#167-10R (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu10067-09_1.html)

IN THE MATTER OF THE TENURE	:	
HEARING OF GILBERT ALVAREZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LAKEWOOD, OCEAN COUNTY.	:	

SYNOPSIS

The petitioning school district certified tenure charges of unbecoming conduct against respondent – a tenured Spanish teacher – for alleged inappropriate behavior toward students, in which he demonstrated poor judgment, an inability to control his temper and demeanor, and insubordination; additionally, on one occasion, respondent used inappropriate language and pushed a desk in such a manner as to threaten or injure a student. The parties initially attempted to settle this matter, but – in light of the apparent seriousness of the Board's allegations and based on the extremely limited record before the Commissioner – the settlement was rejected and the matter remanded to the OAL for hearing.

The ALJ found that: respondent does not dispute that his conduct in pushing a desk into a student on December 23, 2008, was inappropriate, nor that he had trouble controlling his anger, emotions and frustrations when dealing with his students; respondent engaged repeatedly in inappropriate and unbecoming conduct for a tenured teacher, was unable to properly control and channel his frustration and anger, violated school policy by removing students to the hallway, and used physical force to push a student out of a room and to push a desk. The ALJ concluded, based on case law which he viewed to be similar in nature, that the appropriate penalty for respondent's unbecoming behavior was the forfeiture of the 120 days of pay withheld for the initial portion of his suspension; that he be suspended for an additional period of two months; that he complete training in anger management, conflict resolution, and management of disruptive students; and that he forfeit any increment that he might be entitled to during the 2009-2010 school year.

Upon careful and independent review of the record, the Commissioner – while concurring with the ALJ's findings as to the seriousness and unacceptability of respondent's conduct – rejected the penalty recommendation in the Initial Decision as he found that the impetus for and the nature of the actions taken by this respondent were substantially more serious in kind and degree from the school law decisions relied upon by the ALJ in fashioning his recommended penalty, necessitating respondent's removal from his position. Accordingly, the Commissioner dismissed respondent from his tenured teaching position with the School District of the Township of Lakewood and the matter was transmitted to the State Board of Examiners for action as that body deems appropriate.

June 3, 2010

OAL DKT. NO. EDU 10067-09
(EDU 0736-09 ON REMAND)
AGENCY DKT NO. 36-2/09

IN THE MATTER OF THE TENURE HEARING OF GILBERT ALVAREZ, SCHOOL DISTRICT OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District and respondent requested and received extensions of time within which to file exceptions and reply exceptions, respectively, to the Initial Decision. These submissions were fully considered by the Commissioner in reaching his determination herein.

The District's exceptions first charge that – although he "correctly found that [respondent] engaged in inappropriate and unbecoming conduct, repeatedly demonstrated an inability to properly control and channel his frustration and anger, used physical force, violated school policy on several occasions, and more than once recognized that his emotions had the best of him and that he might hit someone or otherwise lose it" (Initial Decision at 27) – the Administrative Law Judge (ALJ) nonetheless declined to terminate respondent from his tenured position. Such a determination, it argues, was apparently premised on the former Commissioner's reversal as to penalty of a prior decision of this ALJ, *i.e., In the Matter of the Tenure Hearing of Adam Mierzwa*, Commissioner's Decision No. 283-08, decided June 23, 2008, wherein this ALJ had concluded that the respondent's tenure should be removed

and the Commissioner determined that a lesser penalty was warranted. The District posits that the ALJ, apparently viewing *Mierzwa, supra,* and the instant matter as similar in nature, and in consideration of the Commissioner's penalty modification therein, misread this prior modification as directing a penalty less severe than removal in the instant matter. It argues that the Commissioner's penalty modification in *Mierzwa* does not dictate the result reached in this matter, as these two cases are fully distinguishable. Specifically, 1) unlike the instant matter, *Mierzwa* did not engage in physical intimidation, verbal abuse, or cursing; 2) the Commissioner in the *Mierzwa* matter accepted that his actions were partially mitigated by a lack of administrative support which is not a factor here; and 3) *Mierzwa* exhibited a lack of self-restraint on only two occasions as opposed to the instant respondent who, it avers, showed an increasingly frequent lack of self-restraint. (District's Exceptions at 2-3)

In response to this particular District exception, respondent points out that the ALJ's Initial Decision was thirty-five pages, eighteen of which meticulously and accurately summarized hearing testimony and physical evidence (pp. 3-20) and fifteen of which analyzed the relevant, applicable law, applied the facts to the law, and imposed a thoughtful, fair and just penalty (pp. 20-35). Respondent argues that the District's contention that the ALJ erred as a consequence of the Commissioner's reversal of his Initial Decision recommendation to remove tenure in *Mierzwa* makes no logical sense. To the contrary, he proffers, the ALJ's decision here 1) carefully considered the Commissioner's modification in *Mierzwa*; 2) found substantial similarities between this case and those where a penalty less than removal was imposed; and 3) reached the ultimate conclusion that tenure removal was unwarranted in the instant matter. (Respondent's Reply Exceptions at 2-5)

The District next contends that the ALJ incorrectly ruled that Dr. Gallina, the District's psychiatrist, and Dr. Tobe, respondent's psychiatrist, could not testify as expert witnesses but, rather, could only testify as to the facts because the ALJ, the District maintains, incorrectly found that respondent's mental state had not been pled in its tenure charges. In support of its accusation in this regard, the District submits that its charges against respondent stated that:

> there were alleged "on-going concerns with [Mr. Alvarez's] demeanor and performance," not limited to his use of "inappropriate language and instructional techniques," but including "less than favorable interactions with students of Mexican and/or African American heritage, often appearing disgruntled, upset, detached from staff and students and *allegedly* attempting to invade their privacy." The Tenure Charges further stated that Mr. Alvarez's cumulative file indicated that, among other things, he "fail[ed] to demonstrate professional responsibility;…fail[ed] to initiate parent contacts; and fail[ed] to monitor [students'] progress," and falsified information. (citations to charges omitted; emphasis in text)

Consequently, the District proffers, the tenure charges contained both allegations and substantial evidence of mental unfitness, requiring that expert testimony with respect to respondent's mental state should have been considered. (District's Exceptions at 8-9, quote at 9) It also suggests that the ALJ erred by refusing to consider the evaluative reports of the two psychiatrists "which further supported a finding of [respondent's] mental unfitness to serve as a school teacher." (*Id*. at 9-10)

The District further charges that the ALJ utterly disregarded the testimony that was proffered by Drs. Gallina and Tobe. Just because he believed such testimony to be "duplicative of that of other witnesses was not a reason to essentially ignore same." It maintains much of the other testimony which the ALJ did consider – such as that of four students, one parent, nine teachers and administrators and even respondent – was also "duplicative." (District's exceptions at 5)

In rejoinder, respondent tenders that not once in its tenure charges against him did the District plead that he "was mentally or psychologically unfit to teach." The only allegation pled – and as such the only allegation considered during the hearing – was conduct unbecoming. Respondent maintains that the District's "claim that its allegation in the tenure charges that there were 'on-going concerns with [Mr. Alvarez's] demeanor and performance' was sufficient to constitute pleading mental or psychological unfitness such that the doctors should have been permitted to testify as experts and have their reports considered is absurd." (Respondent's Reply Exceptions at 8-9) Respondent, he posits, is not required to intuit and decipher charges from broad and unspecific language. The language highlighted by the District in its exceptions could not serve to put any reasonable person on notice that charges of mental of psychological unfitness were being brought against him. Respondent cites to *Jenkins v. South Woods State Prison*, OAL Dkt. No. CSV 6363-04 (May 10, 2006) for the proposition that:

> [c]lear and unambiguous notice of all the charges or potential charges that may arise at the hearing is indispensable to fundamental fair and proper notice. Whether the appointing authority can meet its burden regarding charges that were never properly noticed, presented or served upon the employee is irrelevant after the hearing has concluded. The appointing authority could have amended the charges prior to the hearing, to conform the evidence and proofs to the charges intended to be offered at the hearing. Absent any amended pleadings, or other means of notice of the proposed charges to be asserted, the employee has a fundamental right to rely upon the preliminary and final notices of disciplinary action, together with any related discovery in connection thereto, in defense of the charges. (Respondent's Reply Exceptions at 9-10)

Moreover, respondent further argues, the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, *et seq.*, specifies that "a tenured teacher may not be dismissed without written charges being filed against them, a copy of which must be provided to the employee." Additionally, *N.J.S.A.* 18A:6-11 specifically requires "that notice of the charges must be given to the employee such that they are able to prepare a meaningful defense on their own behalf." That did not happen in the instant

matter with respect to any claim of mental or psychological unfitness as nothing in the charges themselves or in the statement of evidence in support of the charges alleges mental or psychological unfitness. Furthermore, respondent offers, even if the District initially neglected to plead mental unfitness, it could have amended its pleadings prior to the hearing in this matter pursuant to *N.J.A.C.* 1:1-6.2 to correct this omission.[1] Because it failed to do so, respondent urges, it was entirely correct for the ALJ to refuse to permit the two doctors to testify as expert witnesses and refuse to allow them to proffer opinion testimony. He maintains that any attempt by the District to have the Commissioner consider expert opinion testimony from the witnesses must be rejected. (*Id*. at 11) However, even assuming, *arguendo*, that the ALJ had considered a charge of mental or psychological unfitness, respondent professes there was and is no basis to find him unfit to teach on that basis. Respondent submits that the District:

> [F]ocuses on [the ALJ's] finding that [respondent] was frustrated by his work, his disruptive students, and his inability to reach some students, to conclude that [the ALJ] erred in not finding [respondent] mentally unfit. Frustration does not make someone mentally unfit to perform their jobs. Indeed, if that were the standard, most (if not all) of us would be considered mentally and psychologically unfit to work, especially teachers in disadvantaged school districts.
>
> While [respondent] may have acted inappropriately in certain instances, there is no evidence that this stemmed from or constituted a psychiatric problem. Accordingly, as [the ALJ] correctly held,
>
> > [i]t is apparent that the rather limited history of Mr. Alvarez's demonstrations of a lack of ability to readily handle the frustrations of his work, the disruptive actions of students and the disappointments that must affect a teacher who is disturbed by the less than motivated attitude of students does not present a sufficiently egregious pattern as to warrant the removal of his tenure. (Initial Decision at 33)
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> (Respondent's Reply Exceptions at 11-13)

[1] Note that in actuality the district would have had to go through the process of filing a second set of tenure charges.

Upon full review and consideration of the entire record in this matter – which included transcripts of the hearing conducted at the OAL on June 4, December 7, December 8 and December 14, 2009 – along with the parties' exception submissions, the Commissioner determines to adopt the Initial Decision with modification as detailed below.

Preliminarily, however, the Commissioner is compelled to clarify what appears to be some confusion in the Initial Decision and on the part of the District as to the prior Commissioner's discussion of the respondent's possible "unfitness" in rejecting the settlement agreement previously proposed by the parties in this matter. (See Initial Decision at 22; and the District's exceptions) The Commissioner's consideration of "unfitness" therein was a reference to the quintessential issue in every tenure case, that of penalty. Specifically, in rejecting the parties' proposed settlement she was speculating – in light of the District's stated allegations and the extremely limited record before her – as to the possibility that the Board's ultimately proven charges of unbecoming conduct against respondent might serve to demonstrate that he was unfit to serve as a teacher, either in this district or any other. (See *In the Matter of the Tenure Hearing of Gilbert Alvarez,* Commissioner's Decision No. 274-09, decided September 4, 2009, at 3) This discussion did not – nor was it intended to – initiate an unpleaded inquiry into respondent's mental or psychological fitness to be a teacher, *i.e.*, incapacity. Additionally, in the same vein, as the District did not choose to lodge an incapacity charge against respondent in this matter, the Commissioner is in full agreement with the ALJ's ruling – for the reasons expounded upon in respondent's reply exceptions – that Drs. Gallena and Tobe could not testify as expert witnesses with respect to respondent's mental or physical fitness in this matter but, instead, would be heard

only as fact witnesses. Similarly, consideration of their respective evaluative reports in this regard was not permissible.[2]

Turning again to the instant decision, the Commissioner finds the ALJ's recitation of testimony advanced by the witnesses and his resultant fact-finding, analysis and conclusions as to the truth of the District's allegations and the depiction of respondent's behavior as unbecoming conduct to be amply supported by the record and consistent with applicable law. The Commissioner – based on this record – is in full accord with the stated conclusions of the ALJ, specifically:

> I CONCLUDE that Mr. Alvarez engaged in inappropriate and unbecoming conduct for a tenured teacher. His repeated inability to properly control and channel his frustration and anger at the conduct, attitudes and faults of his students led him to outbursts of inappropriate language, to the use of words and phrases not proper for a teacher to utilize in a classroom setting, to the use of physical force to push a student out of a room and to push a desk that he must have known would also cause another desk with a student in it to be similarly pushed. He also violated school policy on several occasions by removing students to the hallway when such action was not permitted. And on more than one occasion, he himself appears to have recognized that his emotions had the best of him and that if he did not "cool down" or was not calmed down by another faculty member he might "lose it" and might "hit" someone, a concern whose validity may be said to have been confirmed by his actions on December 23, [2008]. (Initial Decision at 27)

The Commissioner similarly concurs with the ALJ – for the reasons presented on pp. 25-26 of his decision – that the District "has failed to demonstrate any sustainable basis for any suggestion that Alvarez is biased against African-American and/or Mexican American students."

However, while the Commissioner is in full agreement with the ALJ as to the nature of respondent's conduct, he cannot accept his recommended penalty as the appropriate

[2] The Commissioner also concurs with the ALJ's assessment of – and, therefore, his declining to elaborate on – the proffered testimony of these fact witnesses, *i.e.*, "[t]he essence of each witness's testimony was to affirm the essence of Alvarez's own testimony, that is, that he admitted certain inappropriate conduct, spoke of frustrations and expressed that he had no intent or desire to injure T.B. In the end, this evidence did not add anything significant to the proofs." (Initial Decision at 20)

one here. In determining penalty to be imposed, factors to be considered include the respondent's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, and 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).

In fashioning his penalty recommendation here, the ALJ in his decision reviewed eight prior school law decisions which the parties had argued were analogous to the instant matter. Six of these cases dealt with respondents who were alleged to have engaged in one incident of corporal punishment. The Commissioner did not find these cases particularly instructive as he concludes – as did the ALJ – that this matter involves neither one isolated incident nor corporal punishment as that term has been developed through prior case law. It appears that the ALJ found this matter most akin to *In the Matter of the Tenure Hearing of Adam Mierzwa*, Commissioner's Decision No. 283-08, decided June 23, 2008, which at first blush might appear to be true: both matters involve respondents who failed to control their tempers, displayed poor judgment, and allowed feelings of frustration and anger to overwhelm their professional demeanor. Additionally, in both matters neither respondents' tenure in the District (approximately 4 years at the time of the filing of tenure charges), nor their performance evaluations could serve to mitigate any penalty that would otherwise be imposed against them.[3] Notwithstanding these similarities, the Commissioner finds that when looking at the impetus for

[3] It is curious, however, that – although finding these two matters analogous – the ALJ recommended a lesser penalty in the instant matter than the one ultimately imposed by the Commissioner in *Mierzwa, supra*. (*i.e.*, in the instant decision, forfeiture of 120 days pay withheld upon initial suspension, an additional suspension of *two* months, forfeiture of any increment to which he might be entitled during the 2009-10 school year and the successful completion of training in anger management, conflict resolution and management of disruptive students vs. penalty in the *Mierzwa* decision of forfeiture of 120 days pay withheld upon initial suspension, an additional suspension of *four* months while he obtains training in anger management, conflict resolution and handling difficult and disruptive students, with termination of his employment if he does not successfully complete the program.)

and the nature of the actions taken, these two matters are substantially different in both kind and degree. The record in this matter evidences that – during the period October-December 2008, in response to frustration he was experiencing as a consequence of the conduct of his unruly, inattentive and unmotivated students – Mr. Alvarez manifested physically against them, erupting out in explosive anger: yelling, engaging in outbursts of inappropriate language, using force to push a student out of his classroom and finally, on December 23, 2008, forcefully pushing a desk into another desk which had a student in it. Both his pupils and other staff members, who witnessed respondent's angry interactions with his students, reported they were scared or afraid of what he might do. In contrast, the respondent in *Mierzwa, supra,* was recognized as having a mindset that focused on a lack of administrative support and/or proper protocols as the primary factors triggering his temper flare ups. (See *Mierzwa* Initial Decision at 17) In two incidents – two years apart – the objects of this respondent's angry outbursts were administrators with whom Mierzwa felt frustration because of their alleged failure to adequately address what he perceived as dangerous situations inside and outside the school. There is no suggestion that Mierzwa engaged in threats or used physical force, violence or inappropriate language against students or staff members.

It is by now axiomatic that teaching "requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321. It is similarly without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987, 1003.

The Commissioner is satisfied that the record herein establishes that respondent acted in a manner which is wholly inappropriate for a professional educator and not commensurate with a teacher's function as a role model. Respondent failed to control his temper, exercised poor judgment, used inappropriate language with students, and allowed his feelings of frustration and anger to overwhelm his professional demeanor – all of which caused students and staff members alike to feel "afraid" or apprehensive. While in no way condoning the actions of respondent's recalcitrant students, the Commissioner observes that – as a professional educator – respondent was required to comport himself properly when faced with the inevitable difficulties and provocations experienced by most public school teachers. Rather than addressing the behavior of his students in a controlled and professional manner, respondent – through his anger and loss of control – became the focal point of the classroom disruption, ratcheting up the tumult by his own actions. Additionally, in his capacity as a role model for his students, respondent by his behavior communicated to them that anger and violence were appropriate responses to frustration.

Based on this record, the Commissioner cannot conclude that respondent's behavior is an aberration; nor can it be said that such conduct would not be repeated in the future. *See In the Matter of the Tenure Hearing of Brady, Morris School District*, 92 *N.J.A.R. 2d* (EDU) 410, 420. Indeed, respondent recognizes and admits the inappropriateness of his conduct but appears to be unwilling or unable to address the challenging situations with which he is faced in a controlled, professional manner.

Under these circumstances, the Commissioner cannot entertain the prospect of respondent's return to the District and the resultant potential for the perpetration of an unhealthy educational environment.

Accordingly, the Initial Decision of the OAL, as modified herein with respect to penalty, is adopted as the final decision in this matter. Respondent is hereby dismissed from his tenured teaching position with the School District of the Township of Lakewood. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: June 3, 2010

Date of Mailing: June 3, 2010

[4] 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)