

STATE BOARD OF EXAMINERS DOCKET NO. 1112-190  
OAL DOCKET NO. EDE 09560-12  
COMMISSIONER APPEAL NO. 1-2/16A

IN THE MATTER OF :  
THE CERTIFICATES OF : COMMISSIONER OF EDUCATION  
GAIL WUNSCH : DECISION

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Denial of Interlocutory Review by the State Board of Examiners,  
January 11, 2016

For the Respondent-Appellant, William P. Hannan, Esq.

For the Petitioner-Respondent State Board of Examiners, Lauren A. Jensen,  
Deputy Attorney General (Christopher S. Porrino, Attorney General of  
New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) denying interlocutory review of the December 18, 2015 Order of the Administrative Law Judge (ALJ), which granted the Board's motion to exclude appellant's expert report and preclude the expert's testimony. On appeal, the appellant maintains that the Board's denial of her request for interlocutory review was arbitrary, capricious and unreasonable. Appellant also seeks reversal of the ALJ's decision to exclude her expert's report and testimony.

Appellant argues that – following receipt of the ALJ's decision on December 28, 2015 – she filed a timely request for interlocutory review with the Board on December 29, 2015, and her request was denied on January 11, 2016, on the basis that the Board lacked a quorum during its January 8, 2016 meeting to review the matter.<sup>1</sup> Appellant posits that such denial was arbitrary, capricious and unreasonable, and the Board abused its discretion by

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<sup>1</sup> The Board noted in its denial letter that appellant's request was considered denied, pursuant to *N.J.A.C.* 1:1-14.10(c), since the Board did not act within ten days to determine whether to review the interlocutory appeal.

not extending the ten-day timeframe, pursuant to *N.J.A.C. 1:1-14.10(g)*, to consider her request. The Board argues that its actions were in accordance with *N.J.A.C. 1:1-14.10*, and therefore, were not arbitrary, capricious, or unreasonable. The Board maintains that it intended to review appellant's request but was unable to do so because it lacked a quorum during its January 8, 2016 meeting. The Board further notes that it did not abuse its discretion with regard to the extension of timelines because in order for the timeframes to be extended, the Board would have had to act collectively – which it could not, due to lack of quorum at the January 8, 2016 meeting. Finally, the Board argues that appellant has failed to meet the standard for interlocutory review because there is no likelihood that such review would have an impact on the outcome of the case.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C. 6A:4-4.1(a)*. The record reflects that appellant's due process rights were denied throughout the proceeding before the Board. The Commissioner concludes that the Board's denial of interlocutory review – on the basis that it lacked a quorum to review appellant's request – deprived the appellant of her due process rights. The Board failed to consider the request due to administrative issues beyond appellant's control. Therefore, the Board's decision was arbitrary, capricious and unreasonable as the denial was not based on the substance of the request for interlocutory review. "Lack of a quorum" simply is not a legitimate basis for denying such requests.

*N.J.A.C. 1:1-14.10(g)* provides that the time limits set forth in the regulation "may be extended by the agency head where the need for a delay is caused by honest mistake,

accident, or any cause compatible with due diligence.” The Board’s lack of a quorum during its January 8, 2016 meeting relates to the issue of due diligence and certainly was an internal issue that should not have affected a party’s due process rights. In this particular case – where appellant filed a timely request for interlocutory review, the Board failed to review the matter pursuant to *N.J.A.C. 1:1-14.10(c)* for lack of quorum, the extension of timelines would not have delayed the scheduling or conduct of hearings, and the next Board meeting was scheduled for January 21, 2016 – the proper course of action would have been to extend the ten-day time limit. Therefore, the Board also abused its discretion when it did not extend the ten-day time limit pursuant to *N.J.A.C. 1:1-14.10(g)*.

Additionally, inclusion of the expert report would certainly have an impact on the outcome of the case because the authenticity of one of the documents is in dispute and appellant relies on the expert report to prove that both documents are authentic. Therefore, appellant met the standard for interlocutory review.

In her request for interlocutory review,<sup>2</sup> appellant argued that the ALJ erred in finding that the expert report relies on incorrect information and that it would not assist in determining a fact in issue, as the expert independently authenticated both documents. Appellant further argued that the ALJ erred in finding that the expert report constituted a “net opinion,” and that excluding the expert’s testimony was improper because the ALJ could have determined whether any weight should be given to the expert opinion *after* considering the testimony. Finally, appellant proffered that the expert report and testimony were critical to her defense, and should have been admitted as it did not unfairly surprise or prejudice the Board. In response, the Board maintains that the ALJ’s exclusion of the expert report and testimony was proper because

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<sup>2</sup> A copy of the letter brief in support of appellant’s Motion for Interlocutory Review has been submitted to the Commissioner.

the report was untimely and the ALJ is allowed to exclude evidence for failure to fulfill procedural requirements. The Board also argues that the report constitutes a “net opinion” and is inadmissible because the expert made bare conclusions and failed to provide sufficient information to support his opinion. Additionally, the Board argues that the report is based on inaccurate information and does not concern any fact at issue in this case.

With regard to the ALJ’s decision to exclude appellant’s expert report and testimony, which appellant intended to rely on to rebut the Board’s testimony that the Teacher of Elementary School Certificate was fraudulent, the ALJ found: the expert report relied on incorrect information and did not address the fact in issue, *i.e.* whether the disputed certificate was authentic; the expert report was a “net opinion” because it relied on unfounded speculation and reached a bare conclusion without explaining the methodology; the expert was not timely identified during discovery and the evidence was non-pivotal to the fact in issue and, thus, admission of the expert report and testimony would unfairly surprise and prejudice the Board. The Commissioner disagrees with the ALJ’s findings and conclusions.

As a preliminary matter, the Commissioner finds procedural deficiencies in the determination that the expert report and testimony were inadmissible. *N.J.A.C. 1:1-15.9* provides in relevant part that expert testimony is admissible if such testimony will assist the fact-finder to understand the evidence or determine a fact in issue, and the fact-finder determines whether the expert opinion or inferences are “[b]ased on facts and data perceived by or made known to the witness at or before the hearing; and within the scope of the special knowledge, skill, experience or training possessed by the witness.” *N.J.A.C. 1:1-15.9* further provides, “[a] witness may be required, before testifying in terms of opinion or inferences, to be first examined concerning the data upon which the opinion or inference is based.” Similarly, pursuant to *N.J.A.C. 1:1-15.1*,

when the “qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, the judge shall hold a preliminary inquiry to determine the issue.” *N.J.A.C.* 1:1-15.1 mirrors *N.J.R.E.* 104, which requires the trial judge to make a preliminary determination pertaining to the admissibility of proffered evidence when there is an issue or dispute pertaining to the admissibility of evidence. A preliminary hearing is also utilized to determine the reliability of scientific testing relied upon by an expert. *See Kemp ex rel. Wright v. State*, 174 *N.J.* 412 (2002). The expert can be questioned on his data and methodology, and the relevancy and reliability of the proffered evidence can then be appropriately considered by the fact-finder. *See N.J.A.C.* 1:1-15.9; *N.J.R.E.* 702. Therefore, the proper procedure would have been to conduct a preliminary hearing as to the admissibility of the evidence, which would allow the ALJ to explore and address any concerns about the expert’s methodology, and then give the expert opinion the weight deemed appropriate.

The expert conducted an examination and analysis of both documents, and opined that both documents were authentic. As such, the expert opinion, if accepted, would assist the ALJ in determining a fact in issue – whether the Teacher of Elementary School Certificate is authentic. It is evident that the expert mixes up the two certificates in Exhibits 1 and 2. Whether this confusion is the result of misinformation from appellant’s counsel or a misunderstanding by the expert is not relevant to the expert’s conclusion because there is no dispute concerning the authenticity of one of the documents, and the expert’s report suggests that his opinion is based on independent testing and comparison of the two documents. To the extent the expert’s confusion may be relevant to his conclusion, it can be appropriately explored and clarified during a preliminary hearing. No such inquiry was made by the ALJ before excluding the expert report

and testimony; therefore, finding that the evidence would not assist in determining a fact in issue was improper.

The net opinion rule allows exclusion of expert opinion if it is not based on “facts or data.” *See N.J.R.E. 702*. An expert’s opinion is construed as net opinion and deemed inadmissible when the expert makes bare conclusions, unsupported by factual evidence or other data. *See State v. Townsend*, 186 N.J. 473 (2006). Here, the expert purportedly conducted independent review of the two documents and opined on the authenticity of both. Therefore, the uncertainty over whether the expert’s opinion was based on such data or on facts provided by the respondent’s attorney, should have been explored as part of the ALJ’s preliminary inquiry into the expert’s qualifications, the methodology and tests used, the significance of each test, the expert’s analysis, and the facts relied upon by the expert. No such opportunity was provided to the expert to explain his findings, the tests performed, or the methodology used. Without such inquiry, the expert report and testimony – which appear to be based on independent testing and analysis – were prematurely disqualified as net opinion.

The Commissioner further disagrees with the ALJ’s exclusion of the expert report and testimony on the basis that it was untimely, not pivotal to the fact in issue, and that it would unfairly surprise and prejudice the Board. The Initial Decision relies on *Wymbys v. Twp. of Wayne*, 163 N.J. 523 (2000) in excluding the expert report and testimony. In *Wymbys*, the Court found that exclusion of the surprise witness was the only option because “[t]he surprise to the plaintiffs was real, the State’s conduct was inexcusable, and the prejudice to plaintiffs irreparable. A continuance was not a viable option because plaintiffs had tried their case for twelve days, believing the State would offer no testimony.” *Id.* at 545. Here, the appellant provided a copy of the expert report to her adversary on the morning of the first day of trial,

May 14, 2014, and the next scheduled hearing was on June 2, 2014. The surprise to the Board in this case was, therefore, vastly different. The Board not only had an opportunity to review the expert report between the two trial dates, but the ruling to exclude the report and testimony was also not made until over a year and a half later.

Additionally, there is no evidence that appellant sought an advantage over the Board by presenting the expert report, dated May 13, 2014, to her adversary on May 14, 2014. In *Wymbs*, the Court noted, “[f]actors that would ‘strongly urge’ the trial judge, in the exercise of his discretion, to suspend the imposition of sanctions, are (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of the evidence.” *Id.* at 544. It does not appear that appellant intended to mislead her adversary or the tribunal. Nor is there any element of “real” surprise in this case because, unlike *Wymbs*, appellant presented the expert report before trial started and made it clear that she intended to rely on the expert’s testimony. There would not have been any prejudice to the Board from admission of the expert report and testimony at the time because the parties would have had the opportunity to consider and rebut the proffered evidence in time for the next hearing date.

Finally, when the “testimony in question is ‘pivotal’ to the case of the party offering the testimony, a court should seek to avoid exclusion where possible.” *Id.* It is clear that the expert report and testimony are pivotal to appellant’s case and the opinion was essential to appellant’s defense of her position, as it is intended to resolve a fact in dispute and is the only support for appellant’s claim that the Teacher of Elementary School Certificate is authentic. Therefore, exclusion of the evidence as a form of sanction was improper in this matter.

In sum, determining the admissibility of expert testimony requires the fact finder to first deem the witness qualified to proffer testimony as an expert. Once qualified, the fact finder must determine whether the testimony is relevant to the issues in the case, based upon sufficient facts or data, and whether the principles and methods used are reliable. Whether an expert opinion deserves any deference – or determining how much weight should be afforded to an expert’s opinion – is a separate issue, and should not have any bearing on the admissibility of the opinion. The ALJ, therefore, erred in excluding the expert report and testimony without conducting a preliminary hearing into the admissibility of the evidence. *See N.J.A.C. 1:1-15.1* and *N.J.R.E. 104*.

Accordingly, for the reasons expressed herein, the ALJ’s decision to exclude appellant’s expert report and testimony is reversed and the matter is remanded to the OAL for further proceedings in accordance with this opinion.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2016

Date of Mailing: December 15, 2016