

272-00

IN THE MATTER OF THE TENURE :  
HEARING OF MARGARET SIDBERRY, :  
SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION  
TOWNSHIP OF WILLINGBORO, : DECISION  
BURLINGTON COUNTY. :

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SYNOPSIS

Petitioning Board filed tenure charges against respondent school psychologist, alleging inefficiency and unbecoming conduct. The charges were based on respondent's repeated failure to complete and file psychological assessments in a timely manner.

After 15 days of hearing, the ALJ, based on the testimony and documentary evidence presented, concluded that the Board had sustained the charge of inefficiency and that dismissal was the appropriate penalty. The ALJ concluded that respondent repeatedly failed to conduct evaluations and submit psychological assessments in a timely manner, despite the extensive assistance provided by the Board to enable her to complete her work. The ALJ rejected respondent's proffered reasons for her untimely completion of her work, including various reductions in staff, serving on two Child Study teams and time spent training new staff. Finally, the ALJ did not address the charges of unbecoming conduct because of her conclusion that the sustained charge of inefficiency warranted dismissal of respondent from her position.

The Commissioner concurred with the ALJ's determination that the Board had proven the charge of inefficiency. In considering the appropriate penalty, the Commissioner weighed respondent's years of service and the fact that her performance was adequate in certain areas. The Commissioner, however, concluded that respondent continued to perform in an inefficient manner despite extensive efforts on the part of the Board to assist her in improving her performance and completing her work. Thus, the Commissioner determined that there could be no reasonable expectation that respondent would be able to conform her performance to the level reasonably expected of child study team members and that termination was the appropriate penalty. The Commissioner transmitted the matter to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

August 18, 2000

IN THE MATTER OF THE TENURE :  
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent’s exceptions and the Board’s reply thereto were timely filed in accordance with *N.J.A.C. 1:1-18.4*.

Respondent first charges that the Initial Decision is deficient, requiring remand, because the Administrative Law Judge (ALJ) based her factual findings solely on the testimony of one of the Board’s witnesses, Margaret Wolford, and fails to make any mention of the detailed testimony proffered by respondent and other witnesses, specifically: Joyce Payne, Shirley Wright, Linda Taylor, Noreen Donnelly, Nancy Bullett, Kurt Jarvis, and Jay Albert. (Respondent’s Exceptions at 3) Thus, respondent argues, because the ALJ failed to discuss the testimony of any of these other individuals, it cannot be ascertained which testimony the ALJ credited or discredited in reaching her ultimate conclusion. Respondent argues that, pursuant to *N.J.S.A. 52:14B-10(d)*, parties and a reviewing body should be able to ascertain “the precise factual basis upon which a result has been reached [rather than being] forced to speculate as to the rational basis for conclusions reached.” (citations omitted) (*Id.* at 4) Consequently,

respondent advances, this matter must be remanded for more detailed findings which consider the testimony of “all of the witnesses.” (*Ibid.*)

Respondent next contends that the ALJ failed to consider and weigh the aggravating and mitigating factors, as required by *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967), in concluding that termination was the appropriate penalty in this matter. (Respondent’s Exceptions at 5) She advances that “evidence as to provocation, extenuation or aggravation” must be taken into consideration along with “any harm or injurious effect which the teacher’s conduct may have had on the maintenance of the proper administration of the school system. *Id.* at 422” (*Ibid.*) She contends “[t]here is no analysis [in the Initial Decision] as to how the ALJ reached the conclusion that the most severe penalty, revocation of tenure, with all its dire consequences, should be imposed.” (*Id.* at 4) Again, respondent argues, should the Commissioner ultimately determine that the Board has sustained its charge of inefficiency, the absence of this required weighing analysis dictates that this matter be remanded to the OAL. (*Id.* at 7)

Notwithstanding respondent’s recommendation of remand to OAL for penalty analysis, she cites extensively to the Initial Decision and specific hearing testimony, asserting that these establish that, in balancing the aggravating and mitigating factors in this matter, “this is not a case which should result in tenure revocation.” (Respondent’s Exceptions at 7) Respondent contends that, although the ALJ’s decision referred to many of the mitigating factors highlighted in her exceptions, such as respondent’s overall good record in other aspects of her job, along with staff cut backs and shortages, her increased case management duties, her extra assignments, scheduling difficulties, and the huge volume of students assigned to her for processing -- all of which interfered with her writing and submission of reports -- the ALJ failed

to take any of these into consideration when recommending an appropriate penalty. Respondent further charges that the ALJ failed to consider that there was no showing that respondent's alleged failure to submit timely reports was deliberate, negatively impacted the District in any way, or served to cause any student to be denied an "appropriate" education. (Respondent's Exceptions at 20) Respondent argues that if all of these mitigating factors had been reviewed and considered as required by *Fulcomer, supra*, a proposed penalty short of termination could have been fashioned, such as a financial penalty or closer monitoring or mentoring. (*Id.* at 23) Respondent requests that the Initial Decision be rejected or, at the very least, remanded with direction that the ALJ perform the required *Fulcomer* penalty analysis.

In reply, the Board urges that the ALJ correctly found that it had sustained its burden of establishing the charges of inefficiency against respondent based upon her "failure to prepare and submit psychological assessment reports in a timely [manner] as required by Federal and State law," and that such failure justifies respondent's removal from her tenured position. (Board's Reply Exceptions at 1) The Board posits that such a result is amply supported by evidence in the record, namely:

1. 53 memos from the Director of Pupil Personnel Services reminding her of overdue psychological reports.
2. Three annual evaluations (by two different evaluators) reprimanding her for overdue reports.
3. Increment withheld.
4. 300 days of professional improvement plans to guide her to improve the submission of her reports. (*Ibid.*)

The Board discounts respondent's assertion that the ALJ made insufficient factual findings based on the testimony of certain witnesses. In this regard, it submits that three of the

witnesses identified, Joyce Payne, Linda Taylor and Shirley Wright, were merely character witnesses who had no knowledge and advanced no testimony as to whether respondent filed timely psychological reports. (Board's Reply Exceptions at 2) Further, the Board claims, it is obvious that the ALJ's decision did consider the testimony of Child Study Team (CST) members Marvin Shuck, Jay Albert, Noreen Donnelly, Kurt Jarvis and Tom Mole, as well as 109 Board exhibits and 38 respondent exhibits. (*Ibid.*) Most importantly, the Board urges, it is fully evident that "the testimony of the primary witnesses, who had direct knowledge of the entire matter, [Respondent Margaret Wolford, and Assistant Superintendent Joan McAndrew] were thoroughly reviewed in the decision." (*Ibid.*) The Board argues that the ALJ's credibility assessments based on the proffered testimony of these witnesses are, likewise, obvious in her decision, wherein she held that:

"Based on her demeanor and the consistency of her testimony I found Ms. Wolford to be a credible witness. I also found her testimony credible and convincing because she gave credit to Ms. Sidberry when credit was called for \*\*\*." [citing the Initial Decision at 5]; "I credit Ms. McAndrew's testimony that the June 1995 incident has no relation to her actions regarding Ms. Sidberry's late filing of reports." [Citing the Initial Decision at 35] (Board's Reply Exceptions at 3)

As to the ALJ's evaluation of respondent's credibility, the Board states that the ALJ made the following observation:

"\*\*\*I have considered and rejected the arguments of Ms. Sidberry justifying her late reports. While I do not suggest that Ms. Sidberry lacked credibility as a witnesses, her explanations for her repeated failures to submit timely reports were simply not convincing to the undersigned." [Citing the Initial Decision at 34] (*Ibid.*)

As such, the Board asserts that after 15 days of hearing already held in this matter, and given that the factual basis for the ALJ's conclusion is abundantly clear, respondent's advancement as to the necessity of remand for more detailed findings is preposterous. (*Ibid.*)

The Board next rejects respondent's claim that, in reaching her recommended penalty of termination, the ALJ failed to weigh the aggravating and mitigating factors pursuant to *Fulcomer*. It proffers that the ALJ dedicated more than 30 pages to reviewing the details in connection with respondent's late reports and carefully reviewed and analyzed the extensive exhibits surrounding the individual case assignments and report completion, along with the Professional Improvement Plans implemented to assist respondent. (Board's Reply Exceptions at 3-4) The Board argues that the ALJ also fully reviewed and considered all of respondent's proffered reasons for the untimeliness of her reports, *i.e.*, "[respondent's] lack of [a] place to test students, inability to locate students, unreasonable demands on her work day, changes in [students'] daily schedules, shortage of professional and clerical staff, claims of training new staff, and an allegation that the tenure charges were motivated by anger resulting from an incident concerning an OAL appeal of a graduation problem." (*Id.* at 4) Upon such examination, the Board proffers, the ALJ concluded that the conditions faced by respondent were identical to those faced by the other child study team members; all of whom were able to submit timely reports. Consequently, it argues, the ALJ did, in fact, consider "evidence as to 'provocation, extenuation or aggravation'" in reaching her recommended penalty. (*Ibid.*) The Board also discounts respondent's assertion that the District was not harmed by her routinely untimely reports

[T]he administration of the school is seriously injured when special education reports are not submitted in a timely fashion. The Individuals With Disabilities Education Act (IDEA) 20 U.S.C. Sec. 1400 et seq. requires that an Individual Education Program (IEP)

must be implemented within 90 days after receipt of parental approval for evaluation and without it the child is denied a free and appropriate education that is guaranteed by the IDEA. (*Ibid.*)

It further points to the ALJ's initial decision observation stating that:

“[f]ailure to submit reports in a timely manner has resulted in the delayed implementation of programs. Students have been denied access to appropriate educational programs and you have contributed to placing the district in jeopardy of noncompliant status...” [Citing the Initial Decision at 24] (Board's Reply Exceptions at 7)

Likewise, the Board rejects respondent's claim that she should not be terminated because of an “overall good record,” asserting that such is not the case. While she was proficient as a case manager, and her reports, when finally completed, were adequate, it advances, “CST members test and write reports three days, meet to develop IEP's one day and have one day for case management.” As such, “[f]our-fifths of Margaret Sidberry's performance was very **sub-standard.**” (emphasis in text) (Board's Reply Exceptions at 5)

The Board next reasons that, although it may be difficult to definitively ascertain whether or not respondent's failure to perform her duties was “deliberate \*\*\* after 53 memos, three evaluations' notations, an increment withheld and four PIP's,” it must be assumed that there was some “deliberate aspect” to her performance, particularly when considering that the other CST members were faced with the same “conditions” facing respondent and were able to submit timely reports. (*Id.* at 7)

Finally, the Board urges that respondent's suggestion of a lesser penalty, such as “closer monitoring or mentoring” would be of no avail here. It asserts:

Progressive discipline principles were painstakingly followed in this case. [Respondent] was given every opportunity to correct her deficiencies and not be placed in jeopardy of losing her job. She was cautioned that if she failed to improve she would face tenure

charges. And, even after the tenure charges were filed and she was given an additional PIP, her performance did not improve. (Board's Reply Exceptions at 8-9)

As such, the Board urges that the Initial Decision be affirmed by the Commissioner and respondent be terminated from her position.

Upon his independent and comprehensive review of the record,<sup>1</sup> the Commissioner agrees with the ALJ's findings and conclusion that the Board has sustained its charges of inefficiency against respondent, after providing her a period of remediation during which it accorded her reasonable support to assist her in overcoming such inefficiencies, which she was unwilling or unable to do and, consequently, the appropriate result is respondent's removal from her position.

In so determining, respondent's exceptions are deemed to be without merit. Initially, the Commissioner does not find the ALJ's lack of specific factual findings based on testimony offered by certain witnesses violative of *N.J.S.A. 52:14B-10(d)*.<sup>2</sup> To the contrary, he determines that the ALJ's Initial Decision satisfies the necessary factual requirements of that statutory provision, presenting a detailed and accurate summary and analysis of all *relevant*,

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<sup>1</sup>It is noted that the record includes transcripts of 10 of the 15 days of hearing conducted at the OAL in this matter, specifically, January 12, 13, 14, 15 and 21, 1998, March 23 and 24, 1998, June 4, 5, and 10, 1998. Respondent's exceptions state that official transcripts were not obtained for the testimony of Board witness Margaret Wolfold, and respondent offers to submit her "unofficial" transcription of hearing tapes of this testimony if the Commissioner so desires. (Respondent's Exceptions at 1) In that the Initial Decision contains extensive detail with respect to the testimony of this witness, the substance of which was not challenged by either party, the Commissioner finds the absence of these particular transcripts to have no prejudicial effect on his consideration of this matter.

<sup>2</sup>This provision, in pertinent part specifies:

\*\*\*A final decision shall include findings of fact and conclusions of law, separately stated and shall be based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director.

Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. The final decision may incorporate by reference any or all of the recommendations of the administrative law judge. \*\*\*

credible testimonial and documentary evidence adduced at hearing, which amply supports the ALJ's ultimate conclusion that the Board has proven an overall pattern of poor performance by respondent which warrants her dismissal.

Similarly, the Commissioner finds incongruous respondent's contention that remand of this matter for further factfinding with respect to a *Fulcomer* aggravating and mitigating factor analysis is warranted. Rather, he concurs with the Board that the ALJ not only considered all of respondent's "justifications" for her repeated failure to prepare and submit timely reports, but also presented a detailed analysis as to why she rejected each of these proffers. (*See* Initial Decision at 34-35), an analysis which the Commissioner finds amply supported by the record and with which he is in full accord.

Additionally, although the Commissioner cannot necessarily conclude that respondent's failure to complete her required psychological reports in a timely fashion was "deliberate," he nonetheless rejects as untenable her claim that there was no deleterious effect to either students or the District as a result of such failure. At a very minimum, the untimely preparation and submission of her reports delayed the initial or re-evaluative placement of students in appropriate educational programs and placed the District in unnecessary jeopardy of potential legal action for failure to comply with federal and statute statutes and regulations governing the rights of classified students.

Finally, in considering the ALJ's recommendation with regard to penalty, the Commissioner was mindful that it is by now well established that:

Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. *Redcay v. State Bd. of Ed.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326 (*E. & A.* 1944)

Here, the ALJ specifically found:

[T]his was not an isolated event of failure to submit reports, but rather an on-going failure beginning in May 1994 and continuing through December 1996. During this period, Ms. Sidberry was given numerous memos documenting her late reports and was provided three PIP periods in order to correct her deficiencies. In addition, Ms. Wolford and Ms. McAndrew provided Sidberry with assistance in the form of allowing her additional writing days; providing her with time management audio tapes and attendance at a workshop; offering her the assistance of an aide in locating students; altering the schedule for submission of her written reports; providing student schedules and providing a dedicated office for her to do student testing. (Initial Decision at 33-34)

The within record demonstrates that respondent was long aware of the District's concern with her performance as evidenced by its withholding of her increment, numerous memoranda, evaluations and a remediation period well in excess of that prescribed by law. Notwithstanding the District's significant efforts to provide support and assistance to encourage her improvement, whether due to unwillingness or inability, respondent clearly failed to reach an acceptable level of performance. Even duly weighing her years of service in the District and the fact that in certain areas her performance was adequate, or even commendable, respondent's failure to fulfill the responsibilities of her position, despite the provision of repeated assistance above and beyond that provided other CST members, evidences that there can be no reasonable expectation that respondent can conform her performance to the level reasonably expected of a CST member in the District in the foreseeable future. Consequently, she cannot be allowed to continue in her position.

Accordingly, respondent is terminated from her tenured school psychologist position in the Willingboro School District 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 against respondent's certificate as that body deems appropriate.

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: August 18, 2000

Date of Mailing: August 28, 2000

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<sup>3</sup>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.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.