COMMONWEALTH OF PENNSYLVANIA
PROFESSIONAL STANDARDS AND PRACTICES COMMISSION

PENNSYLVANIA DEPARTMENT OF EDUCATION, Petitioner,	:	Docket No. DI-92-08
v.	:	
MARTIN BARACCA Respondent	:	

MEMORANDUM AND ORDER

This matter is before the Commission on Martin Baracca's exceptions to the proposed decision and order of the hearing officer dated September 2, 1995. The order recommends that the Department of Education be directed to revoke Mr. Baracca's certificate as a professional educator. The Commission will dismiss the exceptions and adopt the proposed decision and order of the hearing officer.

Mr. Baracca holds an Instructional II teaching certificate endorsed in Driver Ed-Safe Living and a Permanent certificate endorsed in the area "To Teach and Supervise Health and Physical Education." At the time of the relevant events, he was employed by Interboro High School in Delaware County, Pennsylvania. On or about January 9, 1992, Mr. Baracca was charged with five counts of Indecent Assault and one count each of Corruption of Minors and Harassment. The criminal charges were based upon statements made to police by a former student of Mr. Baracca's. The substance of the charges was that Mr. Baracca sexually harassed and abused her in the fall of 1991, while she was completing the first half of her senior year in

high school.

On April 20, 1992, the Department of Education served Mr. Baracca with a Notice of Charges alleging that he had been charged with crimes involving moral turpitude. Mr. Baracca responded by denying that he had committed any actions or offenses involving moral turpitude, and by stating that he had pled not guilty to the charges against him. Mr. Baracca requested a hearing. A pre-hearing conference was held on July 24, 1992, and the hearing was continued until resolution of the criminal charges against Mr. Baracca.

The criminal charges against Mr. Baracca were eventually dismissed as a result of his successful completion of an Accelerated Rehabilitative Disposition program. On June 14, 1994, the Department filed an Amended Notice of Charges, alleging that during the latter part of 1991, Mr. Baracca encouraged a sexual relationship with a female student by threatening to fail her if she did not cooperate, by forcibly kissing and fondling her on more than one occasion, by rubbing his body against hers and by attempting to disrobe her. The Department alleges that Mr. Baracca's activities constitute immorality, intemperance and cruelty and that he is a danger to the health, safety and welfare of the students of the Commonwealth. Mr. Baracca filed a reply denying the allegations on July 8, 1994.

After a pre-hearing conference, and at the direction of the hearing officer, the Department issued a Second Amended Notice of Charges on January 25, 1995. Along with the initial charges, the Second Amended Notice of Charges incorporates allegations that Mr. Baracca

behaved in an inappropriate manner toward four additional students or former students.

A hearing was held on February 13, 14, and 15, March 13 and 14, and April 24, 1995, before hearing officer Jeffrey Thomsen, Esq. The witnesses for the Department included the original complaining witness, as well four former students -- and . On September 5, 1995, the hearing officer issued a decision finding that Mr. Baracca: (1) forcibly kissed and fondled : five times in the fall of 1991, the last episode occuring on December 13, 1991, in the high school weight room; (2) moved 's hair aside and rested his hand on her shoulder in a sex education class during freshman year at Interboro High School; (3) required to write him notes stating he was cute or sexy in order to be excused from gym, and, at one point during her senior year at Interboro, attempted to fondle her breasts while they were alone in the high school wrestling room; (4) forcibly kissed and fondled in the high school kitchen after her high school graduation when she returned to the school one night to watch a basketball game; and (5) forcibly kissed, fondled and attempted to undress in the high school weight room after her high school graduation when she returned to attend a "Back-to-School" night. The hearing officer concluded that the Department had proven by a preponderance of the evidence that Mr. Baracca's conduct toward , and constituted immorality, intemperance and cruelty, and that his conduct toward constituted intemperance. The hearing officer also concluded that Mr. Baracca was a danger to the health, safety and welfare of students and

recommended immediate revocation of his teaching certificate.[1]

Statute of Limitations as Bar

Mr. Barraca first contends that charges other than those pertaining to are barred by the statute of limitations set forth in section 9(a) of the Teacher Certification Law, which provides as follows:

> [A] proceeding to discipline a professional educator shall be initiated by any interested party filing a complaint with the Department 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; however, if the alleged action is of a continuing nature, the date of its occurrence is the last date on which the practice occurred.

24 P.S. § 2070.9(a). The Commission disagrees. As noted by the hearing examiner, the Department is an interested party within the meaning of section 9(a). Decision and Proposed Order at 44. Consequently, the one year statute of limitations in section 9(a) did not expire until one year after the facts supporting the charges were known to the Department in 1994. Decision and Proposed Order at 30, 33, 36 and 40.

Notice

Mr. Baracca next contends that the Second Amended Notice of Charges was insufficient as a matter of law or fact and did not provide adequate notice of the charges stemming from the allegations of the additional students. Mr. Baracca essentially admits that no objection on this

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[1] The hearing officer noted that his decision to recommend revocation of Mr. Baracca's teaching certificate was not based upon the incident involving Decision and Proposed Order of the Hearing Examiner, September 2, 1995 (Decision and Proposed Order), at 59.

point has been preserved in the record, but offers the affidavit of his attorney that the issue was raised before the hearing examiner. The Commission will not consider this argument. It is the responsibility of counsel to ensure that objections appear in the record.

For a notice to be adequate, it must contain a sufficient listing and explanation of any charges against the "accused" so that he can know the charges against which he must defend himself. Begis v. Industrial Board, 9 Pa. Commonwealth Ct. 558, 560-61, 308 A.2d 643 (1973). In this case, the hearing examiner concluded that the Amended Notice of Charges was lacking, and pursuant to his direction, the Department filed and served the Second Amended Notice of Charges. The Commission agrees with the hearing examiner that the Second Notice of Charges provided Mr. Baracca with adequate notice of the charges of which he had been accused. Decision and Proposed Order at 44.

Laches

Mr. Baracca contends that the hearing examiner erred in rejecting his assertion that the charges involving the additional students were barred by the doctrine of laches. This contention is without merit.

Laches is an equitable defense that is available in administrative proceedings. Weinberg v. State Board of Examiners of Public Accountants, 509 Pa. 143, 501 A.2d 239 (1985). However, to succeed in a laches defense, a respondent must prove that: (1) there was a delay in taking action; (2) such delay was unreasonable or unjustified; and (3) the delay worked to the

prejudice of the party's rights. Leedom v. Thomas, 473 Pa. 193, 373 A.2d 1329 (1977).

In this case, the hearing examiner specifically found that there was no unjustifiable delay attributable to either the Department or the additional students themselves, and that, in any case, Mr. Baracca failed to demonstrate any prejudice to his rights resulting from a delay. Decision and Proposed Order at 46, 70. Consequently, the Commission will reject Mr. Baracca's assertion of a laches defense.

Evidentiary Issues

All relevant evidence of reasonably probative value may be received at an administrative hearing. 2 Pa. C.S. § 505. It is the hearing officer's authority, in the first instance, to determine the relevancy and materiality of evidence.[2]

Mr. Baracca argues that the hearing examiner erred in refusing to admit Respondent's Exhibit "C," newspaper articles which related the allegations made by In his exceptions, Mr. Baracca notes that the additional students testified that they had read newspaper articles relating the allegations made by . Mr. Baracca provides no indication in either his exceptions or his brief as to why the content of these newspaper articles would have been relevant, and the Commission perceives none. Thus, the Commission dismisses the exception on this point.

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[2] 1 Pa. Code § 35.142.

Mr. Baracca contends that the hearing examiner also erred in refusing to admit Respondent's Exhibit D-35, 's 1992 statement to the District Attorney's Office, and Respondent's Exhibit D-36, 1992 statement to the District Attorney's Office. Mr. Baracca contends that the 1992 statements constituted prior inconsistent testimony and should have been permitted for impeachment purposes.

In his decision, the hearing examiner stated that his examination of the proposed exhibit revealed no significant inconsistency between the 1992 statements and the witnesses' testimony at the hearing. Decision and Proposed Order at 48, 72. Although Mr. Baracca argues that and s 1992 statements were "replete" with inconsistencies, his proposed findings of fact indicate only one: that 's testimony at the hearing indicated that Mr. Baracca had moved his hand toward her breast when he touched her, and that her 1992 statement had omitted this detail. Consequently, the Commission concurs with the hearing examiner that the 1992 statement was not admissible.

Finally, Mr. Baracca contends that the hearing examiner erred in failing to admit the handwritten notes of 's father, Exhibit "D" of the March 15, 1995 Stipulation. Mr. Baracca contends that this exhibit was relevant to his assertion that the Department failed to make timely or adequate disclosure of the existence of additional allegations. The hearing examiner determined that the notes were "irrelevant or at best merely cumulative . . . ." Decision and Proposed Order at 48. The Commission concurs with this conclusion.

After review of the hearing examiner's proposed findings, the Commission finds that they adequately resolve the conflicts in the testimony and that they are sufficient to prove, by a preponderance of the evidence, that Mr. Baracca engaged in conduct with , and that constituted immorality, intemperance and cruelty. The proper discipline for Mr. Baracca's conduct is revocation of his teaching certificate.[3] The Commission also concurs with the hearing examiner's finding that Mr. Baracca is a danger to the health, safety and welfare of the students of the Commonwealth. Therefore, the Department must revoke Mr. Baracca's teaching certificate immediately.

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[3] Immorality is defined as "conduct which offends the morals of a community and is a bad example to the youth whose ideals a professional educator has a duty to foster and elevate." 22 Pa. Code § 237.3(a). Incompetency is defined as "a continuing or persistent mental or intellectual inability or incapacity to perform the services expected of a professional educator." 22 Pa. Code § 237.4. Cruelty is defined as "the intentional, malicious and unnecessary infliction of physical or psychological pain upon living creatures, particularly human beings." 22 Pa. Code § 237.7.

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ORDER

AND NOW, this 29th day of April, 1996, the Commission hereby DISMISSES Respondent's exceptions and ADOPTS the proposed decision and order of the hearing officer. Having determined that Respondent Martin Baracca has engaged in a course of conduct constituting immorality, intemperance and cruelty and that he is a danger to the health, safety and welfare of students and others in the schools of Pennsylvania, the Commission hereby ORDERS the Department to REVOKE the teaching certificate of Martin Baracca IMMEDIATELY.

PROFESSIONAL STANDARDS AND
PRACTICES COMMISSION

By: Gilbert R. Griffiths
Gilbert R. Griffiths
Chairperson Pro Tempore

Attest: Warren D. Evans
Warren Evans
Executive Director

Date of Mailing: April 29, 1996