

#488-10 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :
HEARING OF LOUIS MELILLO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY :

SYNOPSIS

The School District of the City of Elizabeth brought tenure charges of conduct unbecoming against respondent – a tenured custodian – alleging inappropriate sexual advances, sexual remarks, and sexual contact with students employed by the district during a summer work program. Petitioner sought respondent’s dismissal from employment. Respondent denied all charges, contending that the students fabricated their stories in a scheme to get him fired because he had caught them derelict in their work duties, had sent them home for not doing their work, and had their pay reduced.

The ALJ dismissed three of six tenure charges following the Board’s presentation of the case, and – in her Initial Decision – found, *inter alia*, that: the testimony of the minor alleged victim witnesses was inconsistent and not credible; the students’ various written statements differed from each other and varied from their testimony in the OAL; accordingly, the Board did not prove by a preponderance of the credible and legally competent evidence that respondent engaged in conduct unbecoming a custodian. Therefore, the ALJ dismissed the remaining tenure charges against respondent.

The Commissioner concurred with the ALJ that the Board did not establish that respondent is guilty of unbecoming conduct, finding that all of the facts related to the alleged unbecoming conduct in the within matter are in dispute, making witness testimony and credibility the only means available to make a determination as to the veracity of the charges. The Commissioner found no basis in the record to reject the ALJ’s recitations of testimony or her determinations of witness credibility. The Commissioner also found that the record does not provide information necessary to make the requisite factual determinations with respect to the appropriate back pay and benefits to be afforded to the respondent in light of the Board’s failure to prove the tenure charges. Accordingly, the Commissioner dismissed the tenure charges, but remanded the matter to the OAL for such proceedings as are necessary to fully resolve the parties’ dispute concerning back pay and emoluments.

<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>

November 4, 2010

OAL DKT. NO. EDU 11502-04
AGENCY DKT NO. 363-10/04

IN THE MATTER OF THE TENURE :
HEARING OF LOUIS MELILLO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY :

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

This case involves tenure charges brought by the Board against the respondent Louis Melillo, a tenured custodian in the Elizabeth City School District. The Board charged the respondent with six counts of unbecoming conduct in which it alleged that the respondent made sexual advances, sexual remarks and inappropriate sexual contact with students during the summer program. The Administrative Law Judge ("ALJ") dismissed charges four, five and six following the presentation of the Board's case. In her Initial Decision the ALJ found that the Board did not prove by a preponderance of the credible evidence that respondent engaged in conduct unbecoming a custodian by making sexually explicit remarks and behaving in an inappropriate manner with the summer student maintenance workers, and therefore dismissed charges one, two and three.

The Board submitted exceptions to support the contention that the ALJ erroneously found that the Board did not prove charges one, two and three against the respondent. Initially, the Board contends that there were glaring procedural errors made by the

ALJ that warrant either the reversal of the ALJ's recommendation or in the alternative a remand to the OAL for a fair, unbiased and impartial hearing. For example, the Board contends that: the ALJ failed to issue an order on the Board's Motion for Ameliorative Intervention; the ALJ failed to provide a ruling on the admissibility of three of respondent's exhibits; and that the ALJ read the deposition transcript of Jay Mills, a witness for respondent who ultimately testified at the hearing.

The Board also provided numerous examples in which it takes exception to the ALJ's summary of witness testimony. The Board maintains that the testimony of the Board witnesses was generally consistent concerning the pivotal conduct demonstrated by the respondent. Given the history of the case, which included a criminal trial, and a division of Youth and Family Services' investigation, coupled with the fact that 5 years had passed from the time of the incidents till the tenure hearing, and the age of the students at the time of the incidents, the Board suggests that it is not surprising that not all of the statements are entirely consistent with regard to date, time and precise description. The Board also asserts in its exceptions that the respondent's witnesses were not credible.¹

In his exceptions, the respondent urges the adoption of the Initial Decision, asserting that the Board failed to sustain its burden of proving that the respondent behaved in a manner demonstrating conduct unbecoming a custodian. Respondent also takes exception to the ALJ's failure to address the remedy issues raised by the Respondent in his post-hearing submission. The respondent's exceptions substantially reiterate the substance of his post-hearing

¹ The Board also requests that the Commissioner overturn the ALJ's February 9, 2009 Order awarding sanctions in the amount of \$4,725.00 against the Board. The Board originally filed a request for Interlocutory Review with the Director of the OAL seeking to have the order of sanctions overturned. It should be noted that in the February 23, 2009 Order denying the Board's request for Interlocutory Review, ALJ Laura Sanders, Director of the OAL, stated "[t]he parties may seek review of this issue at the conclusion of the hearing by filing exceptions pertaining to this matter with me as Director of the Office of Administrative Law." The Commissioner does not have jurisdiction to assess or deny sanctions.

submission where he details with great particularity his entitlements relating to his required back pay, salary increments and accrued benefits.

In reply to the Board's exceptions, the respondent contends that the procedural arguments made by the Board in its exceptions do not serve as a legitimate legal basis to reverse the ALJ's recommended dismissal of the tenure charges. The respondent points out that many of the procedural arguments made by the Board are not properly before the Commissioner or were generally incorrect. In reply, the respondent also provides a counter to the Board's exceptions, and again advances his position detailed in its post-hearing submission urging the adoption of the Initial Decision.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL between June 21, 2007 and March 11, 2010, the Commissioner concurs with the ALJ that the Board has not established that respondent is guilty of unbecoming conduct. The Commissioner finds the Board's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and evidence in concluding that the record did not support the Board's charges. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony.

In this regard, the clear and unequivocal standard governing the Commissioner's review is:

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)].

In this case, all of the facts related to the alleged unbecoming conduct were in dispute; as such, witness testimony and ultimate credibility is the only means available to make a

determination as to the veracity of the charges. Based on her overall assessment of the minor alleged victim witnesses, the ALJ found that the minors “were less-than truthful and were motivated by their own self-interest and immaturity.” Notwithstanding the Board’s contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ’s recitations of testimony or her determinations of witness credibility.

The Commissioner also finds that the current record does not allow the Commissioner to make the requisite factual determinations with respect to the appropriate back pay and benefits to be afforded to the respondent in light of the Board’s failure to prove the tenure charges. Despite the fact that the respondent raised the issues regarding his entitlement to full back pay and emoluments in his post-hearing submissions, and the Board addressed same in its post hearing brief, the ALJ left the resolution of these issues unaddressed.

The Initial Decision of the OAL is adopted as to the ALJ’s finding that the Board did not prove by a preponderance of the credible evidence that the respondent engaged in conduct unbecoming a custodian. Accordingly, the tenure charges are hereby dismissed. This matter, however, is remanded to the OAL for such proceedings as are necessary to fully resolve the parties’ disputes concerning back pay and emoluments.

IT IS SO ORDERED.²

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 4, 2010

Date of Mailing: November 12, 2010

² Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.