124-00

IN THE MATTER OF THE TENURE :

HEARING OF RANDALL DUNHAM, :

SCHOOL DISTRICT OF POINT : COMMISSIONER OF EDUCATION

PLEASANT BOROUGH, OCEAN : DECISION

COUNTY. :

_____:

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent middle school teacher for allegedly leaving vulgar and obscene messages on an answering machine for two pupils in the school system, M.L. and D.L.

In light of the record and the testimony of witnesses, the ALJ found and concluded that the Board had proven the charge of unbecoming conduct. Respondent admitted making the telephone calls and admitted the content of each call, blaming his behavior on a drug interaction with a small amount of alcohol. The ALJ questioned respondent's veracity as to the quantity of alcohol he consumed on the date of the incident and found that his defenses lacked substance. Citing *In re Sammons* and *Redcay*, the ALJ noted that respondent engaged in inexcusable behavior for a teacher and the incident was sufficiently flagrant to warrant his dismissal from his teaching position. The ALJ ordered his removal from his position as of the date of the final decision in this matter.

The Commissioner concurred with the ALJ that respondent's behavior was sufficiently flagrant to warrant dismissal from his teaching position. Even after considering respondent's lengthy, apparently unblemished record with the Board, along with his proffered defenses, the Commissioner found these factors were greatly outweighed by the seriousness of respondent's admitted conduct. The Commissioner ordered respondent dismissed from his teaching position and transmitted the matter to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificate.

April 17, 2000

OAL DKT. NO. EDU 4937-99
AGENCY DKT. NO. 173-6/99

IN THE MATTER OF THE TENURE	:	
HEARING OF RANDALL DUNHAM,	:	
SCHOOL DISTRICT OF POINT	:	COMMISSIONER OF EDUCATION
PLEASANT BOROUGH, OCEAN	:	DECISION
COUNTY.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were submitted in accordance with the directives of *N.J.A.C.* 1:1-18.4. The Board, for good cause shown, requested and was granted an extension of time within which to submit reply exceptions, and such submission was filed in conformance with the adjusted timelines. The parties' exception filings were fully considered by the Commissioner in making his determination herein.

Respondent's exceptions[1] object to the Administrative Law Judge's (ALJ) finding him guilty of unbecoming conduct, charging that in so concluding the ALJ failed to consider and analyze any of respondent's advanced defenses and, moreover, neglected to even find these defenses "mitigating circumstances" in fashioning an appropriate penalty herein. (Respondent's Exceptions and Brief Submitted in Support of Exceptions, at 30) Initially, in this regard, respondent charges that the ALJ failed to consider and properly weigh hearing testimony establishing that respondent was a "recovering alcoholic" and that, due to his ingestion of four

[1]It is noted that the vast majority of respondent's 72-page exception submission is essentially a verbatim reiteration of his Post-hearing Brief advanced before the ALJ and fully addressed in the Initial Decision.

prescription drugs and alcohol, he was in a "highly intoxicated state" during the period on April 11, 1999 when he made the telephone calls at issue herein. (*Id.* at 31) As a consequence of this condition, respondent maintains, he was incapable of formulating any "intent" to involve D. and N. in his marital difficulties. (*Id.* at 33) It is "[in]explicable," respondent contends, that the ALJ would ignore "intent" in evaluating his conduct on this day, particularly in light of his "alcoholism disability" and the New Jersey Supreme Court's holding that "alcoholism is a handicap protected, in part, by the New Jersey State Law Against Discrimination***." (*Id.* at 34) Clearly, he argues, the telephone calls he made were solely attributable to his alcoholism disability and the matrimonial-related stress factors that he faced during that time period. (*Id.* at 35) Respondent urges that "had the Administrative Law Judge properly evaluated the proffered facts in this matter a determination should have been made that [respondent] did not possess the capacity during the operative time period on April 11th to engage in any 'conduct unbecoming a teacher.'" (*Id.*)

Even assuming that a finding of unbecoming conduct could be sustained, respondent contends, the ALJ again erred by failing to accord proper weight and consideration to his 25-year excellent teaching record in the District and the fact that the conduct at issue here was not "work related," in evaluating a proper penalty. (Respondent's Exceptions and Brief Submitted in Support of Exceptions at 35-37) Respondent reproduces from his Post-hearing Brief a myriad of prior decisions of the Commissioner[2] which, he urges, stand for the proposition "that it is unprecedented that a teaching staff member, with the exemplary record that [respondent] had within the Point Pleasant Borough School District, would face removal from

[2]One additional case was included in respondent's exception submission, *In the Matter of the Tenure Hearing of Charles Motley, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner August 4, 1999.

his position regarding conduct that was not work related and that, moreover, was not criminal in nature." (*Id.* at 38) Similarly, respondent asserts, the ALJ erred in failing to accord proper significance to his testimony with respect to the monumental matrimonial stress factors he was under on April 11 which precipitated the phone calls; his testimony expressing deep remorse for his actions; and testimony of his expert witness, Dr. Robert Bransfield, stating that respondent's prognosis was very positive and there was no reason he could not return to his teaching duties. (Respondent's Exceptions and Brief Submitted in Support of Exceptions at 38-45)

In conclusion, respondent urges that the tenure charges be dismissed or, should the Commissioner find "*any* 'conduct unbecoming a teacher,'" (emphasis added) the penalty imposed be limited, in recognition of respondent's excellent record and the likelihood that such behavior will not be repeated, to a one-year increment withholding. (Respondent's Exceptions and Brief Submitted in Support of Exceptions at 72)

In reply, the Board advances that although respondent "persistently argues" that he is remorseful for his actions, he continues to deny that such actions were directed at students, a contention fully belied by the transcript of the conversations at issue. (Board's Reply Exceptions at 6) Further, the Board advances that, curiously, respondent's exceptions fully fail to challenge the factual findings or conclusions with respect to his other conduct at issue herein, the "stalking" of D.L. "[Respondent] argues that he was remorseful for his actions, [the Board posits,] but apparently that remorse did not occur on the Wednesday after the phone calls when he was peering into two different classrooms at D.L., frightening her." (*Id.*)

The Board next observes that not only did respondent, himself, never previously agree or claim that his actions here were attributable to "alcoholism," such a "defense" was never argued before the ALJ below, and no medical basis was presented for such a conclusion.

(Board's Reply Exceptions at 9) Undoubtedly, the Board reasons, "[t]here would appear to be no question that [respondent] became intoxicated on the afternoon of the telephone calls, but it is unclear what substance or substances caused that state, inasmuch as [respondent] is the only one who knows what he consumed that afternoon." (*Id.*) Even assuming, *arguendo*, that alcoholism could be termed a legitimate defense here, the Board proffers, such condition does not address or explain respondent's subsequent stalking behavior which occurred days later. (*Id.* at 10)

Upon careful and independent review of the record in this matter, which included transcripts of the two days of hearing conducted at the OAL[3], the Commissioner determines to affirm the Initial Decision of the ALJ, since he finds that the record before him amply establishes that respondent's behavior with respect to the incidents detailed in the Board's tenure charges constitutes conduct unbecoming a teaching staff member. He further concurs with the ALJ that, under the circumstances existing here, respondent's dismissal from his tenured teaching position is warranted.

In reaching his determination that the within charges have been established, the Commissioner observes that respondent's admitted conduct in this regard is serious and highly unprofessional. As observed by the ALJ:

> In this matter, a teacher, a person in a position of authority over a pupil, clearly addressed improper messages including profanity to a thirteen-year-old pupil and her older sister. It is not possible to explain away the direction of vulgar and obscene messages to two children. It is clear to this judge that Dunham knew he was addressing a high school pupil and a pupil in his own school. No matter what Dunham believed the provocations to be, this is inexcusable behavior. The respondent used two children as a means of getting at his perceived tormentor, M.L. (Initial Decision at 25)

[3]Hearing was held on October 26 and October 28, 1999.

Such behavior[4] is directly contrary and inimical to the expectations placed on teaching staff members and, undeniably, conduct unbecoming a teacher. It is well-established that the obligation and responsibilities of a public school teacher impose a heavy duty of self-restraint and controlled behavior "rarely requisite to other types of employment." *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 302, 321. The Commissioner categorically dismisses respondent's exception contention that, because his faculties were impeded, he was, therefore, incapable of forming the "intent" to engage in unbecoming conduct, rendering it impossible for him to have committed such an offense. The within respondent admittedly engaged in conduct which is clearly unbecoming. Whether he did so purposely or intentionally is of no moment here. Although such *mens rea* may be considered by the Commissioner in fashioning an appropriate penalty, it does not operate to immunize respondent from guilt, or absolve him from the consequences of his actions. Likewise, the Commissioner rejects as untenable respondent's apparent claim of entitlement to the protections afforded a handicapped person by New Jersey's Law Against Discrimination (LAD) by virtue of his "alcoholism disability," which, it is noted was *raised for the first time in his exceptions*. Although it is well-established that alcoholism is a handicap under LAD, *N.J.S.A.* 10:5-1 *et seq.*, *e.g.*, *Matter of Cahill*, 245 *N.J. Super.* 397 (App. Div. 1991), and even accepting, *arguendo,* that such a defense was properly before the Commissioner, *i.e.*, *previously advanced and argued in the proceedings below*, the result in this matter would remain unaltered, as employers are not required to tolerate

[4]It is additionally noted that "[t]here were four messages over a four-hour period which would appear to indicate an extended angry outburst.***" (Initial Decision at 3)

criminal or egregious conduct of employees, even if the conduct in question was caused by a disability. *See Barbera v. DiMartino*, 305 *N.J. Super.* 617, 640 (App. Div. 1997).[5]

Similarly, no credence can be afforded respondent's exception challenge to credibility determinations made by the ALJ and the weight he ascribed to proffered testimony. In this regard, the Commissioner is satisfied, based on the record as a whole, that the ALJ gave full consideration to all evidentiary proofs and testimony which comprise the record and weighed it according to the credibility of the witnesses and the plausibility of its content. The Commissioner finds no basis whatsoever in the record before him for overturning such findings or credibility assessments of the ALJ who had the benefit of observing the witnesses firsthand. In so concluding, the Commissioner was especially mindful that:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.*** (*In re Perrone*, 5 *N.J.* 514, 522 (1950))

Like the ALJ, the Commissioner's review persuades him that "[t]he respondent's defenses lacked substance. He offers a curious concatenation of events to explain his behavior," (Initial Decision at 24) which, the Commissioner observes, lacks persuasive evidential corroboration in the within record. Although it is axiomatic that in tenure matters a Board has the burden of proving its proffered charges by a preponderance of the credible evidence, it is, likewise, undeniable that a respondent in going forward with defenses, must present credible evidence of those defenses.

[5]In this case, the Court held that plaintiff's assault of a supervisor caused by a psychotic episode, was nonetheless a legitimate nondiscriminatory reason for terminating and not rehiring him finding "We are in line with the federal authority that laws protecting the handicapped from employment discrimination are not intended to protect against crime or egregious conduct which, if committed by any other employee, would have warranted the adverse employment decision." (at 640

In considering the appropriate penalty in this matter, the Commissioner is again compelled to reiterate his long-standing belief that educators, by virtue of the unique position they occupy, must be held to an enhanced standard of behavior and must continually realize that they serve as role models to students and the community. The Commissioner, as did the ALJ, finds the prior decisions of the Commissioner cited by respondent in support of mitigation of penalty in consideration of what he claims is the "less serious" nature of his offense, his exemplary work record and his claim that his conduct here was not "work related," are not particularly beneficial to him in the context of this case. The Commissioner finds appropriate the ALJ's culling of guidance from *Ostergren, supra,* in this regard, namely:

> The Commissioner finds significant differences between these *** cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion *each such matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.* (emphasis added) (Initial Decision at 23, citing *Ostergren*, 1966 *S.L.D.* 188)

Said differently, because in tenure matters each case is extremely fact sensitive, meaningful comparisons between cases can be difficult to make. The Commissioner's full review persuades him that the ALJ correctly concluded that none of the cases advanced by respondent is similar enough in nature or factual circumstances to the instant matter so as to provide precedential support for respondent's position.

The Commissioner, additionally, does not share respondent's belief that his offending actions here were not "work related." The within record establishes that the messages left by respondent were directed to two students in the District, one of which, D.L., was a former student of his and attended the very school where he was a teaching staff member. The record

further contains credible testimony that D.L. became physically ill, experienced sleeping difficulties, and was fearful of the possibility of contact with respondent. At the very least, respondent's conduct had the effect of causing unwarranted disruption to and interruption of N.'s educational program. *See In the Matter of the Tenure Hearing of Robert A. Dombloski, School District of the Town of Belvidere, Warren County*, decided by the Commissioner June 23, 1999. The adverse effect upon the proper administration of the Point Pleasant Borough School system is, likewise, apparent. The incident resulted in negative newspaper coverage for the school (Initial Decision, at 9), and may have precipitated a possible tort claim action against the Board. (Initial Decision, at 10) Moreover, even accepting, *arguendo*, respondent's claim that his conduct was not work related, it does not necessarily follow that such situation calls for a mitigated penalty. The mere fact that misconduct occurred at a time and place entirely apart from school and even may involve people entirely unrelated to it does not immunize the offender from disciplinary sanction commensurate with his offense. Indeed, the Commissioner has not refrained from imposing the penalty of dismissal upon a tenured employee for unbecoming conduct "even if such conduct did not occur in the course of a teacher's employment," where it is otherwise warranted. *Board of Education of the Township of Parsippany-Troy Hills v. Molinaro*, 96 *N.J.A.R.* 2d (EDU) 268, 276, citing *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville*, 1973 *S.L.D.* 157. *Also see In re Dombloski, supra.*

Although duly considering respondent's lengthy, apparently unblemished record with the Board, along with each of his other proffered defenses, the Commissioner concludes that these factors, which ordinarily could serve to mitigate against respondent's dismissal, are greatly outweighed by the seriousness of his admitted conduct in this matter. Therefore, in light of the charges established herein reflecting respondent's clear violation of his obligation to

conduct himself in a manner befitting a tenured teaching staff member, the Commissioner concludes that, under the particular circumstances of this matter, respondent's behavior is "sufficiently flagrant" to warrant his dismissal from his tenured position. *See Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326 (*E. & A.* 1944).

Accordingly, for the reasons expressed therein, as expanded upon above, the Commissioner affirms the Initial Decision of the OAL, and hereby orders that Randall Dunham be dismissed from his teaching position with the School District of Point Pleasant Borough as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: April 17, 2000

Date of Mailing: April 17, 2000

[6] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.