

109-00

IN THE MATTER OF THE TENURE :  
HEARING OF BRIAN EILERT, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF THE : DECISION  
TOWNSHIP OF HAZLET, MONMOUTH :  
COUNTY. :  
\_\_\_\_\_ :

SYNOPSIS

The Board certified a tenure charge of unbecoming conduct against respondent middle school teacher for allegedly allowing, and even encouraging, pupils to assault another pupil.

In light of testimony of witnesses and evidence in the record, the ALJ concluded that the charge against respondent was true and that the appropriate penalty for such egregious behavior was dismissal from employment. Even without considering observation reports that indicate long-standing deficiency in the area of pupil discipline, the ALJ concluded that the one incident of June 9, 1999 was sufficiently flagrant to demonstrate unfitness. (*Redcay*) ALJ ordered respondent removed from his position.

The Commissioner adopted the findings and determination in Initial Decision as his own and forwarded the matter to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

April 3, 2000

OAL DKT. NO. EDU 8059-99  
AGENCY DKT. NO. 269-9/99

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent takes exception to the Administrative Law Judge's (ALJ) conclusion that the appropriate penalty in the within matter is removal. Respondent argues, *inter alia*, that of the 23 findings of fact set forth by the ALJ, only two (numbers 6 and 9) illustrate that he engaged in acts of commission by arguably encouraging two students in the class to make contact with M. F., while two other findings of fact (numbers 5 and 19) involve, arguably, acts of omission. Respondent further contends that the remaining findings of fact pertain to background and/or elaborations relative to the consequences of the kicking incidents, *i.e.*, M.F. going to the school nurse and receiving an ice pack. As to this, respondent argues that the two acts of commission were spur of the moment responses which must "be contrasted with a factual backdrop and associated 'mens rea' that would be as egregious as rising to the level of the four categories as elucidated in the *Fulcomer, supra*, case," a level of culpability which he contends is

not present in the instant matter. (Respondent's Exceptions at p. 3) As such, respondent argues that termination is too excessive a penalty in light of the fact that at least one of the involved students, J.P., thought that respondent's comments relative to the invitation to kick M.F. were just a joke. (See Exhibit 9 at p. 5.)

Respondent also takes exception to the ALJ accepting evidence in the form of observation reports dating back to 1994, averring that when the instant tenure charge was submitted by the Board, it was based upon conduct unbecoming a teaching staff member as a result of the June 9, 1999 incident, not inefficiency relative to performance in class. Respondent maintains that there was never a hint that these observation reports would be introduced at the hearing and argues, *inter alia*, that the implication of such action by the Board is that it intended to inflame the ALJ by subtly, but strategically, placing the observation reports in the record. As to this, respondent asserts that had the Board alleged a charge of inefficiency, the observation reports would have been fair play for introduction into evidence and he would have had the ability to submit evidence of his own in defense of the charges, instead, he was blindsided by the extraneous observation reports.

The Board urges that the ALJ properly concluded respondent's actions in the instant matter constituted conduct unbecoming a teaching staff member and that the appropriate penalty is termination of his tenure status and removal from his teaching position. It contends, *inter alia*, that:

Simply stated, Mr. Eilert permitted, and indeed encouraged, two pupils in his class to conduct an assault on one of their peers, M.F. His claim that it was somehow a joke rings hollow in light of two significant facts: (1) the fact that he never told the children it was a joke, and (2) the fact that he failed to move a muscle to prevent the attacks. When Mr. Eilert saw that the alleged joke had gone awry, he could have taken steps to rectify the matter and prevent further harm to M.F. He had the power - throughout this episode -

to stand up, walk to the back of the room, and intervene to prevent, or at least to end, the attacks. Not only did he not do so, but he did not even attempt to do so. And after J.P. had kicked M.F., Mr. Eilert then stated, “Why don’t we get [V.M.] and see what he can do, “ referring to the biggest child in the grade.\*\*\*

It is difficult to imagine a moral compass more badly skewed, or a judgment more flawed, than Mr. Eilert demonstrated in this case. The administrative law judge’s conclusion that Mr. Eilert’s conduct was “shocking to the conscience” is more than borne out by the evidence; it is a conclusion with which no reasonable person could disagree.\*\*\*(Board’s Reply Exceptions at p. 4)

The Board also avers in its reply exceptions that the ALJ properly admitted evidence of respondent’s prior record, including his observations and evaluations reports, arguing, among other things, that respondent’s record of performance, as evidenced by such documents, does not warrant mitigation of the penalty of termination.

Upon a thorough and independent review of the record in this matter, the Commissioner agrees with and adopts as his own the ALJ’s findings and conclusions that the charge of conduct unbecoming a teaching staff member certified against respondent by the Hazlet Board of Education has been sustained and that the conduct was of such a nature as to require that his employment be terminated. The Commissioner finds such penalty to be more than amply supported by the record, even if accepting *arguendo* that the observation and evaluation reports entered into evidence by the Board were a “red herring,” as argued in respondent’s post-hearing submission, or “extraneous” as alleged in his exceptions to the Initial Decision. As aptly stated by the ALJ, even without the predicate of the observation reports, the egregious behavior respondent demonstrated on June 9, 1999 constitutes an incident sufficiently flagrant to demonstrate unfitness warranting removal from his position and termination of his tenure rights. (*Redcay, supra*)

Accordingly, the Initial Decision issued by the OAL, directing that respondent be dismissed from his tenured teaching position, is adopted by the Commissioner for the reasons expressed therein. A copy of this decision shall be forwarded to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.<sup>1</sup>

COMMISSIONER OF EDUCATION

Date of Decision: April 3, 2000

Date of Mailing: April 3, 2000

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<sup>1</sup> This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.