

IN THE MATTER OF THE TENURE :
HEARING OF CLARE MILLER, : COMMISSIONER OF EDUCATION
UNION COUNTY EDUCATIONAL : DECISION
SERVICES COMMISSION, :
UNION COUNTY. :
_____ :

SYNOPSIS

Petitioning Educational Services Commission filed tenure charges against respondent, a teacher in the district, asserting unbecoming conduct based on two separate incidents of alleged violence against students in her classroom. Both incidents were alleged to involve kicking students who refused to comply with directives and return to their seats.

The ALJ determined that the charge with regard to the alleged kicking of pupil K.Z. was proven by the Commission, but held that, because respondent had already been penalized for this action by the Commission when it withheld a salary increment from her, this charge could not serve as a basis for penalty in a tenure matter. The charge with respect to student K.W. was determined by the ALJ not to have been proven by the Commission. The ALJ recommended dismissal of the charges against respondent.

The Commissioner affirmed the ALJ's determination that the charge with respect to pupil K.W. was not proven by the Commission and must, therefore, be dismissed. The Commissioner also affirmed the ALJ's determination that respondent kicked K.Z. However, the Commissioner disagreed that this charge should be dismissed because it had already been resolved by agreement between the parties as to respondent's increment withholding. Therefore, the Commissioner modified the ALJ's decision to hold that the tenure charge involving K.Z. was sustained, but that, in the absence of any further proven incidents of unbecoming conduct and under all of the circumstances of this matter, an increment withholding was the appropriate penalty for the isolated incident of which respondent was found guilty as charged.

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both respondent and the Commission, and respondent's reply exceptions, were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in reaching his determination herein.

The exceptions of both parties initially charge that the Administrative Law Judge (ALJ) erred in failing to make factual findings with respect to either of the charges against respondent, as specifically required by The Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.* and well established case law. In this regard, the Commission points to *State of New Jersey, Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435, 442-43 (App. Div. 1984) wherein the court stated

[T]he ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. The requirement of such findings is not a technicality but it is a matter of substance. Its purpose is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.

Here, the Commission maintains, the ALJ merely provided a summary of evidence “composed of selective testimony and evidence presented, but she did not make findings of fact upon which to base her conclusions of law.” (Commission’s Exceptions at 4) Both parties, therefore, urge that this matter be remanded for the development of comprehensive factual findings.

In their exception and reply submissions, the parties present detailed recitations of their respective versions of the facts, which are largely duplicative of those advanced to the ALJ in post hearing briefs, with both presenting selected portions of testimony to support their particular versions of events and suggesting weight and credibility assessments to be ascribed to the evidence. Each party claims that its version of the facts is the “appropriate” one, while that of the other is fraught with inconsistencies.

Respondent’s exceptions contend that the Board did not meet its burden of proof on either of the charges against her. She asserts that only two eyewitnesses testified to each of the incidents at issue, herself and the respective student involved. As such, this entire matter centers on credibility determinations and respondent advances that the record amply establishes that neither K.Z. nor K.W. was credible in recounting events. With respect to the May 3, 2001 incident involving K.Z., respondent submits that, rather than make findings of fact as to whether she actually kicked K.Z., the ALJ, instead, relied on the fact that respondent’s increment had been withheld for this incident to establish her guilt on this charge. Respondent urges that it must be found that she did not kick K.Z. but, rather, merely shoved him with her foot, after he had disregarded all of her prior directives, “solely to prevent injury to other students or damage to property,” (Respondent’s Exceptions at 24) so that, under these circumstances, her conduct was proper pursuant to *N.J.S.A. 18A:6-1*. As to the incident on June 5, 2001 involving K.W., respondent agrees with the ALJ’s dismissal of this charge, but vehemently objects to her finding

that “[t]he evidence is in a state of equilibrium, ALJ. P. 11,” arguing that such a finding is inconsistent with the ALJ’s conclusion, on page 13 of the Initial Decision, that K.W.’s version of the incident was fabricated. (Respondent’s Exceptions at 2-3) Rather, respondent professes that appropriate findings of fact must be made to establish that respondent did not kick K.W.

The Commission’s exceptions contend that the ALJ erroneously concluded that the charge involving K.Z., although found to be true, should be set aside as grounds for respondent’s dismissal or other punishment and should only be considered in determining penalty should the K.W. charge be proven, because respondent’s increment had already been withheld as a consequence of this event. Such mistaken opinion, it concludes, was apparently derived from Exhibit R-22 - a letter from a union representative to the Superintendent of Schools - detailing the parties’ “agreement” with respect to this charge. As the Commission explains,

[t]he purported agreement between petitioner and respondent was that the Commission would withhold respondent’s salary increment for the 2001-2002 school year and respondent would subsequently “be restored to her step.” According to the letter, the Commission would not use the matter “in the future against Mrs. Miller.” (Commission’s Exceptions at 7)

The Commission contends that there was no testimony or evidence presented in this matter as to the meaning of the term “not be used in the future against Mrs. Miller,” and it hypothesizes that such language might well refer to her “subsequent restoration to her step.” (*Ibid.*) Moreover, the Commission tenders, the record contains no testimony that the Commission, itself, agreed to this stipulation nor is such a limitation contained in the Commission’s resolution dealing with respondent’s increment withholding. The Commission cites *In re Tenure Hearing of Ward Campbell*, 95 N.J.A.R. 2d (EDU) 211 (App. Div.), *certif. denied*, 142 N.J. 518 (1995) for the proposition that nothing prohibits the withholding of a salary increment concurrent with tenure

charges for the same offense. (Commission's Exceptions at 6-7) For these reasons, and considering that respondent offered no testimony or affirmative defense claiming that a salary increment withholding for the K.Z. incident precluded a subsequent tenure charge on this incident, the Commission proposes that the ALJ erred in confining the K.Z. charge to consideration only in the penalty phase of the instant hearing.

The Commission further urges that the kicking of K.Z., which the ALJ correctly found to have occurred, even standing alone, is sufficient to justify respondent's termination. It maintains that kicking or shoving a student constitutes corporal punishment prohibited by *N.J.S.A.* 18A:6-1 unless reasonable and necessary:

- (1) to quell a disturbance, threatening physical injury to others;
 - (2) to obtain possession of weapons or other dangerous objects upon the person or within control of a pupil;
 - (3) for the purpose of self-defense; and
 - (4) for the protection of persons or property***
- (Commission's Exceptions at 9)

The Commission further notes that none of these conditions existed at the time respondent kicked K.Z. The Commission proposes that it was wholly unnecessary for respondent to resort to kicking K.Z., as hearing testimony clearly revealed that the district has procedures in place to assist teachers experiencing difficulty with an unruly student. When also considered in conjunction with respondent's evaluations, any number of which contained "reference to her being too negative in her interaction with staff and students," (*id.* at 13) pursuant to *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967) and prior cases of the Commissioner and the State Board, this one incident of corporal punishment, it argues, is sufficient to require respondent's dismissal.

With respect to the June 5, 2001 incident involving K.W., the Commission advances that the ALJ was incorrect in her conclusion that it did not meet its burden of proof for

sustaining this charge. It claims that, in so determining, the ALJ failed to properly credit significant testimony and evidence proffered and made erroneous credibility assessments.

Upon careful and independent review of the record in this matter, which included the transcripts from the hearing at the OAL conducted on October 17 and 18, 2001, for the reasons detailed below, the Commissioner determines to modify the recommended decision of the ALJ.

Initially, the Commissioner rejects the parties' suggestion that the Initial Decision does not comport with the requirements of the Administrative Procedure Act at *N.J.S.A.* 52:14B-10, as these requirements were interpreted by the court in *State of New Jersey, Dept of Health v. Tegnazian, supra*. Rather, the Commissioner finds that the ALJ's decision contains a sufficient summary of the underlying testimonial evidence culminating in findings of fact on each of the charges (Initial Decision at 9, 13), which are amply supported by the testimony, both as presented in the decision and as appearing in full in the transcripts. Quite contrary to the circumstances which were present in *Tegnazian*, where the ALJ's decision recommending dismissal of all but a single charge against a nursing home administrator was found to be "highly conclusory" in its form, and consisting of "judgments rather than statements of fact," *Tegnazian, supra*, 194 *N.J. Super.* at 446, the Commissioner finds that the instant Initial Decision clearly apprises "****the interested parties and any reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra-legal considerations." *Id.* at 443, citing *Application of Howard Savings Institution of Newark*, 32 *N.J.* 29, 52 (1960)

Turning to the charges advanced against respondent, the Commissioner first concurs with the ALJ that the Commission has failed to sustain its burden of proof with respect

to the June 5, 2001 incident involving K.W., and that such charge, therefore, is properly dismissed. In so concluding, the Commissioner is cognizant of the well-established standard that, in tenure matters, the charging entity bears the burden of proving, by a preponderance of the credible evidence, respondent's guilt on the charges. It is, likewise, clear that this burden is not satisfied where the evidence is in equipoise or is such as to raise legitimate doubt as to the existence of essential facts.¹ A review of all of the evidence advanced indicates that resolution of the charge involving K.W. turns almost exclusively on credibility determinations with regard to the witnesses' testimony and the weighing of proffered evidence. Notwithstanding the parties' assertions on exception, the Commissioner finds no basis, either in the transcripts or in the record as a whole, to challenge the credibility determinations of the ALJ, who also had the benefit of observing the witnesses first hand. To the contrary, the ALJ, on pp. 10-13 of the Initial Decision, carefully details the rationale underlying her credibility determinations as they pertain to this charge. It is fully evident from her decision that the ALJ carefully measured conflicts, inconsistencies, and plausibility of content in deciding which testimony to credit, and her determinations are fully supported by the record. As such, they may not be disturbed by the Commissioner. *N.J.S.A. 52:14B-10(c)*.

In his consideration of the May 3, 2001 incident involving K.Z., the Commissioner agrees with the ALJ's finding that this charge has been sustained. Respondent's contention that the ALJ based her finding of guilt here solely on the fact that respondent's increment was withheld is meritless. Rather, hearing transcripts confirm that respondent, at a number of points in her testimony, *admitted* either kicking or shoving K.Z. (*See* October 17, 2001, Transcript, p. 137, lines 12-23; p. 140, lines 15-18; p. 148, lines 16-25)

¹ Similarly, such a circumstance would also preclude a declaration of absolute vindication of the charge for respondent.

Whether respondent “kicked” or “shoved” K.Z. is a distinction without a difference under the circumstances. Clearly, respondent’s conduct went beyond professional boundaries, apparently as an impulsive attempt to control a student who refused to listen to her instructions. The Commissioner finds and concludes that it is of no import that K.Z. is portrayed as a student who was prone to misbehavior and at times was difficult to control, since there can be no excuse, under circumstances of the type herein, for an offensive touching of a pupil by a teacher.² As noted in *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County*, 1969 *S.L.D.* 159, 172-173, aff’d State Board, 1970 *S.L.D.* 448, aff’d N.J. Superior Court 1972 *S.L.D.* 662 (App. Div. 1972):

[w]hile the Commissioner understands the exasperations and frustrations that often accompany the teacher’s functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) *an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm.****(emphasis added) (citations omitted)

Further,

such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.
In the Matter of the Tenure Hearing of David Fulcomer, 1962 *S.L.D.* 160, 162

² Specifically rejected here is respondent’s claim that her behavior was justified because of the exigency of the situation.

Thus, the Commissioner fully concurs with the ALJ's finding of respondent's guilt on this charge. However, Commissioner does not accept the ALJ's concomitant conclusion that the charge should be dismissed, and considered solely in conjunction with fashioning a penalty should the K.W. charge be sustained, because it was essentially resolved by an "agreement" between the parties to the effect that respondent would not contest an increment withholding and the Commission would not use this incident against her in the future. Instead, the Commissioner determines that the charge should be *sustained*, but that no *further* penalty is warranted because, in the absence of any additional proven incident of unbecoming conduct, and under all of the circumstances of this matter, an increment withholding is the appropriate penalty for the isolated incident of which respondent has been found guilty as charged.^{3 4}

Accordingly, the Initial Decision of the OAL is modified as set forth herein. It is hereby directed that, as a result of the charge sustained against her, respondent be assessed no

³The Commissioner notes that, as correctly argued by the Commission, the record is devoid of evidence or testimony either to clarify the meaning of the letter purporting to set forth an agreement between the Superintendent and respondent's union representative, or to show that the Commission ever had knowledge of or consented to be bound by any such "agreement." (*See Donald C. Backer v. Board of Education of the Township of Roxbury, Morris County*, decided by State Board September 9, 1994)

⁴ The Commissioner is mindful that removal of a teacher from a tenured position may not be undertaken casually. Full evaluation must be given to respondent's prior record in the District, the nature and gravity of her offense under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect which her conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer* 93 N.J. Super. 404, 424-22 (App. Div. 1967). In contrast, it is equally true that, if sufficiently flagrant, "the need to remove a teacher may be demonstrated by a single incident." *Id.* at 421. On balance, giving full consideration to all of the circumstances, and in light of the testimony, the Commissioner cannot concur with the Commission that respondent should be removed from her position for this one incident.

penalty in addition to the one-year increment withholding already imposed by the Commission for the conduct underlying the charge.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/02

Date of Mailing: 4/8/02

⁵ 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.