

#488-08 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :
HEARING OF FREDERICK W. CLAYTON, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
CAMDEN, CAMDEN COUNTY. :
_____ :

SYNOPSIS

Board certified charges against tenured guidance counselor, alleging numerous irregularities with respect to student grades and transcripts, as well as respondent's offering of services and accepting of an appointment as interim principal of Brimm Medical Arts High School notwithstanding that he lacked the necessary certificate for the position. In an effort to limit what would otherwise be a lengthy inquiry, proceedings were initially limited to the charge of service without proper certification, which the Board deemed sufficient in itself for respondent's dismissal from tenured employment.

The ALJ found that respondent did, in fact, improperly serve as acting principal from August 25, 2003 through his removal in December 2003. The ALJ found such service to constitute conduct unbecoming a school employee, and concluded that respondent must be dismissed, since, as a primary role model, a principal who falsifies his credentials is guilty of both a serious breach of trust toward his employer and teaching the student body a destructive lesson.

The Commissioner declined to reach the merits of the tenure charge, instead remanding the matter to the OAL for further proceedings. The Commissioner found support in the record for respondent's contention that he was not given the opportunity to fully present testimony, evidence and argument, so that he had not received the due process contemplated by law. The Commissioner further required some resolution of the remaining charges, even if the ALJ on remand again recommended respondent's dismissal based on the single charge actually litigated.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

December 18, 2008

OAL DKT. NO. EDU 12196-06
AGENCY DKT. NO. 447-12/06

IN THE MATTER OF THE TENURE :
HEARING OF FREDERICK W. CLAYTON, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
CAMDEN, CAMDEN COUNTY. :
_____:

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have respondent's exceptions and the reply of the Board of Education (Board), pursuant to *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

In his exceptions, respondent argues that the Initial Decision must be rejected on substantive grounds, since the Administrative Law Judge (ALJ): 1) wrongly refused to credit his (respondent's) testimony that he never served as principal of the Brimm Medical Arts High School and ignored material facts so demonstrating, instead crediting the testimony of other witnesses – including the testimony of Paula Veggian, which was confusing and inconsistent with her written certification – and creating his own definition of a “lead teacher” as someone who filled in for the principal for short periods of time only; 2) misconstrued the February 24, 2004 memorandum from Superintendent Annette Knox confirming that respondent served as lead teacher – an uncontested admission on the part of the Board that should have exculpated respondent – instead according it an unsupported “contextual” meaning contrary to its plain language; 3) ignored the fact that the Board was unable to produce any contract or other evidence that respondent applied for or accepted the position of acting principal, neglecting to draw an adverse inference from the fact that the Board not only had no contract but offered nothing to counter respondent's representation that no one ever questioned him regarding lack of follow up to the letter of August 26, 2003 (Exhibit P-6) –

purportedly sent by the Board to inform respondent that he was approved as acting principal and had five business days to sign and return his contract; 4) failed to consider that he received no benefit – monetary or otherwise – for his alleged service in a position that would have paid him \$30,000 to \$40,000 a year over and above his salary as guidance counselor, since “lead teacher” in the Camden district is an unofficial and unpaid position and he would not have expected additional compensation; 5) accorded no weight to the fact that respondent remained a member of the Camden Education Association, a bargaining unit from which he would necessarily have been excluded had he been employed as a principal; and 6) took into account neither the Board’s statutory responsibility for ensuring that staff members are properly certified for their positions nor the fact that respondent’s actions were directed solely toward enabling Brimm Medical Arts High School to open as scheduled, thus ignoring mitigating factors – as well as the absence of any evidence of prior discipline or misrepresentation by respondent regarding his certification status – to recommend dismissal of an eighteen-year employee for whom the Board had actually attempted to obtain principal certification prior to bringing tenure charges. (Respondent’s Exceptions at 7-20)

Respondent additionally excepts to the Initial Decision on procedural grounds, contending that the ALJ decided this matter prematurely, without according respondent the full hearing to which respondent is entitled pursuant to *N.J.S.A. 18A:6-10* and its implementing rules. According to respondent, although he was cross-examined as an adverse witness for the Board and presented evidence in that context, the ALJ had agreed that he could testify and present evidence on his own behalf following the upcoming videotaped deposition of Board witness Fred Reiss; however, he was prevented from advancing his case-in-chief and rebutting the evidence presented by the Board, as well as deprived of his

opportunity to submit a post-hearing brief pursuant to *N.J.A.C.* 1:6B-14.2 when the ALJ “inexplicably” failed to schedule further hearing dates, closed the record upon receipt of the Reiss deposition and issued an Initial Decision a few days later. Respondent contends that – had he been able to present his own case as anticipated – he would have been able to rebut the Board’s claims by, for example, calling witnesses to confirm that he acted as lead teacher rather than principal and presenting videotape evidence of Board meetings in which his situation is discussed; had he done so, respondent asserts, the ALJ would not have been able to conclude that respondent was guilty as charged by relying exclusively on the uncontested representations of the Board. Respondent urges, therefore, that if the Initial Decision is not rejected, it must be remanded to the OAL to allow for presentation of his case-in-chief. (Respondent’s Exceptions at 21-23; appended Certification of Leonard C. Shiro, Esq.)

In reply, the Board counters that respondent has presented no basis on which the Commissioner may properly reject or modify either the ALJ’s findings of fact or his conclusions of law, since both are amply supported by the record and due deference is owed the judgment of the ALJ, as the trier of fact, as to the sufficiency of evidence and credibility of witnesses. According to the Board, respondent is simply dissatisfied with the results of the ALJ’s assessment – proffering counter-explanations that are both implausible and in direct conflict with the “overwhelming” testimony and documentary evidence presented by the Board, and ignoring the fact that misrepresentation of credentials is conduct far more serious than that which has resulted in dismissal in other tenure cases.¹ (Board’s Reply at 2, 4-10)

¹ In this regard, the Board cites *In the Matter of the Tenure Hearing of Monica Meade-Stephens, State-operated School District of the City of Jersey City, Hudson County*, 92 *N.J.A.R.2d* (EDU) 550 (1992), wherein a teacher was dismissed due to “chronic tardiness and excessive absenteeism,” and *In the Matter of the Tenure Hearing of Philip Sheridan, School District of Orange Township, Essex County*, 92 *N.J.A.R.2d* (EDU) 257 (1992), *aff’d*, 92 *N.J.A.R.2d* (EDU) 393 (1992), wherein a teacher was dismissed for “use of profanity, derogatory remarks about women, and racial and ethnic slurs.”

The Board likewise dismisses respondent's procedural exception as meritless, contending that respondent was afforded every opportunity to present his own testimony, and that he noticed neither the Board nor the ALJ of any intent to call other witnesses – and, indeed, none appeared with him on the date of hearing to testify on his behalf; nor did he apply, following the deposition of Fred Reiss, to keep the record open, call additional witnesses or submit summation briefs – an opportunity which the ALJ was under no obligation to afford, since *N.J.A.C. 1:6B-14.2* does nothing more than set forth a briefing schedule in cases where briefs are anticipated by the parties – so that he should not be permitted to do so now simply because he is dissatisfied with the ALJ's decision. (*Id.* at 10-11)

Upon careful review and consideration, the Commissioner must concur with respondent that he has not been afforded the due process to which he is entitled, so that this matter must be remanded to the OAL for further proceedings.

Although the final pages of the transcript of the August 14, 2008 OAL hearing (at 76-79) do, indeed, suggest that the ALJ and parties at that point considered the hearing in this matter concluded except for the impending deposition of Board witness Fred Reiss and the possible recalling of respondent to testify in response to such deposition, the fact remains that there is nothing in the record indicating that the ALJ ascertained with certainty – once the transcript of the deposition was received – that respondent was, in fact, resting his case; nor did he make it clear to the parties that, if a request from respondent for an additional hearing date was not received immediately following the actual deposition on August 25, 2008, the matter would be deemed concluded upon receipt of the deposition transcript and the record would close without further proceedings *of any kind* – including submission of post-hearing briefs. While it is true, as argued by the Board, that *N.J.A.C. 1:6B-14.2* does not expressly

require post-hearing briefs, it *does* create an expectation of opportunity for their submission; consequently, respondent should not have been deprived – by misunderstanding or lack of communication – of the chance to provide a summative perspective on the testimony and evidence taken at hearing, together with legal argument addressing the nature of his alleged conduct and the appropriateness of the penalty sought by the Board in light of it. Moreover, given the material consequences of a tenure hearing on the charged party – potential loss of employment, as well as possible impact on pension and certification status – the Commissioner cannot in good conscience render a determination on the merits where there is reasonable basis to credit a respondent’s contention that he or she has not been fully heard, whether with respect to presentation of testimony and evidence or as to submission of briefs.

Additionally, the Commissioner notes that – as set forth in the Initial Decision (at 2) and memorialized by the ALJ at hearing (Transcript at 5) – several other charges remain in this matter notwithstanding the agreement by the ALJ and parties to temporarily limit proceedings to the charge herein, which the Board deemed sufficient in itself to warrant respondent’s dismissal. In view of the Commissioner’s obligation in tenure matters – even if the ALJ again recommends respondent’s dismissal upon reconsideration of his findings and conclusions in light of proceedings on remand – some resolution of the remaining charges is required, for example, a spreading on the record of reasons why such charges should be dismissed as moot or their withdrawal should be permitted by the Commissioner consistent with the standards of *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff’d* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is rejected, and this matter is remanded for further proceedings as set forth above.²

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: December 18, 2008

Date of Mailing: December 19, 2008

² In so holding, the Commissioner stresses that she implies no judgment on the merits of this matter, nor intends any inference that the ALJ is precluded from making the same factual findings or reaching the same conclusions of law following proceedings on remand.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.