552-98

IN THE MATTER OF THE TENURE	:	
HEARING OF EUGENE M. LEGGETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
___________________________________	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent physical education teacher due to his handling of two incidents in his swimming classes. Board alleged that respondent utilized improper techniques to effectuate the rescue of students and failed to properly supervise students.

ALJ found that the Board failed by proofs, by either direct or by reasonable inferences, to establish a *prima facie* case on any of the four charges that it brought, and, therefore, he concluded that the charges must be dismissed. Board failed to present any evidence as to what was the appropriate conduct for an individual such as respondent faced with such circumstances in the swimming incidents and that his action breached any established standard of behavior. ALJ ordered that respondent be restored to his position with all appropriate restoration of salary and benefits subject to any lawful mitigation.

In light of the paucity of relevant evidence brought forth by the Board in support of its charges, the Commissioner concurred with the conclusion of the ALJ that, based on the record before him, the Board failed to advance a *prima facie* case in support of any of the charges of unbecoming conduct, thereby necessitating the dismissal of said charges. Commissioner concurred with the ALJ that in order to make an evaluation of the propriety of respondent's action, standards, not mere speculation on the part of the Board, were required. Commissioner directed that respondent be reinstated to his position and credited with all salary and emoluments due him. Moreover, the Commissioner found no just cause to reconsider his prior determination barring the Board's presentation of testimony and/or report of its expert as a result of the late submission of the report.

December 17, 1998

OAL DKT. NO. EDU 4017-98
AGENCY DKT. NO. 84-4/98

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and respondent's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4, and these submissions were duly considered by the Commissioner in making his determination herein.

The Board excepts to the Administrative Law Judge's (ALJ) dismissal of Counts Two and Four of the tenure charges[1] lodged against respondent and the ALJ's Interlocutory

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[1] **Count Two** of the Board's charges specifies: "1. When Respondent was informed by [R.P.] that a student was laying (sic) motionless in the deep end of the pool, Respondent directed [P.} to dive into the pool to see who it was. 2. [R.P.] dived into the pool but could not identify who the student was and informed Respondent of that fact when he surfaced to the water. 3. Respondent then directed [R.P.] to go back to the bottom of the pool to see if he could help the student. 4. [R.P.] returned to the surface again and informed Respondent that the student at the bottom of the pool was not moving and he could not help him. WHEREFORE, Respondent's conduct in directing a student to dive into the water to identify and attempt to save another student who was laying (sic) motionless at the bottom of the pool, rather than go into the water himself to identify the student and rescue him is unbecoming conduct of a teacher, which should result in his termination and suspension without pay for 120 days upon certification of these charges." (Board's tenure charges certified to the Commissioner on April 1, 1998)
Count Four of the charges specifies: "l. Some time in late September or early October 1997, prior to the near drowning of [R.D.], Respondent was supervising a swimmers' test to determine which students should be permitted in the deep end or restricted to the shallow end of the pool. 2. During his swim test, student, [K.C.] panicked and needed help while he was still in the deep end of the pool. 3. Rather than get into the pool to save [K.C.], Respondent ordered another student, [S.E.], to go into the pool to save [K.]. 4. Further, Respondent directed another student, [M.J.], to assist [S.E.] in rescuing [K.C.]. 5. Respondent never reported this incident to the Holland Middle School administration. WHEREFORE, Respondent endangered the safety of students, [K.C.], [S.E.], and [M.J.] by directing [S.] and [M.] to rescue [K.] and is conduct unbecoming of a teacher which should result in his termination and suspension without pay for 120 days upon certification of these charges." (Board's tenure charges certified to the Commissioner on April 1, 1998)

Order of October 9, 1998, affirmed by the Commissioner on October 23, 1998, which excluded the testimony and/or the report of the Board's proposed expert witness. With respect to the two charges, the Board urges that the ALJ's grant of a directed verdict for respondent at the conclusion of the Board's presentation of its case was clearly in error. In reaching this result, the Board contends that, although the ALJ ostensibly utilized the standard applicable to the grant of directed verdict set forth in *Dolson v. Anastasia*,[2] 55 *N.J.* 2 (1969), and New Jersey Court Rule 4:40-1, in determining "that reasonable minds cannot find that the Board presented proof to establish a *prima facie* case of misconduct" (Board's Exceptions at p. 2), he, in actuality, misapplied *Dolson* by failing to properly weigh all of the Board's evidence and "failing to give the Board the benefit of all legitimate inferences that support the Board's *prima facie* position in Counts Two and Four that Respondent was guilty of misconduct on the respective near drownings of R.D. and K.C.." (*Id.* at p. 3)

Count Two

While conceding that no evidence was presented as to respondent's qualifications as a lifesaver or what he knew or should have known in such a situation, the Board asserts that "the ALJ glaringly failed to weigh significant factors supporting the Board's position as required by *Dolson* ***." (*Id.* at p.4) The Board cites selected hearing transcripts which it contends establish

> Respondent directed R.P., a 12 year old 6th grade student, to investigate R.P.'s report that someone drowned and was laying (sic) motionless in the bottom of the eight feet deep part of the pool. ***After R.P. surfaced to the water to advise Respondent that the body was not moving, Respondent again directed R.P.,

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[2] Such standard requires that in reviewing a motion for directed verdict the court must accept as true all evidence which supports the position of the party defending against the motion and must accord him the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be dismissed. See *Dolson* at p. 5.

> along with another 6th grade student, M.H., to try to pull the victim out of the pool themselves. ***R.P. ***when trying to save R.D.***, suffered a loss of breath and had to go back to the surface for air.*** Respondent directed R.P. a third time to go underwater and assist as Respondent used a pole to pull an unconscious R.D. out of the pool. ***R.P. was not trained in lifesaving techniques by Respondent or anyone else.*** Apparently, Respondent was dressed in a sweat suit and not properly attired to go into the water.*** (citations omitted) (Board's Exceptions at pp. 4-5)

The Board argues that for the ALJ to enter a directed verdict given these uncontroverted facts is clear error. (*Id.* at p. 5) It further asserts

> It is axiomatic, that Respondent, as a teacher, is in charge of maintaining the safety and welfare of students in his supervision. We are not dealing with an adult in a residential pool setting. The within situation involves a teacher supervising the deep end of the pool for a 6th grade swim class. To send an untrained 12 year old 6th grade student underwater three times to investigate, attempt to save, and attempt to save again another student who [was lying] motionless in the pool, is clearly inappropriate and unbecoming. To send another classmate underwater to assist him is also clearly inappropriate and unbecoming. This is not a situation where a teacher directed a student, or even two students, to reach out from the side of the pool to pull a student near the edge of the pool out of the water. Respondent stayed on the side of the pool and told a student to risk his life and health to go underwater three times to save another student who was unconscious and motionless.
> (Board's Exceptions at pp. 5-6)

The Board contends that the absence of expert evidence to conclude that respondent's behavior here was unbecoming conduct is irrelevant. It cites *Brown v. Racqet Club of Bricktown*, 95 *N.J.* 280 (1984)[3] for the proposition that "[r]espondent's conduct speaks for

[3] The Commissioner notes that this case, wherein patrons brought an action against a proprietor to recover for injuries sustained when a stairway collapsed, deals with the liability of a defendant for injury occasioned to the plaintiffs under the doctrine of *res ipsa loquitur.* "*Res ipsa loquitur,* a Latin phrase meaning 'the thing speaks for itself,' is a rule that governs the availability and adequacy of evidence of negligence in special circumstances. The rule creates 'an allowable inference of the defendant's want of due care' when the following conditions have been shown: '(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality [causing the injury] was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the

itself; that is his actions according to [a] reasonable mind, [justify] an inference of unbecoming conduct or gross negligence[,] and [a]ny man, woman, or child could reasonably infer that Respondent's conduct in sending students into the eight foot deep part of a pool to rescue a motionless drowning student is unbecoming of a teacher.***" (Board's Exceptions at pp. 6-7) As such, the Board contends that the ALJ's dismissal of this charge, when its proffers are viewed in a light most favorable to the Board as required by *Dolson*, is erroneous and must be reversed. (*Id.* at p. 7)

Count Four

Similarly, the Board's exceptions charge that the ALJ failed to recognize and properly weigh its evidence with respect to this count of its tenure charges. Again, the Board cites selected hearing transcripts which it contends establish

> S.C., 12 years old at the time, testified that when Respondent, while standing on the pool side, directed him into the water to save K.C. who was attempting to swim from the deep end to the low end of the pool, he immediately replied, "why should I go get him?"*** In response, Respondent again told him to go in the eight foot deep end of the water after K.C.*** S.C. was surprised by this because he thought it was Respondent's duty as a teacher to go into the water to rescue another student not his responsibility.*** Respondent also directed student, Ma.J., to assist in saving K.C.*** As in the R.D. near drowning, Respondent was dressed in a sweat suit and not properly attired to go into the water to save K.C.*** More importantly, S.C. stated that he had no training from Respondent, or anyone else, as to how to save someone in the water and felt he was not capable to do so.***(citations omitted) (Board's Exceptions at p. 8)
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> Once more, the Board urges, consideration of these facts
>
> demonstrates that Respondent's conduct, speaks for itself; a teacher does not send untrained 6th grade 12 year old students in the deep end of the pool to save another 6th grade student in distress. With K.C. in distress, a reasonable person could find that

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result of the plaintiff's own voluntary act or neglect.'" *Brown v. Racquet Club of Bricktown*, 95 *N.J.* 280, 288 (1984) citing *Bornstein v. Metropolitan Bottling Co.,* 26 *N.J.* 263, 269 (1958).

> he would have easily endangered S.C. and Ma.J. who were directed by Respondent to save K.C. Respondent was the teacher in charge, the only one during that incident. It is reasonable to infer that if he was not capable of getting in the water to save K.C. in the deep end of the pool, it was unbecoming conduct for him to conduct a swim class. Just as important, it was unbecoming conduct for him to direct students to perform swim tests in the deep end of the pool, if he could not save K.C. and would have to *rely* on the untrained skills o[f] 6th grade 12 year old fellow students to save K.C. (emphasis in text)
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> (Board's Exceptions at p. 10)

The Board opines that for the ALJ to find an absence of *prima facie* evidence of unbecoming conduct on the part of respondent with respect to this charge, when all of its evidence is examined under the relevant standard, is clear error and must be reversed.

Finally, the Board objects to the ALJ's Interlocutory Order, dated October 9, 1998, which directed that the Board would not be allowed to present testimony and/or a report of its expert witness in this matter due to its failure to adhere to the ALJ's established timetable with regard to discovery. (Board's Exceptions at pp. 10-11) It cites *Westphal v. Guarino*, 163 *N.J. Super.* 139 (App. Div. 1977) for the proposition that although such exclusion "is well within the discretion of the trial court ***the sanction of exclusion is an *extraordinary measure* and it should only be employed where there exists evidence that the offending party acted in a manner [calculated] to mi[s]lead, surprise, or otherwise prejudice the non-delinquent party.***" It contends that absent evidence of such improper motive on the part of the delinquent party, the courts are reluctant to exclude probative evidence where a lesser sanction would be sufficient to remove prejudice suffered by the other party. (*Id.*) The Board, fully conceding that its submission was not in accord with the ALJ's Pre-hearing Order, posits that "it is significant that the report was received twenty-four (24) days prior to the date of trial. As such, there was ample time available to the ALJ to fashion a remedy that would have provided

the Board its day in court." (*Id.* at p. 12) It advances that "[t]he ALJ could have allowed the Respondent to delay the proceeding to have more time to prepare[;] ***could have allowed the Respondent additional time to obtain an expert at some point following the Board's presentation of its expert testimony[;] [or] the ALJ could have adjourned the entire hearing to allow Respondent to obtain his own experts.***" (*Id.* at pp. 13-14) In that the Board's delay in making its submission was not attributable to an attempt to mislead, surprise or prejudice the respondent, and, in fact, no clear showing of prejudice to respondent was made, the Board maintains that the ALJ's barring of its expert witness' testimony and/or report must be reversed. (*Id.* at p. 14)

In response, respondent avers that the Board's exceptions advance not even the remotest suggestion that the ALJ's decision in this matter was erroneous. He contends that there is no doubt that the ALJ had absolutely no choice but to dismiss the tenure charges against respondent. He avers that, as was succinctly stated by the ALJ

> The Board relies solely on what it perceives to be what it says is common sense. The problem with relying on common sense in a circumstance like this is that we know, and I think I can take notice of the fact, that life saving is not something that is left to common sense in terms of procedures to be used. Initial Decision, p. 6.
> (Respondent's Exceptions at p. 1)

Respondent proffers that the Board's exceptions do not even attempt to address this imposing conclusion but rather, "simply make generalized assertions, without any basis in the record whatsoever, that somehow Mr. Leggett had engaged in 'inappropriate and unbecoming' conduct." (*Id.*) Respondent asserts that, as the "Board has neither facts nor law on its side[,] [it] ultimately appeals to 'common sense,' which 'dictates that Respondent acted improperly in an unbecoming manner' (Exceptions, p. 6)[,] [with] [t]his unsupportable conclusion [being] based upon the Board's bootstrapping of a purported 'reasonable mind' analysis," relying upon *Brown*

*v. Racquet Club of Bricktown, [supra].***"* (Respondent's Exceptions at p. 2) Respondent maintains that this cited case deals with the application of *res ipsa loquitur*, where, it asserts, the Board neglects to mention that the Court in discussing this particular doctrine states that *res ipsa loquitur* "requires, among other things for its application, a lack of any indication in the 'circumstances that the injury was the result of the [Board's] own voluntary act or neglect.' *Id.* at p. 288." Respondent maintains that the situation involved in this matter is directly attributable to the Board's own inaction in that

> The Board which is exclusively responsible for the assignment of its teaching staff was guilty of "neglect" in that it assigned to the very class that Mr. Leggett was teaching, a second non-swimming teacher, Tyrone Robinson, whose responsibilities were for the non-swimmers (of whom R.D. was one). (Initial Decision, p. 2). Additionally, the Board failed to provide standards or guidance for the implementation of water safety, etc., including any determination of Mr. Leggett's water safety skills. Under such circumstances, the doctrine of *res ipsa loquitur* does not apply.
> (*Id.*)

Respondent asserts that the Board failed to make a *prima facie* case against respondent as, under the attendant circumstances, there were no applicable water safety standards which could lawfully be applied to his conduct. (*Id.* at p. 3)

Addressing the Board's argument that it was inhibited from presenting a "meaningful" case due to the ALJ's (and the Commissioner's) previous decision barring introduction of testimony or a report of a purported expert by the Board, respondent argues that such testimony and report was correctly barred by both the ALJ and the Commissioner. (*Id.*) He further proffers that the relevance of such testimony/report is highly questionable given that

> Such testimony would only be arguably relevant in a situation where there were in fact objective standards in place, and a dispute as to the duty required by those standards existed, hence the need for expert opinion testimony, if it would aid the trier of fact.

> *N.J.R.E.* 702. That was not present in this case. It is well settled that when the question presented is the "standard of care" owed by a defendant, that is a matter of law to be decided by the judge *alone*. An expert *may* be useful thereafter but only after first establishing that there was a "standard of conduct" in place which was violated. (emphasis in text) (Respondent's Exceptions at pp. 3-4)

Respondent, therefore, urges that the ALJ's decision be affirmed by the Commissioner.

Upon his independent and thorough review of the record in this matter,[4] the Commissioner finds the Board's exception arguments, which essentially reargue its assertions made before the ALJ at hearing, unpersuasive. Rather, in light of the paucity of relevant evidence brought forth by the Board in support of its charges, the Commissioner is legally mandated to concur with the conclusion reached by the ALJ that, based on the record before him, the Board has failed to advance a *prima facie* case in support of any of its four unbecoming conduct charges against the within respondent, thereby necessitating the dismissal of such charges.

Initially, upon his review of the circumstances attendant to the incidents involved here, the Commissioner cannot accept the Board's assertion that respondent's conduct "speaks for itself," that is, that his conduct, under the circumstances with which he was faced was so obviously outrageous, so beyond the scope of conduct expected from a teacher in these circumstances, that any reasonable person, without the benefit of any expert evidence, would find that his behavior constituted unbecoming conduct. The within Board is arguing that the only acceptable thing for the respondent to have done under these conditions was to go into the water himself to save the two students in distress. The Commissioner observes that in this matter we are not faced with a respondent who stood idly by doing nothing when faced with these situations. He took action. At issue herein is the propriety of the action taken vis-à-vis that

which the Board asserts should have been taken under the circumstances. The Commissioner concurs with the assessment of the ALJ, that in order to make such an evaluation, standards, not mere speculation on the part of the Board, are required. In this regard, as was aptly articulated by the ALJ during the course of the hearing

> ***unbecoming conduct, I think you will agree, suggests that he violated some standard. I mean, it's not framed in the language of negligence. But when we conclude that somebody engaged in conduct that's unbecoming a teacher, we assume that there are certain standards that apply to teachers in whatever the circumstance is, and that the conduct displayed by the individual is not within those standards. It's outside of those standards. (T-2, p. 71, lines 5-12)[5]

The Commissioner concludes that the focus of the examination here is not whether the Commissioner, or any other individual for that matter, in retrospect, might find that there were more appropriate procedures which might have been utilized under the circumstances which occurred in these incidents but, rather, the relevant issue in this tenure case is whether the Board has established that respondent's actions breached any established standard of behavior. In his review of this matter, the Commissioner finds himself in complete agreement with the observations made by the ALJ when he stated

> Now, I ---I admit to you that it might be a gut reaction for anybody, in this circumstance, to look at this situation and [at] first glance, scream out, why didn't the teacher jump into the pool? That's an easy gut reaction.
> And it's an understandable reaction, I think. But this case is not decided on gut reactions. This case isn't decided on*** what people want to hear. This case is decided on standards and what standards apply to this individual and the circumstances. (T-2, p. 78, lines 8-16)
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> ***there are no standards presented in this case. So to me, ***, that really is the crux of this, because in order for me to decide that

[4] It is noted that the record contains transcripts of the hearing conducted at the OAL on October 26 and 28, 1998.
[5] T-2, as used in citations herein, indicates hearing transcript of October 28, 1998.

> he did wrong here, it seems to me that I am required to go beyond what I might think and what you might think and the Board might think and the public might think at first blush, and look at what the standard is. And there is no standard that's been presented. (T-2, p. 98, lines 5-12)

Thus, the Commissioner finds that, even acknowledging that the Board must be given all reasonable inferences arising from its evidence under the standard applicable to the granting of a directed verdict pursuant to *Dolson, supra*, the Board presented no testimony or evidence with respect to standards against which respondent's conduct is to be measured in order to facilitate a determination that he did not adhere to such standards. Specifically, the record is totally devoid of any evidence to establish

- that the Board required a person assigned to a swimming class to be trained or certified in lifesaving;
- that respondent's certification as a physical education teacher required that he know lifesaving techniques;
- that there was an administrative standard for conduct regarding procedures at the pool;
- what a teacher is required to do under circumstances such as were present herein; or even
- that a person who has been instructed in lifesaving is taught that, when faced with a situation where there are more than 35 other students in the pool for whom he is responsible, and he is the only instructor there who knows how to swim, that he should be the first one into the pool to effectuate lifesaving, irrespective of the fact that if a problem were to arise with one of the other students, there would be no one available to assist him.

Notwithstanding the total absence of such evidentiary proofs, the Board is asking that I draw the inference or assumption that what respondent did on each of these occasions was unbecoming conduct. The Commissioner concludes that, as the Board has set forth no evidence that anything done by respondent in connection with either of these incidents breached any standard of behavior required at a pool, its unbecoming conduct charges cannot be sustained. In light of this

legally mandated result, the Commissioner finds that respondent must be reinstated to his tenured position.

Despite his ultimate determination herein, the Commissioner is compelled to acknowledge that, in the course of his review of this matter, he experienced sentiments similar to those expressed by the ALJ

> ***I will grant you that there is something that does sound disturbing about the idea that the teacher, [a] fully mature adult, physical education teacher, told ***12 and 13[-]year[-]old***students that they should go and do certain physical things, to ***rescue ***student[s].
> I grant you that on the face of it, that sounds disturbing. But we don't decide cases on what's disturbing. We decide cases on what's the legal standard that applies in this circumstance. (T-2, p. 86, lines 17-25; p. 87, lines 1-3)

Finally, the Board asks that the Commissioner reconsider the ALJ's Interlocutory Order in this matter, previously before him on Interlocutory Review, which barred the Board's presentation of testimony and/or report of its expert as a result of the late submission of this report. After due regard to the ALJ's report in such order that rescheduling of the hearing would be difficult and result in an inordinate delay of the proceedings, and in full consideration of the materials submitted by the parties in this regard, the Commissioner, on October 23, 1998, affirmed the ALJ's order finding

> Initially, I note the Board admits that, notwithstanding the clear directive in the ALJ's Prehearing Order that all discovery, including the exchange of expert reports, be completed no later than September 1, 1998, it did not provide the report of its expert until October 2, 1998, and that such expert's curriculum vitae was not provided until October 8, 1998. I further observe that at no time prior to its ultimate submission of this material did the Board provide notice to the court and/or to respondent that it would be unable to supply an expert report in accordance with the established timeframes, nor has it subsequently provided any good cause for the report's tardiness. Finally, I have also considered that the hearing in this matter is scheduled to commence on

> October 26, 1998. With all of the above factors in mind, I have taken into account the potential prejudice which could inure to each of the parties as a consequence of my ruling herein, which must be an overriding consideration in my determination. In this regard, I am persuaded that any prejudice to the Board is solely attributable to its own dilatory conduct in this matter and is outweighed by the prejudice which could result to respondent, who faces the potential loss of his tenured position at the conclusion of this case, and who was entitled, pursuant to the ALJ's Preliminary Order, to have sufficient time to prepare for the examination of any and all experts advanced by the Board, such preparation possibly including consultation with an expert of his own. (Commissioner's Letter Decision of October 23, 1998 at pp. 1-2)

Given that an examination and consideration of the potential prejudice to the parties was the key consideration in the Commissioner's prior determination, and upon balancing such potential prejudice it was obvious, that said prejudice facing the respondent was, indeed, serious, while that which might be experienced by the Board was unnecessary, inexcusable, and solely ascribable to its own conduct, the Commissioner can find no just cause, at this point in time, to reconsider his previous determination.

Accordingly, the initial decision of the OAL is affirmed for the reasons clearly stated therein. The within tenure charges are hereby dismissed and the Commissioner directs that respondent be reinstated to his position and credited with all salary and emoluments due him as a result of this decision. [6]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 17, 1998

[6] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.