasion, Len drove several students to buy a video game to be released at midnight. They returned to a student's house and played games and Len did not leave until 3:00 a.m.

## III. LEN'S INVOLVEMENT IN STUDENT SOCIAL AFFAIRS

Len also interjected himself into the students' social affairs. On one occasion, he attended a school-sponsored student dance where students attended with their respective dates while Len socialized with the students. When some of the boys became "frustrated and left the dance" to go to a restaurant, Len encouraged the girls "to reconcile with the boys" by offering to drive them to

the restaurant. CP at 10. They declined his offer; the next week, Len “approached the girls again and encouraged them to reconcile with the boys.” CP at 10. They again rejected his offer and one of the girls spoke angrily toward Len about the way he was interjecting himself in their personal affairs.

#### IV. EVENTS WITH STUDENTS

During a number of school sponsored trips, Len spent time in sleeping areas with students. He also spent time with a few of his male students who were not part of any school sponsored event; these contacts occurred during the summer, after school, and on weekends.

During a trip to a jazz festival in Idaho, Len invited several boys to spend the night in his room to play video games on Len’s game console that he bought for this trip. Len, dressed in pajamas, watched them play and only slept in his bed for part of the night. The school’s jazz choir advisor found out later that Len helped these students violate curfew. On one occasion, without the District’s knowledge or advance approval and in violation of the District’s policy, Len had a party for the high school math team before its spring competition and invited the students to sleep over at his house. No other adults were present and the school’s principal did not know about the event until after it occurred. On another occasion, Len was invited to a former student’s family barbeque along with several other students who planned to spend the night there prior to leaving on a trip with that student and his stepfather the next morning. Len stayed overnight in the former student’s room and watched the students play video games, without the knowledge or consent of the former student’s parents.

Len took a weekend road trip to the Oregon coast with four students, with their parents' permission (one student had just graduated). Len shared rooms with the students during this trip and one night shared a room with only one student and slept side-by-side next to the student.

#### V. DISTRICT INVESTIGATION AND PRINCIPAL'S DIRECTIVES

In March 2008, after a teacher at the school informed the principal about Len's interactions with students, the principal initiated an investigation and interviewed certain students and their parents. On March 13, during the investigation, the principal gave Len formal directives limiting Len's permissible interactions with students and prohibiting him from certain conduct, including (1) prohibiting Len from discussing the investigation with school students or their parents, (2) prohibiting Len from spending time with students after school hours, and (3) limiting Len's interactions with students to those of a professional teacher/student relationship.

In the fall of 2008, while the investigation continued, the District involuntarily transferred Len to another school within the District. Upon completion of the investigation in November 2008, the District issued a Letter of Reprimand to Len for his "failure to respect appropriate professional boundaries with students" and directed him to stop engaging in his "alarming pattern of behavior." CP at 802-05. He was directed to: (1) not visit students' homes without explicit permission from administrators, (2) have no telephone, email, or other communication with District students outside the normal requirements of teacher-student communication on school-related matters, and (3) refrain from any social or other contact with District students away from school. If he unexpectedly ran into students outside of school, Len was "directed to promptly separate [him]self from the situation in a polite and professional manner." CP at 11. In addition to the no-contact directives, the District imposed a number of directives designed to limit Len's

interactions with students in school-sanctioned activities (restricting where he could park, banning him from chaperoning or supervising students on overnight trips, and prohibiting him from being the sole chaperone/supervisor for any evening or non-school day local events).

Len ignored these no-contact directives. In May 2008, two months after the principal issued the directives, during the investigation, another teacher witnessed Len talking with students about the investigation. Between 2008 and 2010, after Len was transferred to another school, he continued to talk with one of the International School students and met another student several times.

#### VI. TEACHER DISCIPLINARY PROCESS

After the District investigated, reprimanded, and reassigned Len, the District's superintendent transmitted a complaint letter to the Office of Professional Practices (OPP), an office within OSPI.<sup>1</sup> See WAC 181-86-110; WAC 181-87-095.

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<sup>1</sup> The complaint triggered an investigation by OSPI, which enforces Washington's code of professional conduct for teachers. RCW 28A.410.010(2), .095(1). Upon receipt of a complaint alleging unprofessional conduct, OPP investigates to ascertain whether the teacher failed to comply with the rules of professional conduct. RCW 28A.410.095; WAC 181-86-100(2). Once OPP completes its investigation, it issues a proposed order informing the teacher of its factual findings, the disciplinary action that OPP intends to take, and the teacher's appeal rights. WAC 181-86-130; RCW 28A.410.095(4). A teacher has 30 days to appeal the proposed order before it becomes final. WAC 181-86-135(1).

A teacher may appeal in writing stating why OPP's proposed discipline is not warranted and requesting an informal review under WAC 181-86-145. OSPI appoints an independent review officer who convenes a committee to review informal appeals and make disciplinary recommendations to the review officer. WAC 181-86-095. The review officer, acting with the committee's recommendations, may uphold, reverse, or modify OPP's proposed disciplinary order. WAC 181-86-145(3). The review officer then issues a final order. WAC 181-86-135, -145. A teacher may then request a formal review under WAC 181-86-150, which results in an Administrative Procedures Act (APA), chapter 34.05 RCW, hearing before an ALJ. WAC 181-86-150(1)-(2).

OPP initiated its investigation on December 12, 2008 after receiving the District's complaint alleging unprofessional conduct by Len. OPP concluded its investigation on March 8, 2011, and issued a proposed order recommending suspension of Len's teaching certificate for 12 months and requiring him to complete a psychological evaluation as a condition for reinstatement. Len administratively appealed the order and, following an informal agency review, OSPI concluded that OPP's proposed discipline was appropriate and issued a final order on November 14, 2011. Len appealed and requested a formal adjudicative hearing under WAC 181-86-150.

In August 2012, an ALJ conducted an adjudicative hearing under RCW 34.05.449(2) and WAC 181-86-150 to determine whether clear and convincing evidence supported OSPI's order suspending Len's teaching certificate for 12 months with conditions on reinstatement. The ALJ issued the agency's final decision on December 18, 2012, concluding that Len committed acts of unprofessional conduct in five ways that constituted a "flagrant disregard or clear abandonment of generally recognized professional standards in the course of" assessing, treating, instructing, or supervising students. CP at 26; *see* WAC 181-87-060.

The ALJ also concluded that, in the course of supervising students, (1) Len violated school, District, and city rules, (2) Len engaged in professional misconduct by selecting some students for "vastly differential treatment as favorites," CP at 27, (3) Len "lavish[ed] meals and gifts on students," CP at 28, (4) Len "interfered with relationships between parents and students, . . . usurp[ing] the parental decision-making role," CP at 28, (5) Len engaged in conduct that disregarded professional teacher-student boundaries "resembl[ing] grooming behavior for sexual abuse," CP at 29, and (6) Len's conduct created potential legal liability for his employer.

The ALJ also made 17 specific findings regarding Len's testimony and his credibility, ultimately finding Len's statements "weak," "unpersuasive," and "untruthful." CP at 13-17. Len appealed the ALJ's final order to superior court. Because he did not request a stay, he completed his 12 month suspension on December 18, 2013. The superior court affirmed OSPI's final order. Len appeals.

### ANALYSIS

Len argues that (1) substantial evidence does not support OSPI's findings of fact<sup>2</sup> and the findings do not support the conclusions of law that Len violated "generally recognized professional standards" and that Len was not truthful, Br. of Appellant at 2, (2) the ALJ lacked substantial evidence or authority to require Len to submit to a psychological evaluation and counseling before his teacher's certification could be reinstated, (3) the ALJ did not correctly apply the 11 disciplinary factors under WAC 181-86-080, and (4) because his career was impacted, the appeal hearing should not have been conducted de novo with additional evidence permitted, but rather OSPI should have been required to prove and defend OPP's investigation and proposed 12 month suspension. Thus, he concludes that OSPI's final order is not supported by substantial evidence, OSPI erroneously interpreted or applied the law, and the order is arbitrary or capricious under RCW 34.05.570.

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<sup>2</sup> He argues that (1) his conduct was not such an egregious departure from the regulations governing professional conduct for teachers, (2) none of his conduct fell within "'unprofessional conduct' or a '[lack of] good moral character' and 'personal fitness,'" because the WACs do not provide "guidelines governing interpersonal relationships with students beyond inappropriate physical and/or sexual contact," and that he had no "prior advance knowledge" that his conduct was unprofessional, and (3) OSPI improperly concluded that he was dishonest during the investigation. Br. of Appellant at 9 (alterations in original), 17-18.



The State responds that (1) substantial evidence supported the ALJ's findings of facts and conclusions of law, (2) OSPI established by clear and convincing evidence through the testimony of teachers, professionals, the principal, and the OPP director that Len's conduct was an egregious departure from the regulations governing professional conduct for teachers, (3) the ALJ correctly weighed the evidence and applied the relevant disciplinary factors in WAC 181-86-080, and (4) the ALJ properly conducted the appeal hearing de novo and properly permitted additional evidence under RCW 34.05.449(2) and WAC 181-86-150. We agree with the State.

#### I. STANDARD OF REVIEW

The Administrative Procedures Act (APA), chapter 34.05 RCW, governs judicial review of OSPI orders in teacher certification cases. *Frazier v. Superintendent of Pub. Inst.*, 106 Wn.2d 754, 756, 725 P.2d 619 (1986); RCW 34.05.558, .570. We review the agency's record rather than the trial court's record. *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 201-02, 286 P.3d 417 (2012), *review denied*, 177 Wn.2d 1002 (2013); *see Frazier*, 106 Wn.2d at 756. We review OSPI's findings of fact for substantial evidence, which is "evidence sufficient to persuade a fair-minded person of the truth of an asserted premise."<sup>3</sup> We review OSPI's legal conclusions de novo, but we give "substantial weight to the agency's interpretation when the subject area falls

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<sup>3</sup> *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). This standard requires us to "view inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002) (quoting *Schofield v. Spokane County*, 96 Wn. App. 581, 588, 980 P.2d 277 (1999)). "Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations." *Gibson v. Emp't Sec. Dep't*, 185 Wn. App. 42, 53, 340 P.3d 882 (2014).

within the agency's area of expertise.”<sup>4</sup> “On appeal, ‘[t]he burden of proving that the agency action was invalid . . . lies with the party challenging the action.’”<sup>5</sup>

When reviewing mixed questions of law and fact, this court must “(1) determine whether factual findings are supported by substantial evidence, (2) make a de novo determination of the correct law, and (3) apply the law to the applicable facts.” *Gibson v. Emp’t Sec. Dep’t*, 185 Wn. App. 42, 52, 340 P.3d 882 (2014); see *Campbell v. Emp’t Sec. Dep’t*, 180 Wn.2d 566, 573, 326 P.3d 713 (2014). We do not reweigh credibility or demeanor evidence when reviewing factual inferences made by the ALJ before interpreting the law, nor do we substitute our judgment of the facts for that of the agency. *Ames v. Dep’t of Health Med. Quality Health Assurance Comm’n (MQAC)*, 166 Wn.2d 255, 260-61, 208 P.3d 549 (2009).

## II. GENERALLY RECOGNIZED PROFESSIONAL STANDARDS FOR TEACHERS

Len argues that the punitive nature of certification revocation requires courts to “strictly and narrowly constru[e regulations] against the enforcing agency,” and, because the regulations

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<sup>4</sup> *B & R Sales, Inc. v. Dep’t of Labor & Indus.*, 186 Wn. App. 367, 344 P.3d 741, 746 (2015) (quoting *Dep’t of Labor & Indus. v. Mitchell Bros. Truck Line*, 113 Wn. App. 700, 704, 54 P.3d 711 (2002)).

<sup>5</sup> *Mitchell Bros. Truck Line*, 113 Wn. App. at 704 (quoting *Mader v. Health Care Auth.*, 109 Wn. App. 904, 911, 37 P.3d 1244 (2002), reversed on other grounds, 149 Wn.2d 458, 70 P.3d 931 (2003)); see *Campbell v. Emp’t Sec. Dep’t*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); see also *Thomas v. Emp’t Sec. Dep’t.*, 176 Wn. App. 809, 812, 309 P.3d 761 (2013); RCW 34.05.570(1)(a).

do not provide sufficient guidance to defining generally recognized professional standards, the ALJ erred in concluding that Len's conduct exceeded the bounds of these standards.<sup>6</sup> We disagree.

Unprofessional conduct occurs when a teacher demonstrates a "flagrant disregard or clear abandonment of generally recognized professional standards in the . . . [a]ssessment, treatment, instruction, or supervision of students." WAC 181-87-060. "Student" is broadly defined and includes students "enrolled in any school or school district served by the education practitioner" and former students under 18 years old who have been under the "supervision, direction or control" of the educator. WAC 181-87-040(2), (4). Private conduct is subject to the professional conduct standards "where the education practitioner's role as a private person is not clearly distinguishable from the role as an education practitioner and the fulfillment of professional obligations." WAC 181-87-020.

"[W]hether particular conduct renders a professional unfit to practice is determined in light of the purpose of professional discipline, and the common knowledge and understanding of members of the particular profession." *Faghih v. Dep't of Health Dental Quality Assurance*

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<sup>6</sup> Br. of Appellant at 17-18. Len bases his argument on the assertion that a teacher certification suspension is "quasi-criminal" in nature, and thus the ALJ was required to hold the District to a higher standard. Br. of Appellant at 14. We disagree.

Although a professional license is a property interest for which revocation requires due process, to revoke a professional license, the fact finder need only meet a "clear and convincing evidence" standard, rather than the reasonable doubt standard in criminal proceedings. *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 8, 256 P.3d 339 (2011). And WAC 181-86-170(2) specifically provides that proof in teacher disciplinary proceedings must be established by the "clear and convincing" evidence standard. Thus, we reject Len's argument that a certification suspension proceeding is quasi-criminal in nature.

*Comm'n*, 148 Wn. App. 836, 848-49, 202 P.3d 962 (2009) (quoting *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 605, 903 P.2d 433, 909 P.2d 1294 (1996)). OSPI may establish generally recognized professional standards under WAC 181-87-060 using the testimony of educators, administrators, and others with specific knowledge of the standards observed by the professional education community. *See Heinmiller*, 127 Wn.2d at 605 (common knowledge and understanding of members of a profession requires fact finding); *see also Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 743, 818 P.2d 1062 (1991) (understanding among members of a profession that particular conduct is unacceptable is a question of fact); *see also Johnson v. Dep't of Health*, 133 Wn. App. 403, 411-12, 136 P.3d 760 (2006) (professional standards can be proven by a person who is not a member of a profession if she or he has work-based knowledge of the standards).

Based on substantial evidence in the form of parent, teacher, and principal testimony, as well as Len's testimony, the ALJ found, among other things, that Len (1) singled out certain students for favoritism, (2) bought gifts, meals, and lent money to students, (3) interfered in parent-child relationships, (4) took students to parks after the parks closed, and (5) was not credible. Based on the findings,<sup>7</sup> the ALJ concluded that Len violated the school's and District's policies

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<sup>7</sup> All of these findings of fact were supported by substantial evidence from parents, teachers, the principal, and the OPP director, all of whom were familiar with Len's conduct and the conduct expected of teachers.

and local city ordinances, failed to obtain parent or the District's approval when necessary, and violated generally recognized professional standards.

### III. VIOLATION OF NO-CONTACT DIRECTIVES

Len also challenges the ALJ's findings<sup>8</sup> that he violated the no-contact directives given to him by the school's principal. The ALJ found that the student and teacher witnesses, who described Len's contact with students after the principal instituted the no-contact directives, were credible whereas Len's testimony was not credible; the ALJ concluded that Len repeatedly violated the directives by contacting students, and that Len thereby "demonstrate[d] a behavioral problem." CP at 3, 31. "We do not evaluate witness credibility or reweigh the evidence." *Kraft v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 708, 717, 187 P.3d 798 (2008). Nor will we disturb credibility determinations on appeal. *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 672, 266 P.3d 932 (2011). Len fails to show that the ALJ lacked substantial evidence in finding that Len violated the no-contact directives.

### IV. EVIDENCE OF ARGUABLY PRIVATE CONDUCT SHOULD HAVE BEEN EXCLUDED

Len argues that, under WAC 181-87-020, the ALJ should have excluded and not considered evidence of his Oregon trip with students in 2007.<sup>9</sup> He argues that the Oregon trip was

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<sup>8</sup> Len does not specifically identify which of the ALJ's findings of fact he asserts are erroneous, but findings of fact 48 and 49 address Len's violation of the no-contact directives.

Len also argues that the principal's Letter of Reprimand did not specify any "regulation, policy or standard of the District" that Len violated. Br. of Appellant at 22. But we review the ALJ's factual findings and conclusions of law, not the comprehensiveness of the principal's Letter of Reprimand. See RCW 34.05.570(1)(a), (3)(d), (e), (i). Accordingly, we need not address Len's arguments regarding the principal's letter.

<sup>9</sup> WAC 181-87-020 provides, "As a general rule, the provisions of this chapter shall not be applicable to the private conduct of an education practitioner except where the education

private conduct to which the teacher's code of professional conduct does not apply. The State responds that the ALJ could consider the Oregon trip because, at the time, Len's role "was not clearly distinguishable from his role as an educator." Br. of Resp't at 31-32. We agree with Len that the ALJ should have excluded this evidence under WAC 181-87-020. But we hold that, in light of the substantial evidence demonstrating that Len continually violated generally recognized professional standards, the ALJ's failure to exclude this evidence was harmless error.<sup>10</sup>

#### V. CREDIBILITY FINDINGS OF FACT

Len argues that the ALJ erred in entering 17 findings that he was untruthful during the investigation and hearings. But Len did not appeal certain findings of fact related to his credibility that are now verities on appeal including Findings of Fact 33-43 and 46-47. RAP 10.3(g), (h); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). In reviewing the record before OSPI, "we will not substitute our judgment for that of the agency regarding witness credibility or the weight of evidence." *Smith v. Emp't Sec. Dep't.*, 155 Wn. App. 24, 35, 226 P.3d 263 (2010). Testimony from students, teachers, and the principal consistently contradicted Len's version of events, whom the ALJ found to be not credible on multiple occasions. The ALJ's factual findings show that other witnesses refuted Len's description of the events with "clear and

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practitioner's role as a private person is not clearly distinguishable from the role as an education practitioner and the fulfillment of professional obligations."

Evidence at the hearing showed that the students who went on the trip with Len were his current students and that he "shared a bed" with one of the boys. CP at 15. We note that the ALJ did not make any reference to the Oregon trip in its conclusions of law.

<sup>10</sup> "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

convincing” evidence, as required under WAC 181-86-170(2). We reject Len’s challenge to the ALJ’s credibility findings.

#### VI. PSYCHOLOGICAL EVALUATION

Len next argues that the ALJ erred in affirming the agency’s directive that Len must submit to a psychological evaluation and counseling as a condition for reinstatement of his teaching certification.<sup>11</sup> We disagree.

A party challenging factual findings on appeal must do more than “argu[e] his version of the facts while ignoring testimony by other witnesses that supports each finding.” *In re Disciplinary Proceeding Against Kagele*, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003). OSPI’s regulations explicitly authorize imposition of “conditions precedent to resuming professional practice.” WAC 181-86-070(2). OSPI’s regulations authorize imposition of “conditions precedent to resuming professional practice.” WAC 181-86-070(2). In the record before the ALJ, the District described Len’s behavior as “alarming.” CP at 798. The ALJ concluded that a psychological evaluation was appropriate given that Len’s conduct fell so far outside acceptable boundaries “for appropriate student-teacher relationships” that it “resemble[d] grooming.” CP at 29, 32. The ALJ also concluded, based on testimony about Len’s conduct, that Len demonstrated a “behavioral problem,” one of the factors relevant to determining “the appropriate level and range of discipline.” CP at 30; WAC 181-86-080(6). Len again asks us to substitute our interpretation

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<sup>11</sup> WAC 181-86-013(3) requires that a certified teacher must not have a behavioral problem; this is among the factors that the agency must consider prior to issuing a disciplinary order. WAC 181-86-080 (“Prior to issuing any disciplinary order under this chapter the superintendent of public instruction . . . shall consider, at a minimum, the following factors to determine the appropriate level and range of discipline . . . (6) Any activity that demonstrates a behavioral problem.”).

of the facts for the ALJ's interpretation and we decline to do so. Under WAC 181-86-070(2), the ALJ had a legal and factual basis for requiring Len to submit to a psychological evaluation as a condition for reinstatement of his teaching certificate. Len's arguments fail.

#### VII. WAC 181-86-080 DISCIPLINARY FACTORS

Len argues that the ALJ's analysis of the disciplinary factors in WAC 181-86-080 was flawed as a matter of law and he asks this court to substitute its interpretation of the facts for the ALJ's interpretation. The State responds that the ALJ's findings are supported by substantial evidence and those findings supported the ALJ's consideration of the disciplinary factors in WAC 181-86-080. We agree with the State and address each of the relevant disciplinary factors.

##### A. Seriousness of the Conduct and Actual or Potential Harm to Students

Len challenges the ALJ's legal conclusion that his conduct was serious and an actual or potential harm to students. In analyzing the first factor under WAC 181-86-080(1), the ALJ concluded:

*Factor (1) — Seriousness of the acts, and actual or potential harm to persons or property.* The Appellant's acts were serious. He modeled for students violations of rules, and drew them into violating rules along with him. He showed extreme favoritism to certain students. He gave significant financial favors to some students. He interfered with relationships between parents and students and usurped the parental decision-making role. He flagrantly violated personal boundaries between teachers and students. He caused actual harm by creating anxiety and guilt on the part of parents, and conflicts between parents and children. He created potential harm to the School District by exposing the District to the risk of litigation for his conduct. This factor weighs against the Appellant.

CP at 30.

Len argues that, because no witness testified that Len harmed any students, the ALJ lacked a factual basis to conclude that he caused "actual or potential harm." Br. of Appellant at 25. But



the ALJ made detailed findings, based on testimony, that Len's interactions with his students "shocked" parents, disappointed other teachers, "interfered with relationships between parents and students," "usurped the parental decision-making role," showed certain students "favoritism," and drew students into violating rules with him. CP at 9, 28, 30. Based on this testimony, the ALJ properly concluded that Len's conduct was serious, and caused both actual and potential harm.

Len asks us to substitute our interpretation of the facts for that of the ALJ, but he fails to show that the hearing officer's factual determinations were not supported by substantial evidence. Nor does Len show that the ALJ committed legal error in making her conclusions of law; rather, he asks us to draw different conclusions from the same evidence. "We will not overturn 'findings based simply on an alternative explanation or version of the facts previously rejected by the hearing officer and Board.'" *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 314, 209 P.3d 435 (2009) (quoting *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 212, 125 P.3d 954 (2006)). Len fails to show how the ALJ's treatment of the first factor in WAC 181-86-080 was legal error and thus his argument fails.

#### B. Criminal History

Len next argues that the ALJ did not give sufficient weight to the second factor in WAC 181-86-080 – that he had no criminal history. The ALJ concluded, "*Factor (2) — Criminal history*. The Appellant has no criminal history. This factor weighs in favor of the Appellant." CP at 30. Contrary to Len's argument, the ALJ's conclusion clearly states that this factor weighs in Len's favor; Len fails to show how this conclusion is legal error. Thus, Len's argument fails on this second factor.

C. Disregard for Health, Safety, or Welfare of Students

As to the fifth factor in WAC 181-86-080(5), the ALJ concluded:

*Factor (5) — Whether conduct demonstrates a disregard for health, safety or welfare.* The Appellant's conduct demonstrates a disregard for the welfare of students, parents, and the parent-child relationship, for the reasons discussed under factor (1), above. His fast driving with students in his vehicle in the Wilburton Park incident demonstrates a disregard for their safety. This factor weighs against the Appellant.

CP at 30.

Len argues that, because none of the State's witnesses testified that he was a threat to the students, the ALJ did not have sufficient evidence to conclude as a matter of law that his conduct demonstrated a disregard for health, safety or welfare.

The ALJ relied on the same facts presented in her analysis of the first factor in WAC 181-86-080(1), as well as testimony about Len driving students to various locations outside of school, to reach her conclusion on this factor. We hold that the ALJ's findings of fact supported the conclusion that this fifth factor weighed against Len.

D. Character and Fitness—Mitigating Factors

Len then argues that the ALJ ignored mitigating factors and factors supporting his character and fitness under WAC 181-86-080(9) and (10). Specifically, Len asserts that the ALJ gave little weight to "[t]he fact that virtually all students who were interviewed by OPP or testified at [the] hearing expressed dismay that Mr. Len would receive discipline for his interactions." Br. of Appellant at 30. He argues that this was a mitigating factor and "strongly support[ed his] qualification to continue in the teaching profession." Br. of Appellant at 31. He also argues that

the failure of students' parents to object to Len's interactions prior to the District's investigation is a mitigating factor ignored by the ALJ.

Len argues that we should draw a different conclusion from the same facts. But we do "not substitute our judgment for that of the agency as to the facts. . . . Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations." *Gibson*, 185 Wn. App. at 53. We hold that the ALJ's factual findings support its conclusion that a 12 month suspension from teaching, and a psychological examination and counseling before reinstatement, was an appropriate discipline.

#### VIII. THE ADMINISTRATIVE ADJUDICATIVE PROCEEDING

Finally, Len argues that (1) the ALJ erred as a matter of law in holding the appeal hearing de novo, rather than requiring the OPP to prove and defend its investigative facts in support of its proposed discipline,<sup>12</sup> (2) the APA does not authorize de novo review in these appeal hearings, and (3) the ALJ erred by not reviewing the same record that OPP reviewed in proposing its 12 month suspension of his teaching certificate. We disagree. The plain language<sup>13</sup> of the APA's formal adjudicative process allows the ALJ to review additional evidence from the parties; the

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<sup>12</sup> On November 14, 2011, OSPI issued a final order suspending Len's teaching certificate for 12 months. On December 9, 2011, Len appealed that suspension order under WAC 181-86-150, which provides a formal review process requiring the superintendent to "conduct a formal administrative hearing in conformance with the [APA], chapter 34.05 RCW." WAC 181-86-150(2).

<sup>13</sup> "To discern the plain meaning of undefined statutory language, we give words their usual and ordinary meaning and interpret them in the context of the statute in which they appear." *Protect the Peninsula's Future v. Growth Mgmt. Hr'gs Bd.*, 185 Wn. App. 959, 969, 344 P.3d 705 (2015).

State has the burden of proof, and both the State and Len were allowed to submit additional evidence for the ALJ to consider at the appeal hearing. The ALJ did not err.

The appeal hearing before the ALJ was a formal APA “adjudicative proceeding.” RCW 34.05.422(1)(c) (“an agency may not . . . suspend . . . a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding”); *see* WAC 181-86-150(2). At the appeal hearing, “the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence” as necessary “for full disclosure of all relevant facts and issues.” RCW 34.05.449(2). Under the APA, OSPI may designate an ALJ as the presiding officer to make the final decision and enter the final order in teacher certification matters. *See DaVita, Inc. v. Dep’t of Health*, 137 Wn. App. 174, 182, 151 P.3d 1095 (2007) (Washington’s APA permits an agency to designate an ALJ as the presiding officer authorized to make a final decision and enter a final order); RCW 34.05.425(1)(b). “[R]ather than reviewing the record, the presiding officer actually takes the evidence, listens to oral argument, and issues her own findings and conclusions.” *DaVita*, 137 Wn. App. at 182; RCW 34.05.449(2), .461(4). In this APA formal adjudicative proceeding, OSPI has the burden of proof and the right to present all relevant evidence to meet its burden. RCW 34.05.449(2); WAC 181-86-170(2).

Similarly, Len had the opportunity to present any additional evidence for the ALJ to consider. Len fails to show that the ALJ erred in following the formal process, or that the ALJ should have been otherwise restricted to a less complete factual record.<sup>14</sup> Nor does Len explain how the ALJ's more comprehensive review of evidence amounted to an error of law. Because RCW 34.05.449(2) and WAC 181-86-150 required the formal APA adjudicative process in Len's appeal hearing and the opportunity to submit additional evidence, his arguments fail.

#### CONCLUSION

Substantial evidence supports the ALJ's findings of fact that Len violated generally recognized professional standards of teacher conduct and that he violated the principal's no-contact directives. The ALJ correctly weighed the disciplinary factors in WAC 181-86-080 and, because the factual findings are supported by substantial evidence, they support the ALJ's conclusions of law. The ALJ correctly applied a de novo review standard and allowed additional evidence during the APA appeal hearing under RCW 34.05.449(2) and WAC 181-86-150.

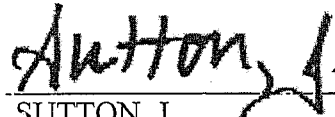
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<sup>14</sup> Len cites to *Hoagland v. Mount Vernon Sch. Dist. No. 320*, 95 Wn.2d 424, 623 P.2d 1156 (1981) for the proposition that de novo review is not appropriate under the APA unless it is expressly required by statute. This is not a correct interpretation of *Hoagland*; in that case our Supreme Court held that a 1976 amendment to former RCW 28A.58.480 required the superior court to apply the same standard of review as that prescribed in the APA. *Id.* at 427 n.2. *Hoagland* did not hold that de novo review is precluded unless expressly required by statute.

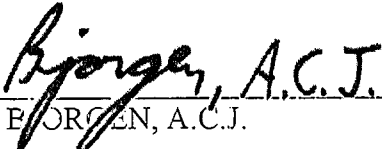
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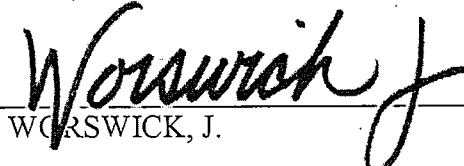
We affirm OSPI's final order suspending Len's teacher's certificate for 12 months and requiring him to undergo a psychological examination as a condition for reinstatement.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
SUTTON, J.

We concur:

  
BJORGE, A.C.J.

  
WORSWICK, J.