

#65-13 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :
HEARING OF AMANDA EISENHOUR, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF HOWELL, MONMOUTH COUNTY. :

SYNOPSIS

The Board certified tenure charges of conduct unbecoming against Amanda Eisenhour – a tenured special education teacher in petitioner’s school district – for alleged abusive behavior towards students and for failure to follow procedures set forth by the New Jersey Department of Education (DOE) for security during Alternate Proficiency Assessment (APA) testing. The physical abuse charge stemmed from a single incident on February 2, 2011, when respondent allegedly used undo force with a special education student who dropped to the floor upon entering school from his bus, and refused to get up. The APA-related charge resulted from respondent’s alleged violation of testing protocols, which caused inconsistencies to be included in the APA portfolio binders. The petitioning Board sought removal of respondent from her tenured position.

The ALJ found, *inter alia*, that: during the February 2011 incident, respondent yanked the arm of one of her students in an action witnessed by three persons; the force utilized by respondent in this incident was in excess of what was deemed appropriate to raise a student from the floor; there is no proof of other allegations of improper conduct in the way respondent treated students, aside from hearsay; innuendo and hearsay are not sufficient on their own to prove improper conduct unless they corroborate competent proof in the record; regarding the APA charge, respondent acknowledged utilizing the test materials to assist her students and concurred that she made erasures to the testing sheets, both of which breached DOE testing protocol; and although the tests were not due in final form for another two weeks when they were reviewed by DOE staff, the violation of the testing protocol constitutes conduct unbecoming a teacher. The ALJ concluded that: the Board has proven that respondent engaged in one incident of conduct unbecoming for using excessive force with a student on February 2, 2011, and for breaching APA testing protocols; and under the circumstances of this matter, removal of respondent from her tenured position is an unduly harsh penalty. Accordingly, the ALJ ordered that the appropriate penalty is the loss of respondent’s salary increments for two years, suspension without pay for the 120 days following the certification of tenure charges pursuant to *N.J.S.A. 18A:6-14*, plus an additional suspension without pay for 150 days. The ALJ further ordered that respondent be provided with appropriate assistance and training.

Upon full consideration and review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter with modification. The Commissioner increased the additional suspension without pay to 360 days and ordered that the respondent receive, at her own cost and expense, the appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA.

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.
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February 11, 2013

OAL DKT. NO. EDU 1384-12
AGENCY DKT NO. 14-1/12

IN THE MATTER OF THE TENURE :
HEARING OF AMANDA EISENHOUR, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF HOWELL, MONMOUTH 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 Board's reply to respondent's exceptions.

This case involves tenure charges brought by the Board against respondent Amanda Eisenhour, a special education teacher in the Howell Township School District. The Board charged the respondent with unbecoming conduct for exhibiting abusive behavior involving improper physical contact towards students, and for failing to follow the appropriate security measures in connection with Alternate Proficiency Assessment (APA) testing. The Administrative Law Judge ("ALJ") found that the respondent was guilty of unbecoming conduct, and recommended: loss of respondent's increment for two year; forfeiture of the 120 days of pay withheld pursuant to *N.J.S.A. 18A:6-14* following the certification of tenure charges; and an additional 150 day suspension without pay. The ALJ also recommended that the respondent be provided with the appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA.

The respondent maintains that the penalty recommended by the ALJ is excessive and that a lesser penalty is appropriate in light of the relevant case law. The respondent argues

that the conduct proven in this case is significantly different than the allegations of physical abuse set forth in the tenure charges and, specifically, there was no finding of a continued pattern of inappropriate behavior. Rather, there was a finding of one incident where the respondent yanked a student, E.F., to get him to stand. Additionally, the respondent points out that there was no finding that she breached security measures for the APA as alleged in the charges. In her exceptions, respondent cites cases where she believes the teacher's conduct was more egregious yet they suffered lesser penalties. As a result, the respondent maintains that the recommended penalty is out of line and must be reduced.

The respondent also contends that Charge Two – which alleged that the respondent breached security measures – must be dismissed because it was only proven that the respondent used the test as a teaching aide, which amounts to an inefficiency charge. Respondent goes on to argue that an inefficiency tenure charge requires a written notice to the individual and the implementation of a modified professional improvement plan allowing the individual 90 days to address the specific alleged inefficiencies before formal tenure charges are filed. The respondent asserts that since the Board did not comply with the 90-day requirement, Charge Two must be dismissed.

In its exceptions, the Board contends that the ALJ erred in not finding that other force used by the respondent to move the student – specifically pulling back his fingers and kicking the back of his leg – was excessive. The Board contends that each witness viewed the incident from different vantage points and the fact that not all of the witnesses saw all of the same actions is not inconsistent but instead is to be expected, given how the events unfolded. As such, the testimony of the witnesses who saw improper finger bending and kicks should be considered credible. Similarly, the Board argues that the ALJ should not have given the most

weight to the testimony of Eileen Kinghorn, the teaching assistant who assisted the respondent in dealing with E.F. The Board points out that during cross examination, Kinghorn testified that she did not see what the respondent was doing during the course of the events. Finally, the Board urges the Commissioner to adopt the ALJ's determination that the respondent engaged in conduct unbecoming a teaching staff member, but maintains that the respondent's unbecoming conduct warrants the dismissal of respondent from her tenured teaching position with the Howell Township School District.

In reply, the respondent argues that the Board's exceptions relating to the ALJ's credibility determinations should be rejected. The respondent points out that under *N.J.S.A. 52:14B-10(c)*, the agency head may not reject or modify findings of fact or credibility determinations unless it is found that they are arbitrary, capricious or are not supported by the record. The respondent contends that the Board did not argue that the findings were arbitrary capricious or unsupported by the record, but instead the Board simply urged the Commissioner to make different findings.

Upon a comprehensive review of the record in this matter, which included the transcripts of the hearing conducted at the OAL on May 8- 9, 2012, the Commissioner concurs with the ALJ – for the reasons discussed on page 31-39 of the Initial Decision – that the Board has established that respondent is guilty of unbecoming conduct. The Commissioner finds the ALJ's conclusions as to the truth of the Board's allegations and the characterization of respondent's behavior as unbecoming conduct to be fully supported by the record and consistent with applicable law.

Moreover, the ALJ had the opportunity to assess the credibility of the witnesses that appeared before her and made findings of fact based upon their testimony. After hearing the

testimony of all of the staff who witnessed the incident with E.F. on February 2, 2011, the ALJ found that each witness related something different and the testimony was not consistent. The ALJ further gave the most weight to the testimony of Kinghorn, who assisted the respondent in getting E.F. into the classroom. Based on all of the evidence, the ALJ determined that the respondent used force that was in excess of what is deemed appropriate to raise a child from the floor, but it was not proven that the respondent pulled back the child's fingers or kicked E.F. Despite the Board's assertions 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. It is well established that the Commissioner must defer to the credibility findings of the ALJ unless these prove to be 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 respondent's assertion that Charge Two must be dismissed because it essentially amounted to an inefficiency charge to be unpersuasive.¹ The Board charged the respondent with conduct unbecoming for failing to follow procedures set by the Department of Education for security during APA testing, breaching security measures and causing inconsistencies to be included in the portfolio binders. Simply because the ALJ did not find that the respondent breached any security measures but rather determined that the respondent breached the protocols by using the testing materials to assist her students, does not mean that her behavior falls outside the scope of unbecoming conduct. Further, the ALJ's finding with respect to Charge Two does not automatically convert the charge into an inefficiency charge. Charge Two was based on allegations involving a discrete incident of conduct associated with the APA testing which falls into the realm of conduct unbecoming a

¹ Respondent concedes in her exceptions that she did not raise this argument below. It should be noted that pursuant to *N.J.A.C. 1:1-18.4(c)*, evidence not presented below shall not be raised for the first time in an exception.

teaching staff member, as opposed to an allegation of deficient skills or the failure to perform teaching duties that is generally associated with an inefficiency charge. *See, Board of Educ. of Bordentown Regional School District v. Patricia Flynn*, EDU 4205-99, Initial Decision (February 15, 2000), adopted Comm'r (March 10, 2000).

Turning to the appropriate penalty, it is well established that the factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's 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 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). Recognizing that the charges in this matter are serious in nature, the Commissioner finds that the penalty recommended by the ALJ is not sufficient to impress upon respondent the seriousness of her errors in judgment displayed in this matter; inappropriate physical force cannot be tolerated under any circumstances, and breach of testing protocols by tampering with assessments is extremely serious.

Therefore, the respondent's increment shall be withheld for two years and – pursuant to N.J.S.A. 18A:6-14 – the respondent is suspended without pay for 120 days following the certification of tenure charges; respondent shall also be suspended for an additional 360 days without pay. Furthermore, the respondent shall receive, at her own cost and expense to the extent there is same, the appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA. Any future deviations from professional conduct will result in more severe sanctions.

Accordingly, the Initial Decision of the OAL, as modified above, is adopted as the final decision in this matter.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: February 11, 2013

Date of Mailing: February 12, 2013

² 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*)