

IN THE MATTER OF THE TENURE :
HEARING OF WILLIAM TRACY, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
TRENTON, MERCER COUNTY. :

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and other just cause against respondent William Tracy – a tenured principal assigned to the Board’s Daylight/Twilight High School – for failure to: enforce the Board’s attendance policy; ensure proper certification of teaching staff involved in the Special Review Assessments (SRA); and properly assign teachers in areas in which they are certified. The Board sought dismissal of respondent from his tenured employment.

The ALJ found: that the respondent made no effort to create or monitor a proper attendance system for the Daylight/Twilight School, as required by the Board’s attendance policy and by law; that the principal’s role in the SRA is not clearly defined by regulations, and consequently respondent’s reliance on the SRA Coordinator in matters concerning certification of staff involved in scoring the tests was not unreasonable; that the Board was responsible for hiring the teachers who were then assigned to schools by the Human Resources department without adequate attention to proper certification; and that respondent could not then be faulted for assigning the teachers he was given to classrooms. The ALJ concluded that the tenure charge related to enforcement of the Board’s attendance policy has been substantiated; however, the Board failed to carry its burden of proving the tenure charges related to SRA administration and inappropriate teaching assignments. Accordingly, the ALJ determined that a six-month suspension is the appropriate penalty, rather than termination and loss of tenure.

Upon a thorough and independent review of the record – which did not contain transcripts of the hearing conducted at the OAL – the Commissioner concurred with the ALJ’s findings, and adopted the Initial Decision as the final decision in this matter. The Commissioner directed that respondent be suspended from his tenured position, without pay, for six-months, prospectively, commencing on the date of this decision.

<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>

April 8, 2009

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The record of this matter and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions of both the Board and respondent – filed in accordance with the prescribed timelines of *N.J.A.C. 1:1-18.4* – were fully considered by the Commissioner in reaching her determination herein.¹

The Board first excepts to the ALJ’s conclusion of law on the Special Review Assessments (SRA) charge. Although finding as fact that respondent allowed the SRA to be scored by an individual who he knew lacked secondary level mathematics certification and that this was outside of the State’s required procedure for scoring the SRA, the ALJ, the Board complains, inexplicably found that he should not be held liable for these infractions because his reliance on his SRA coordinator was not so inappropriate as to allow the sustaining of a “separate, stand-alone charge of conduct unbecoming.” To the contrary, the Board argues,

¹ The Commissioner is compelled to clarify that the Administrative Law Judge’s (ALJ) ordering of charges in her Initial Decision in this matter – and, in one instance, titling of the charge – was not the sequence utilized by the Board in its filed charges. Specifically, the ALJ’s Charge I – which she titled Appearance of a Forged Signature by a Noncertified Teacher on Special Review Assessments was Charge Two in the Board’s filing and captioned Failure to Ensure Proper Certification of Teaching Staff Involved in SRA Process (this charge is essentially two-pronged in nature: 1) the Board alleges that respondent allowed a math teacher who did not have a certificate in mathematics to score the SRA, and 2) the Board alleges that this teacher’s signature on the SRA documents was a forgery); the ALJ’s Charge II – Assignment of Teachers in Areas Where They Were not Certified was the Board’s Charge Three; and the ALJ’s Charge III – Failure to Enforce the Board’s Attendance Policy was the Board’s Charge One.

respondent's reliance on his SRA coordinator does not absolve him of responsibility for ensuring the proper administration of the SRA test, particularly given that this test is a major indicator of whether a student is prepared to satisfactorily progress to the next educational level. "Incorrect scoring on this test is not acceptable and it is harmful to the student as it sends a false sense of security to the public as to the student's ability to handle and properly understand the test subject (here, mathematics)" (Board's Exceptions at 1-2, quotes at 2)

With respect to the assignment of teachers to areas in which they were not certified, the District excepts to the ALJ's finding that respondent "could have believed" that the Department had approved the waivers allowing teachers to teach outside of their areas of certification. Such a finding, it contends, was belied by the testimony of Superintendent James Lytle, the evaluation which was conducted on the Daylight/Twilight School (Exhibit R32) which criticized the program for using non-certificated teachers, and two of respondent's evaluations (Exhibits P-26 and R-35) which gave him an "unsatisfactory" rating in the category of ensuring that certified teachers were teaching in their core content certified areas. Based on these, it is clear that the District and the administration believed that respondent had the responsibility for ensuring that teachers taught in their core content certificated areas. (Board's Exceptions at 3)

Finally, the Board is in full agreement with the ALJ's findings of fact and conclusions of law with regard to the charge of failure to enforce the board's attendance policy. It does, however, disagree with her penalty determination in this matter. It claims that respondent has admitted violations of each of the charges: "a. SRA mathematics tests possibly not scored correctly, contrary to State guidelines; b. Use of non-certified teachers to teach the core content curriculum areas which, by State law, require certified instructors in that content

area; and c. Failure to administer, or even establish a coherent and accountable attendance policy for the Daylight/Twilight School.” The Board maintains that these violations all constitute conduct unbecoming and warrant no less than respondent’s termination from the District. (Board’s Exceptions at 4-5)

Respondent’s exceptions initially present a factual recitation and references to hearing testimony which he alleges allowed the ALJ to correctly conclude that the charge with respect to improprieties in the SRA scoring process and the one alleging that respondent had allowed teachers to teach outside of their certification had not been proven by the Board. (Respondent’s Exceptions at 4-12)

With respect to the attendance policy charge, respondent argues that the ALJ’s conclusion that 33 of the 91 graduates of the Daylight/Twilight School in 2005-06 had more than the allowable fifteen absences is solely predicated on testimony of DOE investigators Daryl Minus-Vincent and James Thomas McBee. He maintains a differentiated analysis of these numbers is necessary because of the structural differences between the Daylight/Twilight High School and the Central High School, and charges that nothing in the record indicates that the DOE investigators took any consideration of the differentiated structure of the two schools. Respondent claims that his testimony – as well as that of vice principal Bart LaGrassa, teacher William Winters and former superintendent of schools, Dr. James H. Lytle – confirms that in order to preserve the retrieval aspect of the school, attendance at Daylight/Twilight had to be reset for each cycle and not based on a cumulative total for the year, as is done at Central High School. Therefore, respondent argues, if he “was acting in accordance with how his superintendent believed attendance needed to be calculated, then there is no basis for the charge that he failed to adhere to the Board’s attendance policy.” (Respondent’s Exceptions at 12-16,

quote at 16) As to the issue of attendance record keeping, respondent charges that this was not part of the tenure charge: none of the Board's witnesses testified with regard to inadequate record keeping; there was no testimony as to how attendance records in the District were kept or tabulated; no testimony as to what teachers in other schools did to track attendance; and no testimony to indicate that respondent acted any differently than other administrators in the District in this regard. Therefore, respondent posits the record contains no standards against which his conduct could be evaluated. (*Id.* at 17)

Respondent's exceptions conclude by urging that all of the charges against him be dismissed and he be immediately reinstated to his principal position with back pay and emoluments due and owing. (*Id.* at 19)

Upon a comprehensive review of the record of this matter – which it is specifically noted did not contain transcripts of the hearing conducted at the OAL² – and finding the parties' exception arguments unpersuasive, the Commissioner determines to adopt the Administrative Law Judge's recommended decision.

Initially, the Commissioner recognizes that in this, as in all tenure matters, the Board bears the burden of proving each of its charges of unbecoming conduct against respondent by a preponderance of the competent, relevant and credible evidence. The Commissioner has given full consideration to all evidentiary proofs which comprise the record and is cognizant of the fact that of particular importance was the ALJ's assessment of the credibility of the witnesses. This being the case – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her, and having made findings of fact based upon their testimony – the standard governing the Commissioner's review is clear and unequivocal:

² Such absence of transcripts is curious in light of the fact that the parties' exceptions make certain representations based on testimony they allege was adduced at the hearing which cannot be reviewed absent the relevant transcripts.

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. (*N.J.S.A. 52:14B-10(c)*).

A considered review persuades the Commissioner that the ALJ's comprehensive discussion and resultant factual findings with respect to each of the Board's charges against respondent (Initial Decision at 4-19) are well grounded in the record, thereby providing no cause whatsoever for alteration of her determinations.

In summary, the Commissioner concurs with the ALJ that the Board did not meet its burden of proving unbecoming conduct against respondent on its charge relating to improprieties in the SRA process (ALJ Charge 1; District's Charge Two) for the reasons presented in her decision, specifically:

...the Board has not proven the most critical component of the charge, which is fraud in the SRA process. The evidence establishes that Fabisch scored the exam, and that Fabisch, while not then secondary-certified as a mathematics teacher, did achieve certification a year later. The lesser component, which is selecting and then failing to adequately supervise the Daylight/Twilight SRA coordinator, is proven to the degree that respondent named Charles Cirillo as SRA coordinator, and then relied on Cirillo, who was wrong about the requirements.

As it happens, neither the statutory language authorizing the SRA, *N.J.S.A. 18A:7C-3*, nor the regulations at *N.J.A.C. 6A:8-4.1 et seq.*, nor the 2006 SRA Manual delineate any specific responsibility for the principal. While the Board is required to administer the statewide assessments, and the chief school administrator to report the results, and the district and school SRA coordinators to maintain the security of the exams, there is no mention of a direct role for the principal. The Manual is even silent on who is to select the scoring panels. The only explicit indication that the principal is involved is the "Principal and Superintendent Certification of Proficiency and Compliance with the Process," which accompanies submissions of SRAs to the County.

Given this statutory silence, I CONCLUDE that the primary responsibility for the SRA rested with the Board, the superintendent, and the SRA coordinators, and that Tracy's reliance on Cirillo, who was unfortunately mistaken about the requirements, was reasonable, given that the regulatory scheme does not place the principal at the center of test administration. Moreover, I am persuaded that Tracy's argument that the HSPA and SRA in aggregate function as a kind of report card on the principal is sensible, in that the principal, as school leader, is responsible for providing the instruction that should lead to subject mastery. While ideally, Tracy should have insisted that Cirillo back up his verbal assurance with something from the State Department of Education, I CONCLUDE that Tracy's reliance on the SRA coordinator was not so inappropriate as to sustain a separate, stand-alone charge of conduct unbecoming. This is particularly so since by the following year Fabisch had obtained her secondary-level certification. Moreover, the emergency was occasioned by the fact that a school with an enrollment of more than 2,000 students had only two instructors certified to teach mathematics at the secondary level. (Initial Decision at 20-21)

Similarly, the Commissioner concurs with the ALJ that the Board has failed to sustain its burden of proof with regard to the charge that respondent is guilty of unbecoming conduct for assigning teachers to areas in which they were not certified (ALJ's Charge II; District's Charge Three) As aptly explained by the ALJ, the seminal issue on this charge is one of "responsibility":

Lytle testified that a cabinet-level group including himself, the Board secretary, and the Board counsel drafted resolutions for the Board. *N.J.A.C. 6A:5-1.5(a)* requires that an application for a waiver must be signed by the chief school administrator, and approved by the district board of education. Therefore, I CONCLUDE that it was up to Lytle and the Board to follow up on the waiver, not Tracy, and that Tracy held a sincere but mistaken belief that the waivers had been granted.

Further, as a threshold matter, the education statutes vest authority for hiring teachers with boards of education, not school principals. [citation omitted] *N.J.S.A. 18A:27-1* states that "[n]o teaching staff member shall be appointed, except by a record roll call

majority vote of the full membership of the board of education appointing him.” Similarly, foundational case law affirms the statutory right of boards to transfer teachers within the scope of their certificates. [citation omitted]

To hold respondent responsible for the Board’s decision to hire teachers not holding high school certifications or certifications in needed areas and to allow transfer of those teachers to the Daylight/Twilight High School vests the principal with a power that belongs solely to the Board. Tracy did not make the decision to transfer two industrial arts teachers and an art teacher to a high school that taught neither industrial arts nor art. He simply did not have that power. He could advocate, he could lobby, but it was the Board that hired teachers, and Human Resources that assigned them to schools.

Once the assignment of teachers was made, however, respondent was undoubtedly responsible for finding something useful to do with them. In 2006-2007, Tracy had at least seven math assignments to cover, and only one math-certified teacher to utilize after Gregory Howard went out on medical leave. Granted, evidence that Tracy did anything to remedy the situation is minimal. Tracy testified that he went to Human Resources, reviewed resumes, and sought to set up interviews for qualified math and science candidates. He acknowledged assigning a business teacher to a chemistry course on a trial basis – an experiment the teacher himself deemed unsuccessful. The waivers and July memo document Tracy advocating for elementary-certified teachers to help students whose entry-level math skills are not ready for high school. Tracy continues to advocate strongly for that need. Nonetheless, the simple fact is that Tracy was handed teachers not certified in areas of instruction where he needed teachers, and expected to do something with them. The Board cannot now complain that he assigned them to classrooms. I CONCLUDE, therefore, that the tenure charge related to inappropriate teaching assignments has not been proved. (Initial Decision at 21-22)

As to the Board’s charge that respondent is guilty of unbecoming conduct for his failure to enforce the board’s attendance policy, the Commissioner is in full agreement with the ALJ that the Board has met its burden of proving this charge. The Commissioner finds, as did

the ALJ, that central to the establishment of this charge were the dual issues of “authority” and “accountability”:

In order to receive State aid, school districts are required to comply with the rules and standards for equalizing opportunity, including implementing the Core Curriculum Content Standards and providing public school facilities for at least 180 days per year. *N.J.S.A.* 18A:7F-9. The authority to make, amend, and repeal rules for the supervision of district schools rests with the board. *N.J.S.A.* 18A:11-1. *N.J.A.C.* 6A:16-7.8(a)(2) and (3) require boards of education to implement policies and procedures on attendance, including “[t]he expectations and consequences regarding attendance at school and classes,” and “[a] definition of unexcused absence...that, at a minimum, shall be based on the definition of a school day...and the following considerations: i. Family illness or death; ii. Educational opportunities; iii. Written parental permission; iv. Excused religious observances...” The regulation goes on to list a detailed required process for addressing four or more absences. The regulations require the average daily attendance rate for each school district to average 90 percent or higher as calculated for the three years prior to the school year being monitored. *N.J.A.C.* 6A:32-13.1(a). Each school with a three-year average below 90 percent is required to develop performance objectives for improving student attendance. *N.J.A.C.* 6A:32-13(b).

The statutes and regulations make clear that Tracy, as a school principal, had no authority to act separately with regard to attendance policy. The Board, not the school principal, is vested with the power to make policy, which is fundamental to the academic mission. Districts are barred from granting diplomas to students who do not meet core curriculum requirements and attendance policy. *N.J.A.C.* 6A:8-5.2(b).

The fact that Tracy was apparently operating a school without any written policy that would meet the standards of *N.J.A.C.* 6A:16-7.8(a)(2) and (3) demonstrates a dereliction of the principal’s duty as primary school administrator. It is the principal’s job to communicate a precise understanding of attendance through a written policy available to everyone. The lack of such a policy contributed to the misunderstanding with the Board and the lax documentation by the staff.

While it is true that *N.J.A.C.* 6A:32-8.3(f) states that daily roll call is taken by a teacher or other authorized person, *N.J.A.C.* 6A:32-

7.4(b) requires that “[r]ecords for each individual student shall be maintained in a central file at the school attended by the student. When records are maintained in different locations, a notation in the central file as to where such other records may be found is required.” *N.J.A.C.* 6A:32-7.3(a)(2) states that mandated student records include a record of daily attendance. The principal is the school leader, responsible for administration and supervision of the school. *N.J.A.C.* 6A:32-4.1(f)(1).

The absence of the school attendance documentation in the required centralized file speaks for itself. Tracy did not see to it that the school had an adequate central file, and he did nothing to ensure that teachers were moving the documentation into that file. There is also no evidence that he made any effort to ensure that waivers were properly granted. Rather, he assumed that the lack of complaint meant that others outside the school understood what was being done inside the school and approved of it.

This was an abrogation of the principal’s duty as a school leader and primary supervisor, as was the failure to disseminate enough written information about the attendance policy to ensure that the Board, the parents, the students, and the staff all understood it. Therefore, based on the fact that 33 of 91 graduates in the 2005-2006 school year had more than the fifteen absences allowed by Trenton Board of Education policy, the fact that no centralized attendance record-keeping system existed for the Daylight/Twilight High School as a whole, the fact that the Smith Avenue location had no actual waiver documentation system, and the fact that Tracy made no effort to create or monitor a proper attendance system, I CONCLUDE that the Board has proved the charge. (Initial Decision at 22-24)

Finally, the Commissioner agrees with the ALJ that, as the Board has sustained only one of its unbecoming conduct charges against respondent, its fourth charge – which essentially alleges that the first three charges, in the aggregate, demonstrate an overall pattern of unsatisfactory performance necessitating loss of respondent’s tenured position – has not been established.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that she is required to consider respondent’s prior record in the District, the nature and

gravity of his offense under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and must consider any harm or injurious effect which his 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, 421-22 (App. Div. 1967) Notwithstanding that the Board has sustained only one of its charges of unbecoming conduct against respondent – that of his failure to adhere to the Board’s attendance policy – the Commissioner does not view this as a *de minimis* infraction. Respondent’s dereliction of his duty to create, widely publicize and monitor a proper attendance policy clearly had a detrimental effect on the Board, impermissibly usurping the Board’s authority in the establishment of uniform standards in its schools and seriously compromising its ability to conform to its regulatory obligations with respect to the attendance component of graduation requirements at the Daylight/Twilight High School. Although recognizing the necessity of impressing upon respondent the seriousness of the abdication of his responsibilities in this regard, the Commissioner is nonetheless compelled to concur with the ALJ that this proven charge does not warrant the extreme penalty of respondent’s dismissal from his tenured position. Rather, when viewed in light of the totality of the circumstances existing in this matter, the Commissioner accepts as valid the ALJ’s cogent analysis in connection with her recommended penalty in this regard:

No doubt, the Board’s difficulties in staffing and Tracy’s problems with administration were aggravated by the extraordinary growth of the school, from one building and 400 students to seven buildings operating on three shifts serving a mixed population of adults and teenagers – all of this within about five years. At bottom, respondent’s argument is that the school was a victim of its own success.

Fear that the success was illusory threads its way through all the Board’s arguments, but there are no proofs to show this was true. The Board had demonstrated that respondent cannot show why, when, or in most cases even if students missing more than fifteen

days of school received appropriate waivers that allowed them to secure credits. But that failure has only an inferential, not a direct, link to inadequate education....

There is something deeply unfair about the loss of tenure in a situation where the Board itself did not adequately document what it created, where multiple schools with different missions were collapsed into one entity, where a single vice principal was assigned to a school with 2,100 enrollees in seven buildings, where evidence does show some test score improvement, and where the substantial enrollment reflected success in the core mission of bringing people back to studying toward a high school diploma.

Consequently, the Commissioner accepts the ALJ's recommendation that respondent should suffer a six-month suspension from his position, and stresses that such suspension must be served prospectively.

Accordingly, the recommended decision of the OAL is adopted – for the reasons well expressed therein. The Commissioner hereby directs that respondent be suspended from his tenured position – without pay – for six-months commencing on the date of this decision.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: April 8, 2009

Date of Mailing: April 9, 2009

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