

IN THE MATTER OF THE TENURE :
HEARING OF JEFF SIMON, : COMMISSIONER OF EDUCATION
FREEHOLD REGIONAL SCHOOL : DECISION
DISTRICT, MONMOUTH COUNTY :
_____ :

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and other just cause against respondent Jeff Simon – a tenured principal at Manalapan High School – for violations of policies, regulations and procedures. The charges alleged, *inter alia*: the mishandling of student activity funds and cash receipts from the school play and football games; and violations of policy regarding fire drills. The Board sought dismissal of respondent from his tenured employment.

The ALJ found, *inter alia*, that: respondent’s testimony lacked candor and was not consistent with that of other witnesses; the petitioning Board’s witnesses were far more credible than the respondent; respondent violated district policy by improperly requesting and allowing monies to be taken out in cash to pay security guards; respondent mishandled proceeds from the school play by failing to properly account for them and keep them in a safe; respondent improperly transferred funds from the yearbook account to pay for baseball championship rings; respondent improperly failed to report missing funds from football game proceeds and then covered up the shortage; respondent violated policy by conducting rapid dismissal fire drills instead of traditional fire drills, and also failed to conduct the appropriate number of statutorily required monthly fire drills; respondent allowed pizza sales to take place during a rapid dismissal fire drill, and allowed staff to remain in the building during another rapid dismissal fire drill, in violation of district policy. The ALJ concluded that although the respondent’s acts were not premeditated or done with intent to harm, they were misguided and inappropriate for an educator in a leadership position, and constituted misconduct. Further, the ALJ concluded that respondent’s repeated pattern of failing to adhere to policy, taking his own course of action, and failing to recognize and admit that his behavior was wrong suggests that respondent would continue to ignore policy if he were to remain in his leadership position as principal. Accordingly, the ALJ ordered that respondent be removed from his tenured position at Manalapan High School.

Upon a thorough and independent review of the record, including transcripts of the nine days of hearing at the OAL, the Commissioner concurred with the ALJ’s credibility determinations and findings – with the exception of his finding on Charge 3, which was effectively upheld in the penalty portion of the recommended decision. Accordingly, the Initial Decision was adopted as the final decision in this matter, and a copy of this decision was transmitted to the State Board of Examiners for action against respondent’s certificate as that body deems appropriate.

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.

March 7, 2013

IN THE MATTER OF THE TENURE :
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FREEHOLD REGIONAL SCHOOL : DECISION
DISTRICT, MONMOUTH COUNTY :
_____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and reply exceptions of respondent and the District – submitted in accordance with the provisions of *N.J.A.C. 1:1-18.4* – were fully considered by the Commissioner in reaching his determination herein.¹

This matter involves tenure charges of unbecoming conduct, insubordination², and/or other just cause brought by the District against respondent, who was the principal at Manalapan High School. In Charge One, the District advances five counts in which they allege the respondent engaged in “numerous violations of policies, regulations and procedures regarding the handling of student activity funds in a manner that is deceptive, dishonest, negligent and, perhaps, criminal in nature” and constitutes unbecoming conduct and/or other just cause for dismissal. In Charge Two, the District advances seven counts in which they charge

¹ The parties are advised that it is only necessary to submit *one* copy of exceptions to the Commissioner for his review (unless exceptions are sent by facsimile – then one hard copy should be filed by regular mail). It is also unnecessary for the parties to submit with their exceptions a copy of the Initial Decision or briefs filed before the Administrative Law Judge (ALJ) below as these are all included in the record transmitted to the Commissioner from the OAL. Additionally, before making copies of voluminous hearing transcripts, the parties would be well served to check with the ALJ to ascertain whether these are also contained in the record sent to the Commissioner by the OAL, as was the case here.

² The ALJ granted respondent’s motion to dismiss the charge of insubordination at the July 10, 2012 hearing.

respondent “engaged in a course of misconduct which did, in fact, or could have imperiled the health, safety and well-being of the thousands of students and employees entrusted to his supervision and care.” This charge relates to respondent’s supervision of fire drills and decorations in a girls’ bathroom. In Charge Three, the District asserts that Charge One and Charge Two, jointly and severally, demonstrate respondent’s unfitness to serve in a position of educational leadership warranting his dismissal.

The District’s exceptions first charge that the Administrative Law Judge (ALJ) erred in concluding that the District has not sustained its burden of proving that respondent is unfit to perform his duties as principal as alleged in Charge 3. It points out that the essence of Charge 3 is that – as a result of the actions/inactions attributed to respondent in Charges 1 and 2 – respondent has demonstrated his unfitness to serve in a position of educational leadership in the District. Although finding the respondent guilty on virtually every Count in Charges 1 and 2, the ALJ inexplicably dismissed Charge 3. With the ALJ’s findings regarding the negative pattern of unbecoming conduct displayed by respondent in Charges 1 and 2, respondent’s unfitness to serve should have flowed from these findings. The District maintains that the ALJ’s decision to separate his findings with respect to respondent’s negative pattern of unbecoming conduct from his determination regarding respondent’s fitness to continue to serve in his position is totally unsupported by legal authority.

The remainder of the District’s exceptions 1) disagree with the ALJ that lack of injury constitutes a mitigating factor in determining the penalty to be meted out to respondent; 2) disagree with his conclusion that the District didn’t meet its burden of proof on the charge dealing with the authorization of an extra duty assignment and payment to Lagomarsino; 3) charge that the ALJ erred in dismissing the charge dealing with the holiday bathroom

decorations; and 4) maintain that he erroneously concluded Robert Malanga was not a credible witness.

Respondent's exceptions charge that the ALJ in this matter did not conduct a fair hearing: 1) he ignored testimony favorable to the respondent while accepting without question that of the District's witnesses, despite the fact that such testimony was replete with inconsistencies and contrary to documentary evidence; 2) he improperly acted as an advocate for the District rather than a trier of fact by repeatedly refusing to allow respondent to elicit testimony or present evidence which respondent contends would have negatively impacted the credibility of all the District's witnesses; 3) he chose to ignore what did not fit into his findings and pull out of context what did; and 4) his recommended penalty of termination was excessive to the extreme, inequitable, inconsistent with precedent and unsupportable.

Upon a comprehensive review of the entire record in this matter – which it is noted contained transcripts of the nine days of hearing conducted at the OAL³ – the Commissioner concurs with the ALJ that the District has established that respondent is guilty of unbecoming conduct warranting removal from his tenured position.⁴

In so concluding, the Commissioner is cognizant that – because essential facts were at issue – the outcome of this matter with regard to the proving of the charges turns almost exclusively on the credibility of the various witnesses. Based on his overall assessment of the District's 20 witnesses, the ALJ found there were no significant inconsistencies or credibility

³ The transcripts received from the OAL reflect that the hearing in this matter was conducted on July 3, 2012, August 16, 2012, September 11, 2012, October 10, 2012, October 16, 2012, November 20, 2012, December 4, 2012, December 11, 2012, and December 19, 2012.

⁴ It is noted that occasionally in the Initial Decision the respondent is mistakenly referred to as “appellant”.

issues with 19 of them.⁵ On the other hand, the ALJ found major credibility issues with respondent's testimony. This being the case – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before him, and having made findings of fact based on their testimony – the standard governing the Commissioner's review is clear and unequivocal:

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)*).

Upon an exhaustive review of the transcripts of the nine days of hearing in this matter, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that he carefully measured its relevance to the charges, conflicts, inconsistencies, potential biases, and the plausibility of its content in deciding which testimony to credit. The Commissioner also finds the ALJ's fact-finding analysis and conclusions as to the truth of the District's allegations and the characterization of respondent's behavior as unbecoming conduct to be fully supported by the record and consistent with applicable law.

The Commissioner, therefore, finds – for the reasons presented by the ALJ in his decision – that the District has sustained its burden of proving the following charges of unbecoming conduct against respondent by a preponderance of the competent, relevant and credible evidence:

Charge 1, Count 1 – (Receiving monies for security guard pay)
Respondent violated District policy by improperly requesting and allowing monies to be taken out in cash to pay the security guards. (Initial Decision at 33-34)

⁵ The ALJ, however, did not find the testimony of the District's expert witness – fire protection engineer Robert Malanga – to be persuasive or credible. (See Initial Decision at 33)

Charge 1, Count 3 – (Missing proceeds from the High School Play)

Respondent violated District policy by mishandling the proceeds from the play by failing to put them in a safe and not properly accounting for them. (Initial Decision at 36-37)

Charge 1, Count 4 – (Transfer of student activity funds from the Yearbook account to purchase championship rings for the baseball team)

Respondent violated District policy by improperly transferring funds from the Yearbook account to pay for baseball championship rings. (Initial Decision at 37-38)

Charge 1, Count 5 – (Missing football game proceeds and cover-up)

\$120 was missing from the game proceeds. Respondent did not report it, and then covered it up by coming up with a plan to replace it without anyone finding out. Therefore, respondent improperly failed to report and then covered up the shortage reported by a staff member. (Initial Decision at 38)

Charge 2, Counts 1 & 2 – (Violations of policy during fire drills)

Respondent violated District policy by conducting rapid dismissal fire drills, and failed to conduct the appropriate number of statutorily required fire drills for September 2009, September 2010, March 2011, October 2011 and November 2011. (Initial Decision at 38-42)

Charge 2, Counts 3 & 4 – (Fire drills conducted during a Cancer Awareness Club pizza sale)

Respondent violated policy by allowing the pizza sales to take place during the rapid dismissal fire drill. (Initial Decision at 42-43)

Charge 2, Count 5 – (Allowed staff to remain in the building during a fire drill)

Respondent violated policy by allowing staff to remain in the building during the rapid dismissal fire drill. (Initial Decision at 44-45)

The Commissioner further concurs with the ALJ – for the reasons detailed in his decision – that the District has failed to sustain its burden of proof on Charge 1, Count 2 (Authorizing extra duty assignment and payment) (Initial Decision at 35-36), and Charge 2, Count 7 (Decorating a girls' lavatory with electrical devices such as speakers and holiday lights, in close proximity to water sources) (Initial Decision at 45-46). As to Charge 3 – the Commissioner rejects the ALJ's analysis on this charge (Initial Decision at 49). On its face and effectively recognized in the District's exceptions, rather than being a stand-alone charge, Charge 3 instead goes to the

appropriate penalty to be imposed if the District's allegations in Charge 1 & 2 are sustained, *i.e.*, deals with respondent's fitness to continue service in his position in light of the charges in Count 1 & 2.⁶

Turning to the appropriate penalty to be imposed in this matter, 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 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. 535, 541; *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967).

The Commissioner concludes that the entirety of the record supports the ALJ's full and fair evaluation of these requisite factors as stated here:

The respondent has served as a principal for five years at MHS. He received outstanding evaluations on November 29, 2008, February 9, 2008, and April 23, 2010. However, the May 31, 2011 evaluation withheld his increment and notes they are investigating the possibility of further action. Aside from withholding the increment, there was no evidence of any disciplinary actions against the respondent.

The significant aggravating factors are the respondent's (1) repeated failure to follow District policy, (2) creating his own policy for the rapid dismissal drills instead of discussing the policy with the District, (3) his conduct involving cash and accounting receipts and (4) advising a subordinate to cover up missing money. Policies are implemented after following a specific procedure and are to be followed. The failure of the principal to follow district policy cannot be tolerated, and sets a poor example [for] subordinates and students. Respondent

⁶ In recommending his penalty in this matter (see below) the ALJ fully and fairly considered all of the positive and negative factors which would appropriately be evaluated in answering this question and concluded that, in balancing of the relevant considerations in this regard, respondent was not fit to continue service in his educational leadership position.

also instructed a subordinate to cover up missing football funds and mishandled the play proceeds.

There are also several mitigating factors. There is no evidence that any of the respondent's actions caused injury to anyone or benefited himself. His actions were examples of poor judgment. There is no evidence that he purposely intended to cause any harm to the students or staff.

Respondent also asserts that he was never given any warnings, notices, or suggestions that anything he did was wrong. This argument has some merit with respect to the rapid dismissal drills, since they had taken place for some time, and the District certainly had the opportunity to discuss their concerns. However, the arguments have no merit with respect to the cover up of funds or mishandling the play proceeds. These actions were not an interpretation of policy and his actions were clearly contrary to existing policy.

Due to a repeated pattern of not following policy, and taking his own course of action, there are significant concerns [regarding whether] the respondent understands his actions were wrong and will not [repeat them]. At no time did he indicate that he was wrong. Instead, he testified that the witnesses were biased and had motives to have him removed, or that the District policy was wrong and that his policy was correct. He made no attempt to discuss any policy concerns with the administration, but instead formed his own policy. He did not read several key and crucial policies in this case.

Based on the record, I find and conclude that the respondent if left in this position would continue to ignore policy and do what he wanted.

There can be no justification for not reporting the missing \$120 in proceeds from the football game and then devising a method to recoup this money so that no one would find out. No matter how small the amount, this type of behavior can never be permitted. Nor can there be any justification for leaving the play proceeds in his office and unaccounted for a few days.

For these reasons, removal of the respondent is warranted. It does not appear that he understands his actions, and they would likely reoccur if he is returned to his position. (Initial Decision at 50-52)

Under these circumstances, the Commissioner finds and concludes that respondent is not fit to discharge the duties and functions of his position as principal at Manalapan High School and he, therefore, cannot entertain the prospect of respondent's return to the District and the resultant potential for the perpetration of a disruptive educational environment.

Accordingly, the recommended decision of the OAL – with the exception of the ALJ’s finding on Charge 3 on page 49, as this charge was effectively upheld in the penalty portion of the recommended decision – is adopted for the reasons detailed therein. Respondent is hereby dismissed from his tenured principal position with the Freehold Regional School District. A copy of this decision will be transmitted to the State Board of Examiners for action against respondent’s certificate as that body deems appropriate.

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2013

Date of Mailing: March 8, 2013

⁷ 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)