

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF EDUCATION  
PROFESSIONAL STANDARDS AND PRACTICES COMMISSION

In Re: Westley Holmes, II : PSPC Docket No. DI-91-01  
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ADJUDICATION AND ORDER

I. INTRODUCTION

This matter comes before the Professional Standards and Practices Commission ("Commission") on exceptions filed by the Department of Education, through its Office of Chief Counsel, to the decision of the Commission's hearing officer regarding the notice of charges against the respondent, Westley Holmes, II. These exceptions were filed with the Commission pursuant to section 14(a) of the Teacher Certification Law, as amended, 24 P.S. §12-1264(a).

After due deliberation, the Commission, by a majority vote of its full membership on March 13, 1992, decided to reject the hearing officer's decision. This Adjudication and Order constitutes the Commission's written opinion and order reversing the hearing officer's decision and imposing discipline upon the

respondent pursuant to section 14(c) of the Teacher Certification Law, as amended, 24 P.S. §12-1264(c).

## II. PROCEDURAL HISTORY

On March 5, 1991, the Department of Education, through its Commissioner for Higher Education and its Office of Chief Counsel, filed a notice of charges with the Commission pursuant to section 13(a) of the Teacher Certification Law, as amended, 24 P.S. §12-1263(a). In that notice of charges, the Department alleged that the respondent, Westley Holmes II, holds a permanent teaching certificate endorsed in the area of elementary education issued in May 1978 and a Master's equivalency issued in February 1981 by the Department of Education. The Department alleged that, on December 28, 1990, it was notified by the School District of Philadelphia that the respondent had been dismissed from employment with the school district. In its notice of charges, the Department included a copy of an arbitrator's decision dated December 20, 1990, upholding the school district's dismissal of the respondent on the grounds of immorality.

As provided by section 11 of the Teacher Certification Law, as amended, 24 P.S. §12-1261, the Department on January 24, 1991 requested that the school district forward a copy of the transcript and other documents reflecting the arbitration proceedings and to submit a report as required under section 11.

The Department received the transcript of the arbitration hearings on February 3, 1991 and made it a part of its notice of charges.

In its notice of charges, the Department incorporated by reference the findings and conclusions of the arbitrator that, in August 1988, the respondent had raped a 15-year-old girl,

, who was staying in his home. The Department averred that such conduct constitutes immorality within the meaning of section 5(a)(11) of the Teacher Certification Law, as amended, 24 P.S. §12-1255(a)(11). In addition, the Department averred that the respondent "is a danger to the health, safety and welfare of students in the schools of this Commonwealth." Because of the respondent's alleged immorality, the Department requested that the Commission order the revocation of the respondent's professional teaching certificates.

On March 26, 1991, the respondent, through counsel, admitted that he had been dismissed by the school district and that the arbitrator had upheld the school district's dismissal. However, the respondent denied the truth of the factual allegations made against him and requested a hearing.

On June 4, 1991, the Commission appointed Karen M. Balaban, Esquire, to serve as hearing officer. After a pre-hearing conference, a hearing was held in Bala Cynwyd, Montgomery County,

on September 13 and 14, 1991, before Ms. Balaban. Pursuant to section 13(c)(7) of the Teacher Certification Law, as amended, 24 P.S. §12-1263(c)(7), Ms. Balaban issued her decision on December 31, 1991. Ms. Balaban decided that the notice of charges filed against the respondent should be dismissed after finding that there was insufficient evidence of immorality.

### III. EXCEPTIONS

On January 30, 1992, the Department of Education, through its Office of Chief Counsel, timely filed with the Commission exceptions to the hearing officer's decision pursuant to section 14(a) of the Teacher Certification Law. Specifically, the Department contends that the hearing officer made five errors of law in rendering her decision.

First, the Department contends that the hearing officer erroneously interpreted the Teacher Certification Law to require that the Department prove its case "by clear and convincing evidence." The Department contends that the legal standard of proof under the Teacher Certification Law is the "preponderance of the evidence" standard, which is applicable generally in all civil proceedings and, in particular, in professional disciplinary proceedings. Under the preponderance of the evidence standard, the Department contends that it has proven that the respondent has committed an act of immorality.

Second, the Department complains that the hearing officer improperly disallowed the testimony of a police officer who had interviewed the alleged victim following the alleged rape. The Department contends that the police officer's testimony would have established the consistency of story describing the sexual assault. The Department contends that exclusion of the testimony was prejudicial to its case.

Third, the Department believes that the hearing officer failed improperly to find that the respondent "is a danger to the health, safety or welfare of students in this Commonwealth." According to the Department, under the preponderance of the evidence standard, the Department has demonstrated that the respondent is a danger to the health, safety or welfare of students or others in the schools of this Commonwealth and, therefore, revocation of the respondent's professional certifications should occur immediately.

Fourth, the Department complains that the hearing officer erred when she characterized the Commission as the prosecutor. Rather, the Department's Office of Chief Counsel alone serves the role of prosecutor. With this proposition we fully agree. To the extent that the hearing officer's report states otherwise, it is incorrect.

Finally, the Department complains that the hearing officer incorrectly opined that the Department's action against the respondent was timely commenced because the notice of charges was filed within one year of the arbitrator's decision dismissing the respondent as an employee of the school district. The Department disavows that rationale as a basis for concluding that its filing of the notice of charges was timely. Rather, the Department believes that the correct rationale is the hearing officer's alternative reasoning -- that a notice of charges may be brought "[u]pon receipt of a copy of the findings, summary of evidence and recommendations of the school board," regardless of when the conduct at issue occurred.

In response to the exceptions, the respondent on February 5, 1992, through his counsel, resubmitted his Brief on Findings of Fact and Conclusions of Law which had been submitted to the hearing officer. In addition, the respondent indicated that he relied as well upon the opinion of the hearing officer.

In reaction to the respondent's February 5, 1992 letter, the Department objected to any issue raised by the respondent on which the respondent had been unsuccessful before the hearing officer since the respondent had not filed exceptions to the hearing officer's decision. We need not reach the question of whether a party, having been successful before the hearing

officer, must nevertheless formally file exceptions to those parts of the hearing officer's findings or conclusions with which the successful party might disagree in order to preserve those issues as alternative grounds for the hearing officer's decision. We need not reach this issue because, at the argument before the Commission on March 13, 1992, the respondent's counsel stated that he was not pursuing before the Commission any issue on which he had been unsuccessful before the hearing officer, including the alleged untimeliness of the notice of charges, double jeopardy and certain evidentiary issues on which the hearing officer had disagreed with the respondent. Therefore, the Commission need not rule on the Department's objections or motion.

#### IV. STANDARD OF PROOF

In her decision, Hearing Officer Balaban concluded "[t]hat the burden of proof is upon [the Department] to show by clear and convincing evidence that Holmes' committed the act of immorality complained of, i.e., rape and sexual assault." Hearing Officer's Decision, at 8 (emphasis added). The hearing officer further concluded that the Department had "failed to meet its burden of proof that Holmes engaged in conduct of immorality, i.e., rape

and/or sexual assault." Id.<sup>1</sup>

In her supporting discussion, the hearing officer reviewed the evidence and found that there were "no positive physical findings of a rape or sexual assault," and, therefore, "the case must be resolved upon the credibility of the witnesses . . . ." Since the Department had "the burden to show by clear and convincing evidence that Holmes' [sic] committed the acts of immorality complained of, i.e., rape and sexual assault," Ms. Balaban said, the Department did not meet its burden. Id., at 10. The hearing officer did not explain her legal reasoning in concluding that the standard of proof in proceedings before the Commission is "clear and convincing evidence." The Department contends that Ms. Balaban erred in using this evidentiary standard.

Section 13(c)(2) of the Teacher Certification Law, as amended, 24 P.S. §12-1263(c)(2), provides that, in proceedings before the Commission, "[t]he burden of proof shall be on the department, which shall act as prosecutor, to establish that

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<sup>1</sup>Although the hearing officer clearly concluded that, in her opinion, the standard of proof under the Teacher Certification Law is "clear and convincing evidence," Ms. Balaban also stated, in another part of the decision, that the standard of proof in proceedings before the Professional Standards and Practices Commission is "preponderance of the evidence." Id., at 6. Therefore, to some extent, the decision of the hearing officer conflicts on this issue. However, it is clear that ultimately Ms. Balaban applied the clear and convincing evidence standard.

grounds for discipline exist." In this case, grounds for discipline exist only if the respondent is guilty of immorality as provided by section 5(a)(11) of the Teacher Certification Law, as amended, 24 P.S. §12-1255(a)(11).

As recited by the Department in its brief on exceptions, there are four standards of proof recognized in law: evidence which is beyond a reasonable doubt, clear and convincing evidence, preponderance of the evidence, and substantial evidence. All participants agree that the lowest standard of proof, substantial evidence, is not applicable to a finder of fact. Rather, substantial evidence is a standard to be applied by an appellate tribunal since the substantial evidence standard does not require the weighing of evidence, which is the quintessential function of a finder of fact. See Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission, 134 Pa. Commw. 218, 578 A.2d 600, 601-02 (1990), petition for allowance of appeal denied, 602 A.2d 863 (Pa. 1992). The participants also agree that the highest degree of proof, beyond a reasonable doubt, is applicable only in criminal proceedings where the sanctions involve a loss of liberty. See Lyness v. State Board of Medicine, 127 Pa. Commw. 225, 561 A.2d 362 (1989), rev'd on other grounds, 1992 WL 60065 (Pa., March 18, 1992) (No. 174 E.D. 1990).

Therefore, all parties agree that the standard of proof applicable in proceeding before the Commission is either the preponderance of the evidence standard advocated by the Department or the clear and convincing evidence standard advocated by the respondent and applied by the hearing officer. The Commission agrees that these are the alternatives.

In at least two cases, the Commonwealth Court of Pennsylvania has said that the "preponderance of the evidence" standard is applicable to civil administrative proceedings. The most direct statement by Commonwealth Court appears in Lyness where, in discussing the different standards of proof, the court stated directly that the "preponderance of the evidence standard" is applicable in "disciplinary proceedings before a licensing board." See Lyness, 127 Pa. Commw. at 239, 561 A.2d at 369. However, the precise issue of whether a preponderance of the evidence standard or a clear and convincing evidence standard should apply in a professional disciplinary matter was not directly at issue in Lyness. Therefore, while the court's statement is certainly a strong indication of the rule of law on this question, the Commission will not rest solely on Lyness in determining this issue.

In the other reference to the standard of proof in civil administrative proceedings, Commonwealth Court in Lansberry observed "that the degree of proof required to establish a case

before an administrative tribunal is the same degree of proof used in most civil proceedings, i.e., a preponderance of the evidence." Lansberry, 578 A.2d at 602. Again, however, the question of the competing standards of proof, as between "clear and convincing evidence" and "preponderance of the evidence," was not precisely at issue in Lansberry.

Therefore, although the court's statements in Lansberry and Lyness are certainly persuasive, the Commission will examine the law further to discern whether, in the case of the Teacher Certification Law, the General Assembly intended for the Commission to abide by the more rigorous clear and convincing evidence standard, rather than the preponderance of the evidence standard generally applicable to administrative proceedings. Unfortunately, the hearing officer's decision is not illuminating on this issue in the least. Ms. Balaban did not explain her rationale in applying the clear and convincing evidence standard, nor did she attempt to distinguish the Commonwealth Court's statements in Lyness and Lansberry. We must therefore analyze this issue without knowing the rationale which led Ms. Balaban to apply the more rigorous standard.

The clear and convincing evidence standard is applied most frequently, we have found, in juvenile proceedings. See, e.g., In re Frank W. D., 315 Pa. Super. 510, 462 A.2d 708 (1983). However, it is clear that the clear and convincing evidence

standard applicable in juvenile proceedings is expressly mandated by the Juvenile Act. For example, a court may find a juvenile to be "dependent" under the Juvenile Act only by "clear and convincing evidence." 42 Pa.C.S. §6341(c). See also 42 Pa.C.S. §6335 (requiring "clear and convincing evidence" for certain minimum findings to justify detention of a juvenile). Because the standard is expressly mandated by statute, those cases applying the Juvenile Act do not support the hearing officer's and respondent's position.

Another instance where the clear and convincing evidence standard appears is section 304 of the Mental Health Procedures Act. Under that statutory provision, a court may order treatment of a person who is found, "by clear and convincing evidence," to be severely mentally disabled and in need of treatment. See 50 P.S. §7304(f). Again, because the standard is expressly mandated by statute, it does not support the respondent's and the hearing officer's position that the standard should apply to proceedings before the Commission.

Other areas where the clear and convincing evidence standard can be found are the laws governing decedents' estates and marriage. See, e.g., 20 Pa.C.S. §2107 (relating to the application of decedents' estates and intestate succession to persons born out of wedlock); 20 Pa.C.S. §6303 (relating to ownership of multi-party accounts during lifetime); 20 Pa.C.S.

§6304 (relating to right of survivorship); 23 Pa.C.S. §3333 (relating to attacks upon divorce decrees); 23 Pa.C.S. §5102 (relating to children declared to be illegitimate). Again, each of these applications of the clear and convincing evidence standard is expressly mandated by statute. It is clear that there is no analogous or similar provision in the Teacher Certification Law; therefore, the basis for applying the clear and convincing evidence standard in areas of marital law and decedents' estates -- the mandate of statute -- does not apply here.

In the area of discipline of professionals, we have found no instance where the clear and convincing evidence standard has been applied to any professional or business licensee where disciplinary action has been taken against the licensee pursuant to statutory authority. Rather, we have found that the standard of "clear and convincing evidence" has been applied only to discipline imposed upon members of the judiciary. See, e.g., Matter of Chiovero, 524 Pa. 181, 186, 570 A.2d 57, 60 (1990). However, in matters of discipline of judges, there is no governing statute passed by the General Assembly. Rather, the regulatory authority for members of the judicial branch is the Supreme Court of Pennsylvania, which itself is empowered to determine the appropriate standard of proof in matters of discipline. See Pa. Const. art. V, §10(c) ("The Supreme Court shall have the power to prescribe general rules governing

practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge or modify the substantive right of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose"). Therefore, the intent of the General Assembly is not relevant to the discipline of judges as it is to the discipline of professional educators and other licensed professionals.

Pursuant to its constitutional authority under article V, section 10(c), the Supreme Court has also established a standard of proof for the discipline of attorneys. The Supreme Court has said that "a preponderance of the evidence is necessary to establish an attorney's unprofessional conduct[,] and the proof of such conduct must be clear and satisfactory." Krehel Appeal, 419 Pa. 86, 89, 213 A.2d 375, 377 (1965).

Unlike judges and attorneys, all other professionals licensed by the Commonwealth are regulated by statutes which have been passed by the General Assembly and approved by the Governor. There are no cases that we have discovered in which an administrative tribunal, governed by a statute which does not expressly require proof by clear and convincing evidence, has nevertheless applied that standard. Rather, our research reveals that professional licensure matters are governed by a preponderance of the evidence standard as described by Commonwealth Court in Lyness and Lansberry.

Based on Lyness, Lansberry and our own research, we conclude that when the General Assembly prescribed that "[t]he burden of proof shall be on the department ... to establish that grounds for discipline exist," it intended to require proof by the generally accepted civil standard of "preponderance of the evidence." Therefore, we believe that the hearing officer erred in concluding that the Department must prove its case by clear and convincing evidence.

#### V. PROOF OF IMMORALITY

After carefully reviewing the record in this matter, the Commission concludes that the Department of Education has proven, by a preponderance of the evidence, that the respondent engaged in an act of immorality when he sexually assaulted

, the 15-year-old niece of his girlfriend, in his home on the morning of August 28, 1988. We reach our conclusion based upon the following findings of fact:

1. When the respondent was approximately 32 years old, and married to another woman, he began a sexual relationship with , a 17-year-old girl. Notes of Testimony (N.T.), at 41-43, 148.

2. Approximately ten years ago, the respondent and began living together. N.T., at 48, 51.

3. had two nieces, including , who frequently visited their aunt and the respondent in their home. These visits included going on trips together and spending the night. N.T. at 50-51.

4. When they visited, each of the nieces had her own bedroom on the second floor of 3-story home. N.T. 51, 53.

5. On the weekend beginning Friday, August 26, 1988 and ending Sunday, August 28, 1988, the nieces spent the weekend at and the respondent's home. N.T., at 51. At that time, had just turned 15 years old and her younger sister was seven years old. N.T., at 47, 49, 51, 92.

6. Shortly before sunrise on Saturday, August 28, 1988, was awakened by the respondent, who was touching her breasts. N.T., at 53-54, 73.

7. asked the respondent to go away, but the respondent began kissing her. The respondent lifted pajama shirt up and pulled down her pants. N.T., at 54, 73-74, 78-79.

8. The respondent then pulled down his own pajama trousers, climbed on top of and forcibly had sexual intercourse with her. N.T., at 54, 64.

9. Holmes then left the room, but shortly thereafter he returned briefly to tell , "don't tell anyone, or I won't be your friend." N.T., at 54, 70.

10. did not call out at the time of the incident. N.T., at 74.

11. The sexual assault took place during a very short period of time lasting no more than two minutes. N.T., at 54, 66.

12. Later the same day, went on a picnic with her

younger sister, her aunt, the respondent and a group of her aunt's friends. N.T., at 52, 55, 74-75, 78-79, 93-94. At the picnic, went swimming. N.T., at 55, 93.

13. did not tell anyone of the incident involving her and the respondent during the picnic or for the remainder of the weekend since she was afraid to do so and did not perceive an appropriate opportunity to tell her aunt. N.T., at 56-57, 74.

14. On Sunday, August 28, 1988, and her sister returned to their home where they lived with their grandmother, who was also their legal guardian. N.T., at 47, 80, 85.

15. On the afternoon of Monday, August 29, 1988, grandmother found her sobbing. N.T., at 57. Upon inquiry by her grandmother, told her that the respondent had raped her two days earlier. grandmother then immediately took to the emergency room at Children's Hospital of Philadelphia. N.T., at 58, 72, 85.

16. Children's Hospital referred to the Rape Trauma Center at Thomas Jefferson University Hospital. N.T., at 58, 90. While waiting to be examined at Jefferson, was interviewed by a police officer, Officer Doris Bey. N.T., at 58.

17. For the first time in her life, had a complete

gynecological exam. N.T., at 58, 85-86. The exam included both an internal and external pelvic examination and the taking of internal bacterial cultures to screen for the presence of sexually transmitted disease and other physical evidence of rape. Notes of Deposition of Dr. DeJong (N.D.), at 19-22; DeJong Ex. 1.

18. For purposes of preventing pregnancy, the attending physician at Jefferson prescribed Ovril, which terminates pregnancy if taken within 72 hours after impregnation. N.D., at 27; DeJong Ex. 1. In addition, was given an antibiotic injection and prescribed oral antibiotics to guard against infection. N.D., at 26-27; DeJong Ex. 1.

19. No physical evidence of sexual intercourse was detected at Jefferson. N.T., at 55, 93; N.D., at 24-26.

20. Based upon report, the respondent was arrested on August 31, 1988, and charged with rape, indecent exposure, corrupting the morals of a minor, simple assault and indecent assault. Shortly thereafter, the respondent's employer, the School District of Philadelphia, became aware of Holmes' arrest and the criminal charges. Notice of Charges, Ex. C.

21. In the criminal proceedings, testified at the preliminary hearing held on October 4, 1988. N.T., at 59, 83. She testified substantially to the same information which she had

told her grandmother on the Monday after the incident involving her and the respondent.

22. During the October 1989 criminal trial, again testified to the incident in substantially the same manner. N.T., at 59, 65-70, 82-83, 92.

23. Following the criminal trial, the respondent was acquitted of all charges by a jury. N.T., at 30-31.

24. Following the acquittal, the school district took action to dismiss the respondent for immorality. During the June 27, 1990 arbitration proceedings following the dismissal, again testified regarding the incident of August 28, 1988. N.T., at 49, 83. The arbitrator upheld the respondent's dismissal on November 26, 1990. Dept. Ex. 1A.

25. As a result of the action of the arbitrator, a copy of which was sent to the Department by the school district on December 28, 1990, the Department commenced disciplinary proceedings before the Commission on March 5, 1991.

26. The Commission finds that is credible and is telling the truth about the incident of Saturday, August 28, 1988.

27. is now 18 years of age and a graduate of Overbrook High School. At the time of the hearing on September 13, 1991, was a freshman at Temple University. At that time, intended to major in biochemistry. N.T. 47-48.

28. testimony at the preliminary hearing on October 4, 1988, the criminal trial on October 9, 1989, the arbitration proceedings before the school district on June 27, 1990 and the hearing before the Commission on September 13, 1991, was substantially consistent. Her testimony in each instance was also substantially consistent with the statements she made to her grandmother on the Monday following the incident of August 28.

29. had no discernible or reasonable motivation to fabricate the story she has told about her August 28, 1988 encounter with the respondent. Indeed, the only reasonable expectation could have had about the consequences of the disclosure of her story was short-term and long-term humiliation, embarrassment and hardship upon her family and family relationships.

30. We believe that credibility is bolstered by her willingness to offer the same testimony in the arbitration proceedings before the school district and in the proceedings

before the Commission even after Mr. Holmes had been acquitted of criminal charges by a jury after hearing testimony. We believe that had fabricated the story about Mr. Holmes, she would most likely have been unwilling or, at least, reluctant to testify in administrative proceedings and to undergo the rigorous cross-examination in those proceedings, knowing that a jury hearing the same testimony from her had concluded that it did not believe her story beyond a reasonable doubt. Moreover, we are impressed by the substantial consistency of testimony from the criminal proceedings through the two administrative proceedings.

31. By contrast to lack of motivation to fabricate her story, we believe that the respondent had obvious motivation to deny the incident, given the shameful and despicable character of the sexual assault alleged and the likely professional and personal consequences to the respondent if he were to admit the incident.

32. The lack of physical evidence of sexual intercourse on the morning of Saturday, August 28, 1988 is readily explained by weekend activities, including swimming, and the amount of time passing between the sexual assault and the physical examination underwent at Jefferson. Therefore, we give the lack of physical evidence little weight.

33. The delay from Saturday until Monday in reporting of the incident, we believe, is consistent with the facts and circumstances of the weekend at issue and consistent with what one might expect from a 15-year-old minor.

34. On the morning of Saturday, August 28, 1988, the respondent, Westley Holmes II, did, by means of forcible compulsion, have sexual intercourse with \_\_\_\_\_ in the home which the respondent shares with \_\_\_\_\_ aunt.

35. On Saturday, August 28, 1988, the respondent committed an act of immorality.

#### VI. OTHER ISSUES

The Commission has reached its findings and conclusions without considering in any way the proffered testimony of Sergeant Doris Bey of the Philadelphia Police Department. Therefore, it is not necessary for the Commission to determine whether Sergeant Bey's testimony was properly excluded by the hearing officer.

We do note, however, that there appears to be a conflict in the case law on the issue of whether a "prosecutor" may offer testimony made by a child victim of sexual abuse to demonstrate

the consistency of prior statements made by the victim with the child's testimony in court. In Commonwealth v. Rakes, 398 Pa. Super. 440, 581 A.2d 212 (1990), petition for allowance of appeal denied, 527 Pa. 599, 589 A.2d 690 (1991), the Superior Court of Pennsylvania allowed testimony of prior consistent statements by the alleged child victim of sexual assault because the victim was present in court, testified herself, and was subject to cross-examination. Therefore, the court concluded that "the prejudices sought to be avoided with the implication of the hearsay rule were obviated," and the testimony was properly admitted. Rakes, 398 Pa. Super. at 447, 581 A.2d at 216 (quoting Commonwealth v. Fanelli, 377 Pa. Super. 555, 559, 547 A.2d 1201, 1203 (1988)). Cf. Commonwealth v. Haber, 351 Pa. Super. 79, 505 A.2d 273 (1986) (hearsay testimony not permitted where it is not supported in court by testimony of the declarant).

By contrast, the Superior Court held in Commonwealth v. Martin, 124 Pa. Super. 293, 188 A. 407 (1936), that "prior consistent statements are only admissible on redirect or rebuttal to refute suggestions" of fabrication. The hearing officer relied upon Martin in excluding the testimony of Sergeant Bey. See also Commonwealth v. Smith, 402 Pa. Super. 257, 586 A.2d 957 (1991).

As we have said, we need not decide whether the hearing officer erred in precluding Sergeant Bey's testimony. But we

note that the Superior Court case law, which is in some apparent conflict on the issue, is not binding on the Commission. It is, rather, of persuasive authority only, as it would be in the Commonwealth Court. Only the decisions of the Supreme Court and Commonwealth Court are binding on the Commission. In addition, unlike criminal proceedings such as those involved in Rakes, Fanelli, Haber, Smith and Martin, the proceedings before the Commission are governed by the Administrative Agency Law, which provides, in part, that "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received . . . ." 2 Pa.C.S. §505. While we do not reach a conclusion in this case on the evidentiary issue of Sergeant Bey's testimony, we strongly suggest that hearing officers be mindful of section 505 when conducting hearings on behalf of the Commission and avoid excluding relevant and reasonably probative evidence on technical grounds.

We have previously noted that the other two issues raised by the Department need not be addressed in any detail. First, it is clear that under the Teacher Certification Law, the Department of Education's Office of Chief Counsel acts as prosecutor and the Commission acts as adjudicator. There is no mixing of the roles of the Commission and the Office of Chief Counsel, and the Teacher Certification Law is therefore in careful compliance with due process requirements as described by the Supreme Court in

Lyness v. State Board of Medicine, 1991 WL 60065 (Pa. March 18, 1992) (No. 174 E.D. Appeal Dkt. 1990).

Secondly, we tend to agree with the Department that the institution of disciplinary proceedings here is governed not by subsection (a) of section 9 of the Teacher Certification Law but, rather, by subsection (b). However, because the respondent's counsel has agreed that he is not pursuing with the Commission the timeliness of the Department's notice of charges, the Commission need not formally decide this issue as part of its adjudication. We reach a similar conclusion regarding the other issues which had been unsuccessfully advanced by the respondent before the hearing officer. Based upon counsel's representation to the Commission, it is our understanding that the respondent is not seeking to sustain the hearing officer's decision on grounds or issues on which he was unsuccessful before the hearing officer. This includes the issue of double jeopardy or res judicata which the hearing officer found did not apply to these proceedings.

#### VII. CLEAR AND PRESENT DANGER

Based upon the Commission's findings and conclusions stated above, the Commission further finds, by a preponderance of the evidence, that the respondent is a danger to the health, safety or welfare of the students and other persons in the schools of

this Commonwealth. Therefore, we conclude that the respondent's professional certificate must be revoked immediately under section 15(b) of the Teacher Certification Law, as amended, 24 P.S. §12-1265(b).

An appropriate order will be entered.

PROFESSIONAL STANDARDS AND  
PRACTICES COMMISSION

By: Howard R. Selekman  
Howard R. Selekman  
Chairperson

Attest: Warren D. Evans  
Warren D. Evans  
Executive Director

DATE: 5/26/92

Commissioners Clarice Chambers, Rosalind Jones-Johnson and Mina H. Shuman did not participate in the consideration or decision in this case.

