

IN THE MATTER OF THE TENURE :  
HEARING OF DESLY GETTY, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF THE CITY OF : DECISION  
ASBURY PARK, MONMOUTH COUNTY :  
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### SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and insubordination against respondent Desly Getty – a tenured performing arts and English teacher – as the result of events that occurred in a classroom at Asbury Park High School on January 10, 2008. Specifically, respondent used her cell phone for a personal call during a class to which she was assigned, failed to respond appropriately to a student “dancing incident” which occurred while she was occupied with her phone call, and later made a related foray into another teacher’s classroom on January 14, 2008. The Board initially issued a written reprimand citing the district cell phone policy and respondent’s failure to maintain an orderly classroom environment. More than seven months later, the Board filed tenure charges seeking dismissal of respondent from her tenured employment.

The ALJ found that: respondent’s conduct during and after the incident on January 10, 2008 was inappropriate, and exhibited a lack of attention to the class she was charged to supervise and a failure to assess her priorities; respondent’s actions fell below the standard of conduct expected of school teachers, and constituted misconduct; respondent’s use of her cell phone during the event in question – which did not comply with district policy, or with specific permissions for limited use of her cell phone – constitutes insubordination. In consideration of the penalty to be recommended, the ALJ found: respondent has been a teacher for over twenty years, and has no prior disciplinary record; respondent’s misconduct arose out of a specific incident of limited duration, without intent to harm or jeopardize students in her charge; and her removal from tenure for what occurred would amount to a distortion of the events into much more than they were. Accordingly, the ALJ ordered that respondent: be reprimanded for her misconduct and insubordination; shall forfeit the 120 days of salary withheld following the certification of tenure charges; and shall be returned to her teaching duties.

Upon independent review of the record, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, finding that the Board’s prior issuance of a reprimand, along with the loss of the 120 days salary, are a sufficient penalty given the circumstances in this matter.

<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>
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July 17, 2009

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

The District excepts to the Administrative Law Judge’s (ALJ) determination that respondent’s actions do not warrant her removal from her tenured position. In so maintaining, the District essentially presents a verbatim recitation of its arguments advanced below which it is determined were fully considered and addressed by the ALJ in his decision and, therefore, these will not be revisited here.

Similarly, respondent excepts to what she contends were certain “factual errors” made by the ALJ, which in essence are no more than areas of disagreement between the ALJ’s findings and those presented in respondent’s post-hearing brief below. Specifically, respondent charges that the ALJ: 1) failed to give proper weight to the fact that the telephone call placed by respondent was to address a serious incident involving a student; 2) failed to recognize that respondent immediately addressed the dancing incident; 3) should have found that respondent’s

use of her cell phone, under the particular circumstances, cannot be viewed as an insubordinate act; 4) incorrectly found that respondent's entrance into Ms. DeMarsico's classroom resulted in up to 20 minutes of disruption of instructional time; 5) erred in concluding that equitable estoppel and double jeopardy did not bar the prosecution of tenure charges in this matter; and 5) recommended a penalty in excess of that imposed in similar matters. (Respondent's Exceptions at 3-10) As it is determined that resolution of each of these "factual differences" was fully considered and explained in the Initial Decision, further elaboration on these points will not be entertained here.

Upon careful review and consideration of the record – which included transcripts of the hearing conducted at the OAL on January 21 and February 26, 2009<sup>1</sup>, the Commissioner concurs with the ALJ – for the reasons presented on pp. 15-17 of his decision – that respondent's actions with respect to the January 10, 2008 classroom "dance" incident and her foray into Ms. DeMarsico's classroom on January 14, 2008 "fell below the standard of conduct that the district was entitled to expect from her, and as such constituted misconduct." (Initial Decision at 16). The Commissioner further agrees that respondent's use of her cell phone on January 10 "did not comply with the district's cell phone policy or with the specific permission she had obtained from Blackmore for limited use of her cell phone, and, as such, was insubordinate." (*Ibid.*)

As to the penalty to be imposed, while in no way minimizing the seriousness of respondent's infractions, the Commissioner, nonetheless, is in accord with the ALJ – for the reasons fully detailed on pp. 17-22 of his decision – that, under all of the circumstances and considerations existing in this matter, removal of respondent from her tenured position is an

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<sup>1</sup> It is noted that the record did not include a transcript of the proceedings conducted on March 20, 2009.

unduly harsh penalty. Rather, the Commissioner finds and concludes that the Board's prior issuance of a reprimand, along with the loss of the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14, following the certification of tenure charges, are a sufficient penalty to impress upon respondent the seriousness of her errors in judgment displayed in this matter.<sup>2</sup>

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein. Respondent shall forfeit the 120 days salary withheld following certification of the within tenure charges. The District shall forthwith return respondent to her tenured employment.

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 17, 2009

Date of Mailing: July 20, 2009

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<sup>2</sup> The Commissioner does not reach to that portion of the ALJ's recommended Order which specifies "[Respondent] is to be made whole for any other salary and benefits of which she has been deprived due to her suspension and the institution of tenure charges. She may file an affidavit of lost salary and benefits with the Board within 20 days of the issuance of the Commissioner's final decision, accounting therein for any mitigation of damages required by law." (Initial Decision at 22) The instant record before the Commissioner does not indicate that respondent lost any salary and/or benefits prior to the certification of tenure charges against her in violation of *N.J.S.A.* 18A:6-8.3 or that she was not promptly placed back on the payroll subsequent to the expiration of the statutory 120 days after such certification pursuant to *N.J.S.A.* 18A:6-14. If such is not the case and respondent feels she has been illegally deprived in this regard, she may file a new petition of appeal before the Commissioner.

<sup>3</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).