



an Answer and New Matter in which he asserted, *inter alia*, that he did not engage in the conduct alleged in the criminal charges, he has never posed a danger of any kind to the school or the school community and that none of the alleged conduct occurred on or near school property. Respondent also requested an evidentiary hearing, which was held before a Commission hearing officer on April 4-5, 2016. On April 13, 2016, the hearing officer certified the record to the Commission, which subsequently considered the Department's request for immediate suspension at its May 9, 2016 meeting.

### Legal Standard

Section 9b(a)(1) of the Act authorizes the Commission to immediately suspend the certificate and employment eligibility of an educator indicted<sup>1</sup> for a crime set forth in section 111(e)(1) through (3) of the Public School Code of 1949. Before the Commission can order immediate suspension pursuant to section 9b(a)(1), the Commission must determine that the educator poses a threat to the health, safety or welfare of students or other persons in the schools of this Commonwealth. The Commission is required to hold a hearing, if requested by the educator, to consider facts relevant to that determination. 24 P.S. § 2070.9b(a)(1); 24 P.S. § 1-111(e)(1)-(3). The purpose of the law is to protect students and others in a school from the risks associated with an educator whose criminal offense is so great that he or she would be permanently barred from school employment if convicted of that offense, while the courts determine his or her culpability.<sup>2</sup>

---

1. Under the Act, the term "indictment" includes a bill of indictment, police criminal complaint, criminal information or other similar document.

2. Section 111 of the Public School Code of 1949 disqualifies from school employment anyone who has been convicted of any of the offenses enumerated in subsections (e)(1)-(3). Revocation of certificates and employment eligibility for educators convicted of those offenses is mandatory under the Act. 24 P.S. § 1-111; 24 P.S. § 2070.9b(a)(2).

In proceedings conducted under section 9b(a)(1), the Department bears the initial burden to establish by a preponderance of the evidence that the educator was indicted for an enumerated offense and that sufficient facts exist to support a finding that the educator poses the requisite threat.<sup>3</sup> The educator then has an opportunity to present evidence on why immediate suspension is not warranted. When considering the propriety of suspending an educator's certification under section 9b(a)(1), the Commission will examine the educator's alleged conduct, as found in the indictment, along with all other relevant evidence. In ordering immediate suspension, the

---

3. In Department of Education v. Deppen, DI-10-03, we rejected the respondent's argument that a finding of threat could only arise from proof of his wrongful acts. We held that an indictment alone can serve as sufficient evidence that an educator poses a threat because the indictment must be based on probable cause to believe the educator committed the acts charged. There is ample support in both logic and precedent for this position. An indictment is an objective "fact" that in most cases raises serious public concern and serves to assure that the decision to suspend is not baseless or unwarranted. See Gilbert v. Homer, 520 U.S. 924, 934 (1997). "Certainly, at some point along the continuum of an employee's involvement in the criminal justice system, evidence of that involvement alone gives rise to reasonable cause to believe the employee has committed a crime." Brown v. Department of Justice and Immigration & Naturalization Service, 715 F.2d 662, 667 (U.S. Court of Appeals, D.C. Circuit 1983) (holding that once an employee is indicted on job-related charges, agency has reasonable cause to justify suspension based solely upon the indictment). The only alternative to allowing suspension on the basis of the indictment is to require the agency to conduct a "mini-trial" to prove independently that the employee committed the crime with which he or she has been charged. Administrative hearings that precede trial on criminal charges constitute improper interference with the criminal proceedings if they churn over the same evidentiary material. Thus, the interests of both the employee and the public are better protected by allowing suspension based upon the fact of the indictment, rather than requiring administrative inquiry into the unlawful conduct alleged in the indictment. Id. at 667-8. This logic applies equally to proceedings under section 9b(a)(1).

As we emphasized in Deppen, the filing of section 111(e) charges does not create an irrebuttable presumption that the educator poses a threat. Our decision in Deppen simply means that the Department may attempt to meet its burden by presenting the criminal indictment as an "objective fact," rather than attempt to prove that the conduct alleged in the indictment actually occurred. The indictment, however, is not dispositive. One cannot validly be indicted on abstract charges; an indictment must set forth specifically the alleged criminal conduct. Thus, in some cases the filing of 111(e) charges will support a finding of threat based upon the specific allegations set forth in the charges and in other cases not. Moreover, prior to the imposition of any discipline, the educator has an opportunity to present evidence on why the indictment and the facts underlying the indictment are not reasonable cause to believe that he or she poses a threat and why immediate suspension is unwarranted.

Commission makes no assertion about the educator's guilt or innocence of the charges alleged in the indictment; rather, the suspension is merely a means of safeguarding the Commission's legitimate interests. If the educator is acquitted or the criminal charges are otherwise removed, the educator will be immediately reinstated. 24 P.S. § 2070.9b(a)(1)(iii). If, the Department believes that despite the acquittal or dismissal, the educator's conduct in the criminal proceeding is sufficient to warrant discipline, it must bring a new proceeding and the educator is entitled to a full-blown administrative hearing at which the Department must prove that the conduct actually occurred. 24 P.S. § 2070.13.

#### Findings of Fact

After carefully reviewing the record in this matter, the Commission concludes that the Department has proven by a preponderance of the evidence that Respondent poses a threat to the health, safety or welfare of students or others in the schools of this Commonwealth justifying the immediate suspension of his educator certification and employment eligibility under section 9b(a)(1). We reach our conclusion based upon the following findings of fact:

1. Respondent holds the following professional certificates issued by the Department: Letter of Eligibility in the area of Superintendent PK-12; Administrative certificate in the area of Principal PK-12; Instructional II certificate in the area of Elementary K-6; and Letter of Equivalency in the area of Master's Equivalency. (Joint Exhibit 1, ¶ 1).
2. Respondent is employed by the Northeastern School District ("District") as the Superintendent. (Joint Exhibit 1, ¶ 2). Respondent has been employed by the

District since 1996. (N.T.<sup>4</sup> 194). He has been the superintendent since 2013. (N.T. 248).

3. Respondent's estranged wife, Dr. Kathy Minnich, is employed by the District as a school social worker. She works at the ninth grade academy, which is about a mile and a half from the administrative building where Respondent works. (Joint Exhibit 1, ¶ 3; N.T. 307).
4. Respondent and Kathy Minnich have two children together, ages 9 and 11. Both children attend school in the District. Respondent's daughter is in fifth grade and his son is in fourth grade. Their school is located approximately one and a half miles from the administrative building. (N.T. 250; 311; R-1).
5. Respondent filed for divorce on November 19, 2015. He and Kathy Minnich are still in the process of divorcing and working out the custody arrangement. (N.T. 243; 296).
6. Respondent was criminally charged with Aggravated Assault, 18 Pa.C.S. § 2702(a)(1)<sup>5</sup> on February 3, 2016 in York County, Pennsylvania. (Joint Exhibit 1, ¶ 4).
7. According to the December 5, 2015 Affidavit of Probable Cause ("Affidavit") prepared by Sergeant Arthur Archambeault of the Northeastern Regional Police Department, Respondent went to the home rented by Kathy Minnich on

---

4. "N.T." refers to "notes of testimony" from the April 4-5, 2016 administrative hearing.

5. A person is guilty of aggravated assault if he: "(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa.C.S. § 2702(a)(1). Serious bodily injury is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S. § 2301.

December 4, 2015 and started intensely ringing the doorbell and banging on the front door. (P-6).

8. According to the Affidavit, at the time, Kathy Minnich, Christopher Leh and the Minnich's two children were inside the residence. The intensity of the banging on the front door and doorbell ringing made them fearful so they moved to the back bedroom. (P-6).
9. According to the Affidavit, the back bedroom has a sliding glass door leading to a patio. At one point, the family dog moved the curtain and they could see Respondent standing on the porch looking into the bedroom through the sliding glass door. Kathy Minnich told Respondent to leave or she would call the police. (P-6).
10. According to the Affidavit, Respondent then picked up a piece of patio furniture and began banging the furniture against the sliding glass door, causing one of the panes to shatter. Kathy Minnich and Christopher Leh began calling 911 and then heard Respondent force his way through the front door. (P-6).
11. According to the Affidavit, Sergeant Archambeault was dispatched to the scene at 9:39 p.m. While en route, Sergeant Archambeault was receiving updates through his computer aided dispatch. The updates indicated screaming and yelling, arguing and slapping could be heard through the phone line. One update indicated that a male stated, "You're fucking dead!" (P-6).
12. According to the Affidavit, after Respondent forced his way into the home, he shoved Kathy Minnich and called her a "whore."<sup>6</sup> (P-6).

---

6. While not directly related to the Aggravated Assault charge, these allegations are part of the same criminal episode and are relevant to the threat question.

13. According to the Affidavit, Respondent approached Christopher Leh and engaged him in a physical altercation by placing his hands around Mr. Leh's neck and shoving, punching and wrestling him. Respondent kept asking Mr. Leh to shoot him. (P-6).
14. During the assault, Kathy Minnich and Respondent's children were screaming and begging Respondent to stop. (N.T. 65, 264). Respondent's 11-year-old daughter can be heard screaming on the 911 tape. (P-5; N.T. 77). Respondent persisted in his actions despite their screams. (N.T. 294). Respondent can also be heard on the 911 tape speaking in a loud and angry fashion. (N.T. 262-3).
15. Mr. Leh testified that when he said to Respondent, "Please don't do this in front of the children," Respondent replied, "I don't give a fucking shit about the children." (N.T. 65).
16. The assault ended when Respondent was restrained by a neighbor. (N.T. 70; 263-4).
17. According to the Affidavit, Mr. Leh stated he was fearful Respondent was going to kill everyone. Kathy Minnich also stated she was fearful for everyone's safety. (P-6).
18. According to the Affidavit, Mr. Leh sustained an injury to his right shoulder during the assault. (P-6).
19. According to the Affidavit, when Respondent was taken into custody, he stated he was at the residence to see his kids and he had no explanation as to why he forced the door open and gained entry into the residence. Respondent stated that he didn't like the fact that Kathy Minnich and Christopher Leh were dating

and he saw them in the bedroom through the sliding glass door. He further stated that he knew what he did was wrong. (P-6).

20. After a preliminary hearing, on February 3, 2016, Magisterial District Judge Jeffery Oberdorf found that there was sufficient evidence for the criminal charges against Respondent to proceed to the Court of Common Pleas of York County. (P-6).
21. At the hearing conducted on behalf of the Commission, Respondent admitted that he was not expected at Kathy Minnich's house on the evening of December 4, 2015 and that he was scheduled to have his children the following day. He also admitted that he broke the sliding glass door, entered through the front door and then grabbed Mr. Leh and pushed him against the wall. While he denied saying he didn't give a "fuck" about the children, Respondent admitted he used the word "kill" during the assault. Respondent also admitted, "I literally couldn't control myself." (N.T. 211-213; 260-264; 266; 293; 295; 315).
22. Respondent has a history of depression and anxiety. (N.T. 135; 256-258; R-1).
23. Respondent also has a history of anger problems dating back to 2013 or 2014. (N.T. 143-144; 154). He has issues communicating thoughts and feelings effectively. He "jams up" and is prone to either "implode" or "explode". Respondent needs continued counseling in order to address these long-standing issues, which contributed to the downfall of two marriages. (146; 155; R-1).
24. Respondent admitted that prior to December 4, 2015, he had a physical altercation with Kathy Minnich during which they "both ended up on the floor." (N.T. 301).

25. Kathy Minnich has a Protection from Abuse Order against Respondent dated December 17, 2015 from the York County Court of Common Pleas. (R-9).

Discussion

The safety of students and others in the schools of this Commonwealth is of paramount importance to the Commission. The Commonwealth Court has recognized the importance of the Commission's interest in removing educators who may constitute a threat to the health, safety or welfare of the students, the teachers or the school and in preserving the integrity of the profession. Petron v. Department of Education, 726 A.2d 1091 (Pa. Cmwlth. 1999); Bowalick v. Department of Education, 840 A.2d 519 (Pa. Cmwlth. 2004). Moreover, there is a strong public policy in favor of safe schools. The public policy is well-defined in legal precedent and in statute. Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educ. Support Pers. Ass'n., et al, 977 A.2d 1205, 1209 (Pa. Cmwlth. 2009) ("A school system has an unmistakable duty to create and maintain a safe environment for its students as a matter of common law."). Respondent's alleged violent criminal conduct clearly implicates the Commission's legitimate interests and public concern for school safety.

As noted above, it is alleged that Respondent forcibly entered Kathy Minnich's home and violently attacked and threatened Christopher Leh while Respondent's frightened children looked on, screaming and begging him to stop. Although we take no stance with regard to the truth of the allegations contained in the complaint, as noted above, the complaint provides reasonable cause for the Commission to believe the alleged acts were committed.

The nexus between those alleged acts and a safe and secure school environment is twofold. Kathy Minnich is employed by the District and Respondent's children attend school there. Their safety and welfare have already been compromised. Respondent's alleged criminal actions subjected all of the home's inhabitants to extreme emotional distress. According to the Affidavit, Mr. Leh was fearful Respondent was going to kill everyone. Kathy Minnich also told police that she was fearful for everyone's safety. Respondent's daughter can be heard screaming on the 911 tape.

Respondent's alleged actions also pose a risk of future endangerment. The mere fact that Respondent is charged with committing a violent crime certainly indicates dangerousness. Further, the allegations against Respondent evidence an extreme indifference to the value of human life and wanton disregard for the welfare of his own children. Respondent's alleged actions also evidence a dangerous lack of self-control. During his testimony Respondent admitted, "I literally couldn't control myself."<sup>7</sup> Ellis Berkowitz testified that Respondent has issues communicating thoughts and feelings effectively and that he "jams up" and is prone to either "implode" or "explode". Mr. Berkowitz found that Respondent has enough difficulty processing certain feelings and thoughts that he is in need of further counseling. Moreover, the violent episode that gave rise to the criminal charges was not an isolated incident. Respondent

---

7. At the hearing, Respondent claimed that he feared for his daughter's safety after seeing her standing in the bedroom with Christopher Leh. We find this testimony incredible. As noted above, Respondent offered no such explanation when questioned by police immediately after the incident. According to the Affidavit, Respondent told police he was not happy that Kathy Minnich and Christopher Leh were dating. In addition, Respondent's aggressive actions began before he was even aware of Christopher Leh's presence. He admitted that he did not know that Christopher Leh was at the home when he went there uninvited and started banging on the door and repeatedly ringing the doorbell. (N.T. 260). Finally, Respondent knew that Mr. Leh had spent time with the children prior to December 4, 2015. (N.T. 299). We also find concerning Respondent's efforts throughout the proceedings to deflect blame for his alleged criminal conduct to Kathy Minnich, Christopher Leh and his use of Ambien.

acknowledged a prior instance when he and Kathy Minnich argued and they “both ended up on the floor” before his daughter walked in the room and became upset.<sup>8</sup>

It is self-evident that one who has caused violence and threatened violence in the past may well do so again. Respondent faces significant stressors associated with his job, the pending criminal charges and ongoing marital and custody issues. His admitted lack of volitional control, which resulted in his alleged violent and dangerous criminal actions, combined with his history of depression and anxiety, his recognized tendency to either implode or explode and the fact that there was at least one other occasion where he acted out physically, give rise to a reasonable fear that these stressors could manifest in another explosive outburst that might threaten students or other members of the school community, including Kathy Minnich or Respondent’s children. When presented with such circumstances, the Commission has a duty to protect those specific individuals and the school community as a whole.

In addition, as noted above, public policy demands that schools provide a safe and secure environment where staff and students know they are safe. The criminal charges establish reasonable cause to believe that Respondent committed acts that are unquestionably inconsistent with his position as a school leader and with a safe school environment. The fact that Kathy Minnich works for the District and Respondent’s children attend school there exacerbates the threat posed by his presence. Allowing Respondent to remain in his position while serious public criminal charges are pending against him, would threaten to erode confidence in the school system and to create an

---

8. Kathy Minnich told Mr. Berkowitz that in August 2015 Respondent physically assaulted her by ripping off her blouse. She claimed that he would have torn her pants off as well if their daughter had not walked in the room. Respondent denied that any clothing was torn during the incident. Kathy Minnich also told Mr. Berkowitz that over the past several years she felt threatened, intimidated and scared and that she had concerns for her children. (N.T. 140; R-1).

environment in which students and staff feel unsafe, thereby adversely impacting their welfare and emotional safety.

Respondent failed to provide sufficient evidence to rebut the Commission's reasonable belief that the health, safety or welfare of students or others would be jeopardized by retention of his certification during the pendency of the criminal proceeding. At the evidentiary hearing conducted on behalf of the Commission, Respondent proffered the testimony of Ellis Berkowitz and Dr. Haynes-Weller, who were qualified by the hearing officer to testify as experts in the areas of general mental health assessments and psychology, respectively.<sup>9</sup> When determining the credibility of an expert witness and the weight of the testimony, the Commission treats the expert the same as any other witness. The Commission is free to believe all, part or none of the expert testimony. In the instant matter, we find that there are several good reasons to view the testimony of Mr. Berkowitz and Dr. Haynes-Weller with skepticism.

Initially, we note that Mr. Berkowitz did not render an opinion on the ultimate question at issue in these proceedings: whether Respondent poses a threat to the health, safety or welfare of students or other individuals in a school. In fact, Mr. Berkowitz testified that he was not asked and was not in a position to offer such an opinion. (N.T. 126). Instead, Mr. Berkowitz was called to testify regarding the general mental health assessment that he performed in February 2016 in connection to the ongoing custody case involving Respondent and Kathy Minnich. (N.T. 125). The purpose of the assessment was to "determine if [Respondent] requires any additional psychological or psychiatric treatment in addition to the outpatient counseling he is

---

9. Mr. Berkowitz is a licensed social worker. He has a master's degree in social work. Dr. Haynes-Weller is a licensed psychologist. Both were qualified as experts over the Department's objection.

already receiving.” (N.T. 117; R-1). The general mental health assessment is a “soft assessment” because the methods used are not as sophisticated as those used by psychologists and psychiatrists. (N.T. 118-119). Mr. Berkowitz’s report is “an add-on” to the risk assessment being performed by Deb Yambor, who did not testify at the hearing. It is designed to provide the court hearing the custody case with Mr. Berkowitz’s general impressions and recommendations.<sup>10</sup> (N.T. 125; 129; 299).

According to Mr. Berkowitz, the mental health assessment showed Respondent has no psychological syndromes, no substance abuse issues and no propensity for violence.<sup>11</sup> Although not part of the evaluation, Mr. Berkowitz also opined that the conduct giving rise to the criminal charges is unlikely to be repeated. In assessing the probative value of Mr. Berkowitz’s testimony, we considered not only the purpose and limitations of the general mental health assessment, but also the fact that Mr. Berkowitz only met with Respondent on two occasions. We also find especially noteworthy Mr. Berkowitz’s admission that he cannot predict how Respondent will behave in certain situations and that his opinion regarding the likelihood of a reoccurrence is based on a “gut feeling.” (N.T. 126, 145, 161). An expert opinion must be based on facts. Pa.R.E. 703; 225 Pa. Code § 705. Expert testimony cannot be based solely on conjecture or surmise. Gillingham v. Consol Energy, Inc., 51 A.3d 841 (Pa. Super. 2012). A “gut feeling” is not an expert opinion.

---

10. Mr. Berkowitz recommended that Respondent continue to receive individual outpatient counseling. He also recommended outpatient family counseling because both of the Minnich children expressed fears about spending overnights with Respondent. (N.T. 146; 152; R-1).

11. Of course, even if accepted as true, none of these findings precludes a conclusion that Respondent poses a threat to the health, safety or welfare of students or others in a school.

Dr. Haynes-Weller offered only a very conclusory opinion that Respondent does not pose a threat to Kathy Minnich, his children or the children he serves in the District. His affidavit, prepared in anticipation of the hearing in this matter, states no facts on which his opinion is based. (R-4). When asked at the hearing to explain the basis for his opinion that Respondent does not pose a threat to Kathy Minnich, Dr. Haynes-Weller explained that Respondent has been able to work through his emotions, has learned the coping skills necessary to deal with any frustrations he might feel and understands "what his responsibilities are."<sup>12</sup> (N.T. 285). Dr. Haynes-Weller offered only the following explanation in support of his opinion that Respondent does not pose a threat to his children or children in the District:

Because he gave no--has never given any indication of irritability or frustration towards any children. He is very calm and understanding in the way he communicated towards me. Obviously, I've never observed him with children, but he is very--communicates in a way that shows concern and care towards individuals, especially children, and--and that's it.

(N.T. 285-6).

Dr. Haynes-Weller offered no testimony regarding his particular training, expertise or qualifications to offer an opinion on whether Respondent poses a threat. He did not articulate the commonly accepted methods within the psychological community for predicting future threats or the accuracy of such predictions. We do not

---

12. Respondent attends counseling sessions with Dr. Haynes-Weller once every other week. (N.T. 224; R-1). That means Respondent attended at most eight counseling sessions between December 4, 2015, the date of the criminal episode, and March 28, 2016, the date Dr. Haynes-Weller executed his affidavit attesting that Respondent does not pose a threat. (R-4). We are incredulous that Dr. Haynes-Weller could reach this conclusion within a reasonable degree of certainty after just eight sessions following Respondent's arrest on charges of aggravated assault. Moreover, in the immediate aftermath of his arrest, Respondent certainly would have had a motive to paint himself in the best possible light, which casts further doubt on the reliability of Dr. Haynes-Weller's testimony. Finally, Dr. Haynes-Weller admitted that it is not unusual for an individual to present more calm following the type of explosive outburst Respondent experienced on December 4, 2015. (N.T. 289). We are not convinced that Respondent's calmer demeanor following the criminal episode is a sufficient basis on which to conclude that he no longer poses a threat.

know if the "facts" on which he relied in reaching his opinion are of the type reasonably relied upon by experts in his field. He cited no empirical literature to support his conclusion. Nor did Dr. Haynes-Weller perform any of the sophisticated psychological testing that according to Mr. Berkowitz's testimony should distinguish a psychologist's evaluation from the sort of soft mental health evaluation performed by someone less qualified. (N.T. 119). Instead, Dr. Haynes-Weller relied solely on information provided by Respondent during counseling sessions. (N.T. 287-8). Under the circumstances, it is difficult to distinguish Dr. Haynes-Weller's "expert opinion" from mere conjecture.

It is, of course, not easy to predict future behavior. In reality, no one can predict future threats precisely and with absolute certainty. While we recognize that in some cases expert testimony may aid the Commission in determining whether an individual poses a threat, based upon the record before us and the very serious and violent nature of the charges lodged against Respondent, we are simply not willing to let school safety rest upon a "gut feeling" or mere conjecture.

In further support of his contention that he does not pose a threat, Respondent proffered the testimony of several colleagues and family members who testified that they have never known him to act violently and that his conduct at school has always been professional. These witnesses also opined that they do not think of him as a threat to students. While this testimony establishes that Respondent is clearly well-liked and respected by some, it is insufficient to overcome the Department's evidence.

#### Other Issues

First, Respondent argues that his due process rights were violated. We disagree.

A teaching certificate is a constitutionally protected property right entitled to due process protection. Bowalick v. Commonwealth, Department of Education, 840 A.2d 519, 522 (Pa. Cmwlth. 2004). By statute, the process Respondent is due is an accelerated pre-deprivation hearing to determine whether he has been charged with an offense enumerated in section 111(e)(1)-(3) and whether he poses the requisite threat. The record is clear that Respondent received the process he was due.

Respondent's due process argument is premised on his faulty assertion that he was denied the opportunity to fully explore issues related to witness credibility. Specifically, Respondent argues that he should have been allowed to question Mary Brungard regarding Kathy Minnich's reputation for truthfulness. Kathy Minnich did not testify in these proceedings. Her credibility was clearly not at issue. Respondent also argues that he was denied the opportunity to fully cross examine Christopher Leh, whose credibility he claims was especially important because Mr. Leh claims to be a victim and has a motive to paint Respondent's conduct in the worst possible light. Mr. Leh's testimony was confined to the criminal episode and his resulting injury, matters about which the Commission makes no findings beyond what is stated in the criminal charges. Nevertheless, the hearing officer gave Respondent leeway in cross-examining Mr. Leh and permitted Respondent to ask multiple questions exploratory of Mr. Leh's credibility, including questions as to his prior testimony.<sup>13</sup> Finally, Respondent argues that he was denied due process because the hearing officer was not asked to rule on

---

13. The hearing officer sustained objections to only three of Respondent's questions. Those questions related to whether or not Mr. Leh took pain killers for his shoulder, whether Mr. Leh told his wife about his relationship with Kathy Minnich and whether Mr. Leh knew that Respondent was upset about the relationship. (N.T. 89; 92; 98). We see no error in the hearing officer's rulings on the Department's objections. Moreover, given the limited scope of these proceedings and the fact that the factual matters about which Mr. Leh testified are not before us for resolution, the hearing officer's decision to preclude this testimony was harmless.

issues of credibility,<sup>14</sup> which denies Respondent an assessment as to his attitude and conduct during the disciplinary hearing.<sup>15</sup> We note that in educator disciplinary proceedings, the Commission is the ultimate fact finder and sole arbiter on issues of credibility and evidentiary weight. Boguslawski v. Department of Education, 837 A.2d 614, 618 (Pa. Cmwlth. 2003); *citing* Gow v. Department of Education, 763 A.2d 528, 532 (Pa. Cmwlth. 2000). As the ultimate fact finder, the Commission is permitted to determine the credibility of testimony and to make findings of fact based solely on a review of the record. Fisler v. State System of Higher Educ., California University of Pennsylvania, 78 A.3d 30 (Pa. Cmwlth. 2013); Cavanaugh v. Fayette County Zoning Hearing Board, 700 A.2d 1353 (Pa. Cmwlth. 1997). It is well-settled that a litigant is not denied due process of law when the ultimate decision in a case is made by an administrative fact finder who did not hear the testimony. Id.

Respondent was afforded ample opportunity to contest the Department's assertion that he poses a threat to the health, safety or welfare of students or others in a school. Consequently, we find no due process violation to have occurred.

Second, Respondent argues that he is entitled to the benefit of a negative inference as a result of the Department's failure to call Kathy Minnich as a witness. The failure to call an available witness who is within one party's control and who has knowledge pertaining to a material issue, may, if not explained, raise an inference or

---

14. The hearing officer was directed to certify the record to the Commission without a proposed report.

15. Section 233.113 of Chapter 233 sets forth a list of factors that the Commission *may* consider in crafting disciplinary sanctions. 22 Pa. Code § 233.113. Among those factors is the educator's attitude and conduct during the disciplinary proceedings. The application of these factors to any given case is entirely within the discretion of the Commission. The Commission is not bound to consider all or even any of the enumerated factors. Moreover, an evaluation of these factors, like all other determinations, can be made by reviewing the record. It should also be noted that the preeminent consideration in all educator discipline cases is ensuring the health, safety or welfare of students and other individuals in our schools. All other factors must yield to this overarching purpose.

presumption that the absent witness' testimony would have been adverse to that party. Bentivoglio v. Ralston, 288 A.2d 745 (Pa. 1972). However, an adverse inference cannot be used when the uncalled witness is equally available to both parties. Barrett v. Ross Township Civil Service Commission, 55 A.3d 550, 560 (Pa. Cmwlth. 2012). Here, Kathy Minnich was available to both the Department and to Respondent. Therefore, no negative inference can be drawn from the Department's failure to call her as a witness.

Finally, Respondent is attempting to raise issues concerning the validity of the criminal charges. He has requested that we find that the charge of Aggravated Assault was added in violation of Rule 564 of the Rules of Criminal Procedure. Such a finding is clearly not within our authority to make. This is a claim that must be raised and disposed of in the Court of Common Pleas.

#### Conclusion

For all the foregoing reasons, we find that the immediate suspension of Respondent's educator certification and employment eligibility pursuant to section 9b(a)(1) of the Act is an appropriate safeguard to protect the health, safety or welfare of students or other persons in the schools of this Commonwealth.

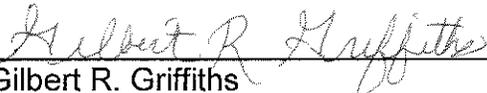
Accordingly, we enter the following:

**ORDER**

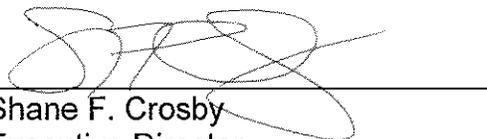
AND NOW, this 26<sup>th</sup> day of May, 2016, upon consideration of the Department of Education's Notice of Charges requesting immediate suspension, it is hereby ORDERED that the educator certification and eligibility to be employed as a charter or cyber charter school staff member or contracted educational provider staff member of SHAWN D. MINNICH shall be SUSPENDED pursuant to 24 P.S. § 2070.9b(a)(1). This order is effective IMMEDIATELY.

PROFESSIONAL STANDARDS AND  
PRACTICES COMMISSION

BY:

  
\_\_\_\_\_  
Gilbert R. Griffiths  
Chairperson

ATTEST:

  
\_\_\_\_\_  
Shane F. Crosby  
Executive Director

Date Mailed: May 26, 2016