

IN THE MATTER OF THE TENURE :
HEARING OF GREGORY J. BREWER, :
SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
BOROUGH OF ROSELLE, UNION :
COUNTY. :
_____ :

DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent science teacher for allegedly engaging in a continuing pattern of sexual harassment directed at A.F., a 19-year-old female special education student.

Having found respondent not credible, the ALJ concluded that respondent's conduct, which included asking A.F. for her phone and beeper number, asking A.F. out on dates to the movies, and looking at her in a sexual manner, was unacceptable and that the only appropriate penalty was removal from position. The ALJ ordered respondent dismissed from his teaching position. Since the time period of suspension without pay is limited to a total of 120 calendar days, the ALJ ordered that respondent be given back pay for the period of October 16 through December 15, 1998. Subsequent to the issuance of the Initial Decision, respondent filed a Motion to Re-Open the Hearing with the Commissioner, alleging that the ALJ's findings and conclusions with respect to his credibility were erroneous and supported by no competent proof in the record. He requested that the hearing be reopened to allow the introduction of additional evidence in this regard.

After conducting an independent review of the record, including a thorough scrutiny of the transcripts of the hearing at OAL, the Commissioner determined that, since the resolution of this matter depends on the credibility of the witnesses, and having found that the ALJ's stated determinations with regard to respondent's credibility were based in large part on facts not supported by evidence in the record, interests of fairness dictate that respondent be provided with an opportunity for entry into the record of further testimony and evidence as will permit the critical determinations relating to credibility to be based on a full and fair record. Thus, the Commissioner granted respondent's Motion to Re-Open and remanded the matter to the OAL for further proceedings. The Commissioner adopted that portion of the Initial Decision which found the Board owed respondent salary payment for the period between October 16 and December 15, 1998.

December 11, 2000

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DECISION

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

On October 3, 2000, one day after filing his exceptions, respondent filed a Motion to Re-Open the Hearing After the Initial Decision, pursuant to *N.J.A.C.* 1:1-18.5, wherein he maintains that the Administrative Law Judge's (ALJ) Initial Decision findings and conclusions with respect to his credibility were clearly erroneous and were supported by no competent proof, so that he seeks to have the hearing in this tenure matter reopened to allow additional evidence to be introduced. The Board submitted reply exceptions and a response to the motion on a timely basis. In that resolution of respondent's motion could impact upon the Commissioner's assessment of the Initial Decision, the within decision will commence with such determination.

In his exceptions and his motion¹ respondent argues that this entire tenure case

¹ It is noted that the parties' motion papers only briefly highlight arguments advanced in detail in their exception submissions. To allow a full understanding of their respective positions on this one particular issue, the documents have been synthesized to present the full argumentation advanced with regard to this issue.

turns on the credibility of the Board's witnesses as opposed to that of respondent and his witnesses. He vehemently challenges certain of the ALJ's findings and conclusions which he contends were based on nonexistent or incompetent evidence, or on misstatements of testimony, and which entailed a shifting of the burden of proof to respondent, leading the ALJ to make erroneous determinations with respect to respondent's credibility. Respondent urges that in light of the ALJ's clear and prejudicial error, failure to reopen the proceedings would result in a miscarriage of justice.

Specifically, the ALJ's Initial Decision made the following limited findings with regard to respondent's credibility:

I do not FIND credible the testimony of the respondent that A.F.'s brother came to school and gave him his beeper number. It is noted here that the respondent told Holmes that A.F.'s brother gave him her beeper number.

Further, I FIND incredulous the respondent's testimony that he copied the three students grades from his grade book. The grades submitted into evidence in this proceeding is not a copy taken from a grade book. Rather, it is a document construed by the respondent. Further, his grade book cannot be found. I reject the respondent's testimony that the grade book was given to Holmes. Moreover, as Holmes testified test papers would have proved one way or the other whether the respondent was grading A.F. differently from the other students. However, this could not have been done since the respondent had not properly maintained the class records. Indeed, many test papers were found ungraded in a garbage bag and in a file cabinet. Respondent did not file any disciplinary complaints or cut slips with the principle [sic] on the three students. Thus, his testimony cannot be corroborated [sic]. Such conduct by itself is a manifestation of incompetency and inefficiency. (Initial Decision at 18)

Respondent contends that, for the following reasons, each of these findings upon which the ALJ relied to find his testimony incredible is incorrect:

1. Respondent states that he testified that A.F.'s brother, Ge.F., concerned that his sister was not in class, asked him where she was, stating that his parents were worried about her grades. Respondent cites specific hearing testimony to establish that he asked Ge.F. for *his* beeper number, not A.F.'s beeper number. He opines that the Board could have challenged this sworn testimony by calling A.F.'s brother as a witness, which it chose not to do. Consequently, respondent's testimony with regard to his conversation with Ge.F. is unrebutted and, therefore, the credibility findings of the ALJ in this instance "were based on incompetent hearsay evidence." (Respondent's Exceptions at 20-21)
2. In determining that respondent's testimony that he hand copied information regarding absences, homework assignments, laboratory assignments, test results and grades for A.F. and her two friends (Exhibit R-4) from his grade book was incredulous, the ALJ ignored A.F.'s report card which was introduced into evidence by the Board as Exhibit P-9. This Board exhibit, respondent contends, is essentially a "mirror image" of respondent's Exhibit R-4. Therefore, he queries, if he didn't copy this information from his grade book, what could he possibly have used to formulate Exhibit R-4. Consequently, he advances, "the grades which were contained in R-4 were precisely what respondent testified under oath they were and not a document 'construed by the respondent' as found by the ALJ." (Respondent's Exceptions at 2-4)

Additionally, with regard to this ALJ finding, Certification of respondent's counsel in support of his Motion to Re-Open the Hearing states that at one of their conferences respondent had showed him photostatic copies of certain pages of his grade book, which he said

he had utilized to compile Exhibit R-4. Counsel claims that because the exhibit adequately represented the grades, test scores, homework, lab grades and notebook, he did not retain the photostatic copies. Inasmuch as Board counsel had sent a letter to the ALJ on October 22, 1999 wherein he was seeking an additional hearing date to present certain additional witnesses to refute certain portions of respondent's testimony in an attempt to impugn his credibility, counsel here avers that he planned to introduce the photostatic grade sheets at that time, as well as examine Mr. Holmes and call the President of the Roselle Education Association as a witness in rebuttal to anticipated testimony of the Board's additional witnesses. He further states that rather than proceed in accordance with his letter, Board counsel chose to rest without calling any rebuttal witnesses. (Motion to Re-Open the Hearing, Certification of Harold N. Springstead, dated September 29, 2000)

3. The ALJ's statement rejecting what she asserts was respondent's testimony that his grade book was given to Holmes is baseless as is her intimation that it is somehow respondent's fault that his grade book cannot be found. He again cites hearing transcripts for the proposition that he testified that the day he left he turned in the attendance and grade book, pointing out that such testimony never asserted that these records were turned over to Holmes. (Respondent's Exceptions at 4) Moreover, respondent asserts, the Board advanced no testimony or evidence that the grade book could not be found; that anyone in the District looked for his grade book or attendance records; or that anyone sent respondent a letter seeking them. Respondent advances that instead of placing the onus on the him for his nonproduction of records that his uncontroverted testimony stated he did not possess, the ALJ should have

drawn an adverse inference against the Board for its failure to produce these records.
(*Id.* at 5)

4. Respondent charges that the ALJ placed the burden of proof on him to come up with test papers, which testimony indicates were customarily graded and returned to students, to prove that he wasn't grading A.F. differently from other students, undoubtedly an impossible burden. (*Id.* at 5-6)
5. Contrary to the ALJ's finding, the record of this matter contains no proof that respondent did not properly maintain class records. Once again, he avers, the ALJ "shifted the burden of proof to the respondent to show that the papers which the Board never produced were somehow not related to the grades." (*Id.* at 9) Here, respondent avers, the Board failed to introduce any testimony as to the nature of the stacks of papers found, never produced any of these documents, nor did it present any foundation to support its assertion that many tests were left ungraded. It stands to reason, he argues, that if A.F.'s name appeared on any test or homework assignment, the Board could have introduced it as proof that respondent was treating this student differently. It is evident, respondent charges, the ALJ shifted the burden to him to produce records which he did not have and used his failure to do so to discredit his credibility.
6. Contrary to the ALJ's finding, Exhibit R-4 (respondent's summary from his grade book) indicates that he filed cut slips for A.F.'s nonattendance in his class. He cites to hearing testimony to explain that, notwithstanding that A.F.'s report card only showed 20 absences from school for the year, this number "doesn't include in-school suspension, ISS; out of school suspension; or cuts." (citations omitted)

(Respondent's Exceptions at 9) As such, it was the Board's burden, as the keeper of these records, to discredit respondent's Exhibit R-4, which they failed to do.

7. For some unknown reason, respondent charges, the ALJ found that because he had a one-foot-thick pile of papers, which allegedly were student papers or records, his conduct evidenced incompetency and inefficiency. Respondent avers that "[t]his gratuitous afterthought was neither alleged or proven and is not substantiated by the record presented." (Respondent's Exceptions at 10) Here, he asserts, the Board found papers which they never claimed supported their allegation that he gave A.F. undeserved grades because she refused to date him. Although these supposedly "important" papers were in the Board's possession, they never found it necessary to analyze, copy or produce them. Consequently, respondent posits, it would appear that the Board, rather than respondent, was inefficient and incompetent. More importantly, respondent submits, it is obvious that in this instance "[t]he ALJ relied upon the *non* production of evidence to discredit respondent's testimony. The pile of unidentified and undisclosed papers was transformed into ungraded tests which, in turn, [were] transformed into tests that A.F. never got back, which then became evidence supporting A.F., and Holmes' testimony and findings of respondent's manifestation of incompetency and inefficiency (Dec. pg. 18)." (emphasis in text) (Respondent's Exceptions at 11) This line of reasoning in the ALJ's findings of fact, respondent contends, is totally based on incompetent evidence. (*Ibid.*)

In conclusion, respondent avows that all of the erroneous and unsupported findings made by the ALJ which led her to disparage respondent's credibility require the reopening of the record of this matter for further testimony and evidence. Respondent urges that,

inasmuch as the entire case here turns on the issue of credibility, the Commissioner exercise his discretion to reopen the hearing, pursuant to *N.J.A.C.* 1:1-18.5(b), in the interest of justice.

In reply, the Board argues that respondent's arguments here "are an attempt at misdirection from the real and critical issues of Respondent's inappropriate behavior with a student." (Board's Reply Exceptions at 7) Whether respondent copied student grades from his grade book; whether his grade book was turned in to the District; whether the District produces student records in its possession; whether or not respondent maintained proper class records; whether respondent filed "cut slips"; or whether or not respondent was incompetent or inefficient are tangential in this matter, dealing only with the "maintaining of records." It asserts that the Board's tenure charges and heart of the case here is inappropriate sexual misconduct directed at a special education student. (*Id.* at 6) The Board charges that "respondent attempts to use peripheral record keeping issues which have nothing to do with the allegations of sexual misconduct by the Respondent to somehow attack the credibility of the student who[m] the sexual misconduct was directed at, and the student witnesses who supported many of the allegations made against the Respondent." (Board's Opposition to Respondent's Motion to Re-open at 3) Specifically, it posits:

Whether or not the Respondent had the grade book, or copied information from the grade book,***[w]hether the Principal did see or did not see the grade book is of no moment. This does not change the credible facts placed before Judge Irene Jones that Respondent asked A.F. to go on dates to the movies and it does not change the testimony that he commented to the student that she had a beautiful body, and it does not change the testimony concerning the way this teacher looked at the student. Whether or not the grade book was turned in by the Respondent to the school district has no impact on testimony that this teacher made very personal and inappropriate overtures to a special education student who was under his control. Whether or not turning a grade book into[sic] a school district is unrelated to the credibility of witnesses who stated that this teacher touched or grabbed the thigh of A.F.

and pulled on her blouse and removing a string which was part of the garment causing it to open. This conduct is unrelated to any inappropriate actions by the Respondent. We would point out that whether A.F. was a good or bad student and whether or not A.F. had good or bad grades or even whether or not A.F. was a major disciplinary problem, the conduct of this teacher concerning the allegations of sexual misconduct are the controlling issues. No student, whether or not exceptional in school or an educational disappointment, should ***be subject to the behavior of this teacher as testified in detail below. (Board's Reply Exceptions at 7-8)

Finally, the Board urges that respondent's motion be denied as an application to reopen is extraordinary relief and should not be granted except, possibly, in cases "where new witnesses came forward, which would strike at the heart of the sexual misconduct allegations ***." Such is not the case here. Rather, it proffers, "the information which Respondent seeks to have introduced was available to him at the time he testified." (Board's Opposition to Respondent's Motion to Re-open at 3-4) He did not have to wait for the Board to call rebuttal witnesses to himself offer additional testimony or witnesses on these record-keeping issues which, it maintains, whether accurate or inaccurate, have no bearing on whether he committed acts of sexual misconduct against a special education student. (*Id.*) Furthermore, it argues, in making her credibility determinations the ALJ "had the ability to listen to the testimony and observe the method and manner of Mr. Brewer's appearance and testimony before her. She simply did not believe that Mr. Brewer was a credible witness. This determination should be given weight since court was present throughout the proceedings." (Board's Reply Exceptions at 9)

Upon careful and independent review of the record in this matter, which includes transcripts of the hearing conducted at the OAL,² along with the parties' Initial Decision

² Hearing dates were July 28, 1999 and October 12, 1999.

exception arguments and motion submissions, the Commissioner determines that interests of fairness dictate that respondent's Motion to Re-open the Hearing be granted and this matter be remanded to the OAL for further proceedings. In so concluding, the Commissioner finds that it is beyond dispute that paramount to the ultimate resolution of this case is the credibility of the witnesses. Although cognizant of the principles of law dealing with reviewing credibility determinations and duly recognizing the due weight which must be accorded the ALJ in this regard since, in addition to receiving testimony and evidence, she also had the opportunity to observe the witnesses and their demeanor, (*See Parker v. Dornbierer*, 140 N.J. Super. 185 (App. Div. 1976); *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14.) the Commissioner's independent review of the record, including a thorough scrutiny of the transcripts, compels him to agree with respondent that the within ALJ's stated determinations with regard to respondent's credibility were based, in large part, on facts not supported by evidence in the record.

The Commissioner is also obliged to remain mindful that in this, as in all tenure matters, his ultimate decision could have a profound effect on respondent and his family, his professional career, and his reputation in the community. Given the gravity of the allegations, *i.e.*, sexual misconduct directed at a special education student, and the significance of the stakes at issue here, the Commissioner concludes that it is essential that respondent be provided with an opportunity for entry into the record of such further testimony and evidence as will permit the critical determinations relating to credibility to be based on a full and fair record.

The Commissioner does, however, adopt that portion of the ALJ's recommended decision which concludes that respondent is entitled to back pay for the period October 16, 1998 to December 15, 1998 for the reasons aptly stated on pages 19-21 of her decision.

Accordingly, respondent's Motion to Re-Open the Hearing After the Initial Decision is hereby granted. The Initial Decision of the ALJ with respect to the tenure charges is set aside and this matter shall be remanded to the OAL for further proceedings in conformance with the instant decision. The Board is hereby directed to pay respondent salary for the period between October 16, 1998 and December 15, 1998.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: December 11, 2000

Date of Mailing: December 11, 2000

³ This decision 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. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.