

STATE OF SOUTH DAKOTA ) DIVISION OF THE SECRETARY  
  ) :SS  
COUNTY OF HUGHES ) SOUTH DAKOTA DEPT. OF EDUCATION

In the Matter of the )  
Teaching Certificate of )  
Brian J. Smith. )

DSE 2016-8  
**ORDER REGARDING  
SOUTH DAKOTA TEACHING  
CERTIFICATION**

Pursuant to the authority granted to the Secretary of the South Dakota Department of Education by SDCL 13-42-9, 13-42-15, and 13-43-28.1, following receipt of a Complaint from the South Dakota Professional Teachers Practices and Standards Commission, and after review of the entire record herein, including the Complaint from the Commission and attached exhibits and the entire hearing record, the Secretary enters the following order:

1. The Secretary affirms and adopts the Findings of Fact and Conclusions of Law of the Commission attached as Exhibit A and incorporated herein by this reference.
2. Based on the foregoing Findings of Fact and Conclusions of Law, Brian J Smith's South Dakota Teaching Certificate 51662 is **hereby immediately, permanently revoked.**
3. Notification of this Order will be placed on the NASDTEC registry and be placed in Smith's permanent certification file within the South Dakota Department of Education.
4. This Order and incorporated findings and conclusions are a public record pursuant to SDCL 13-42-17.1.
5. Smith is prohibited from being employed by a public school or other accredited school in South Dakota pursuant to SDCL 13-43-5.1.

This constitutes final agency action and may be appealed pursuant to SDCL 13-42-16 unless appeal has been waived.

Dated this 5th day of July, 2016.

*Melody Schopp*

Dr. Melody Schopp, Secretary  
South Dakota Department of Education

STATE OF SOUTH DAKOTA )  
COUNTY OF HUGHES ) ss: SOUTH DAKOTA PROFESSIONAL TEACHERS  
PRACTICES AND STANDARDS COMMISSION

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Summer Schultz, Superintendent	)	
Dell Rapids School District	)	PTPSC 2016-02
	)	
COMPLAINANT,	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
Brian J. Smith,	)	
	)	
RESPONDENT.	)	

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This matter came on for hearing pursuant to the provisions of SDCL § 13-43-28 before the South Dakota Professional Teachers Practices and Standards Commission on May 24, 2016, at 1:00 p.m. Central Time in Conference Room 1, MacKay Building, 800 Governors Drive, Pierre, South Dakota, as previously scheduled and duly and properly noticed for hearing.

The following members of the South Dakota Professional Teachers Practices and Standards Commission (Commission) were present at the hearing: Connie Gretschmann, Bev Kopren, Ann Noyes, Tammy Jo Schlecter, and Paula McMahan. Holly Farris, counsel for the Commission, and Ferne Haddock, executive secretary of the Commission, were also present. Vice-chair Gretschmann served as acting chair. Complainant Superintendent Summer Schultz was personally present and appeared through counsel Scott Swier of Avon, South Dakota. Respondent Brian Smith was personally present and was not represented by counsel.

Based upon the evidence presented at the hearing and documents contained in the official file, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Respondent is the holder of a valid South Dakota Teacher's Certificate, No. 51662-4, issued on April 2, 2013, and expiring on July 1, 2018.
2. On or about February 8, 2016, Superintendent Summer Schultz of the Dell Rapids School District, in Dell Rapids, South Dakota, filed a complaint against Smith with the Commission.
3. The complaint alleged that Smith violated sections of the South Dakota Code of Professional Ethics for Teachers as a result of his interactions with an 18-year-old female student in the Dell Rapids School District.
4. The complaint was served on Smith on or about February 17, 2016.
5. In his response, Smith did "not dispute the fact that [he] sent illicit text messages, via Facebook Messenger" to a female student in the Dell Rapids School District.



6. A due and proper notice of hearing was served on the parties on or about April 6, 2016.
7. At the hearing, Smith denied the allegation that he had violated the Code of Professional Ethics for Teachers, ARSD 24:08:03:01(9), which states that in fulfilling their obligations to students, educators shall "maintain professional relationships with students in a manner which is free of vindictiveness, recrimination, or harassment."
8. At the hearing, Smith denied the allegation that he had violated the Code of Professional Ethics for Teachers, ARSD 24:08:03:02(8), which states that in fulfilling their obligations to the public, educators shall "exemplify high moral standards by not engaging in or becoming a party to such activities as fraud, embezzlement, theft, deceit, moral turpitude, gross immorality, sexual contact with students, illegal drugs, or use of misleading or false statements."
9. At the hearing, Smith admitted to the allegation that he had violated the Code of Professional Ethics for Teachers, ARSD 24:08:03:01(10), which states that in fulfilling their obligations to students, educators shall "not engage in or be a party to any sexual activity with students including sexual intercourse, sexual contact, sexual photography, or illicit sexual communication."
10. Smith was employed by the Dell Rapids School District as an instrumental music instructor for approximately eleven-and-a-half years. Smith has been a teacher for approximately 22 years and, prior to Dell Rapids, has taught in Irene, Chamberlain, Dakota Valley, and Rapid City Catholic schools.
11. At the time of the conduct underlying this complaint, Student was an 18-year-old senior student at Dell Rapids High School.
12. Student had previously been enrolled in several of Smith's music classes and, as Smith described in his response to the Complaint, he "became one of [Student's] most trusted teachers."
13. Student continued to be involved in instrumental music, although her schedule did not allow her to enroll in Smith's classes during the first semester of the 2015-2016 school year. Student, however, continued to participate in regional honor bands and musical auditions. Smith assisted Student with her preparation for these events.
14. Smith and Student became Facebook friends at the beginning of the 2015-2016 school year. Smith is friends with some former students on Facebook, but at the time of the underlying conduct, Student was the only current student with whom Smith was Facebook friends.
15. Smith and Student agreed to use Facebook Messenger "as a method of quick communication for the exchange or instructions or questions either party had for the other" when they were not able to meet face-to-face at school.
16. Smith testified that he wanted to use Facebook Messenger to communicate with Student because he thought there would be transparency there and that, if questions ever arose about his conversations with Student, there would be a record. Smith testified that he and Student communicated every two to three weeks via Facebook Messenger.

17. In approximately October 2015, Student and Smith utilized Facebook Messenger to communicate about an honor band competition. Smith stated this conversation took place "late at night." During this conversation, Smith asked student how she was doing, as he had not seen her at school in over a week. Student replied that she was having issues with her parents and was in the process of moving out of her parents' home. Smith was concerned for Student's well-being and stated that, if they had been at school, he would have taken her to the counselor but since that was not an option at the time, he felt he should "try to talk her down." He encouraged her to talk about the situation with another friend on Facebook.

18. During the October 2015 conversation, Student also told Smith about issues with her boyfriend and the decision of whether or not to have sex with her boyfriend. Smith stated that he advised the student not to take the decision lightly and go to the school counselor if necessary.

19. Smith believed he handled the situation of the October 2015 conversation professionally and that, due to past issues with student suicide in the school district, they were "always told that if [they] thought a student needed an adult to talk to, then [they] should be that person if the student feels comfortable" speaking about personal problems.

20. Smith stated "it is obvious that [Student] felt secure in confiding in me."

21. Between the approximate hours of 11:00 p.m. on December 29, 2015, and 2:00 a.m. on December 30, 2015, Smith exchanged a series of messages with Student through Facebook Messenger.

22. On the evening of December 29, 2015, Smith met a friend at a bar and consumed approximately five beers between the hours of 7:00 p.m. and 11:30 p.m. Smith began the conversation with Student on his cell phone via Facebook Messenger before leaving the bar that night. Smith ultimately determined he was not safe to drive and called his friend for a ride home. Smith arrived home around midnight. Once home, Smith consumed approximately three additional beers and continued the conversation with Student until approximately 1:22 a.m. on December 30, 2015.

23. The message exchange during that time period began with Student replying to a message Smith had sent concerning the scheduling of an honor band event.

24. The December 29-30, 2015, conversation, admitted into evidence as Exhibit 4, included the following exchanges:

BS (Brian Smith): "Hey, I have been wondering about this all year. Last year, at All-state, you were very.....forward. What was that all about?"

ST (Student): "Ohhhhhhh yeah I remember that. Hah I'm not sure to be exact. I suppose since I was going through a hard time and my hormones were all over the place, and I was with you and I had a teacher crush on you, it just kinda exploded into some strange thing"

BS: "You had a crush on me?!"

ST: "Yeah haha I was also an extreme flirt then too which may have added to the situation"

BS: "Hmm, interesting No one will see this conversation, right?!"

ST: "That was something you were wondering about? I suppose yes haha I was quite confusing and forward the – Then And yeah"  
BS: "I wanted to kiss you so badly that last day"  
ST: "You did??"  
BS: "Yes, you just have this aura about you. Made me want to kiss you. Sorry"

25. The December 29-30, 2015, conversation consists of approximately 49 pages of messages with similar content. Other exchanges include:

ST: "That must have really bugged you what I did I felt bad because you were married and had [name omitted]."  
BS: "I didn't feel bad, part of me wanted to take you and in my arms and hold you tight, kiss you"  
ST: "Oh I see okay, yeah I was quite something then haha At least we have everything situated out now! Everything is out in the open and we can discuss it and get past it! no worries now! Huh"  
BS: "I suppose Still severely attracted to you"

[...]

BS: "Can I ask you a personal question?"  
ST: "Sure"  
BS: "Do you masturbate? I know you said you were still a virgin"  
ST: "I gave it to [name omitted]."  
BS: "You did?"  
ST: "Yes"  
BS: "Do you masturbate?"

[...]

BS: "And if I wasn't married and much Der than you, I would be hitting on you big time LOL. Older that is"  
ST: "I believe you already are?"  
BS: "Am I? Who was hitting on whom first?"  
ST: "I was 16 then"  
BS: "That's why I didn't act on it at the time"  
ST: "I wasn't me then"  
BS: "I'm sorry if anything I have said tonight has hurt you. Please make sure you delete this from you phone and computer. I could get fired for what I've said tonight. I just needed to hear from you what was going through your head that weekend. I just want you to be happy. I will always be there for you as a friend if you need anything!"

[...]

BS: "If you weren't 18, I never would have mentioned this to you, and probably still shouldn't have because I don't want things to be weird between us"

ST: "It won't be. Still confused as to why you wanted to know about the virginity and masturbation..?"

BS: "Want the honest truth?"

ST: "Yes"

BS: "I kept fantasizing about you having sex – this happened after you told me that you were still a virgin. I'm not proud of this, just stating a fact And one day earlier this year we talked about running away from our current life. For a moment, I wondered what it would be like running off together Just a mid-life crisis fantasy I guess"

26. The December 29-30, 2015, conversation ended at approximately 1:22 a.m with Smith telling Student, "I am tired too. Make sure you delete this conversation! Goodnight!"

27. During the December 29-30, 2015, conversation, Smith also told the student that he believed he had developed a little crush on her and that he had developed crushes on two students on prior occasions, approximately 16 years ago. He also said that after a prior student graduated, she had admitted to him that she had a crush on him and they went on "a few dates, which led to some interesting moments."

28. Smith testified that he was not fully aware of everything he had said in his conversation with Student, due to alcohol consumption.

29. Smith also testified that as the conversation drew to a close, he had stopped drinking and started to sober up a little.

30. Later on the morning of December 30, 2015, Smith woke up and looked through his conversation with Student, then blocked Student from sending him messages and deleted the messages exchanged between himself and Student.

31. On or about January 6, 2016, Student sent a Facebook message to Smith stating:

"I feel uncomfortable around you.. I used to look up to you so much, and you inspired me to express myself more through music... But now you make me want to avoid it.. You were my favorite teacher. The person I could always go to, to discuss things. You were the teacher I trusted the most. And now I avoid you, because I am scared of you and you make me feel horrible inside... Please don't contact me unless it has to do with music. If I sense you hinting or attempting to flirt with me more, I will report it."

32. On or about January 8, 2016, Dell Rapids School District was notified by Student's parents of the messages exchanged between Smith and Student.

33. On or about January 11, 2016, Smith was served with a written notice of recommendation for teacher termination by the Dell Rapids School District, signed by Dr. Summer Schultz.

34. On or about January 24, 2016, Smith submitted a written letter of resignation to Dr. Schultz and the Dell Rapids School Board.

35. The Dell Rapids School Board accepted Smith's resignation at its January 27, 2016, meeting.

36. Dr. Schultz is not aware of any other instances in which Smith may have participated in illicit sexual communication with a student.

37. There was no evidence of or allegations regarding physical sexual contact between Smith and Student.

38. Dell Rapids School District does not have an employee policy that specifies guidelines for personnel on interacting with students via social media. The school district does have a general policy on professionalism regarding students, which is provided to employees in the employee handbook.

39. On or about February 9, 2016, an Order for Protection, [REDACTED], was entered against Smith in Minnehaha County, South Dakota. Student was the petitioner seeking the protection order. The protection order is effective from February 9, 2016, through February 9, 2017. The order prohibits Smith from contacting Student, as well as coming within 500 feet of Student, Student's residence, Student's place of employment, and Dell Rapids High School. Smith stipulated to the entry of the protection order in order to avoid a public hearing and additional media attention.

40. Smith indicated a desire to return to the teaching profession.

41. Smith admitted that he would like to apologize to Student for the comments that were made.

42. Smith's alcohol consumption on the night of December 29-30, 2015, is not a mitigating factor in these circumstances, as Smith had a pattern of engaging in both school-related and personal conversations with Student and chose to engage in the communications with Student via social media on December 29, 2015, prior to leaving the bar with his friend. Smith also chose to continue consuming alcohol and messaging Student after returning to his home.

43. Smith's various references within the conversation to deleting the messages or not letting anyone else see the conversation indicate that Smith was aware he should not engage in such communications. This is emphasized by Smith's testimony that towards the end of the conversation he began to sober up and that his last message to Student on December 30, 2015, at 1:22 a.m. was "I am tired too. Make sure you delete this conversation! Goodnight!"

44. The fact that Smith recognized that he was the trusted teacher and authority figure to Student, with whom he had discussed her family and personal issues, yet still engaged in illicit sexual communication with Student, is an aggravating factor.

45. Student's petition for a protection order indicates that Student felt threatened or harassed by Smith's conduct or communications to her.

46. Smith's communications with Student demonstrate a lack of judgment as to what constitutes appropriate communications with students.

47. Smith's inappropriate communications with Student demonstrate a lack of judgment as to appropriate boundaries between students and teachers.

48. Smith's inappropriate communications with Student and lack of judgment as to inappropriate boundaries between students and teachers constitute moral turpitude.

49. Any finding of fact improperly denoted as a conclusion of law is hereby incorporated as a conclusion of law.

Based upon the foregoing Findings of Fact, the Commission here by issues the following Conclusions of Law:

#### CONCLUSIONS OF LAW

50. The Commission has jurisdiction over this matter pursuant to SDCL §§ 13-43-28 and 13-43-28.1, SDCL ch. 1-26, and the Administrative Rules of South Dakota, chapters 24:08:03 and 24:08:04:01.

51. The burden of proof in this matter as a contested case hearing is clear and convincing. In re: Setliff, 2002 SD 58, 245 N.W.2d 601, 605.

52. The South Dakota Code of Professional Ethics for Teachers provides at ARSD 24:08:03:01 that in fulfilling their obligations to students, educators shall act as follows:

- (9) Maintain professional relationships with students in a manner which is free of vindictiveness, recrimination, and harassment;
- (10) Not engage in or be a party to any sexual activity with students including sexual intercourse, sexual contact, sexual photography or illicit sexual communication.

53. The South Dakota Code of Professional Ethics for Teachers provides at ARSD 24:08:03:02 that in fulfilling their obligations to the public, educators shall act as follows:

- (8) Exemplify high moral standards by not engaging in or becoming a party to such activities as fraud, embezzlement, theft, deceit, moral turpitude, gross immorality, sexual contact with students, illegal drugs, or use of misleading or false statements.

54. Smith entered an admission to the allegation that he violated ARSD 24:08:03:02(10), and denied the remaining allegations.

55. The Complainant has met its burden of proof as a result of the exhibits entered into the record and testimony presented at the hearing.

56. Clear and convincing evidence exists that Smith violated ARSD 24:08:03:01(9) and (10).



57. Clear and convincing evidence exists that Smith violated ARSD 24:08:03:02(8)

58. Smith violated ARSD 24:08:03:01(9) in that he failed to maintain a professional relationship with his student in a manner free from harassment.

59. Smith violated ARSD 24:08:03:01(10) in that he engaged in sexual activity with students including illicit sexual communication.

60. Smith violated ARSD 24:08:03:02(8) in that he failed to exemplify high moral standards by engaging in and becoming a party to such activities as moral turpitude.

61. Any conclusion of law improperly denoted as a finding of fact is hereby incorporated as a conclusion of law.

Based upon the foregoing findings and conclusions, it is hereby

ORDERED that this matter be referred to the Secretary of the South Dakota Department of Education for proceedings to permanently revoke the teaching certificate of Smith as provided for in SDCL § 13-43-28.1. It is further

ORDERED that a copy of the Findings of Fact, Conclusions of Law, and Order be sent to the parties herein. It is further

ORDERED that a copy of the Findings of Fact, Conclusions of Law, and Order be provided to the Secretary of the South Dakota Department of Education for placement on the National Association of the State Directors of Teacher Education and Certification Clearinghouse and that it remain with the Department's permanent certification file. It is further

ORDERED that the Department may release the Findings of Fact, Conclusions of Law, and Order to the certification office of any state in which the respondent holds or applies for a certificate.

Dated this 21<sup>st</sup> day of June, 2016.

PROFESSIONAL TEACHERS PRACTICES  
AND STANDARDS COMMISSION

By: Connie Gretschmann  
Connie Gretschmann, Acting Chair