IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Doe,	:	
Petitioner	:	
	:	
v.	:	
	:	No. 2050 C.D. 2009
Department of Education,	:	Submitted: May 14, 2010
Respondent	:	SEALED CASE

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: August 18, 2010

John Doe (Doe)[1] petitions for review of the September 24, 2009 order of the Professional Standards and Practices Commission (Commission) revoking his professional educator certification.[2] The issues before this Court are: (1) whether the

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[1] As a result of the confidentiality rules set forth in Section 10 of the Professional Educator Discipline Act (Act of December 12, 1973, P.L. 397, *as amended*, added by Section 3 of the Act of December 14, 1989, P.L. 612, 24 P.S. § 2070.10), on October 27, 2009, this Court ordered that the docket and all materials filed at this docket number are sealed and shall remain sealed unless otherwise ordered. It is for this reason that Petitioner is identified only as "John Doe" and his employer is identified only as "School District."

[2] "Because the Commission has no interest in its adjudications, the named respondent in this, and in other such cases, is the 'Department of Education.' Pa. R.A.P. 1513(b)." *Pardue v. Dep't of Educ.*, 815 A.2d 1162, 1162 n.1 (Pa. Cmwlth. 2003). Accordingly, on November 4, 2009, the Commission petitioned this Court, pursuant to Pa.R.A.P. 1513(b), to amend the caption that read "John Doe v. Professional Standards and Practices Commission," to read "John Doe v. Department of Education," since the Commission was "disinterested in the subject matter" of the decision being appealed, and the Department is the real party in interest. By order issued November 13, 2009, this Court granted the Commission's petition to amend the caption.

Commission erred in denying Doe's motion to dismiss based upon the running of the statute of limitations; (2) whether the Commission erred by finding that the Department of Education (Department) met its burden of proving that Doe was guilty of immorality and intemperance; (3) whether the Commission erred by failing to dismiss the educator misconduct proceeding as a penalty for violating the confidentiality provisions of the Professional Educator Discipline Act (PEDA);[3] and, (4) whether the Commission erred by not sanctioning the Department for spoliation of evidence. For the reasons that follow, we reverse the decision of the Commission.

Doe is certified by the Department as a health and physical education educator, and as an elementary and high school principal. After teaching for 34 years, Doe became superintendant of a Pennsylvania public school district (School District) in 2000. By letter dated November 19, 2003, Doe was notified by the Department that a complaint for sexual harassment had been lodged against him for making inappropriate comments or statements to or about a School District employee. On or about July 5, 2005, Doe was notified by the Department that his office computer was being confiscated.

On December 7, 2007, the Department issued a Notice of Charges to Doe alleging that he: (1) accessed pornographic websites on his computer at work in 2004 and 2005, and (2) sexually harassed a School District employee in 2002 and 2003. The School District was granted leave by the Commission to intervene in this matter on January 16, 2008. On February 5, 2008, Doe filed an answer, new matter and demand for hearing, to which the Department responded on February 11, 2008. A hearing officer was appointed and, over June 23, June 24 and September 29, 2008, a hearing was held, following which the parties filed post-hearing briefs, and the

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[3] Act of December 12, 1973, P.L. 397, *as amended*, 24 P.S. §§ 2070.1a - 2070.18a.

Department withdrew its sexual harassment charge.[4] On April 28, 2009, the hearing officer issued a proposed adjudication and order recommending that Doe's professional educator certification be revoked for accessing pornographic websites on his computer at work. Doe filed exceptions to the hearing officer's proposed adjudication and order, which were opposed by the Department and the School District. By memorandum and order issued September 24, 2009, the Commission denied Doe's exceptions, accepted the hearing officer's proposed adjudication and order, and revoked Doe's professional educator certification. Doe appealed to this Court.[5]

Doe first argues that the Department violated the statute of limitations by failing to timely initiate an educator misconduct complaint for accessing pornography on his office computer and, as a result, the Department and the Commission were without authority to revoke his certification on that basis.[6]

The Department argues that Doe waived the argument that it violated the statute of limitations by not asserting it as a defense in his new matter to the Department's Notice of Charges in accordance with Pa.R.C.P. No. 1030(a). We disagree. First, this Court has held that "the Pennsylvania Rules of Civil Procedure do not apply to proceedings before administrative agencies and commissions." *Malt*

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[4] Doe retired from the School District.

[5] "Our scope of review is limited to a determination of whether constitutional rights were violated, whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence." *Pardue*, 815 A.2d at 1165 n.10.

[6] The issue posed by Doe is that the Department violated the statute of limitations in the case twice: first, by failing to show the initial complaint for sexual harassment was brought within one year of the alleged misconduct; and, second, by failing to timely initiate an educator misconduct complaint for accessing pornography on his work computer. However, since the charge of sexual harassment was withdrawn by the Department, whether the sexual harassment complaint was timely filed is moot, and need not be considered by this Court.

Beverages Distribs. Ass'n v. Pennsylvania Liquor Control Bd., 966 A.2d 1188, 1197 (Pa. Cmwlth. 2009). More specifically, the Commission has declared that disciplinary matters before it are "not governed under the Rules of Civil Procedure." *Dep't of Educ. v. Baracca*, Docket No. DI-92-08, *see* Doe Br. Ex. B at 66; Department Br. Apps. A and B at 66. In addition, it is only in Doe's brief on appeal that he uses the term "statute of limitations"; he had previously used the term procedural violations. Doe raised the issue of the Department's procedural violations and the Commission's resultant lack of jurisdiction in his post-hearing brief. The hearing officer decided the issue. Doe subsequently addressed it in his exceptions to the hearing officer's proposed adjudication, and the Commission ruled on it as well. Finally, Doe raised the issue in his petition for review before this Court. Since Doe sufficiently raised the issue of the Department's failure to timely file a complaint against him for accessing pornography, we find that he did not waive it. *See Gow v. Dep't of Educ.*, 763 A.2d 528 (Pa. Cmwlth. 2000) (educator waived his statute of limitations claim where he failed to at least raise the issue in his exceptions before the Commission).

As to the merits of whether the Department violated the statute of limitations, Section 5(a)(11) of PEDA, 24 P.S. § 2070.5(a)(11), authorizes the Department "[t]o discipline any professional educator . . . found guilty upon hearings before the [C]ommission of immorality, . . . intemperance, . . . or negligence . . . ." However, according to Section 9(a) of PEDA, 24 P.S. § 2070.9(a):[7]

> (a) A proceeding to discipline a professional educator shall be initiated by the filing of a complaint with the [D]epartment 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. . . .

[7] Added by Section 3 of the Act of December 14, 1989, P.L. 612.

> If the alleged action is of a continuing nature, the date of its occurrence is the last date on which the conduct occurred.

Section 9(c) of PEDA, 24 P.S. § 2070.9(c),[8] specifies that educator misconduct complaints shall be filed on a form prescribed by the Department, must specify the nature and character of the charges, and must be verified or duly authorized. The Department is an "interested party" authorized to file complaints against educators. *Seltzer v. Dep't of Educ.*, 782 A.2d 48 (Pa. Cmwlth. 2001); *see also* Section 9(d) of PEDA, 24 P.S. § 2070.9(d)[9] (PEDA generally prohibits only the Commission and its individual members from filing complaints).

According to Section 9(f)(2) of PEDA, 24 P.S. § 2070.9(f)(2),[10] if after its review of a complaint, the Department finds that the allegations are legally sufficient to warrant discipline, it shall provide written notification to the complainant and the educator. The Department has acknowledged that educators have the opportunity to respond to the allegations in a legal sufficiency letter. Thereafter, the Department must conduct a preliminary investigation. *Id.* If a finding of probable cause is made by the Department as a result of its preliminary investigation, pursuant to Section 9(f)(3) of PEDA, 24 P.S. § 2070.9(f)(3),[11] it shall notify the educator and the complainant in writing, and then either transmit its findings to the school board for investigation, or conduct its own full investigation. Finally, under Section 13(a) of PEDA, 24 P.S. § 2070.13(a),[12] and Section 233.115 of the Department's Regulations, 22 Pa. Code § 233.115, either based upon the school board's investigation or its own, the Department shall file with the Commission a written

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[8] *Id.*.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

notice of charges against the educator, who has thirty days to respond to the charges and request a hearing. The Department has the burden of proving that grounds for discipline exist. 24 P.S. § 2070.13(c)(2).[13]

Doe argues that, in order for the accessing pornography charge to be properly before the Commission, under Section 9(a) of PEDA, the Department was mandated to file an educator misconduct complaint to begin an investigation on that specific charge. We agree. Neither PEDA, the Department's regulations, nor the record specify what procedure the Department is to follow to initiate a complaint against an educator. We take notice, however, that in *Seltzer*, "[t]he Department filed a complaint against [the e]ducator" before it conducted an investigation and filed a notice of charges. *Id.*, 782 A.2d at 51 (emphasis added). Whether or not the Department is mandated to file a formal, verified complaint, as is required of third-party complainants by Section 9(c) of PEDA, there is nothing in the law that waives the requirement of the filing of a complaint within the one-year statute of limitations when the Department is the complaining party. Thus, we hold that, just as any interested third party would be, the Department is required by Section 9(a) of PEDA to lodge an educator misconduct complaint within one year from the date of the alleged violation or within one year of the discovery of the violation.

The Commission, based upon the hearing officer's proposed adjudication and order, declared that the Department was not required to file an educator misconduct complaint as to the pornography charge in this case, since its discovery that pornography was accessed on Doe's computer was the "fruit" of its investigation of the original sexual harassment complaint, and because a complaint

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[13] *Id.*

merely begins the investigative process, while the notice of charges begins the formal adjudicatory process. We disagree.

First, there is nothing in the record to show how the Department's investigation of the sexual harassment charge led its investigator to examine Doe's computer. Also, if the pornography charge can stand on its own after the sexual harassment charge was withdrawn, it stands to reason that it was sufficiently independent to warrant the filing and notice of a formal complaint under Section 9 of PEDA separate from the November 2003 sexual harassment complaint. Finally, the Commission's only support for its "fruits" of the investigation argument is its decision in *Baracca*, which is not factually similar to the instant appeal.

In *Baracca*, the Department charged Baracca with the assault of a female student. At the pre-hearing conference, it was discovered that additional students had similar allegations of assault by Baracca. The Department filed a second amended notice of charges based upon the new facts. Baracca argued that the Department should have been required to file a separate complaint on the new facts within the statute of limitations and, because it failed to do so, he could not be disciplined based upon the additional charges. The Commission held, however, that since the new allegations of assault arose from and were extremely similar to those for which Baracca was already charged, and since Baracca had notice of those allegations within the statutory one-year period, a second complaint need not be filed by the Department pursuant to Section 9(a) of PEDA, in order for the Department to discipline Baracca as to those additional incidents.

In the instant case, however, the only complaint filed against Doe was for inappropriate comments or statements he made to or about a School District employee. There are no facts in this record to establish that the alleged sexual

harassment involved Doe's computer, so it is not clear here, as it was in *Baracca*, that the pornography charge is a natural extension of the sexual harassment investigation. In addition, if it were the case that the pornography and sexual harassment charges were so closely linked as to make the former the "fruit" of the latter, then when the charge of sexual harassment was withdrawn by the Department, it follows that the charge for viewing pornography should, likewise, have been withdrawn. Moreover, unlike in *Baracca*, despite the fact that the Department had Doe's computer confiscated and analyzed for inappropriate materials in July of 2005, it was more than two years later that the Department charged Doe with accessing pornography. Were we to accept the Commission's "fruits" of the investigation argument on these facts, the Department would be free to disregard PEDA and charge any educator for any past misconduct at any time.

We, likewise, find error in the Commission's position that since a complaint merely begins the investigative process, the Department's failure to file a second complaint against Doe, and the resultant loss of Doe's opportunity to respond to a legal sufficiency letter, were "insignificant" in light of his subsequent notice and opportunity to respond to the Notice of Charges.

The Department's July 2005 confiscation of his computer, and the December 2007 Notice of Charges were not sufficient to notify Doe that he was being investigated for accessing pornography at work. During the time he was superintendant, Doe experienced pop-ups of a pornographic nature on his computer, which he reported to the School District's Information Technology (IT) coordinator. The Department's professional conduct investigator asked the School District's IT coordinator to review the School District's internet usage, particularly Doe's computer. The IT coordinator notified the investigator that pornographic images had

been accessed from Doe's computer, and Doe was notified by the Department that his office computer was being confiscated. That the Department was going to examine his computer, under circumstances in which it was typical for School District employees to experience pop-ups for pornographic sites, does not rise to the level of notice under Sections 9(f)(2) and (3) of PEDA that Doe was being investigated for intentionally accessing pornography.

The Commission also erroneously held that the absence of an opportunity to respond to a legal sufficiency letter "is of no significance in this matter" since the record does not reflect any prejudice Doe may have suffered as a result. Reproduced Record (R.R.) at 9a. Doe's computer was taken by the School Board president to the School District solicitor's office, where it was picked up by the investigator on August 4, 2005. It remained with the investigator until he turned it over to the Pennsylvania State Police on October 27, 2005 for analysis. The State Police issued its investigative report on December 5, 2005. Yet, Doe was not notified that he was being charged with any wrongdoing until December of 2007. Thus, for some reason not evident in this record, more than two years passed from the time pornographic images were documented on Doe's computer and he was notified of the charges and could respond. We are dismayed by the Commission's designation of the Department's blatant disregard of Section 9 of PEDA as "insignificant" under circumstances that resulted in the revocation of Doe's professional educator certificate and a livelihood he enjoyed for more than 40 years.

In PEDA, the General Assembly went to great lengths to ensure that accused educators are notified after a complaint is filed by an interested party. Section 9(a) of PEDA clearly states that "[a] proceeding to discipline a professional educator <u>shall</u> be initiated by the filing of a complaint." (Emphasis added). In

addition, Sections 9(f)(2) and (3) of PEDA specifically require that the Department shall notify Doe in writing of any complaints against him at two points in the process – if and when the Department determines that a complaint sets forth facts legally sufficient to begin a preliminary investigation, and if and when it makes a finding of probable cause prompting a full investigation. There is nothing in PEDA or the Department's regulations that waives those requirements when the Department is the complaining party. Moreover, the Pennsylvania Supreme Court has held that the term "shall" is mandatory when it is used in a statute that is otherwise unambiguous. *Chanceford Aviation Props., L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 592 Pa. 100, 923 A.2d 1099 (2007). Where, as here, the filing of a complaint and written notification thereof is a prerequisite to the Department's filing of a notice of charges, it is mandatory, and the Department's "[f]ailure to follow a mandatory statute renders the proceedings void . . . ." *Pass v. Dep't of Transp., Bureau of Driver Licensing*, 804 A.2d 77, 81 (Pa. Cmwlth. 2002) (quoting *Fraternal Order of Police, Lodge No. 5 v. City of Phila.,* 789 A.2d 858, 862 n.3 (Pa. Cmwlth. 2002)).

Since no complaint was ever filed by the Department or any other interested party against Doe for allegations of accessing pornography on his office computer, the Department did not meet the requirements of Section 9(a) of PEDA. Thus, the matter was not properly before the Commission. It, therefore, erred in denying Doe's post-hearing motion to dismiss that charge.[14]

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[14] Because this Court holds that the Department's failure to follow the procedures set forth in Section 9(a) of PEDA is fatal to its pornography charge against Doe, it need not address whether the Commission erred by finding that the Department met its burden of proving that Doe was guilty of immorality and intemperance, or whether the Commission erred by not sanctioning the Department for spoliation of evidence. Since, however, the issue of whether there was a breach of Doe's confidentiality is an issue that may survive this Court's holding, we will address it.

As to whether the Commission erred in failing to dismiss the educator misconduct proceeding as a penalty for violation by the Department and the School District of PEDA's confidentiality provisions, Doe specifically argues that the Department breached that provision when in June of 2005 the Department's professional conduct investigator asked the School District's IT coordinator to check Doe's work computer for inappropriate material. Doe also avers that the School Board, on behalf of the School District, breached that provision by referencing the disciplinary proceedings against him at a public meeting.

Section 10 of PEDA, 24 P.S. § 2070.10,[15] states:

> (a) All information relating to any complaints, including the identity of the complainant, or any proceedings relating to or resulting from such complaints, shall remain confidential, unless or until discipline, other than a private reprimand, is ordered, any provision of law to the contrary notwithstanding. . . .
>
> (b) This section shall not prohibit any person from disclosing information previously made public as a result of action by a school entity to dismiss a certified employe for cause . . . .

See also 22 Pa. Code § 233.114(a)-(c). However, Section 9(f)(2) of PEDA authorizes the Department to request from the educator or the educator's current or former employer school district "any documents it may reasonably require in pursuit of its preliminary investigation."

There is no evidence in this record that the actions of the Department or the School District referred to by Doe were anything other than those activities authorized by Section 9(f)(2) of PEDA. Moreover, the only specific reference to a penalty for violation of Section 10 of PEDA is set forth in Section 17 of PEDA, 24

[15] *See* footnote 7.

P.S. § 2070.17,[16] which provides only that violators are guilty of a misdemeanor of the third degree. *See also* 22 Pa. Code § 233.114(d)-(e). Since Doe has not established that there was a violation of Section 10 of PEDA and, even if there were, that the Commission was authorized to dismiss pending charges as a sanction therefor, the Commission did not err by denying Doe's motion to dismiss on that basis.

Based on the foregoing, the September 24, 2009 order of the Professional Standards and Practices Commission must be reversed.

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JOHNNY J. BUTLER, Judge

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[16] *Id.*

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O R D E R

AND NOW, this 18th day of August, 2010, the September 24, 2009 order of the Professional Standards and Practices Commission is reversed.

JOHNNY J. BUTLER, Judge