

140-00

IN THE MATTER OF THE TENURE :
HEARING OF NEAL A. ERCOLANO, :
BOARD OF EDUCATION OF :
BRANCBURG TOWNSHIP, :
SOMERSET COUNTY. :

And :
NEAL A. ERCOLANO, : COMMISSIONER OF EDUCATION
PETITIONER, : DECISION ON REMAND

V. :
BOARD OF EDUCATION OF THE :
TOWNSHIP OF BRANCBURG, :
SOMERSET COUNTY, :

RESPONDENT. :

SYNOPSIS

In consolidated matters, the Board certified tenure charges of unbecoming conduct against teaching staff member for allegedly assaulting a student and Mr. Ercolano contested the withholding of his increment for the 1997-98 school year. ALJ concluded that Mr. Ercolano forfeited his teaching position due to his conviction. Moreover, the ALJ upheld the increment withholding. Commissioner reversed the initial decision in that, pursuant to N.J.S.A. 2C:51-2, as amended by *P.L. 1995, c. 250*, the Commissioner does not have jurisdiction to enter orders of forfeitures of public employment, as such orders may now only be issued by the sentencing court. Commissioner remanded this matter to OAL to move forward on both the Board's tenure charges and the increment withholding challenge.

On remand, the ALJ concluded that Mr. Ercolano's conviction constituted conduct unbecoming a teacher and that he should be removed from his position. ALJ also concluded that Mr. Ercolano presented no convincing arguments to show that the Board's action as to the withholding of the increment for the 1997-98 school year was untimely or that the Board's action was arbitrary, capricious or unreasonable. ALJ ordered that Mr. Ercolano be removed from his position, that the decision to withhold his salary increment for the 1997-98 school year be affirmed and that he be paid salary payments retroactive to February 27, 1998, the date on which the stay of his salary payments ended.

Commissioner adopted findings and determination in Initial Decision as his own. Commissioner dismissed Mr. Ercolano from his tenured position as teacher and referred the matter to the State Board of Examiners for action against his certificate as it deemed appropriate.

May 1, 2000

OAL DKT. NOS. EDU 8422-97, EDU 8509-97 AND EDU 6138-98 (ON REMAND)
AGENCY DKT. NOS. 321-9/97 AND 334-9/9 (CONSOLIDATED)

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| BRANCHBURG TOWNSHIP, | : | |
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| NEAL A. ERCOLANO, | : | |
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| V. | : | |
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| BOARD OF EDUCATION OF THE | : | |
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| SOMERSET COUNTY, | : | |
| | : | |
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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Both the Board and Neal A. Ercolano (“Ercolano”) submitted exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4.

The Board excepts to the Administrative Law Judge’s (ALJ) award of Ercolano’s back pay retroactive to February 27, 1998, without off-set, and urges the Commissioner to vacate that portion of the Initial Decision. In the alternative, the Board requests that the Commissioner stay the award of any back pay due Ercolano until the forfeiture issue is decided by the Appellate Division, since a decision rendered by that Court in the Board’s favor will negate Ercolano’s entitlement to any back pay. (Board’s Exceptions at 2)

In his exceptions, Ercolano maintains that there are facts in dispute, since he and J.F. “gave conflicting accounts of the incident in their testimony before the Municipal Court,” (Ercolano’s Exceptions at 2) thereby rendering this matter inappropriate for summary decision. Additionally, he excepts to the ALJ’s finding that he was given ample opportunity to present his version of the incident, along with mitigating circumstances, in his municipal court trial. Instead, Ercolano asserts that in the municipal court trial, the sole issue before the Court was whether he had committed the simple assault; whereas, in this forum, the issue is whether he engaged in conduct unbecoming a teacher. (*Id.* at 3) In this connection, Ercolano reiterates that a plenary hearing is necessary to determine the appropriate penalty.

Upon careful and independent review of the record in this matter, the Commissioner affirms the findings and conclusions of the ALJ. Initially, the Commissioner notes that, under these particular circumstances, there is no meaningful purpose to be served by permitting Ercolano to relitigate the issue of his conduct on January 17, 1996, since this issue was fully and fairly litigated, and decided, in the prior criminal proceeding.¹ As such, the Commissioner draws his conclusion that Ercolano’s conduct was, without question, unbecoming a teaching staff member,² based upon his conviction on April 23, 1997 for the simple assault of a sixth grade student while in school.³

¹ Notably, Ercolano withdrew his appeal of that conviction. (Initial Decision at 6)

² The Board specifically charged that “[r]espondent was guilty of unbecoming conduct by assaulting a student, for which he was subsequently convicted in Branchburg Municipal Court,” (Board’s Statement of Tenure Charge at 1)

³ “It is well established that where no disputed issues of material fact exist, and administrative agency need not hold an evidential hearing in a contested case.” *Frank v. Ivy Club*, 120 N.J. 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 N.J. 13, 24-25 (1975). “Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment.” *Contini v. Board of Education of Newark*, 96 N.J.A.R. 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey*, 269 N.J. Super. 469, 478 (App. Div. 1994). *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner’s Decision No. 129-97, decided March 20, 1997.

The Commissioner also recognizes that his exclusive jurisdiction to hear and decide tenure matters requires a concomitant penalty determination. *See In re Fulcomer*, 93 N.J. Super. 404 at 412. Factors to be considered in assessing penalty include the nature and gravity of the offense under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and the harm or injurious effect, if any, the teacher's conduct may have had on the maintenance of discipline and proper administration of the school system. (*Id.* at 422) In this connection, like the ALJ, the Commissioner finds that Ercolano was accorded ample opportunity at his municipal court hearing to offer his version of the facts, as well as mitigating circumstances. (Initial Decision at 10) Yet, significantly, Judge Kelleher found that Ercolano “***grabbed the child and *** pushed the child against the wall, and the child was placed in fear of bodily harm,” (Initial Decision at p. 6), thereby rejecting Ercolano's contention that he was merely reacting to deflect a running child. (*Id.*) Moreover, as the Judge observed, when Ercolano was confronted the next day with an account of events which was altogether different from the version he later presented, Ercolano nonetheless apologized and did not deny J.F.'s account of the incident. (*Id.*) Thus, Judge Kelleher found that Ercolano “*attempted to cause or purposely, knowingly or recklessly caused bodily injury to J.F.*” (emphasis added) (Initial Decision at 10)

Further, for the purposes of his penalty determination, the Commissioner accepts Ercolano's undisputed assertion that he has been employed by the Board for more than 20 years, “he was never the subject of any serious disciplinary action and, prior to January 17, 1996, was never the subject of an allegation that he improperly touched a student.” (Brief on Behalf of Neal A. Ercolano in Support of Cross Motion and In Opposition to Motion for Summary Decision at 1) However, notwithstanding his apparently sound teaching record, like the ALJ,

the Commissioner finds that that this incident is sufficiently flagrant to warrant Ercolano's removal from his teaching position⁴:

It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County*, 1966 S.L.D. 185, as cited in *In the Matter of the Tenure Hearing of Thomas Tiefenbacher, School District of the City of East Orange*, 1982 S.L.D. 142, 150, *aff'd with modification* 1982 S.L.D. 157. (Teacher found to have pulled a student from his chair, pushed him so that he hit a cabinet, grabbed him by the neck and thrown him to the back of the room where he hit a table. Teacher also threatened student in the corridor. The ALJ concluded teacher's conduct was "so gross so as to impose the most severe penalty allowed ***." *Tiefenbacher*, at 150. The Commissioner accepted the ALJ's findings of fact, but modified the penalty, asserting that "summary dismissal of respondent for a single offense is unwarranted in light of his prior unblemished record of teaching experience in the Board's employ ***." *Id.* at 156. The State Board of Education vacated the Commissioner's penalty determination, dismissing respondent in accordance with the ALJ's decision. *Id.* at 157.)

With respect to the issue of Ercolano's back pay, in light of the July 2, 1999 decision of the Superior Court (Initial Decision at 7), the Commissioner, like the ALJ, must conclude that, at the time of this decision, respondent remains entitled to his salary and related emoluments retroactive to February 27, 1998, without off-set for substituted employment.⁵ (*Id.* at 11-13)

⁴ Although Ercolano asserts that *In re Portia Williams*, 1981 S.L.D. 931, is "a factually similar tenure case," (Brief on Behalf of Neal A. Ercolano in Support of Cross Motion and In Opposition to Motion for Summary Decision at 7), the Commissioner does not agree. There, respondent was found to have "hit various students in her class lightly on the hand with a ruler for disciplinary purposes ***." *In re Williams* at 940. The ALJ, however, specifically found that Ms. Williams "did not intend to inflict any physical pain on her pupils," and further determined that "[t]here was no evidence of lack of self-control on the part of respondent." *Id.* at 941. In the instant matter, however, Judge Kelleher's findings are not consistent with those of the ALJ and the Commissioner in the *Williams* case.

⁵ On April 10, 2000, the Board filed a Motion to Enlarge the Record to include information which, it attested, provided a basis on which to permit discovery in order to determine whether respondent's income derived from his landscaping business constituted "substitute employment." The motion was denied.

Finally, the Commissioner concurs with the ALJ that Ercolano has not met his burden of establishing that the Board's action to withhold his salary increment for the 1997-98 school year was arbitrary and capricious.

Accordingly, the Initial Decision of the ALJ is affirmed for the reasons expressed therein, and Ercolano is dismissed from his tenured position as a teacher in the Board's District. This matter is hereby referred to the State Board of Examiners for action against Ercolano's certificate as it deems appropriate.

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: May 1, 2000

Date of Mailing: May 1, 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.