

IN THE MATTER OF
GARY ROTH, OWNER,
KIDS FIRST SWIM SCHOOL – APPELLANT
9970 York Road
Cockeysville, MD 21030

RE: Code Enforcement Hearing Officer;
Civil Citation: P2-11-7884

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA – 12-050

* * * * *

OPINION

This case comes to the Board on appeal of the Findings Of Fact And Conclusions Of Law Final Order of The Administrative Law Judge dated March 26, 2012 which Order upheld a violations under the Code of Maryland Regulations (COMAR) and the Code of Baltimore County Regulations (COBAR), namely violating COMAR 10.17.01 (Title 10, Department of Health and Mental Hygiene [DHMH]), Subtitle 17 – Sanitation, Chapter 01 – Public Swimming Pools and Spas), and COBAR (Title 01, Department of Environmental Protection and Resource Management [DEPRM], Subtitle 05 – Environmental Health, Chapter 02 – Swimming Pool and Bathing Beaches), on property located at 9970 York Road, Cockeysville, Maryland 21030. The Final Order imposed a civil penalty in the amount of One Thousand Dollars (\$1,000.00) and that the Respondent shall immediately provide, at each of his Baltimore County locations, for a certified lifeguard whose sole responsibility shall be to be present at pool side, observing individuals then in the pool. If the civil penalty of \$1,000.00 is not paid within thirty days of billing, the civil penalty AND any expenses incurred by Baltimore County, as authorized above, shall be imposed and placed as a lien upon the property.

A hearing before this Board was held on May 17, 2012. Mark A. Mixter, Esquire appeared on behalf of Gary Roth and Kid's First Swim Club and Dayna Kipnis, Assistant County Attorney, appeared on behalf of the County.

Factual Background

This matter came before the Administrative Law Judge on October 5, 2011 and January 4, 2012 for a Hearing on a citation for violations under the Code of Maryland Regulations (COMAR) and the Code of Baltimore County Regulations (COBAR). The Respondent was charged with violating COMAR 10.17.01 (Title 10, Department of Health and Mental Hygiene [DHMH]), Subtitle 17 – Sanitation, Chapter 01 – Public Swimming Pools and Spas), and COBAR (Title 01, Department of Environmental Protection and Resource Management [DEPRM], Subtitle 05 – Environmental Health, Chapter 02 – Swimming Pool and Bathing Beaches), on property located at 9970 York Road, Cockeysville, Maryland 21030.

On September 27, 2011, pursuant to Section 1-2-217 of the Baltimore County Code (B.C.C.), Danielle Daywalt, Sanitarian/Inspector issued a Baltimore County Uniform Code Enforcement Citation. The citation was sent to the Respondent by 1st class mail to the last known address listed in the Maryland State Tax Assessment files. The citation proposed a civil penalty of Five Hundred Dollars (\$500.00) a day for 2 days (August 26, 2011 and September 8, 2011) for a total of One Thousand Dollars (\$1,000.00).

The following persons appeared at one or both of the hearings: Gary Roth, Respondent/Owner of Kids First Swim School, Mark T. Mixter, Esquire on behalf of the Respondent, Baltimore County Sanitarian/Inspector Danielle Daywalt, Angela Sutherland, and William Clark, from the Division of Environmental Health Services, Department of Health.

NOTE: Counsel was not present at the hearing that commenced on October 5, 2011.

The Respondent was cited as a result of inspections on site, which took place on August 26, 2011 and September 8, 2011. The inspector issued the citation on the basis that there was not a certified lifeguard whose sole responsibility was to watch swimmers in the pool. Although proper documentation could not be produced at the time, all parties now agree that on these two dates, a certified lifeguard was in the water instructing five and seven students, respectively. No additional lifeguard; however, was assigned to be at the pool solely to observe the swimmers, separate from the instructor. The parties disagree as to whether County or State regulations apply to the number and duties of lifeguards at the Respondent's business. Even if that is determined, both sides disagree as to what the applicable statutes mean as they relate to the assignment and number of lifeguards at Respondent's business.

Gary Roth, the Respondent/Owner, testified that he has operated swimming schools since 2001. He stated that the pools at his locations vary from 35,000 to 50,000 gallon sizes; and the students taught are primarily minors. In fact, he described the median age of students as between 5 and 6 years old. He further testified that his locations have operated without a single safety incident.

Issues

Protestants raise the following issues to be determined by the Board.

1. Did the ALJ err in determining that State regulations defer to stricter County regulations in the event there is a conflict?
2. Did the ALJ err in determining that the stricter County regulation requires an additional lifeguard present at the pool to observe the pool area?
3. Did the ALJ err in allowing the October 5, 2011 hearing to proceed without Respondent being represented by legal counsel, thereby violating Respondents Constitutional rights?

Findings

1. Did the ALJ err in determining that State regulations defer to stricter County regulations in the event there is a conflict?

State regulations which control this matter were adopted by the Department of Health and Mental Hygiene under its authority to regulate sanitation and infectious diseases in various provisions of the Health-General Article of the Annotated Code of Maryland. See generally 2-102, 2-104, 18-102 and 20-303. The regulations for public swimming pools is controlled by Title 10, Subtitle 17, Chapter 01 of the Code of Maryland Regulations (COMAR). Controlling in this matter is COMAR 10.17.01.12 which provides that an owner or operator of a public swimming pool must comply with any provision that establishes a higher standard for the promotion and protection of public health and safety if a provision in this chapter is in conflict with a local code, ordinance, statute, or other regulation.

We concur with the ALJ that it is clear that the State regulations defer to a stricter local standard in these matters in the event of conflict between them. We can derive no other meaning from COMAR 10.17.01.12(A). Further COMAR 10.17.01.40(D)(1)(a) mandates that stricter local codes and regulations be complied with :

COMAR 10.17.01.40(D) which reads:

“D. Lifeguards.

(1) An owner of a public pool shall comply with:

(a) Local codes requiring lifeguards if the requirements of the local codes are stricter than the requirements set forth in §D(2)—(5) of this regulation; or

(b) §D(2)—(5) of this regulation if no local codes exist, or if the local codes requiring lifeguards are not as strict as the requirements of §D(2)—(5) of this regulation.

(2) Except as set forth in §D(1) and (3) of this regulation, an owner of a recreational pool shall have at least one lifeguard on duty on the deck observing the pool while an individual is in the pool, and shall have at the pool:

- (a) Lifeguards who are appropriately trained and certified for the type of facility and activity in the pool;
- (b) A sufficient number of lifeguards so that a lifeguard is on duty for each group of 50 individuals, or fraction thereof, in the pool; and
- (c) In addition to the number of lifeguards required in §D(2)(b) of this regulation, additional lifeguards on duty if:
 - (i) The shape, dimensions, layout, use, activities, or features of the pool create potential safety hazards;
 - (ii) The vision of the required lifeguard or lifeguards is obstructed;
 - (iii) The capabilities of the individuals using the pool are substandard; or
 - (iv) Another condition exists that compromises the ability of a lifeguard to monitor the pool.”

Our reading of these provisions lead us to conclude that a stricter County regulation must be complied with. Further, pursuant to the above regulations, at least one lifeguard “observing the pool” is also required by COMAR. We agree with the ALJ that Kid’s First Swim Club does engage in an activity that **compromises** (emphasis added) the ability of a lifeguard to monitor the pool under which would require an additional lifeguard to monitor the pool. See COMAR 10.17.01.40(D) (2)(c)(iv). The ALJ was accurate in his assessment that “teaching a group of young children in an inherently dangerous environment such as a pool requires a degree of concentration and supervision, not only to an individual student, but to all in the class. Invariably, the instructor’s attention can be diverted, even for a moment, by an individual student; and at that moment, the ability of the teacher/lifeguard to observe and protect the other

students is truly “compromised”. Anyone who ever interacted with small children knows that tragedy can happen in a second; hence the need for focused supervision by a certified lifeguard, to the exclusion of all else, especially in a swimming pool environment” .

2. Did the ALJ err in determining that the stricter County regulation requires an additional lifeguard present at the pool to observe the pool area ?

Our review of the record and applicable statutes leads us to conclude that the relevant County regulations are found in COBAR, under Title 01, Subtitle 5, Chapter 2, subsection (31)(L), which states:

“L. Lifeguards

- (1) Each facility shall provide on the premises during all hours of operation the following:
 - (a) At least one certified pool operator must be on site; and
 - (b) A minimum of one lifeguard on duty observing the pool while any individual is in the pool
- (2) An additional lifeguard is required for each additional 50 bathers, or fraction thereof, above the first 50 bathers
- (3) The single responsibility of a solo guard is to watch swimmers;
- (4) When the guard must leave his or her station the swimmers shall vacate the pool water
- (5) The solo guard shall take hourly breaks of 5 to 10 minutes.
- (6) Conspicuously posted pool rules shall state that the pool is to be vacated by all swimmers when the guard leaves his or her station
- (7) The approving authority may require additional lifeguards to be on duty at any swimming pool if the approving authority finds that the pool is inadequately guarded because:
 - (a) Of the number of persons using the pool or within the pool enclosure;

- (b) The size, dimension, layout, use, activities, or features of the pool create potential safety hazards;
 - (c) The vision of the required lifeguard(s) is obstructed;
 - (d) The capabilities of the individuals using the pool are substandard; or
 - (e) Another condition exists that compromises the ability of a lifeguard to monitor the pool
- (8) A lifeguard on the pool deck may monitor an adjacent wading pool if the wading pool is within the lifeguard's 180-degree field of vision and the total number of individuals being monitored does not exceed 50
- (9) At least one individual must be on duty with CRP certification, a solo lifeguard, if alone, must have a current certification in cardiopulmonary resuscitation (infant, child, adult) and first aid."

The Board finds that Subsection (1)(b), sets forth the requirement that the one lifeguard "observing" is required. Subsection (3) mirrors the State regulations and provides that the single responsibility of a solo lifeguard is to watch swimmers; and under (7)(e), an additional lifeguard(s) is required if the ability of that single lifeguard is "compromised". We also agree with the ALJ that an instructor with a group of young children in the water is, by definition, teaching, instructing, and interacting with his students. Under these conditions, we do not believe that an instructor can carry out the required "single responsibility" called for in Subsection (L)(3) and comply with the County regulation.

3. Did the ALJ err in allowing the October 5, 2011 hearing to proceed without Respondent being represented by legal counsel, thereby violating Respondents Constitutional rights?

A review of the record indicates that the case below was bifurcated into two hearings.

The first hearing was conducted without benefit of counsel as agreed to by the Appellant. At that

hearing the sole witness presented was the Baltimore County employee who issued the citation in this case. ALJ advised the appellant of his right to have counsel present at the initial hearing on October 5, 2011 and Mr. Roth, for himself and Kids First Swim School affirmatively waived his right to counsel on the record and agreed to proceed with the hearing pro se. Respondent was then represented by counsel at the subsequent hearing on January 4, 2012.

Decision

An appeal to the Board of Appeals for a code violation is an appeal on the record made before the Code Enforcement Officer under BCC §3-6-303 (a):

(a) *Hearing on the record.*

- (1) (i) Except as provided in subsection (b) of this section, the Board of Appeals hearing shall be limited to the record created before the Hearing Officer, which shall include:
 1. Except as provided in paragraph (2) of this subsection, the recording of the testimony presented to the Hearing Officer;
 2. All exhibits and other papers filed with the Hearing Officer; and
 3. The written findings and final order of the Hearing Officer.

After hearing argument and a summary of the evidence presented at the Code Enforcement hearing, this Board has the authority under BCC, §3-6-304 to do the following:

- (a) *Disposition options.* In a proceeding under this subtitle, the Board of Appeals may:
- (1) Remand the case to the Hearing Officer;
 - (2) Affirm the final order of the Hearing Officer; or

- (3) Reverse or modify the final order if a finding, conclusion, or decision of the Code Official, the Director, or the Hearing Officer:
 - (i) Exceeds the statutory authority or jurisdiction of the Code Official, the Director, or the Hearing Officer;
 - (ii) Results from an unlawful procedure;
 - (iii) Is affected by any other error of law;
 - (iv) Subject to subsection (b) of this section, is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
 - (v) Is arbitrary or capricious.

The Board has considered the issues raised by Respondent/Appellant, reviewed the complete record and has concluded that whether you read the County regulations or the State regulations, the Respondent did not meet the requirements of having a certified lifeguard observing the pool and swimmers by merely having a lifeguard/instructor in the water actively teaching students. We do not believe that a individual can ensure the safety of the swimmers by performing two very important tasks at the same time. More importantly, we conclude the ALJ correctly ruled that both State and County regulations require a certified lifeguard to monitor the pool area and swimmers at all times. Clearly, County regulations envision a lifeguard separate from other related activities, whose function is solely to provide the required observation of those in a pool with his/her single responsibility is to watch all swimmers; in the pool generally and a lifeguard/instructor in the midst of teaching a group of students cannot be said to satisfy this requirement. The Respondent must comply by hiring additional lifeguards to carry out the observation function, separate entirely from teaching activities.

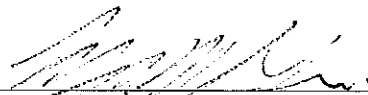
ORDER

THEREFORE, IT IS THIS 1st day of June, 2012 by the Board of Appeals of
Baltimore County,

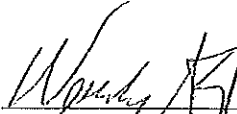
ORDERED that the decision of Administrative Law Judge in the above captioned case
number CBA-12-050 be and the same is hereby AFFIRMED.

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



Wendell H. Grier, Chairman



Wendy A. Zerwitz



David L. Thurston



Board of Appeals of Baltimore County

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June 1, 2012

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Baltimore County Office of Law
Historic Courthouse
400 Washington Avenue
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RE: *IN THE MATTER OF:* GARY ROTH/LEGAL OWNER
KIDS FIRST SWIM SCHOOL - APPELLANT
9970 YORK ROAD, COCKEYSVILLE, MD 21030
Case No.: CBA-12-050

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,


Theresa R. Shelton
Administrator

Enclosure: Opinion

Duplicate Original Cover Letter

c(w/Encl.): Gary Roth, c/o Texas Property II, LLC
Kids First Swim School
Danielle Daywalt/Sanitarian/Inspector
Angela Sutherland/Inspector
William Clarke, Department of Health
Lionel VanDommelen, Chief of Code Enforcement/PAI
Lawrence M. Stahl, Chief Administrative Law Judge
Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney
Michael Field, County Attorney