

IN THE MATTER OF THE TENURE :
HEARING OF DR. JOHN HOWARD, JR., : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF : DECISION
EAST ORANGE, ESSEX COUNTY. :

SYNOPSIS

Petitioner East Orange Board of Education certified tenure charges of unbecoming conduct and/or other just cause for dismissal against superintendent of schools, Dr. John Howard Jr. Respondent was suspended without pay for a period of 120 calendar days in accordance with the tenure employee's hearings law. *N.J.S.A. 18A:6-10 et seq.* Subsequently, a second set of tenure charges was filed relating to respondent's lying under oath in a deposition. The petitioning Board suspended respondent for a second period of 120 calendar days without pay. The ALJ refused the Board's application to consolidate these charges with those already pending; a hearing was held on the first set of tenure charges; an Initial Decision was issued by the OAL wherein Respondent was determined to have engaged in conduct unbecoming a superintendent of schools; the Initial Decision was affirmed by the Commissioner and the State Board of Education with some modification; and the penalty of termination was upheld. With regard to the instant set of tenure charges, the Board sought partial summary judgment, and as penalty, the forfeiture of respondent's 120 calendar days pay. Respondent sought dismissal of the second set of tenure charges, arguing, *inter alia*, that his voluntary recanting of his dishonest testimony mitigated his admitted behavior.

Upon consideration of the facts and submissions in this matter, the ALJ found that the respondent engaged in the behavior alleged; that the conduct in which respondent engaged was deceptive and dishonest, and warranted the imposition of the most severe sanction available, which is the forfeiture of 120 days' pay withheld at the time this suspension was imposed. The ALJ granted summary judgment in favor of the petitioning Board.

Upon a thorough and independent review of the record in this matter, including the exception arguments advanced by the parties, the Commissioner concurs with the findings and conclusions of the ALJ as expressed in the Initial Decision, and emphasizes that, despite respondent's efforts to characterize this case otherwise, this matter is first and foremost a tenure proceeding with the underlying issue being whether the respondent engaged in conduct unbecoming. Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons expressed therein. The matter shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

<p>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.</p>

OAL DKT. NO. EDU 7442-01
AGENCY DKT. NO. 271-7/01

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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 East Orange Board of Education's (Board) reply thereto were submitted in accordance with *N.J.A.C. 1:1-18.4* and were duly considered by the Commissioner in reaching his determination.

Respondent contends that the Administrative Law Judge's (ALJ) failure to conduct a hearing, "as called for by the Commissioner," to determine whether the Board inequitably and deliberately timed the assertion of a second set of tenure charges against him so as to deprive him of an additional 120 days of salary, denied him the opportunity to conduct discovery to discern when the Board became aware of the facts pertaining to the second set of charges and why the Board delayed in bringing those charges. (Respondent's Exceptions at 1) If the second set of tenure charges had been timely asserted, respondent maintains, there would have been only one 120-day period of withholding, not two as occurred herein. (*Id.* at 2.) Respondent, therefore, claims that because the Board withheld the second set of charges so as to deprive him of an additional 120 days of salary, he is entitled to the 120 days of salary, regardless of whether the second set of charges are founded. (*Ibid.*)

Additionally, respondent argues that: 1) the record is incomplete; 2) the ALJ failed to conduct any inquiry into the “fact sensitive” timing of the Board’s filing of a second set of tenure charges; 3) the record does not support the ALJ’s conclusion that the earliest the Board knew of respondent’s conduct was March 8, 2001; and 4) the ALJ draws an impermissible inference excusing the Board’s delay. (*Ibid.*) In this regard, respondent contends that there is no evidence to suggest that the Board was so distracted by pending business that it could not attend to tenure charges and opines that the ALJ’s ascription of an innocent motive for the Board’s delay, without a hearing, has effectively denied his statutory right to be paid during the pendency of tenure charges. (*Ibid.*)

Moreover, respondent claims that he regrets his failure to disclose his personal romantic relationship in his September 6, 2002 deposition, but notes that he corrected his misleading statements and points to *N.J.S.A. 2C:28-1(d)* in arguing that recantation, or correction of misleading testimony, is an affirmative defense to perjury. (*Id.* at 3) In that he corrected his deposition only a day after he had been suspended by the Board and the misleading testimony had no apparent prejudicial impact on the Board, respondent reasons, the additional suspension of 120 days under these circumstances was not warranted. (*Ibid.*)

In conclusion, respondent asks the Commissioner to remand this matter and direct the ALJ to conduct a hearing, claiming that the Commissioner’s decision of December 17, 2001 instructing the ALJ to conduct a hearing into this fact sensitive-matter was patently clear, and that the ALJ herein did not heed this instruction. (*Id.* at 3-4) Claiming that the aftermath of the hearing of the first set of tenure charges affected the ALJ’s judgment in this matter, respondent requests that the within matter be assigned to another ALJ on remand. (*Id.* at 3)

In response, the Board avers, *inter alia*, that there is nothing in *N.J.S.A.* 18A:6-10 or the implementing regulations which specifies that tenure charges be certified within a specific period of time. (Board's Reply Brief at 2) Additionally, the Board points out that respondent did not submit his affidavit admitting to the conduct which forms the basis of the second set of tenure charges until March 9, 2001. (*Ibid.*) Given that the first set of tenure charges had been filed in January and tenure charges cannot be amended, the Board asserts, the earliest it could have certified the charges would have been the end of March, a week or so before the first 120 days of unpaid suspension was to expire. (*Ibid.*) The Board, therefore, concludes that respondent's argument that it purposely timed the second set of tenure charges to deprive him of another 120 days' pay is "simply a red herring." (*Id.* at 3)

Moreover, the Board contends, the purpose of a tenure proceeding is to determine whether the teaching staff member engaged in conduct warranting dismissal and, as the ALJ correctly noted, there is nothing in the tenure laws which "requires or permits inquiry into the motive behind the certification of the charges or the timing of certifying them." (*Ibid.*) The Board further points out that respondent admitted to lying under oath and argues that, once the ALJ determined that respondent's action constituted unbecoming conduct, the Board was under no obligation to return the money withheld from respondent's second unpaid suspension since it is only when tenure charges are dismissed that the charged employee is entitled to a return of the pay withheld. (*Ibid.*)

With respect to whether the appropriate penalty was imposed in this matter by the ALJ, the Board avers that, since respondent has already been dismissed from his position, the forfeiture of 120 days' pay is completely justified under the circumstances. (*Id.* at 5) In support thereof, the Board contends that respondent's retraction of his false testimony only three days

before the deposition of Joyce Jackson, when the truth was going to surface, does not exonerate his misconduct, and points to *In re Caruba*, 139 N.J. Eq. 404 (Ct. of Chancery, 1947) in maintaining that, based upon well-settled law, there is no excuse for respondent's conduct. (*Ibid.*) Whether or not the Board was harmed by respondent's conduct is irrelevant, the Board argues, because, by lying under oath, respondent abused the public trust. Moreover, the Board points out, respondent fails to realize that he could have been ordered to pay monies beyond the 120 days' pay which was already withheld. (*Ibid.*)

Upon a careful and independent review of the record in this matter, including the exception arguments advanced by the parties, the Commissioner agrees with the findings and conclusions of the ALJ as expressed in the Initial Decision. Initially, the Commissioner notes that, pursuant to N.J.A.C. 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 N.J. Super. 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. For the reasons that follow, the Commissioner concurs that this matter satisfies the above criteria for grant of summary decision to the Board.

Notwithstanding respondent's efforts to characterize this case as a dispute over whether an additional 120 days' pay was properly withheld when the second set of tenure charges was filed, this matter is first and foremost a tenure proceeding with the underlying issue being whether respondent engaged in the behavior alleged and whether such conduct constitutes conduct unbecoming a teaching staff member. Thus, whether respondent's additional suspension without pay was inequitable under the circumstances is a secondary matter to be resolved within the context of the tenure proceedings. Respondent admits that he lied under oath, thus admitting

that he engaged in the conduct which forms the basis of the tenure charge of unbecoming conduct. In that the material facts in a tenure proceeding consist of those which establish whether the individual engaged in the conduct charged, and in that respondent herein admits that he lied under oath, the Commissioner concludes that there is no material fact in dispute with regard to the tenure charge which would prevent this matter from being decided on a summary basis.

With respect to respondent's claim that the Commissioner's decision of December 17, 2001 required the ALJ to conduct a "hearing," the Commissioner also finds that his prior interlocutory decision does not preclude deciding this matter on a summary basis. The December 17 determination states, in pertinent part:

Whether, however, the Board's certification of charges in Howard II on July 24, 2001, along with its resultant suspension of respondent without pay, was inequitable under the circumstances, remains a fact-sensitive question to be determined upon hearing. (Commissioner's Decision on Respondent's Request for Interlocutory Review, dated December 17, 2001)

The Commissioner points out that *N.J.A.C. 1:1-2.1* defines "hearing" as "a proceeding conducted by a judge for the purpose of determining disputed issues of fact, law or disposition" and "plenary hearing" as "a complete and full proceeding conducted before a judge, providing the parties with discovery, the opportunity to present evidence, to give sworn testimony, to cross-examine witness and to make arguments." The Commissioner emphasizes that he did not specify that a *plenary hearing* was to be conducted in this matter, but, instead, indicated that the ancillary issue of the second suspension without pay was to be determined upon *hearing*. In this matter, the parties were provided a full opportunity to be heard through the submission of legal briefs and certifications. Accordingly, the ALJ provided respondent the due process contemplated by the Commissioner and to which he was entitled.

Turning to whether respondent's admitted conduct constitutes conduct unbecoming a teaching staff member, the Commissioner is not persuaded by respondent's contention that correcting his testimony mitigates his conduct. While recantation may be an affirmative defense to perjury, it does not excuse respondent's deceptive and dishonest conduct in a school setting. In lying under oath about a relationship with a subordinate employee of the school district, respondent not only violated the fundamental principles underlying our system of justice, but also violated the public trust placed in him as superintendent of schools. The Commissioner, therefore, finds respondent guilty of conduct unbecoming a teaching staff member. In so determining, the Commissioner emphasizes that, as noted by the State Board in *In the Matter of the Tenure Hearing of Frank J. Napoli*, 1988 S.L.D. 284, 288:

If the standard of behavior required of teachers is stringent, the standard for high administrative personnel must be even more stringent. As was noted in *In the Matter of the Tenure Hearing of Louis Cirangle*, 1980 S.L.D. 95, 96, *aff'd* by the State Board, 1980 S.L.D. 97, *aff'd*, Docket #A-3967-79A (App. Div. Jan 30, 1981), certif. Denied, 87 N.J. 347 (1981): The position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers and pupils alike.

In assessing the penalty to be imposed, the Commissioner concurs with the reasoning of the ALJ that respondent's conduct warrants the imposition of the most severe sanction available. Given the removal of respondent from his position as a result of the first set of tenure charges, the only available penalty is the forfeiture of the 120 days' pay withheld at the time respondent was suspended for this set of tenure charges. With respect to respondent's argument that the Board deliberately timed this second set of tenure charges so as to deprive him of an additional 120 days of pay, the Commissioner finds this argument specious, given respondent's opposition to the Board's Motion to Consolidate the two sets of tenure charges.

(See Respondent's Brief in Opposition to the Board's Motion to Consolidate, dated July 21, 2001) Were it not for respondent's opposition, these two sets of charges may have been consolidated, thus conceivably dictating a different result as to whether respondent would suffer the additional withholding of 120 days' pay. Moreover, whatever the equities may have been with respect to the second 120 days of pay withheld at the time of filing of the within tenure charge, given the conclusion that respondent is guilty of unbecoming conduct as a result of this tenure proceeding, the equities clearly lie with the Board at this juncture. The Commissioner, therefore, concludes that the appropriate penalty, under these particular circumstances, is the forfeiture of the 120 days' pay withheld as the result of the Board's certification of the within tenure charges on July 24, 2001.

Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons stated therein and as set forth above. This matter shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: April 1, 2005

Date of Mailing: April 6, 2005

* This decision 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.*