

IN THE MATTER OF
KIDS FIRST SWIM SCHOOL
9638 Belair Road
Baltimore, Maryland 21236

Citation No. 13-PR0105403

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-14-037

* * * * *

OPINION

This matter comes before the Board of Appeals for Baltimore County (the "Board") as a Record Appeal from the Administrative Law Judge's April 28, 2014 Opinion and Order wherein a violation for combined chlorine in excess of mandated maximum .2 ppm; failure to comply with closure order and civil penalty in the amount of \$500.00 per day beginning September 23, 2013 was dismissed. The Administrative Law Judge further ordered that the Health Department of Baltimore County shall, in all future testing utilizing DPD technologies to measure combined chlorine in pool water, adjust the DPD result obtained thereby by a factor of DPD/3.63 to produce a result upon which enforcement shall be based. The decision was appealed by Bambi Glenn, Assistant County Attorney. This Board held a hearing on the record September 24, 2014. Appellee, Kids First Swim School (Kid's First) was represented by Mark T. Mixer, Esquire.

BACKGROUND

As this case comes before the Board as a Record Appeal, the Board's review of the Administrative Law Judge's decision is solely based on the record of the hearings that this Board was provided and the oral argument presented before this Board at September 24, 2014 Record Appeal hearing.

This case comes before the Board of Appeals as a result of the citation issued on the basis of test results for combined chlorine obtained at Appellee's swimming pool on September 23, 2013, September 25, 2013, September 26, 2013, November 13, 2013, and November 14, 2013; the results noted not being in compliance with Sections 1.05.02.20A(2) and 1.05.02.3II(1) and (2) of the Code of Baltimore County Regulations (COBCR) and Sections 3-6-203(e), 3-6-204, 3-6-205(a) and (b), and 3-6-206(a) of the Baltimore County Code (BCC).

The Administrative Law Judge analyzed the evidence and testimony presented in his decision. After a thorough review, he determined that the central issue was: "...Is the testing regime and equipment as presently available, accurate? –And if not, what if anything can be done to improve its accuracy?" (ALJ Opinion p.14) The Administrative Law Judge was presented with what he termed the "Blatchley adjustment," presented by Ernest R. Blatchley, III, Ph.D., P.E., DEE, Professor, School of Civil Engineering and Division of Environmental & Ecological Engineering at Purdue University. Dr. Blatchley recommended an "adjustment factor" of $\frac{DPD}{3.63}$ which significantly affects the result of the test for combined chlorine. The Administrative Law Judge applied the "Blatchley adjustment" to the combined chlorine levels cited and determined that all of the amounts were within the CDC's acceptable range. The Administrative Law Judge determined that the Respondent "...exerted a tremendous effort to comply with the standards; all to no avail..." (ALJ Opinion p.16) Accordingly the Administrative Law Judge dismissed the Citation. He continued on to suggest that "...not issuing a Citation for readings presently below .4ppm (the CDC standard) would be a better policy. In addition, testing for combined chlorines should include the application of the 'Blatchley adjustment' for purposes of County supervision and enforcement." (ALJ Opinion p.16)

ISSUE PRESENTED

Whether ALJ Stahl prospective ruling exceeded his subject matter jurisdiction.

BOARD'S OPINION

Code § 32-4-281 (e) of the Baltimore County Code states,

(e) Actions by Board of Appeals.

(1) In a proceeding under this section, the Board of Appeals may

- (i) Remand the case to the Hearing Officer;
- (ii) Affirm the decision of the Hearing Officer; or
- (iii) Reverse or modify the decision of the Hearing Officer if the decision:

- 1. Exceeds the statutory authority of jurisdiction of the Hearing Officer;
- 2. Results from an unlawful procedure;
- 3. Is affected by any other error of law;
- 4. Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
- 5. Is arbitrary or capricious.

In the hearing before this Board, Kids First correctly established that Professor Blatchley's testimony was not rebutted by any of Baltimore County's experts. Blatchley testified that the research he conducted was for the purpose of improving sanitation of water generally and pools particularly. Professor Blatchley testified that the FAS/DPD test methodology, such as

that utilized by Baltimore County, is tragically flawed such that 96 percent of the samples tested in his study failed the regulatory standard of .2 ppm. Furthermore, his testing revealed that the test results for the presence of combined chlorine from tests conducted with the DPD methodology on average were several times as large as the test results using the MIMS test methodology. Thus, in order to recalculate the test results based on DPD methodology and obtain an accurate reading for combined chlorine, one must divide the results obtained using the DPD methodology by 3.63. This uncontroverted evidence was incorporated into Judge Stahl's ruling. Thus, the unrefuted testimony of Professor Blatchley makes it clear that the test methodology utilized by Baltimore County is tragically flawed and that the test results are not credible.

Kid's First also argued that the ALJ did not exceed his statutory authority by unilaterally changing the current testing procedures required by State and County statutes. In particular Kid's First asserts in ordering Baltimore County, if utilizing the DPD testing methodology, to include an "adjustment factor", Judge Stahl acted pursuant to his duties and within the scope of his powers citing Baltimore County Code §3-12-104(a) and Baltimore County Code §3-12-105 which states, "The Office of Administrative Hearings have jurisdiction over: [...] (3) A code enforcement citation issued under Title 6 of this article [...] (5) Any other matter delegated to the Office". Kid's First reads this provision of the BCC very broadly to include Judge Stahl's ability to modify State and County statutes. Kid's First also cites Baltimore County Code §3-12-106(a)(1) to support their legal theory: "The Office *may* adopt regulations to govern the procedures and practices in all contested cases". They also take a broad view of this statutory provision by encouraging this Board to allow Judge Stahl to unilaterally adopt the Baltimore

County regulations to resolve the issues alleged in this matter. For those reasons Kid First is requesting that we affirm Judge Stahl's Order in its entirety.

The EHS argues that Administrative Law Judge Stahl's Order should be reversed or modified as it exceeds his subject matter jurisdiction. EHS argues that to order a change to State mandated testing methodology in all tests of public swimming pools, ALJ Stahl went well beyond ruling on the five contested citations that were before him, and strayed into an area over which he was not authorized to rule. At the appeal hearing the EHS argued that the situation before this Board is analogous to one in which, at a District Court traffic hearing in which a defendant contested the results of a radar device, the judge not only dismisses the citation but prohibits the police department from utilizing radar equipment to verify vehicle speed in the future and changing what the speed limit is. EHS further argued that Judge Stahl went far beyond the subject matter that was properly before the court and impermissibly invades the sole right and discretion of an agency to promulgate regulations affecting that agency and upsets a system of government as the power to enact legislation rests solely with the legislative bodies – the Maryland General Assembly at the State level and the County Council at the County level.

EHS further argued Judge Stahl has no authority to change State law. EHS properly argues that testing the water in public swimming pools and ensuring that it complies with State and Local regulations concerning its temperature, chemical make-up, and content is a State law. C.O.M.A.R. 10.17.01.44 sets forth the State's regulatory requirement that the maximum permissible amount of combined chlorine in a public pool is .2 ppm (parts per million). C.O.M.A.R. 10.17.01.46 requires that the owner of public swimming pools shall maintain operating records which include testing and recording the level of combined chlorine on a regular basis. C.O.M.A.R. 10.17.01.47 sets forth the test kits which are permissible in

complying with the State regulations, and include “a chlorine or bromine test kit that is the DPD (diethyl-p-phenylene diamine) reagent system for measuring free and combined chlorine or total bromine with an indicator range from 0.00 to 10.0 ppm or with procedures for performing a dilution test to achieve readings up to 10.0 ppm.” *See* C.O.M.A.R. 10.17.01.47 (A)(1)(a).

The EHS properly argues that The Maryland Department of Health has designated as the local authority to enforce these regulations the Baltimore County Health Department. Consistent with its regulatory enforcement duties, the Baltimore County Health Department has promulgated local regulations that mirror the State requirements. They can be found in the Code of Baltimore County Regulations (COBCR) §1.05.02.20A(2), which sets forth the maximum permissible amount of combined chlorine in a public swimming pool at .2 ppm; and COBCR §1.05.02.25A(1), providing that “ADPD (NN-Diethyl-Para-Phenylene Diamine) type test kits shall be provided with a minimum range testing capacity of 02 to 100 ppm at standard public pools”. Therefore the State and local regulations require that the basis upon which the combined chlorine level of the water in a public swimming pool is determined in order to assess its compliance with the .2 ppm standard be the application of DPD testing methodology.

EHS correctly asserts that ALJ Stahl’s ruling impermissibly altered the requisite testing methodology to determine the level of combined chlorine in public swimming pools by applying the “Blatchley adjustment”, which is a mathematical formula that alters the results of the mandated testing methodology for the purpose of enforcement. We agree that the broad language of Judge Stahl’s Order effectively requires EHS to disregard both the State and County regulations as they pertain to testing for combined chlorine in public swimming pools, and to apply an adjustment that is neither set forth in, nor anticipated by, the regulations, and which effectively re-writes the permissible combined chlorine levels of public swimming pools and also

impermissibly alters the mandated testing methodology. While the ALJ has the right and ability to apply and enforce the regulations relating to combined chlorine levels in swimming pools, nowhere is he granted the authority to alter the regulations or to adopt new regulations.

The EHS also argues that any alteration of local jurisdiction is pre-empted by State law. They assert that preemption of local law by state law can be express or implied or can occur when local law conflicts with State law. *Talbot County v. Skipper*, 329 Md. 481, 487-88, 620 A.2d 880 (1993). Conflict preemption occurs “when [a local law] prohibits activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law.” *Skipper, Id.*, at 487, n.4, 620 A.2d 880. The EHS asserts ALJ Stahl’s order is incompatible with both State and local regulations governing the maximum permissible levels of combined chlorine in public swimming pools and the manner in which that number is to be determined. EHS argues that they are forced by Judge Stahl’s order, which is in direct conflict with both the State and local regulations, to knowingly and intentionally violate the applicable state COMAR provisions it has been tasked with enforcing.

CONCLUSION

At the hearing below Kids First presented uncontroverted expert testimony from Professor Blatchley that the testing procedures ordered by statute were inaccurate and flawed. However, this Board has determined that Judge Stahl exceeded his statutory authority by mandating prospective changes to testing procedures. We agree with the EHS that any changes to the State mandated testing procedures enacted in COMAR must come from the properly empowered legislative branch of government. This Board was unpersuaded by Kid’s First argument that County administrative procedures they cited are so broad as to allow a ALJ to

unilaterally alter State or County code. Though strong arguments have been made that discredits the current testing procedures such a determination will have to be made on a case by case basis. For that reason we determine that Judge Stahl had the authority to consider the testimony in this case, however the doctrines of res judicata and collateral estoppel may predetermine the outcome of any future cases that the EHS chose to pursue employing the methodology that ALJ Stahl has already ruled to be discredited.

Based on the findings stated above, the Board finds that the Administrative Law Judge's April 28, 2014 decision in this matter, insofar as it altered the testing procedures will be REVERSED.

ORDER

THEREFORE, IT IS THIS 9th day of October, 2014, by the Board of Appeals of Baltimore County

ORDERED that the decision of the Administrative Law Judge dated April 28, 2014, to dismiss citation/Case No. 13-PRO105403 is hereby **AFFIRMED**;

ORDERED that the decision of the Administrative Law Judge dated April 28, 2014, to mandate the Health Department of Baltimore County in all future testing to utilize DPD technologies to measure combined chlorine in pool water to adjust the DPD result obtained thereby by a factor of DPD/3.63 to produce a result upon which enforcement shall be based is hereby **REVERSED**.

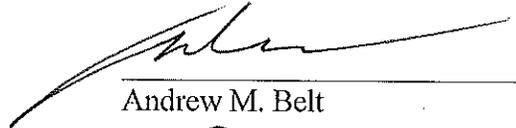
In the matter of: Kids First Swim School/CBA-14-037

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**



David L. Thurston, Chairman



Andrew M. Belt



Richard A. Wisner



Board of Appeals of Baltimore County

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October 9, 2014

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RE: *In the Matter of: Kids First Swim School*
Case No.: CBA-14-037

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review** filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,


Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: See Attached Distribution List

c: Gary Roth, President, Kids First Swim School
Paul McDermott
Charles Mooshian, President, Fountain Valley Labs
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