

IN THE MATTER OF THE TENURE HEARING :
OF CHRISTOPHER WANNEMACHER,
PASSAIC COUNTY MANCHESTER
REGIONAL SCHOOL DISTRICT. :

CHRISTOPHER WANNEMACHER,

PETITIONER,

COMMISSIONER OF EDUCATION

DECISION ON REMAND

V. :

BOARD OF EDUCATION OF THE :
PASSAIC COUNTY MANCHESTER :
REGIONAL SCHOOL DISTRICT, :

RESPONDENT. :

SYNOPSIS

Petitioning Board certified 14 charges of unbecoming conduct against Wannemacher and sought his removal from his tenured teaching position, alleging *inter alia*, that Wannemacher sexually harassed female students, made sexually explicit and sexually suggestive remarks to female students, engaged in inappropriate physical touching and contact with female students, displayed a lack of regard and concern for the educational progress and welfare of students, threatened or intimidated students and discriminated against students. Wannemacher denied the charges and filed a separate petition seeking restoration of his employment and adjustment increments withheld from him for the 1999-2000 school year. The cases were consolidated at the OAL and, in 1999, the parties reached a proposed settlement that was rejected by the Commissioner.

Although the 14 charges included extensive factual allegations, the ALJ determined that only 15 of the factual allegations were proven by a preponderance of the credible evidence. The ALJ recommended that Wannemacher be reinstated to his teaching position and that the 120 days of salary withheld from him be tendered to him. The ALJ also upheld the Board's decision to withhold Wannemacher's increments for the 1999-2000 school year.

The Commissioner affirmed the decision of the ALJ with modification. Specifically, the Commissioner determined that two of the findings did not constitute conduct unbecoming a teaching staff member. The Commissioner concluded that the improper comments made by Wannemacher, considering his unblemished record and recent decisions addressing inappropriate comments by teaching staff members, did not warrant his dismissal and affirmed the ALJ's penalty recommendation. Finally, the Commissioner affirmed the dismissal of Wannemacher's petition seeking reinstatement of his increments for the 1999-2000 school year.

OAL DKT. NOS. EDU 9126-99, EDU 7096-99 and EDU 1340-00 (ON REMAND)
AGENCY DKT. NOS. 200-7/99 and 134-6/99

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The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exception and reply arguments were submitted on behalf of the parties (hereinafter, “the Board” and “Wannemacher”) in accordance with *N.J.A.C. 1:1-18.4*.

WANNEMACHER’S EXCEPTIONS AND THE BOARD’S REPLIES

Wannemacher takes exception to the findings of the Administrative Law Judge (ALJ). Specifically, Wannemacher contends that the ALJ improperly determined that: 1) he made the statement, “If your mother’s pretty you won’t have a problem” (Wannemacher’s Exceptions at 2); he said to K.M., “Nice bra.” (*id.* at 4); 3) he made the statement, “Why don’t you just drop my class, you’re going to fail anyway,” to D.C. and J.C. (*id.* at 5); 4) he made the statement “You should pick better kids to hang out with,” to M.F. (*id.* at 6); 5) his use of the

process of urination as an example in his class to explain motion constitutes unbecoming conduct (*id.* at 7); and 6) his practice of reading certain grades aloud was conduct unbecoming a teaching staff member (*id.* at 8).

With respect to the ALJ's recommended penalty, Wannemacher argues that, in the Board's eagerness to file the within charges without any investigation and without soliciting his response to the students' allegations, his reputation has been damaged and he has suffered a reduced income for the past two years, since he has been paid at the salary rate he was receiving for the 1998-99 school year. (*Id.* at 10) Wannemacher underscores the positive evaluations he has received in the course of his employment with the Board, and urges the Commissioner, in carefully considering this matter, to conclude that his "actions do not constitute an adequate basis to sustain the charges of unbecoming conduct***." (*Id.* at 12) In this connection, he asserts that the ALJ's recommended forfeiture of his salary and adjustment increment for the 1999-2000 school year is too harsh a penalty. Wannemacher contends he is entitled to return to his position, with back pay and benefits withheld during his suspension, and that his increments for the 1999-2000 school year be restored.

In reply to Wannemacher's exceptions, the Board argues that each of the ALJ's factual findings and concomitant credibility determinations to which Wannemacher objects is grounded in the record and, therefore, entirely proper. The Board further contends that Wannemacher's use of the process of urination in his class, which offends the "sound judgment and sensibility" that a teacher must demonstrate (Board's Reply at 12), as well as his practice of reading aloud students' grades, thereby failing to take into consideration their "potential sensitivities," constitutes unbecoming conduct of a teaching staff member. (*Ibid.*)

As to its decision to withhold Wannemacher's increment for the 1999-2000 school year, the Board contends that Wannemacher's exceptions do *not* argue that its action was arbitrary or capricious, but only "that he has already suffered because of the tenure charges brought against him." (*Id.* at 16) However, in light of the ALJ's findings of unbecoming conduct, the Board maintains that its decision to withhold his 1999-2000 increment should be upheld. (*Id.* at 7) The Board further reasons:

Since there can be no doubt that the decision to withhold Wannemacher's increments was not arbitrary, unreasonable, or capricious, the ALJ effectively did not impose a penalty for his findings of misconduct. The Board respectfully requests that the Commissioner, at the absolute minimum, increase the sanctions against Wannemacher to include the 120 day suspension (which was effectively 60 days since Wannemacher's suspension coincided with the summer months when he would not receive any pay). *** (*Id.* at 18, 19)

It is respectfully submitted that it is incumbent upon the Commissioner to reject Wannemacher's arguments for a lesser penalty and order the forfeiture of 120 days salary, increase the length of the suspension, and require dismissal of Wannemacher ***." (*Id.* at 20, 21)

BOARD'S EXCEPTIONS AND WANNEMACHER'S REPLY

The Board excepts to the ALJ's dismissal of Charges One, Two and Three, basically contending that it met its burden to prove the essential specifications of these charges.¹

¹ In this connection, and with respect to Charge One, the Board argues that Wannemacher's comments constituted sexual harassment. It contends, "Courts have further held that sexual harassment of students by teachers is unacceptable and cannot be tolerated in the school setting. In *In the Matter of the Tenure Hearing of Gregory J. Brewer*, Agency Dkt. No. 205-6/98 (September 13, 2000), a tenured teacher was dismissed from his position when he engaged in the sexual harassment of a female student by complimenting the student on her attire ***. The court reasoned that sexual harassment cannot be tolerated in the school setting where students deserve a great deal of protection." (citations omitted) (Board's Exceptions at 6) To this, Wannemacher responds that the case is completely inapposite, since the conduct attributed to Brewer far exceeds the actions herein alleged. (Wannemacher's Reply at 3) In any event, the Commissioner finds that the Board's use of *Brewer* to advance its position is both misleading and misplaced, since, notwithstanding that the ALJ recommended Brewer's dismissal, the case was remanded to the OAL for further proceedings subsequent to Brewer's Motion to Reopen the record, and upon the Commissioner's specific finding that the ALJ's credibility determinations issued therein were based largely on facts not supported by evidence in the record. *Brewer*, Commissioner Decision December 11, 2000, slip op. at 34.

(Board's Exceptions at 4-9) Additionally, the Board asserts: 1) that the ALJ erroneously found that Wannemacher did not state, in response to a request from D.C. for paper, "Down there, bend at your knees, you're good at that." (*id.* at 11); 2) that the ALJ wrongly discounted the testimony of Cynthia Miller, A.D. and B.B., who testified as part of the Board's case on rebuttal in order to dispute Wannemacher's assertions that he did not make inappropriate comments to students; 3) that the ALJ incorrectly prevented the Board from offering the testimony of Barbara Ann Kopicki, the teacher who was hired to replace Wannemacher after his suspension, in order to prove its charges; 4) that the ALJ improperly found that the Board failed to prove the conduct alleged in specifications 2 through 10, 12 and 13 of Charge Nine, since the "overwhelming evidence offered to the court proved that Wannemacher willfully neglected, consciously abandoned and blatantly refused to teach many of the students enrolled in his Chemistry I class," (*id.* at 28); 5) that the ALJ erroneously dismissed specification 14 of Charge Nine, stating that Wannemacher refused to allow J.C. to participate in a laboratory since January 1999²; 6) that the ALJ wrongly found that only eight of the findings of proven conduct actually constitute unbecoming conduct a teaching staff member; and 7) that the ALJ improperly concluded, particularly in light of prior case law, that the eight instances of unbecoming conduct did not warrant Wannemacher's 120-day suspension and dismissal.

In reply to each of the Board's exceptions, Wannemacher argues that the ALJ carefully examined each and every charge, as well as his responses to the charges, and properly determined which charges should be dismissed. Wannemacher also distinguishes the case law relied upon by the Board in furtherance of its position, and urges the Commissioner, where certain statements are admitted or found to be factual by the ALJ, to consider the circumstances

² Wannemacher notes in his replies that although the Board refers to specification 14 of Charge Nine, he believes that the exception in fact refers to specification 11 of Charge Nine. (Wannemacher's Reply at 17)

“and not merely rule for the petitioner because they have attempted to frame their charges in a way that allows for no explanation of respondent’s motivations for his actions.” (Wannemacher’s Reply at 17) Notwithstanding the Board’s repeated references to sexually explicit comments, Wannemacher underscores that “none of the comments that the ALJ found that respondent made are [sic] sexually explicit,” although some may be inappropriate and one or two may be suggestive. (*Id.* at 22-23)

COMMISSIONER’S DETERMINATION

Upon careful and independent review of the record in this matter, which included the transcripts from nine days of hearings at the OAL, the Commissioner determines to affirm the Initial Decision of the ALJ, with modification.³ Initially, the Commissioner notes that the ALJ accurately summarized the testimony from numerous witnesses in this matter, meticulously linked such testimony, along with the documentary evidence, to the specifications alleged in each of the Board’s charges, and prepared a careful set of findings which the Commissioner can find no cause to disturb. Not insignificant in this examination of evidence is the ALJ’s admonition with respect to the students’ statements which, to a large degree, not only formed the genesis of these charges, but also the crux of the Board’s case herein:

[T]he students who filed statements of complaint against respondent and who testified in the matter originally were together when the principal asked them to state the complaints they had. Not only did the students hear the complaints of classmates before they wrote out their individual statements, they had the opportunity between February 22 and March 6, when they wrote out their complaints, to discuss among themselves their individual complaints. Furthermore, all student witnesses against respondent received copies of each other’s complaints prior to giving their testimony at hearing. Great caution must, therefore, be used in assessing the credibility of the student witnesses to insure their

³ To the extent Wannemacher submitted documents in his exception arguments which were not presented at the hearing, these documents were not considered by the Commissioner in reaching his decision. *N.J.A.C.* 1:1-18.4(c).

testimony is based on personal knowledge, and not what they heard other students complaining about. (Initial Decision at 13)

As such, notwithstanding the parties' objections to findings which were predominantly based upon credibility determinations, the ALJ's credibility determinations herein are entitled to the Commissioner's deference, since the Commissioner finds the ALJ *did* use great caution as he measured conflicts, inconsistencies and potential biases in deciding which testimony to credit in reaching his findings of fact and which facts are supported by evidence in the record. The ALJ, as the finder of fact, had the greatest opportunity to observe the demeanor of the witnesses -- most of them students -- and consequently, is better qualified to judge their credibility. See *In the Matter of the Tenure Hearing of Frank Roberts*, 96 N.J.A.R 2d (EDU) 549, 550, citing *In the Matter of the Tenure Hearing of Tyler*, 236 N.J. Super. 478, 485 (App. Div. 1989), *certif. denied* 121 N.J. 615 (1989). See also *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip. op. at 14.

Furthermore, with respect to the Board's contention that the ALJ improperly failed to consider the testimony of its witnesses on rebuttal which the Board offered, "not as a basis for unspecified tenure charges, but rather to dispute Wannemacher's assertions that he did not make inappropriate comments and, more importantly, did not make comments regarding students' boyfriends or girlfriends as asserted in charges 1 through 6" (Board's Exceptions at 17), the Commissioner finds that, even considering, as he did, the testimony of these rebuttal witnesses for the purposes advanced by the Board, the factual findings listed, *infra*, would not be altered by the Commissioner. Similarly, although the Board objected to the ALJ's exclusion of the testimony of Barbara Ann Kopicki, the Commissioner herein affirms the ALJ's ruling in this regard. (Tr. 4 (5/4/00) at 119-122) Finally, based upon his review of this record and, in particular, the ALJ's specific factual findings, the Commissioner declines to set aside the ALJ's

dismissal, issued at the close of the Board's case, of that portion of the charges alleging "sexual harassment." (Initial Decision at 37; Tr. 5 (5/8/00) at 150-152)

Thus, the Commissioner affirms the following findings of fact and, in so doing, recognizes that the ALJ was deliberate in his choice of words, no doubt in order to exclude phrases and allegations which were unsupported by the record herein:⁴

1. During 1996-97, respondent asked D.C. what she and her boyfriend do when they are alone in the context of a general discussion that some do study with their boy/girl friends;
2. *During 1996-97, respondent more likely than not, and based on the testimony of Mrs. M., stated to students that if your mother is pretty you won't have a problem;*
3. *During 1996-97, respondent did state, as a general proposition, the direction which one urinates may have an effect on the direction of movement and that the guidance counselor had knowledge of the statement;*
4. *During 1996-97, respondent told K.M. he would change her seat if she kissed the boy next to her with whom she had been bickering and that the guidance counselor had knowledge of the statement;*
5. During 1998-99, respondent told students who appeared dressed up that they looked nice, or looked attractive;
6. During 1998-99, respondent and J.G. voluntarily held hands for a brief time after having met each other in the hallway;
7. During 1998-99, respondent told R.S. she may remove her sweater if she were hot in the classroom;
8. *During 1998-99, respondent made the comment, "nice bra," to K.M., who was wearing a "translucent white shirt" in class;*
9. *During 1998-99, respondent told M.T. that K.M. was allowed to use the bathroom and he was not because she is cute and he is not;*
10. While the Board established respondent administered one or two question quizzes and examinations, there is no companion finding that such examinations were prohibited;
11. *During 1998-99, respondent did read certain grades aloud to those students who gave permission;*

⁴ It is noted that the recitation of factual findings may contain some grammatical or semantic changes which do not alter the substance of the findings. Additionally, as in the Initial Decision, "R" refers to Wannemacher.

12. During 1998-99, respondent posed the question to two students of why not drop the class because you are failing anyway;⁵
13. During 1998-99, respondent did request guidance to effect the reassignment of four students from his chemistry class without first asking guidance to talk with them to ascertain the nature of the problem;
14. During 1998-99, respondent did tell parents at a back-to-school night chemistry requires good math skills and if students do not have such skills, the study of chemistry would be difficult and [they] may fail; and
15. *During 1998-99, respondent more likely than not stated to M.F. in the presence of J.C. that he should “pick better kids to hang out with”, meaning J.C. (emphasis supplied) (Initial Decision at 62-63)*

From these 15 findings of fact, the ALJ concluded that seven findings, *i.e., those italicized above*, could actually constitute conduct unbecoming a teaching staff member.⁶ However, the Commissioner disagrees, in part, with the ALJ’s conclusion. Specifically, the Commissioner cannot find, based on the record herein, that Wannemacher’s practice of reading students’ grades aloud, *with their permission*, was conduct unbecoming a teaching staff member, *particularly* where Superintendent Petrelli testified that it would not be inappropriate to do so, provided students were given the option. (Tr. 5 (5/8/00) at 112) Moreover, the Commissioner cannot conclude on the record before him that Wannemacher’s use of urination in his physical science class constituted conduct unbecoming a teaching staff member, where the reference occurred within the context of identifying bodily functions which may be impacted by the laws of motion (*e.g.*, breathing, coughing), (*see* Initial Decision at 17 and Tr. 7 (5/23/00) at 171, 172), and where the ALJ makes no specific finding that any statement related thereto was directed to a

⁵ The ALJ also found these comments were made “in the context of not putting forth an effort to succeed in chemistry. There is no evidence as to the intention of the Board alleging that comment was made ‘routinely.’” (Initial Decision at 46)

⁶ Although the Initial Decision states that there are *eight* findings which constitute unbecoming conduct, only seven are listed on page 64, as a result of misnumbering.

particular student, notwithstanding that Wannemacher may not have carefully considered the use of this term vis-a-vis his young audience.

Therefore, the Commissioner finds that the following conduct, as proven by the Board, may fairly be considered unbecoming a teaching staff member:

1. During 1996-97, Wannemacher more likely than not, and based on the testimony of Mrs. M., stated to students that if your mother is pretty you won't have a problem;
2. During 1996-97, Wannemacher told K.M. he would change her seat if she kissed the boy next to her with whom she had been bickering and that the guidance counselor had knowledge of the statement;
3. During 1998-99, Wannemacher made the comment, "nice bra," to K.M., who was wearing a "translucent white shirt" in class;
4. During 1998-99, Wannemacher told M.T. that K.M. was allowed to use the bathroom and he was not because she is cute and he is not; and
5. During 1998-99, Wannemacher more likely than not stated to M.F. in the presence of J.C. that he should "pick better kids to hang out with," meaning J.C.

Further, in spite of the Board's urging to the contrary, the Commissioner concurs with the ALJ that the improper comments made by Wannemacher, although certainly imprudent and unprofessional, do not warrant his dismissal in the context of his prior unblemished record and when measured against the conduct of respondent teaching staff members in recent cases who were dismissed largely due to their inappropriate comments to students. *See In the Matter of the Tenure Hearing of Henry Komorowski, State-Operated School District of the City of Jersey City, Hudson County*, Commissioner Decision July 27, 2000, *aff'd* State Board December 6, 2000, where respondent was found to have engaged in graphic discussions with fifth grade students regarding torturing and killing one of the students in his class; *In the Matter of the Tenure Hearing of Roberts*, 94 N.J.A.R. 2d (EDU) 284, *aff'd* State Board 95 N.J.A.R. 2d (EDU) 349, *aff'd* App. Div. 96 N.J.A.R. 2d (EDU) 549, where respondent was found to have spoken openly about sex, at times crudely, to have discussed his personal experiences and probed the conduct of his students, to have initiated monologues about sex, and to have commented on

the sex lives and physical features of his students; *In the Matter of the Tenure Hearing of Sheridan*, 92 N.J.A.R. 2d (EDU) 257, *aff'd* State Board 92 N.J.A.R. 2d (EDU) 393, where respondent was found to have used profanity in the presence of students, to have made derogatory remarks about women, to have made improper sexual references to students' bodies, and to have inferred that he was in a relationship with a student; *In the Matter of the Tenure Hearing of Campbell*, 93 N.J.A.R. 2d (EDU) 196, *aff'd* State Board 93 N.J.A.R. 2d (EDU) 604, *aff'd* App. Div. 95 N.J.A.R. 2d (EDU) 211, where respondent was found, *inter alia*, to have made racist remarks to students in class, to have commented that "girls can be stupid" to a student (*id.* at 207), to have told students that he's been known "to hit kids," (*id.* at 208) and to have engaged in a pattern of unprofessional conduct with parents, students and administrators generating numerous complaints, in spite of many prior warnings from administration; and *In the Matter of Van Gilson*, 93 N.J.A.R. 2d (EDU) 378, *aff'd* State Board 93 N.J.A.R. 2d (EDU) 630, where respondent was found to have verbally abused and ridiculed a classified pupil in class, to have made derogatory and belittling comments to students, to have commented about a seventh grader's "hooters" and said "If I were 30 years younger, I'd go after her," (*id.* at 382, 385) to have used profanity when talking to a student, and to have discussed personal matters regarding his wife and their divorce with his students. Thus, the Commissioner concurs with the ALJ that the extreme penalty of loss of tenured employment is not warranted under the circumstances of the within matter.

In concert with his penalty determination regarding the Board's tenure charges, the Commissioner considers Wannemacher's allegations that his 1999-2000 employment and adjustment increments were withheld arbitrarily and capriciously. (Petition of Appeal at 2) Here, the Board provided as reasoning for its withholding the following:

- (a) sexual harassment of female students enrolled in your classes;
- (b) use of sexually explicit and sexually suggestive remarks toward female students enrolled in your classes;
- (c) inappropriate physical touching and contact with female students enrolled in your classes;
- (d) a total lack of regard and concern for the educational progress and welfare of students enrolled in your classes;
- (e) use of threatening and/or intimidating remarks and/or tactics toward students enrolled in your classes;
- (f) use of inappropriate, disrespectful and disparaging remarks to students enrolled in your classes;
- (g) discrimination against, and/or disparate treatment of, students enrolled in your classes; and
- (h) use of language and/or tactics that undermine students' respect for, and integrity of, authority and the educational process. (Petition of Appeal at 2) (Exhibit R-44)

Recognizing that it is Wannemacher's burden to prove, by a preponderance of credible evidence, that the Board's decision to withhold his increment for the 1999-2000 school year was unreasonable, based on the facts, *Kopera v. West Orange*, 60 N.J. Super. 288 (App. Div. 1960), and relying upon the above 15 factual findings made by the ALJ and affirmed herein as part of this consolidated matter, the Commissioner finds that Wannemacher has not demonstrated that the Board's action was arbitrary, capricious and unreasonable. In so finding, the Commissioner notes that since *one of the eight reasons* provided by the Board for withholding Wannemacher's increment is supported, at least in part, by these factual findings, *i.e.*, that Wannemacher used inappropriate, disrespectful and disparaging remarks to students enrolled in his classes, the Board's action cannot be said to be without any rational basis. Thus, the Commissioner finds that Wannemacher's Petition of Appeal was properly dismissed.

Accordingly, the Initial Decision is affirmed for the reasons set forth by the ALJ, as modified herein. Like the ALJ, the Commissioner concludes that much of the conduct alleged by the Board did not occur as described and that the nature of the conduct proven to have been exhibited by Wannemacher, *supra*, does not warrant dismissal or forfeiture of his 120-day salary, already withheld pursuant to *N.J.S.A.18A:6-10*. As such, Wannemacher's salary withheld from him for the first 120 days of his suspension must be immediately restored. Rather, like the ALJ, the Commissioner finds that the loss of salary increments for the 1999-2000 school year is the appropriate sanction to impress upon Wannemacher that his conduct fell short of the "self-restraint and controlled behavior" required of a teaching staff member, *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 302, 321, and that, therefore, he must act with greater prudence in his comments to, and interactions with, students in his charge.

IT IS SO ORDERED.⁷

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 26, 2001

Date of Mailing: February 26, 2001

⁷ 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. 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.