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Professional Standards and
Practices Commission

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
PROFESSIONAL STANDARDS AND PRACTICES COMMISSION

Department of Education, Complainant	:	
	:	
v.	:	
	:	
Robert E. Montgomery, Respondent	:	PSPC Docket No. DI-91-08
	:	
	:	

DECISION OF HEARING OFFICER

This matter is before the hearing officer pursuant to 22 Pa. Code §233.13(e)(1)(iv) providing that upon a professional educator's failure to expressly request an evidentiary hearing of the factual allegations contained in the Department of Education's Notice of Charges, a hearing officer shall be appointed by the Professional Standards and Practices Commission who will accept as true the allegations of fact contained in the Notice of Charges and who will prepare a proposed report without a hearing.

Findings of Fact

1. Robert E. Montgomery (hereinafter "Respondent") holds a teaching certificate in the area of music issued in June, 1979 by the Commonwealth of Pennsylvania, Department of Education (hereinafter "Complainant").

2. On April 15, 1991, Complainant was notified by the Trinity Area School District that Respondent had been charged with the crime of simple assault involving a student. The incident is alleged to have occurred while Respondent was serving as a substitute teacher.

3. On May 3, 1991, Complainant received a copy of the records of the Clerk of Courts of Washington County, Washington, Pennsylvania docketed to No. 1998-90, Commonwealth of Pennsylvania v. Robert E. Montgomery, indicating that Respondent had been arrested for and that by Information had been charged with the crime of simple assault in violation of Sections 2701(a)(1) and (a)(3) of the Pennsylvania Crimes Code, 18 Pa.C.S.A. §2701(a)(1) and (a)(3).

4. The aforesaid records indicated that the incident giving rise to the charges was alleged to have occurred on October 9, 1990 in the piano lab of Trinity High School, North Franklin Township, Pennsylvania and that Respondent was alleged to have struck a student in the head and face with his hand causing soreness and discoloration of the student's face and to have grabbed the same student by the head and neck, pinning him against the wall while yelling at him.

5. The aforesaid records indicated that on March 25, 1991, in disposition of these charges, Respondent was accepted into the ARD Program, that he was placed on ARD probation for a period of six months and that further proceedings on the charges were postponed during the aforesaid term of probation.

6. On July 1, 1991, Complainant issued a Notice of Charges to Respondent alleging that Respondent had pushed and struck a student in the face and head, that these facts constitute a crime of moral turpitude as well as incompetency, immorality, and cruelty, all justifying disciplinary action, and that Respondent is a danger to the health, safety, and welfare of students and other persons in the schools of the Commonwealth, justifying

immediate disciplinary action. Complainant further notified Respondent that it was initiating hearing procedures on these allegations pursuant to 24 P.S. §12-1263 and that he had the right to contest any assertion in the Notice, in writing, within thirty (30) days of his receipt thereof and that his failure to timely respond would be deemed an admission of all facts asserted in the Notice.

7. Respondent received a copy of the aforesaid Notice by certified mail on July 3, 1991.

8. On August 5, 1991, the Professional Standards and Practices Commission received a letter from Respondent in which he stated that the averments of paragraphs 6 and 7 of the Notice (allegations of moral turpitude, incompetency etc. and that Respondent is a danger to students) "are not legally supported and therefore all charges against me ... are hereby requested to be cancelled immediately." Respondent also stated that he took exception to other assertions against him and that he never plead guilty to and was never found guilty of any offense. Respondent did not demand a hearing of the factual allegations in the Notice.

9. On October 21, 1991, Complainant filed a Motion for Entry of Judgment seeking a default judgment because Respondent had not filed a response to the Notice of Charges within thirty (30) days of his receipt thereof. Complainant also requested entry of summary judgment. It argued that the factual allegations must be deemed admitted by the Commission and accepted as true and that such admission having been made and since his acts constitute a crime of moral turpitude, Respondent's teaching certificate should be suspended. Complainant also alleged that because Respondent had admitted that he is a danger to students, the requested suspension should occur immediately. In the alternative, Complainant argued that even if Respondent could not be deemed to have admitted the factual assertions of the Notice, he should be found to have waived his right to an evidentiary hearing.

10. By Memorandum and Order dated November 18, 1991, the Commission denied Complainant's motion for default judgment, directed the appointment of a hearing officer to prepare a proposed report without hearing and referred Complainant's motion for summary judgment to said officer.

11. A hearing officer was appointed on February 4, 1992.

12. By letter dated February 7, 1992, the hearing officer informed both parties of their right to present legal argument and directed Complainant to file its brief within thirty (30) days of its receipt of the February 7, 1992 letter and Respondent to file his brief within thirty (30) days of his receipt of Complainant's brief.

13. Complainant's brief was received by both Respondent and the hearing examiner on March 11, 1992.

14. The hearing officer received no brief from Respondent by the April 10, 1992 deadline for such submission.

Conclusions of Law with Discussion

1. Complainant's motion for summary judgment and the alternative relief requested, that Respondent's certificate be suspended pending the outcome of the criminal charges, are granted. However, all grounds for relief requested, except one, are denied.

2. Complainant has not proved that simple assault is a crime involving moral turpitude. Since Respondent has neither been charged with nor convicted of a crime involving moral turpitude, the Commission can order neither suspension nor revocation of Respondent's certificate on that basis.

Complainant has produced and the hearing officer has discovered no authority for the proposition that the crime of simple assault is one involving moral turpitude. U.S. ex rel. Manzella v. Zimmerman, 71 F.Supp. 534 (1947) (prison break and escape are not crimes of moral turpitude); Quilodran-Brau v. Holland, 232 F.2d 183 (3rd Cir. 1956) (larceny of government property is a crime of moral turpitude); Moretti v. State Board of Pharmacy, 2 Pa.Cmmwlth.Ct. 121, 277 A.2d 516 (1971) (tax evasion is a crime of moral turpitude); John's Vending Corporation v. Cigarette Tax Board, 3 Pa.Cmmwlth.Ct. 658, 282 A.2d 834 (1971), reversed on other grounds, Secretary of Revenue v. John's Vending Corporation, 453 Pa. 488, 309 A.2d 358 (1973) (selling untaxed liquor and drug possession are crimes of moral turpitude); Yurick v. Commonwealth, Department of State,

Bureau of Professional and Occupational Affairs, Board of Osteopathic Examiners, 43 Pa.Cmmwlth. Ct. 248, 402 A.2d 290 (1979) and Startzel v. Commonwealth Department of Education, 128 Pa.Cmmwlth.Ct. 110, 562 A.2d 1005 (1989), alloc. denied ___Pa.____, 574 A.2d 76 (1990)(mail fraud involves moral turpitude); Liesner v. State Dental Council and Examining Board, 95 Pa.Cmmwlth.Ct. 435, 505 A.2d 1074 (1986)(violation of Fraud and Abuse Control Act involves moral turpitude); Foose v. Commonmwealth State Board of Vehicle Manufacturers, Dealers and Salesperson, 135 Pa.Cmmwlth.Ct. 62, 578 A.2d 1355 (1990) (drug related crimes involve moral turpitude). In the absence of specific authority, the hearing officer is not inclined to enlarge the scope of the term "moral turpitude" to include crimes which do not involve, as the cases cited above indicate, an element of fraud or personal or public corruption.

It appearing that simple assault and simple assault by physical menace, the crimes with which Respondent was charged, are not in and of themselves crimes of moral turpitude, the hearing officer finds that Respondent is not subject to discipline on that basis.

2. Cruelty is defined as the intentional and malicious infliction of physical suffering upon living creatures, particularly human beings; or, as applied to the latter, the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity; outrage. Caffas v. Board of School Directors of the Upper Dauphin Area School District, 23 Pa.Cmmwlth.Ct. 578, 353 A.2d 898, 900 (1976). Respondent's admission that he was charged with simple assault and his failure to specifically deny that he struck a student are sufficient to justify a finding that he committed cruelty.

3. Although the authority cited by Complainant suggests that the appropriate discipline of an educator found guilty of cruelty is dismissal, the hearing officer finds that pursuant to 24 P.S. §§12-1255 and 1226(f), suspension or revocation can be ordered.

4. The hearing officer finds that on the facts admitted, suspension of Respondent's certificate is appropriate discipline.

The sole authority cited by Complainant in support of its proposition that Respondent can be disciplined for committing cruelty suggests that dismissal/discharge is the appropriate discipline. See Blascovich v. School Directors of Shamokin Area School District, 49 Pa.Cmmwlth.Ct. 131, 410 A.2d 407 (1980); Caffas v. Board of School Directors of Upper Dauphin Area School District, 23 Pa.Cmmwlth.Ct. 578, 353 A.2d 898 (1976); Landi v. West Chester Area School District, 23 Pa.Cmmwlth.Ct. 586, 353 A.2d 895 (1976). However, the hearing examiner finds that since Respondent was a substitute teacher at the time of the alleged incident, such discipline would not be appropriate.

Moreover, since 24 P.S. §12-1255 provides that the Commission may discipline for violation of any provision of 24 P.S. §1224 et seq. and since 24 P.S. §1226(f) provides for suspension and revocation of any educator found guilty of cruelty, the hearing officer finds that the Commission has authority to suspend or revoke a certificate upon a finding of cruelty in an educator. The hearing officer finds that the facts that Respondent was charged with the crime of simple assault and admitted to the ARD program in disposition thereof, and the consequent possibility that the criminal charges against him will be dismissed, are not sufficient to justify permanent removal of Respondent from the teaching profession. Accordingly, suspension of Respondent's certificate is ordered.

5. Incompetency is defined as disqualification, inability, incapacity, lack of ability, legal qualifications or fitness to discharge the required duty; want of physical, intellectual or moral ability, insufficiency, inadequacy, want of legal qualifications or fitness. Horosko v. School District of Mount Pleasant Township, 355 Pa. 369, 6 A.2d 866, 869 (1939). Complainant has not proven that the one incident of Respondent's conduct constitutes such incompetency as to justify either suspension or revocation of his certificate or any other discipline.

Although in Landi v. West Chester Area School District, 23 Pa.Cmmwlth.Ct. 586, 353 A.2d 895 (1976), cited by Complainant, the Court stated that "a single incident of sufficient severity [can justify] a charge of cruelty even against a teacher with a long and unsullied record of service," 353 A.2d at 896, 897, Complainant's authority on the issue demonstrates that a pattern of misbehavior must exist to justify a finding of incompetency. Complainant has not proven that Respondent engaged in the "continual" or "repeated" or multiple incidents of conduct found in the Hamburg case. See Hamburg v. North Penn School District, 86 Pa.Cmmwlth.Ct. 371, 377-378, 484 A.2d 867 (1984). Accordingly, Respondent is not subject to discipline on the basis that he is guilty of incompetency.

6. Immorality is defined as conduct which offends the morals of a community. Bovino v. Board of School Directors of Indiana Area School District, 32 Pa.Cmmwlth.Ct. 105, 377 A.2d 1284 (1977). Complainant has not proven that Respondent's conduct, alleged physical assault, constitutes such immorality as to justify either suspension or revocation or any other discipline.

Whether conduct is immoral depends on the circumstances of its commission. The naked facts admitted by Respondent, that he struck a student, that he was charged with the crime of simple assault and admitted to the ARD program, do not provide sufficient information to justify the broad

conclusion that Respondent's act was immoral. What is more, the sole authority cited by Complainant on the issue of Respondent's alleged immorality does not indicate that any court has found a single act of physical assault or cruelty to constitute immorality. See Bovino, supra.: teacher called a female student a "slut." Accordingly, the hearing officer declines to order discipline on that basis.

7. Complainant was without authority to allege in the Notice of Charges that Respondent is a danger to the health, safety and welfare of students in the schools of the Commonwealth. Pursuant to 22 Pa. Code §233.13(g)(2), such finding is only properly made by the Commission at the point it decides to discipline, and is relevant only to the effect of an appeal to stay the discipline imposed. What is more, it is a conclusion of law which Respondent was required to neither admit nor deny. Accordingly, no discipline can result automatically from Respondent's purported failure to deny the allegation.

In accordance with 22 Pa. Code §233.13(c)(1) (Hearing notification), a Notice of Charges is to contain "a statement of the particulars of the charges against the educator." Those particulars must make out one of the bases for discipline specified in 24 P.S. §12-1255. Said section contains no provision for the imposition of discipline upon an allegation

that the educator is a danger to students. The hearing officer finds no authority in Complainant to include such allegation in the Notice of Charges it issued on July 1, 1991.

The language concerning "danger" is a procedural trigger only. It is contained in 22 Pa.Code §233.13(g) (Appeal) which provides that the Commission shall consider the decision of the hearing officer and issue an opinion and order affirming, reversing or modifying, and imposing discipline if any. This order may be appealed and said appeal acts to stay the imposition of discipline "unless the Commission's decision to discipline is accompanied by a finding that the educator is a danger to students." (Emphasis added.) The hearing officer finds that this "finding" is in fact a conclusion of law which is made, or not, on the basis of the factual findings and conclusions of law of the hearing officer. As such, Respondent had no obligation to deny such allegation and no discipline can result automatically from his purported failure to do so.

In the case at bar Complainant could not properly make the finding that Respondent is a danger to students. What is more, the hearing officer reaches no such conclusion, finding once again that the record provides insufficient information to

support such broad allegation. If the Commission makes such finding, it should be included in its order disposing of the hearing officer's decision.

8. A person admitted to the ARD Program does not plead guilty to the criminal charges pending against him/her. What is more, successful completion of a term of ARD probation results in dismissal of the charges and expungement of the criminal record. Pa. R. Crim. P. 178 (2), 181, 185., 42 Pa. C.S.A.

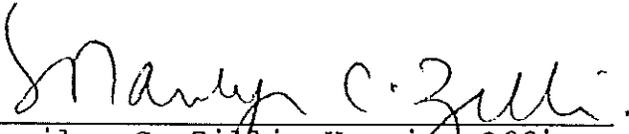
9. Respondent's certificate shall be suspended for the period of the ARD probation imposed on him. Complainant shall be required to notify the Commission of the date of Respondent's successful completion of the term of ARD probation and of the consequent dismissal of criminal charges against him. Such date shall determine the termination date of the period of suspension of Respondent's certificate.

The hearing officer finds that Respondent is guilty of "cruelty" as addressed in 24 P.S. §12-1255 and that he is subject to discipline. Suspension of Respondent's certificate is deemed appropriate in this case. At the same time, since imposition of ARD probation on criminal charges is made without a finding of guilt and since successful completion of a term of ARD probation results in dismissal of the charges and expungement of the criminal record, the hearing officer finds that it would not be appropriate to extend the period of suspension beyond the period of ARD probation. Accordingly, Complainant is directed to notify the Commission of the date of Respondent's successful

completion of the term of ARD probation and of the consequent dismissal of criminal charges against him. Such date shall determine the termination date of the period of suspension of Respondent's certificate.

PROPOSED ORDER

AND NOW, this 13th day of April, 1992, Complainant's motion for summary judgment is granted in part. It is hereby ordered that Respondent's teaching certificate is suspended and that the period of suspension shall coincide with the term of ARD probation imposed on Respondent in disposition of the criminal charges filed against him in Washington County, Pennsylvania. It is further ordered that Complainant shall notify the Commission of the date of Respondent's successful completion of the ARD probation and of the consequent dismissal of the criminal charges so that the Commission can thus determine the termination date of the period of suspension of Respondent's certificate.


Marilyn C. Zilli, Hearing Officer

Date: 13 April 1992