

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF EDUCATION

PROFESSIONAL STANDARDS AND PRACTICES COMMISSION

COMMISSIONER OF HIGHER EDUCATION :  
DEPARTMENT OF EDUCATION, :  
Complainant :

v. :

WESTLEY HOLMES, II, :  
Respondent :

DI-91-01

**RECEIVED**

DEC 31 1991

Professional Standards and  
Practices Commission

FINDINGS OF FACT

Background and Procedural History:

1. Westley Holmes, II, ("Holmes") holds an Instructional II certification endorsed in the area of elementary education issued by the Commonwealth of Pennsylvania, Department of Education (PDE) in May 1978. PDE issued Holmes a master's equivalency in 1981.
2. Holmes allegedly raped a minor (age 15) on August 27, 1988. The victim reported the alleged rape to her grandmother on August 29, 1988. Holmes was arrested by the City of Philadelphia Police Department on charges of rape, indecent exposure, corrupting the morals of a minor, simple assault and indecent assault on August 31, 1988.
3. The School District of Philadelphia was aware of the criminal charges against Holmes, as well as his arrest, as early as September 7, 1988.
4. Holmes' criminal trial on the aforesaid charges was conducted on October 4th and 5th, 1989. On October 5, 1989, Holmes was acquitted of all criminal charges related to the alleged August 28, 1988 incident.
5. The School District of Philadelphia conducted arbitration hearings on the issue of Holmes' immorality, arising from the alleged August 1988 incident, on November 6, 1989, June 27, 1990 and September 9, 1990.
6. An arbitrator's award, dated November 26, 1990, discharged Holmes from his employment as a teacher with the School District of Philadelphia for immorality arising from the alleged August 28, 1988 rape and sexual assault of a minor.
7. The School District of Philadelphia submitted a Mandatory Report of Certificated Employee Terminated for Cause, accompanied by a copy of the arbitrator's opinion and award, to the

Pennsylvania Department of Education, Bureau of Teacher Preparation and Certification which was received by PDE on December 28, 1990. (PDE Exhibit No. 1).

8. By letter dated January 24, 1991, PDE requested the School District of Philadelphia to forward a copy of the transcript of the November 6, 1989, June 27, 1990 and September 9, 1990 arbitration hearings. (Docket Exhibit No. 4 ).

9. On February 8, 1991, PDE received a letter dated February 4, 1991 from Attorney Vincent Salandria with the transcripts of the June 27, 1990 and September 11, 1990 arbitration hearings, the school district's memorandum regarding Holmes' arrest on August 31, 1988, and a copy of the October 4 and 5, 1989 transcript of testimony in the Court of Common Pleas in the Philadelphia Criminal Trials Court. (PDE Exhibit No. 2).

10. On March 5, 1991, the Commissioner for the Office of Higher Education issued a Notice of Charges against Westley Holmes, II relating to discipline, including possible revocation of his teaching certification, based upon the allegation of immorality. (Docket Exhibit No. 2).

11. By letter dated March 26, 1991, and received on April 1, 1991, Holmes filed an answer to the Notice of Charges. (Docket Exhibit No. 5).

12. A hearing officer was appointed on June 4, 1991. (Docket Exhibit No. 8).

13. A pre-hearing conference was conducted by telephone on Wednesday, July 3, 1991. (Docket Exhibit No. 9).

14. Pursuant to a subpoena issued by the hearing officer, PDE deposed Alan DeJong, M.D. as a medical expert witness, for use at the administrative hearing, on August 5, 1991 over the objection of Holmes. (PDE Exhibit No. 3A).

15. On August 5, 1991, Holmes raised issues and filed a brief on the constitutionality of conducting the license revocation proceedings. (Docket Exhibit No. 17).

16. PDE responded by filing a brief on August 9, 1991. (Docket Exhibit No. 18).

17. On August 12, 1991, the hearing officer certified a Motion to Dismiss to the Agency Head for Consideration and Disposition. (Docket Exhibit No. 19).

18. By Memorandum and Order dated August 13, 1991, counsel for the Commission deferred consideration of the matter until the

Proposed Report of the Hearing Officer is filed at the conclusion of the hearing. (Docket Exhibit No. 20).

19. A hearing was scheduled for August 15, 1991 in Philadelphia. (Docket Exhibit No. 15). Due to Holmes' legal counsel's medical emergency, the hearing was continued, with the consent of both parties, until September 13 and 14, 1991.

20. The formal, administrative hearing on the Notice of Charges was conducted on September 13 and 14, 1991.

21. The briefs of both parties were received by the hearing officer by November 9, 1991.

HEARING:

Holmes' objection to the direct testimony of PDE's witness Sergeant Doris Bey:

22. The PDE's offer of proof was that Sgt. Bey's direct testimony would show that the victim reported her allegations of rape to the Philadelphia Police Department, Sgt. Bey interviewed the victim and the victim's grandmother and, based upon these interviews, an arrest was made. (Tr. 9/13/91 @ p. 98).

23. Holmes objected to Sgt. Bey's proposed testimony on direct as hearsay since it was being used as a prior consistent statement to bolster the credibility of the complainant. The objection was sustained by the hearing officer. (Tr. 9/13/91 @ p. 98-100).

Holmes' objection to the direct testimony of PDE's witness [REDACTED]:

24. The PDE's offer of proof was that [REDACTED]'s direct testimony would show that she had a long standing relationship with both the victim and Holmes, she is the legal guardian of the victim, she was the first person to whom the victim disclosed the alleged rape, she took the victim to the hospital for a medical examination after the alleged rape, and she controlled the subsequent turn of events relating to the report of the incident to the police and medical personnel. (Tr. 9/13/91 @ p. 100-101).

25. Holmes objected to [REDACTED]'s proposed testimony on direct as hearsay since it was being used as a prior consistent statement to bolster the credibility of the complainant. ((Tr. 9/13/91 @ p. 101).

26. Before the Hearing Officer could make a ruling on the objection to [REDACTED]'s direct testimony, counsel for PDE voluntarily withdrew the presentation of witness [REDACTED] on direct and reserved [REDACTED]'s testimony for rebuttal. (Tr. 9/13/91 @ p. 101).

Holmes' objection to the direct (deposition) testimony of Allan DeJong, M.D.:

27. Prior to and at the August 5, 1991 deposition of Dr. DeJong, Holmes' attorney objected to the entire testimony as hearsay upon hearsay and as not being admissible as an affirmative part of the complainant's or the PDE's case in chief. Further, that the expert testimony could only be used in rebuttal and only if certain issues had been raised by the defense. (DeJong 8/5/91 Dep. @ p. 5, 15).

28. Holmes' attorney stipulated that Dr. DeJong was an expert in pediatrics and in child sexual abuse. (DeJong 8/5/91 Dep. @ p. 7).

Holmes' objection to the admission of the medical records of the victim's physical examination:

29. Dr. DeJong testified as to the identity of the medical records, the mode of their preparation and that they were prepared in the regular course of business at or near the time of the event. (DeJong 8/5/91 Dep. @ p. 10, 14 -16).

Testimony:

30. PDE called Ann Shuster to verify the chronology of the receipt of items relating to the complaint and to confirm the dates they were received. (The findings of fact from her testimony is set forth under paragraphs 7-10).

31. PDE's second witness was the victim who testified that in the early morning hours of Saturday, August 27, 1988 Holmes kissed her while she was sleeping in her own bed at her aunt's house; Holmes lifted up her pajama shirt and pulled down her pajama pants; Holmes pulled down his pajama pants and got on top of her; and Holmes put his penis in her vagina. (Tr. 9/13/91 @ p. 54).

32. The aunt's dog would always bark when Holmes came near the victim or when the dog was put outside. Nobody heard the dog bark during the time of the alleged incident, even though the dog usually sleeps in the same room as the victim.

33. During the time of the alleged incident, the victim's sister was sleeping in the next room with the adjoining door open, yet no one heard any noise.

34. The victim was sleeping in the same house with her aunt and sister when the alleged incident happened and slept there the next night; she attended an all-day picnic with her sister and her aunt on Saturday; she went to church with her sister and aunt on Sunday, but did not tell her aunt or her sister during this time about Holmes' alleged conduct.

35. Holmes accompanied the victim to the all-day picnic and spent the next night sleeping in the same house as the victim.

36. Mrs. [REDACTED], the victim's grandmother has legal guardianship of the victim. Mrs. [REDACTED] picked the victim up at the aunt's house on Sunday evening and the victim spent Sunday night with Mrs. [REDACTED]. On Monday afternoon, the victim first accused Holmes of the immorality when she told Mrs. [REDACTED] what happened after Mrs. [REDACTED] had discovered the victim was crying.

37. PDE's third witness, called as on cross as a hostile witness, was [REDACTED], the victim's aunt. She did not contribute anything of substance to the testimony.

38. Holmes presented himself as his sole witness. He specifically denied that he raped the victim or that he ever had intercourse with her. (Tr. 9/13/91 @ p. 123).

39. The victim was physically examined for evidence of sexual assault at 2:05 a.m. on August 30, 1988. (DeJong 8/5/91 Dep. @ p. 32).

40. The physical findings of victim's 8/30/88 pelvic examination were: "small white discharge, vagina dry and tender, no cervical motion tenderness". (DeJong 8/5/91 Dep. @ p. 36, PDE Exhibit No. 3).

41. The victim had an elevated body temperature of 100.2 during the examination. (DeJong 8/5/91 Dep. @ p. 37, PDE Exhibit No. 3).

42. There was no sperm or acid phosphatase found in or on the victim during the physical examination. Acid phosphatase is an enzyme that is secreted by the prostate gland. It forms a major part of the liquid portion of the ejaculate, the liquid portion that surrounds the sperm. (DeJong 8/5/91 Dep. @ p. 38-39).

43. Dr. DeJong testified that a pelvic examination revealed that there was no tenderness in the tubes and ovaries and further there were no lesions anywhere on the body, and in particular on the sexual organs. (DeJong 8/5/91 Dep. @ p. 36).

44. The findings of the victim's 8/30/88 physical examination do not confirm whether or not there was sexual contact. The tenderness, which was the only remarkable physical finding in an otherwise normal genital and internal examination, external genital and internal genital examination, does not indicate where the tenderness originated. (DeJong 8/5/91 Dep. @ p. 42).

## CONCLUSIONS OF LAW

### Estoppel and Res Judicata Defenses:

1. The Pennsylvania Department of Education Professional Standards and Practices Commission is not collaterally estopped from pursuing an administrative proceeding under the Teacher Certification Law for a license revocation against an individual based upon immoral conduct when the individual has been acquitted of criminal charges arising out of the same incident, and pursuing said action is not precluded by res judicata, nor does it constitute state action which violates the double jeopardy clause of the 5th Amendment, U.S. Const. amend. V.

2. An acquittal on criminal charges does not serve as a collateral estoppel bar to disciplinary proceedings before the Professional Standards and Practices Commission involving the charge of immorality because:

a. The differing standards of proof, i.e. "beyond a reasonable doubt" standard in criminal proceedings versus the "preponderance of the evidence" standard in the Professional Standards and Practices Commission proceedings, prevents an identity of the issues;

b. the Professional Standards and Practices Commission proceedings do not involve the possibility of a loss of liberty;

c. the Professional Standards and Practices Commission's determination of guilt with regard to conduct of the Respondent which constitutes immorality is distinguishable from the determination of guilt in a criminal offense tried in court proceedings; and

d. the proceedings before the Professional Standards and Practices Commission are de novo.

### Statute of Limitations defense - time to file Complaints:

3. 24 P.S. Section 12-1259(a) provides that:

A proceeding to discipline a professional educator shall be initiated by the filing of a complaint with the department by any interested party within one year from the date of the occurrence of any alleged action specified under Section 5(a)(11), or from the date of its discovery. ...

4. 24 P.S. Section 12-1255(a)(11), {Section 5(a)(11)}, empowers the Professional Standards and Practices Commission:

To discipline, as provided hereunder, any professional educator found guilty upon hearings of immorality, ...

5. The "occurrence of any alleged action specified under Section 5(a)(11)" was finding Holmes "guilty upon hearings of immorality", i.e. when the arbitrator issued his November 26, 1990 award discharging Holmes for immorality.

6. The Commission complied with the one year statute of limitations to file a complaint against Holmes when it filed the Notice of Charges on March 5, 1991 which was within one year from the November 26, 1990 award discharging Holmes for immorality.

In the alternative:

7. Under 24 P.S. Section 12-1259(b)(1) a commissioned officer of a school entity is required to report promptly to the department each instance "where the school entity has dismissed a certified employee for cause".

8. The Mandatory Report of Certificated Employee Terminated for Cause, accompanied by a copy of the arbitrator's opinion and the arbitrator's November 26, 1990 award of discharge for immorality submitted by the School District of Philadelphia and received by the Bureau of Teacher Preparation and Certification on December 28, 1990 complies with the applicable reporting time limitation under the statute.

9. The subsequent receipt on February 8, 1991 of transcripts of the June 27, 1990 and September 11, 1990 arbitration hearings, school district's memorandum regarding Holmes' arrest on August 31, 1988, and a copy of the excerpt testimony in the Court of Common Pleas in the Philadelphia Criminal Trials Court, 1989 triggered the 30 day time frame under 24 P.S. Section 12-1259(f) to initiate hearing procedures.

10. The hearing procedures were initiated in a timely fashion, in accordance with the required statutory provisions of 24 P.S. Section 12-1263(a), on March 5, 1991, when the Commissioner for the Office of Higher Education issued a Notice of Charges against Westley Holmes, II alleging immorality.

Objection to the direct testimony of Commission's witness Sergeant Doris Bey:

11. Sgt. Bey's direct testimony of consistent statements made by the victim was inadmissible because if a witness is impeached by prior inconsistent statements with suggestion that her testimony is a recent fabrication, prior consistent statements are only admissible on redirect or rebuttal to refute suggestion. Com. v. Martin, 124 Pa. Super. 293, 188 A. 407 (1936). (see Tr. 9/13/91 @ p. 61, 88-89, 146-147, 149-150).

12. The victim's response when questioned by Holmes' legal counsel about certain inconsistent statements made by her at the prior criminal trial, regarding the color of the shirt Holmes was wearing when he allegedly entered her bedroom and what she did immediately following the rape, cannot impeach her credibility as to those facts in that the victim testified that she did not remember. Com. v. Knudsen, 443 Pa. 412, 278 A.2d 881 (1971). (see Tr. 9/13/91 @ p. 67-69, 82).

Admissibility of the victim's Medical Records of the emergency room gynecological examination:

13. PDE qualified Dr. DeJong as a proper witness to identify the medical records, the mode of their preparation and that they were prepared in the regular course of business at or near the time of the event.

14. The records are admissible under the Business Records Act exception to the hearsay rule for the purpose of showing hospitalization, treatment prescribed, symptoms given and diagnosis. (42 Pa.C.S.A. Section 6108).

Admissibility of Dr. Alan DeJong's expert medical testimony as the non-treating physician:

15. Dr. DeJong was qualified as an expert in pediatrics and in child sexual abuse with the concurrence of Holmes' counsel as such he is qualified to testify as to the contents of the medical records and their medical significance.

Conclusions:

16. During the medical examination conducted on August 30, 1988, there was no positive physical findings that the victim had sexual intercourse.

17. The burden of proof is upon PDE to show by clear and convincing evidence that Holmes' committed the acts of immorality complained of, i.e. rape and sexual assault.

18. The administrative hearing on the Notice of Charges filed by the Commissioner of Higher Education is a de novo hearing at which the testimony and evidence from the previous criminal trial and arbitration hearing cannot be considered except for the purpose of impeaching a witness by inconsistent statements.

20. PDE failed to meet its burden of proof that Holmes engaged in conduct of immorality, i.e. rape and/or sexual assault.

## DISCUSSION

There are certain procedural matters and points of evidence that merit discussion regarding the hearing officer's findings.

In PDE's brief at page 15, it contends that it intended to qualify Sgt. Bey as a witness under the Uniform Business Records as Evidence Act to introduce police records of the interview she conducted with the victim. However, the introduction of the police report or interview was never stated by PDE as part of the offer of proof, nor was the issue of the Uniform Business Records as Evidence Act discussed. (Tr. 9/13/91 @ p. 98). The hearing officer sustained the objection but specifically granted permission for PDE to present Sgt. Bey as a rebuttal witness. (Tr. 9/13/91 @ p. 100, lines 13-16).

In support of Holmes' objection to the introduction of the direct testimony of Bey and [REDACTED] to rehabilitate the victim's testimony by showing consistent out of court statements, reference was made by Holmes to 42 Pa.C.S.A. Section 5985.1. This rule makes such testimony admissible if the child victim was 12 years of age or younger at the time the statement was made. The statute limits the applicability of this rule to criminal proceedings.

The case of Commonwealth v. Rakes, 398 Pa. Super. 440, 581 A.2d 212 (1990) upon which PDE relied is also inapplicable because it dealt with criminal proceedings at which the victim was 8 or 9 years old at the time of the alleged incident and 15 years old at the time of trial. Further, the victim testified that she told her counselor and psychologist of the abuse she suffered.

The victim of Holmes' alleged immorality never identified Bey as the officer to whom she directed her complaint or to whom she provided any information. The hearing transcript indicates that the victim gave her statement to a male police officer. (Tr. 9/13/91 @ p. 58, lines 12-13). If Section 5985.1 is applicable, then the Rakes case cited by PDE is not on point since the circumstances to place the testimony as either an exception to hearsay or as admissible testimony on direct are not present in the victim's situation.

Although discussed in its brief, PDE never raised the issue of spontaneous utterances or res gestae as either part of its offer of proof or in response to Holmes' objection to [REDACTED]'s proposed direct testimony.

PDE's statement in its brief that Bey and [REDACTED] were prohibited from testifying on rebuttal is not accurate. Bey was specifically advised by the hearing officer that she could testify on rebuttal and did not do so. Mrs. [REDACTED] testified as PDE's rebuttal witness on September 14, 1991. Holmes' objection to Mrs. [REDACTED]'s direct testimony was never ruled upon since PDE voluntarily withdrew the

proposed testimony and decided to present her on rebuttal. (Tr. 9/13/91 @ p. 101 lines 17-20).

The hearing officer, even after assuming that the victim was not examined until 65 to 72 hours after the alleged rape occurred, finds the testimony of Dr. DeJong as credible so far as the probability of finding sperm or acid phosphatase is essentially nil 72 hours subsequent to sexual intercourse. It may explain why there were no positive physical findings, however, it does not prove sexual intercourse or assault. The legal significance of the physical findings, or rather lack thereof, as explained by Dr. DeJong's testimony differs between PDE and Holmes.

What Dr. DeJong actually testified to was:

The medical records do indicate some physical findings that may (emphasis added) suggest that she (victim) has had some type of trauma. (DeJong 8/5/91 Dep. @ p. 22).

So that, as far as the pelvic examination, the finding of tenderness is a finding that is consistent with injury. (DeJong 8/5/91 Dep. @ p. 23 lines 6-8).

Tenderness can be produced through many different mechanisms. One of the mechanisms can be penile penetration, others can be other kinds of injury, and one could possibly be, possibly occur during the examination. (DeJong 8/5/91 Dep. @ p. 29 line 24 through p. 30 line 3).

The victim herself testified in response to PDE's question "How did you feel after that (GYN) examination?", that:

I was hurt. I felt pain. I felt uncomfortable and tender. (Tr. 9/13/91 p. 58 line 23 through p. 59 line 2).

When asked whether Dr. DeJong could tell from the physical findings whether or not it was from sexual contact, he responded:

No. The fact that there is tenderness, which was the only remarkable physical findings, and an otherwise normal genital and internal examination, does not tell me where that tenderness originated. ((DeJong 8/5/91 Dep. @ p. 42 lines 7-11)).

Since there is no positive physical findings of a rape or sexual assault, the case must be resolved upon the credibility of the witness with PDE having the burden to show by clear and convincing evidence that Holmes' committed the acts of immorality complained of, i.e. rape and sexual assault. The hearing officer did not find that PDE met that burden.

ORDER

AND NOW this 31st day of December, 1991, the Notice of Charges dated March 5, 1991 and filed by the Commissioner of Higher Education against Holmes are dismissed.

Karen M. Balaban  
Karen M. Balaban, Hearing Officer