

#141-11 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :
HEARING OF JAMES DOERBECKER, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF EDISON, MIDDLESEX COUNTY. :

SYNOPSIS

The petitioning Board certified charges of conduct unbecoming and insubordination against respondent – a tenured custodian – for allegedly engaging in inappropriate sexually harassing conduct toward his coworkers. Respondent contended that the charges against him were fabricated in a scheme to get him fired, and were not true. The Board sought to dismiss petitioner from his tenured position.

The ALJ found, *inter alia*, that: the Board’s witnesses were completely credible and truthful, and that respondent’s offensive behavior and inappropriate workplace conduct had become so blatant that his coworkers were unable to withstand it any longer; respondent’s testimony was not credible, convincing or reliable; the Board sustained its burden of proving that respondent’s conduct was sexually harassing and inappropriate; and the Board further sustained its burden to prove that respondent was insubordinate in disregarding administrative directives and in flagrantly violating the Board’s sexual harassment policy. Accordingly, the ALJ affirmed the charges of conduct unbecoming a custodian and insubordination, but made no penalty recommendation in the Initial Decision.

Upon independent review of the entire record in this matter, the Commissioner concurred with the ALJ’s findings, adopted the Initial Decision of the OAL as to the ALJ’s finding that respondent is guilty of both conduct unbecoming and insubordination, and dismissed the respondent from his tenured position.

<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 1, 2011

OAL DKT. NO. EDU 03525-10
AGENCY DKT NO. 53-3/10

IN THE MATTER OF THE TENURE :
HEARING OF JAMES DOERBECKER, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF EDISON, MIDDLESEX COUNTY. :

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

The respondent's exceptions substantially reiterate the substance of his post-hearing submission at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously sustained the Board's charges. Respondent asserts that the ALJ erred in finding respondent guilty of unbecoming conduct because he did not engage in sexually harassing behavior toward his coworkers. Further, the respondent contends that the Initial Decision is void of any legal analysis as to why and how the ALJ found the Board's witnesses to be credible, but the respondent's testimony to be unconvincing. The respondent maintains that the Board's witnesses were not credible because they testified to different versions of the alleged incidents. The respondent also argues that the Board failed to prove that he was guilty of insubordination because he followed Dr. Bank's directive to cease and desist from engaging in any alleged inappropriate behavior.

In his exceptions, respondent also points out that the ALJ did not recommend the appropriate penalty to be imposed if the tenure charges are sustained by the Commissioner. The

Respondent argues that the penalty of removal and termination from his tenured position is too severe and disproportionate to the alleged charges. Respondent emphasizes the fact that the evidence showed that all of the custodians joked around and used foul language; he has been an employee of the Board since 1993; and he has had no prior incidents. Therefore, the respondent argues that a lesser penalty would be appropriate if the tenure charges are sustained.

The Board's reply also reiterates the positions advanced in its post-hearing submission at the OAL urging the adoption of the Initial Decision. In its reply, the Board stressed respondent's pattern of egregious conduct that occurred during the 2008-2009 school year and during the summer of 2009, citing examples of testimony that detailed respondent's inappropriate, sexually harassing conduct toward his co-workers. The Board also argues that the respondent's exceptions set forth a skewed recital of the hearing testimony, noting that the 18 Board witnesses were credible and all shared a common core in their factual allegations. With respect to the appropriate penalty, the Board argues that the nature and degree of respondent's unbecoming conduct and insubordination warrants dismissal from his tenured position of custodian. Despite the length of his employment, the Board argues that respondent's behavior deteriorated to the point where he was unable or unwilling to follow the directives of his supervisors to cease and desist from engaging in any and all inappropriate behavior. Finally, the Board contends that the evidence demonstrates that the respondent is unable to perform his job functions with even a modicum of the requisite demeanor appropriate in a school setting.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL between August 20, 2010 and October 13, 2010, the Commissioner concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct and insubordination.

The Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by her in weighing the testimony and evidence, and in concluding that the record overwhelmingly supported the Board's charges. Based on her overall assessment of the Board's witnesses, the ALJ found that they were "persuasive, consistent and credible." On the other hand, the ALJ found the "respondent's testimony to be entirely unconvincing and completely unreliable." Notwithstanding respondent's contentions to the contrary, the Commissioner finds no basis in the record – which includes transcripts of six days of hearing – to reject either the ALJ's recitations of testimony or her determinations of witness credibility. 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)*].

The Commissioner also finds that the ALJ's fact-finding analysis and conclusions as to the truth of the Board's allegations and the characterization of respondent's behavior as insubordinate and unbecoming conduct to be fully supported by the record and consistent with applicable law.

Turning to the appropriate penalty to be imposed in this matter,¹ the Commissioner is mindful that the "[f]actors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the individual's

¹ The ALJ determined that the Board "more than sustained its burden of proving by a preponderance of the competent and credible evidence that respondent engaged in conduct absolutely unbecoming a custodian" and that the respondent was insubordinate; however, the ALJ did not include a recommended penalty in the Initial Decision.

prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring.” *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner October 14, 1997, slip. op. at 32, citing *In re Hearing of Ostergren, Franklin School District*, 1966 S.L.D. 185; *In re Hearing of Kittell, Little Silver School District*, 1972 S.L.D. 535, 541; *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967).

The Commissioner recognizes that the charges in this matter are serious in nature and finds that the respondent’s inappropriate sexually harassing conduct necessitates the termination of his tenured position. The respondent’s unbecoming conduct and insubordination was not the result of an isolated incident, but rather a pattern of egregious conduct that escalated during the summer of 2009, causing a hostile, uncomfortable environment at the school.² Importantly, respondent’s inexcusable behavior occurred in the school building while children were present, putting them at risk of exposure to the sexually harassing and offensive conduct. The record also demonstrates that respondent has been unwilling or unable to improve his inappropriate behavior for the betterment of the school environment. His responses to the charges against him range from complete denial of the alleged behavior to allegations that such behavior was inconsequential in nature and/or provoked by others, a position which is completely inconsistent with the testimonial evidence. Finally, the Commissioner does not find that the record before him provides any indication that the respondent will improve his behavior, or adhere to the mandated policies regarding sexual harassment.

² The details and history of respondent’s inappropriate behavior toward his coworkers are extensively outlined in the Initial Decision and need not be repeated here.

Accordingly, the Initial Decision of the OAL is adopted as to the ALJ's finding that the respondent is guilty of both conduct unbecoming a custodian and insubordination. Respondent is hereby dismissed from his tenured position with the Edison Township School District.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 1, 2011

Date of Mailing: April 1, 2011

³ 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*)