

IN THE MATTER OF : NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF : STATE BOARD OF EXAMINERS
DAVID M. PEKAREK : ORDER OF SUSPENSION
_____ : DOCKET NO: 1415-124

At its meeting of October 23, 2014, the State Board of Examiners (Board) reviewed information it had received from the Morris County Prosecutor's Office regarding David M. Pekarek. On August 6, 2014, Pekarek was accepted into a Pretrial Intervention program (PTI) for two years following his arrest for Aggravated Assault. Pekarek had allegedly stomped on a fellow soccer player's face while he was lying prone on the ground after a play. Pekarek's actions caused the victim to lose consciousness temporarily.

Pekarek currently holds a Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing, issued in July 2012 and a Teacher of Health and Physical Education certificate, issued in October 2015. After reviewing the above information, at its December 12, 2014 meeting, the Board voted to issue an Order to Show Cause to Pekarek as to why his certificates should not be revoked.

The Board sent Pekarek the Order to Show Cause by regular and certified mail on December 17, 2014. The Order provided that Pekarek must file an Answer within 30 days. Pekarek responded on January 29, 2015. In his Answer, Pekarek admitted that he was admitted into PTI but stated that his admission "does not constitute, as a matter of law, any acknowledgment or admission of guilt or wrongdoing in any way, shape or form." (Answer, ¶ 3). He also denied all conduct attributed to him in the Order to Show Cause. (Answer, ¶ 3).

Since there were material facts in dispute, on April 7, 2015, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Administrative Law Judge (ALJ) Joseph A. Ascione heard the matter on January 19, 2016. The

record closed on May 10, 2016, and the ALJ issued an Initial Decision on June 23, 2016. *In the Matter of the Certificates of David M. Pekarek*, Dkt. No. EDE 04776-15 (Initial Decision, June 23, 2016).

After reviewing the testimony and the record, ALJ Ascione found that Pekarek admitted to the cleat stomping of his opponent's head both to the police officer who appeared at the scene and to "this tribunal." (Initial Decision, slip op. at 6). The ALJ found that "Pekarek's actions were a violent and brutal act," and that his conduct during the game "evidences his loss of control and self-restraint." *Id.* at 8. The ALJ also noted that he did not base any of his findings on the fact that Pekarek was criminally charged or entered PTI. *Ibid.*

ALJ Ascione acknowledged that "Pekarek's personnel records reflect, other than the incident on November 7, 2013, an effective performance as a physical education teacher." *Id.* at 9. However, the ALJ concluded that Pekarek's actions on that date "clearly demonstrate conduct that is unbecoming, or just cause for a revocation of the certificates." *Ibid.* ALJ Ascione was not persuaded by Pekarek's argument that the admitted incident was aberrational and should not deprive him of his career. *Ibid.*

In his decision, ALJ Ascione found that the Board had proven that Pekarek had engaged in conduct unbecoming a teaching staff member. *Ibid.* He therefore ordered the revocation of Pekarek's certificates. *Id.* at 10. Pekarek filed Exceptions in the case and the Deputy Attorney General (DAG) representing the Board filed Reply Exceptions.

In his Exceptions, Pekarek argued that the Board should not review ALJ Ascione's decision and instead transfer the matter to the Commissioner of Education. Pekarek claimed that the Board had a conflict of interest since it was represented by the Attorney General's office in litigating the case as well as deciding the matter. (Exceptions, pp. 2-4). He further argued that

the ALJ failed to analyze the impact a revocation would have on Pekarek's career and failed to ascertain whether Pekarek's conduct had any injurious effect on the proper administration of the school system. (Exceptions, pp. 6-7). Pekarek also took exception to the ALJ's fact finding, specifically his rulings as to the source of Pekarek's remorse for the incident, his doubt of Pekarek's assertion that his actions did not result from anger but rather from the pain due to a collision, his questioning of Pekarek's reasons for attending anger management, and his characterization of Pekarek's behavior as a "violent and brutal act." (Exceptions, pp. 8-11). Finally, Pekarek also argued that revocation was too harsh a penalty in this case, especially since he had an unblemished educational record, this was a one-time event, he was immediately remorseful and voluntarily attended anger management. (Exceptions, pp. 11-17).

In her Reply Exceptions, the DAG argued that the Board was entitled to the well-established presumption of impartiality absent a showing of a direct conflict of interest. (Reply Exceptions, pp. 2-6). In response to Pekarek's other challenges to the Initial Decision, the DAG argued that the decision was supported by ample evidence in the record. (Reply Exceptions, pp. 6-13). She noted that several of the statements to which Pekarek took exception were not included in the ALJ's findings of fact, *i.e.*, those pertaining to Pekarek's remorse or his enrollment in anger management. (Reply Exceptions, pp. 8-9, 10). The DAG also disputed Pekarek's assertion that the ALJ was incorrect in calling Pekarek's action "brutal." (Reply Exceptions, pp. 10-11). As the DAG noted, "it certainly can be argued that directly and forcefully stomping on a person's head with a cleated foot is cruel." (Reply Exceptions, pp. 10-11). However the DAG also acknowledged that calling Pekarek's act "brutal" was unlikely "the lynchpin in determining that Respondent's act constituted unbecoming conduct." (Reply Exceptions, pp. 10-11). Finally, the DAG also contested Pekarek's assertion that revocation was

too harsh a penalty. (Reply Exceptions, pp. 11-13). Instead, she noted that while revocation would dramatically affect one's career, "it does not follow that it should not be appropriate because of this dramatic effect." (Reply Exceptions, p. 12).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of September 16, 2016, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision and the parties' submissions, the Board voted to adopt the Initial Decision with modification as to penalty.

There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. As noted above, after assessing the evidence and the credibility of the witnesses, ALJ Ascione concluded that the Board had amply demonstrated that Pekarek had engaged in conduct unbecoming a teacher by attacking a prone player after an admittedly violent collision in a soccer game. According to the ALJ, such conduct warranted the revocation of Pekarek's certificates. (Initial Decision, slip op. at 10). After reviewing the entire record, the Board agrees with the ALJ except as to the appropriate penalty.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). In this case, Pekarek's actions, taken as a whole, clearly demonstrate conduct that warrants action against his certificates. His behavior, whether

motivated by pain or anger or both, is inexcusable for any adult and certainly for a teacher, especially a physical education teacher like Pekarek who is charged with being a role model for students and educating them about sportsmanlike conduct. However, given that Pekarek has an otherwise unblemished teaching record, was playing in a fiercely competitive league with all adult players and was, by all accounts, immediately remorseful for his conduct, the Board determines that suspension of his certificates is more appropriate here. The Board therefore adopts the Initial Decision with modification as to penalty.

Accordingly, on September 16, 2016, the Board voted to adopt the Initial Decision with modification as to penalty and ordered to suspend Pekarek's certificates for a period of two years. On this 1st day of November 2016, the Board formally adopted its written decision in this matter, and it is therefore ORDERED that David M. Pekarek's Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing and his Teacher of Health and Physical Education certificate are hereby suspended for a period of two years, effective immediately. It is further ORDERED that Pekarek return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

RRH/MZ/th

Date of Mailing:
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.