

EDU #4017-98
C # 552-98
SB # 4-99

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

Decided by the Commissioner of Education, December 17, 1998

For the Petitioner-Appellant, Sumners, George & Dortch (Thomas W.
Sumners, Jr., Esq., of Counsel)

For the Respondent-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of
Counsel)

On March 31, 1998, the Board of Education of the City of Trenton (hereinafter "Board") certified tenure charges of unbecoming conduct against Eugene M. Leggett (hereinafter "respondent"), a tenured teaching staff member, arising from two incidents which had occurred while respondent, a physical education teacher, was conducting swimming classes at the Holland Middle School. The Board alleged that on two separate occasions respondent had acted in an unbecoming manner in responding to students in distress in the pool and had used improper techniques to effectuate the rescue of those students, one of whom nearly drowned.

In a prehearing order issued on July 8, 1998, the Administrative Law Judge ("ALJ") required that all discovery, including the exchange of any expert reports, be

completed by September 1, 1998. On October 2, 1998, the Board provided respondent with a written report prepared by its expert with regard to respondent's conduct.

On October 9, 1998, upon request of the respondent, the ALJ issued an interlocutory order, which was affirmed by the Commissioner of Education on October 23, 1998, precluding the Board from presenting the testimony and/or written report of its expert as a result of the Board's failure to comply with the deadline for discovery. The ALJ and Commissioner found that notwithstanding a clear directive in the prehearing order that all discovery be completed by September 1, the Board had not provided its expert's report until October 2 and had failed to request an extension for such submission or to provide good cause for its failure.

After the Board, without the benefit of its expert, finished presenting its case at hearing, the ALJ recommended granting the respondent's motion to dismiss the tenure charges. The ALJ concluded that the Board had failed to establish a prima facie case on any of the charges, observing that the Board had presented no evidence as to the standard of care required of swimming instructors. On December 17, 1998, the Commissioner adopted the ALJ's recommendation and dismissed the charges.

The Board filed the instant appeal to the State Board, contending that the Commissioner had erred in excluding the report and testimony of its expert. The Board further argues that respondent's conduct was so reckless that an expert's testimony was not necessary to establish a prima facie case of unbecoming conduct.

After a thorough review of the record, we reverse the decision of the Commissioner to bar the Board from offering the testimony and/or written report of its expert at hearing. Although we share the concerns voiced by the ALJ and the

Commissioner with regard to the Board's failure to make discovery in a timely manner, we find that this case involves substantive issues of transcendent importance, requiring consideration of all relevant evidence. See, e.g., In the Matter of the Tenure Hearing of M. William Cowan, 224 N.J. Super. 737 (App. Div. 1988). (Court proceeded to the merits in tenure proceeding against teacher charged with verbal and physical abuse of students despite an overlength appeal brief that "blatantly violates the Rules of Court." Id. at 751. The Court noted that the case would have been dismissed "were it not for the transcendent importance of the substantive issues raised in the appeal." Id. at 753.) Given the import of the issues raised by this appeal, including the safety of students while participating in swimming class, we conclude that consideration of all pertinent evidence, including the testimony or other evidence offered by expert witnesses, is essential for a proper determination of this matter.¹

We therefore reverse the Commissioner's decision to dismiss the tenure charges and remand this matter to the Commissioner with direction that he transmit it to the Office of Administrative Law for further proceedings in accordance with our decision herein. We stress, of course, that the respondent must be provided with a full opportunity to present his defense to the tenure charges, including a sufficient opportunity to offer any witnesses or other evidence in rebuttal to any testimony and written evidence provided by the Board's expert.

¹ We note, in response to exceptions filed by the respondent to the report of our Legal Committee, that our determination herein addresses only the interlocutory order issued by the ALJ and affirmed by the Commissioner which precluded the Board from presenting the testimony and/or written report of its expert as a result of the Board's failure to provide the report in a timely manner. Since the issue has not been litigated or addressed in these proceedings, except in the respondent's exceptions, we have not determined the relevancy of the specific information included in that report.

We note, in addition, that our determination herein should not be construed in any way as a condonation of the Board's conduct in this matter. Indeed, we would not hesitate to affirm the Commissioner's decision barring the Board from producing its expert witness at hearing were it not for the transcendent importance of the substantive issues raised by this case.

Attorney exceptions are noted.

June 2, 1999

Date of mailing _____