

IN THE MATTER OF THE TENURE :
HEARING OF STEPHEN FOX, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE : DECISION
BOROUGH OF NEW PROVIDENCE, :
UNION COUNTY. :

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent music department chairman for allegedly establishing a personal relationship with a student that culminated in physical contact.

The ALJ found that the actions and conduct of the respondent constitutes unbecoming conduct and “other just cause” for discipline pursuant to *N.J.S.A.* 18A:6-10(a). The ALJ found that, based on the testimony of the witnesses, respondent’s admissions, and undisputed documentary evidence, respondent kissed minor child J.F. on the lips in April 2002; that he engaged in this conduct while presenting himself to the young boy as a concerned adult and counselor and encouraging his confidences; that this sexual physical contact occurred during a period when respondent knew that J.F. was in great emotional distress for a number of reasons, including his home life, concerns about his sexual orientation, his harassment by other students and, quite probably, his relationship with P.B.; and that respondent’s unwelcome physical contact altered J.F.’s educational environment in an offensive way. ALJ concluded that, notwithstanding his previously unblemished record in the district, respondent’s conduct renders him unfit to remain a teacher and was sufficiently egregious to warrant removal from his position.

The Commissioner adopted the findings and conclusions of the ALJ, and ordered respondent dismissed from his tenured teaching position in the New Providence School District as of the date of this decision. The Commissioner referred the matter to the State Board of Examiners for action against respondent’s certificate 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>

February 10, 2005

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_____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent requested and was granted two extensions of time within which to file exceptions to the Initial Decision and such exceptions were filed pursuant to the extended timeframe. These and the District's reply submission were fully considered by the Commissioner in making his determination herein.

Respondent's exceptions charge that, in reaching her recommended penalty determination, the Administrative Law Judge (ALJ), at pp. 2-7 of her decision, made certain factual findings which were neither based on hearing testimony nor supported by any competent evidence, wholly ignoring the requirements of the residuum rule. (Respondent's Exceptions at 9-13) Specifically, according to respondent, the ALJ found:

that the Respondent told Scott Brogan, Director of Color Guards at New Providence High School, on several occasions that he felt bad about kissing the student, that Brogan asked the student if he should report the matter to the administration, but the student asked him not to, (A.L.J. Decision, pp. 2-3); that the student was involved with an older man (not Respondent (*sic*)) for a considerable period of time, that some other student told Brogan that J.F. was in big trouble, that Brogan reported the affair with the older man to the State Police, that the student was taken to the Police Station and questioned about the relationship, that the student threatened suicide, that the student believed he and the

adult were in a loving relationship, that other students taunted J.F. about the relationship with the older man, that Brogan asked J.F.'s permission to report the kiss with Fox to the administration, that J.F. asked him not to do so, that the adult entered into a plea bargain and revealed Fox's name to the police, that Brogan brought the incident with the Respondent to the attention to (*sic*) the School District when he found out the District would learn from others about the incident, that J.F. was terrified of returning to school for his senior year because of the adult being released from prison, that J.F. told Brogan he did not want to face Fox, that the incident with Fox could be placed in time with J.F.'s mother finding his diary, that J.F.'s conduct, after the incident with the Respondent, shows that it "changed his already difficult school environment for the worse" (A.L.J. decision, pp. 2-7) (Respondent's Exceptions at 7-8)

To the extent there is any evidentiary support for these factual findings, respondent argues, such evidence can be found "in statements identified by Feinberg and Pepper as documents provided to them by other individuals who did not testify" (*Id.* at 9) and, therefore, these findings are pure hearsay and should be dismissed by the Commissioner.

Respondent further challenges the ALJ's conclusions that respondent took the role of counselor for which he was untrained and unqualified and that the damage to J.F. as a result of respondent's conduct was immeasurable (Initial Decision at 9-10) as justification of her dismissal recommendation, contending such conclusions are based on a presumption of facts rather than on facts in the record. (Respondent's Exceptions at 16)

Finally, respondent urges that the penalty assessed by the ALJ is too harsh in light of his exemplary employment history with the District, his admission of the act and acknowledgement that his behavior was improper, and the realization that there is no likelihood of a repetition of his behavior. (*Id.* at 17) In support of this contention, he cites a series of school law decisions where it was determined that one incident of inappropriate behavior by an educator with an otherwise unblemished employment history does not warrant the individual's termination but, rather, calls for reinstatement with the imposition of some lesser penalty, which, respondent contends, should be the case here. (Respondent's Exceptions 17-22)

In reply, the District charges that respondent's exceptions attempt to obfuscate the application of both the hearsay and the residuum rules. Pointing to *N.J.A.C. 1:1-15.5(b)*, the District submits that it is without question that the use of hearsay evidence is permissible in an administrative proceeding. Further, citing the Appellate Division's decision in *In the Matter of the Tenure Hearing of M. William Cowan*, 224 *N.J. Super.* 737 App. Div. (1988), the District proffers that "the residuum rule comes into play pursuant to that same rule only when hearsay evidence is the basis for each ultimate finding of fact, and application of that residuum rule requires identifying the ultimate finding of fact made by the Administrative Law Judge." (District's Reply Exceptions at 3)

Here, the District urges that the ultimate factual finding upon which the ALJ based her conclusion was that the respondent kissed the student, a fact which was uncontested and specifically admitted by respondent. (*Ibid.*) It further cites to the hearing transcript to establish other direct admissions made by respondent in his testimony, including:

from the time he met the student he developed a relationship whereby he was someone whom the student could come and talk to about his struggle with sexual orientation, bullying, and his home life[;] that this relationship was continuous until the kissing incident occurred at which point the student immediately left the room, and thereafter there were no further personal conversations. (citations omitted) (District's Reply Exceptions at 3-4)

In addition to his direct testimony, the District urges that respondent made various other admissions during his interview with Assistant Superintendent Pepper, who testified at hearing. Such admissions, which were reduced to writing and placed into evidence (Exhibit P-4) included:

that in the later Spring of 2004 J.F. had confided in him about the relationship with the adult P.B. and had asked for confidentiality[;] that he had general concerns about J.F., but never reported the P.B. matter to Administration[;] that he saw himself as a mentor for J.F., someone J.F. could use as a sounding board for dealing with the issues he was facing. (*Id.* at 4-5)

The District, therefore, submits that each of the ALJ's ultimate findings of fact, on Page 6 of the Initial Decision, is based on either respondent's own testimony or admissions made to Pepper, and, therefore, is properly grounded in competent evidence and not hearsay.

As to respondent's exception challenge to the ALJ's conclusions as to the severity of his admitted conduct, as a consequence of the role he assumed and the damage done to J.F., being unsupported by competent evidence in the record, the District charges that respondent is attempting to obfuscate the line between the ALJ's factual findings and her conclusions regarding these. In this regard, the District points out that respondent's testimony at hearing and his admissions to Mr. Pepper establish:

that Mr. Fox was aware of the student's relationship with [P.B.], was aware that the youngster was deeply conflicted as to his sexuality, had problems dealing with both his school experience and his home life resulting from the relationship with [P.B.], and yet, in Mr. Fox's own words, served as mentor and confidante to this student from his initial contact through the time of the incident wherein the kiss took place. Fox admits to his repeated meetings with the youngster and, perhaps most tellingly, sets forth the fact that immediately before he kissed the youngster they were engaged in a hug. (District's Exceptions at 7-8)

In light of this direct evidence, the District professes that the ALJ's conclusion that respondent placed himself in the role of counselor to an extremely troubled adolescent was entirely proper.

Similarly, it argues, respondent's objection to the ALJ's conclusion that the damage to J.F. was immeasurable as being unsupported in the record is misplaced. Rather,

as Dr. Feinberg testified, when she met with the youngster to discuss the incident of the kiss, he stated to his therapist and to the others present, "Now you understand why I don't trust adults." He went on to state that the fact that Fox was an icon in the district was what led him to believe that he thought nothing would happen regarding the incident. Clearly, it was not inappropriate for the Administrative Law Judge to take note of the fact that the youngster was still in therapy at the time of this meeting with Dr. Feinberg, some two years after the kiss incident, that the child had expressed an interest in leaving the New Providence School District to change his educational environment and, finally, the

child's evident belief in his inability to trust adults because of his experiences in which he had been taken advantage of.
(District's Reply Exceptions at 11)

In light of the above, the District contends the conclusion of the ALJ that respondent willingly engaged in a personal relationship with J.F., a youngster whom he knew had significant emotional problems, which led to respondent's unbecoming conduct, which contributed to the young student's difficulties, was well grounded. (*Id.* at 12-13)

As to the penalty in this matter, the District charges that the series of cases cited by respondent as justification for mitigation of penalty are inapposite in that, although they deal with a wide variety of unbecoming conduct, none involves "physical sexual contact between a teacher and a student." (District's Reply Exceptions at 14). It further contends that determination as to penalty is based on the particular nature and severity of what is under review.

Here, it advances, respondent

used his position of trust as a teacher to invite a youngster whom he knew to have recently undergone a traumatic event in terms of the child's sexual relationship with an adult male, encouraged conversations involving the child's sexuality and parental problems, and culminated in his having inappropriate sexual contact with the child.
(*Id.* at 18)

Citing *In re Fulcomer*, 93 N.J. Super. 404 App. Div. (1967), the District argues that this behavior is sufficiently flagrant, notwithstanding that it may have been a single incident or that respondent had a heretofore unblemished record and positive evaluations in the District, that nothing short of his termination is warranted. (District's Reply Exceptions at 19-21)

Upon a careful and independent review of the record, the parties' exception submissions and the transcript of the one day of hearing held in this matter,¹ the Commissioner determines to adopt the Initial Decision of the ALJ, as he finds that respondent's admitted behavior with respect to fifteen-year-old student, J.F., is wholly outside the boundaries of

¹ The OAL hearing was conducted on October 14, 2004.

professional propriety and inimical to the expectations placed on teaching staff members, and hence is unquestionably conduct unbecoming a teacher. He further concurs with the ALJ that respondent's dismissal from his tenured teaching position is the appropriate penalty.

In so determining, the Commissioner rejects respondent's challenge to certain of the ALJ's factual findings as justification for imposition of a penalty less than termination. Rather, even assuming, *aguedo*, such identified findings were improper and should be excluded from consideration in this matter, the Commissioner finds that, as persuasively argued by the District, the ALJ's underlying factual findings which formed the basis of her conclusions, *i.e.*, that respondent kissed minor child J.F. on the lips in April 2002; that he engaged in this conduct while presenting himself to the young boy as a concerned adult and counselor and encouraging his confidences; that this sexual physical contact occurred during a period when respondent knew that J.F. was in great emotional distress for a number of reasons, including his home life, concerns about his sexual orientation, his harassment by other students and, quite probably, his relationship with P.B.; and that respondent's unwelcome physical contact altered J.F.'s educational environment in an offensive way (Initial Decision at 6-7), are well established by a preponderance of the credible, competent evidence in the record and, in and of themselves, amply justify respondent's removal from his position.

Similarly rejected are the prior school law decisions cited by respondent in support of mitigation of penalty in consideration of what he apparently believes is the less serious nature of his offense and his exemplary prior work record. Rather, the Commissioner finds that these cases are not particularly beneficial to respondent in the context of this matter. As recognized in *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County, 1966 S.L.D* at 188.:

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)

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 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.

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.* As an educator, respondent stands in a fiduciary relationship with all of his students. As such, he owes each of them a duty of trust and loyalty which means that he is responsible, at all times, to act in the best interests of his students and may not engage in any activity which would serve his own self interests to the detriment of his students. That respondent here abrogated his duty of trust to J.F. is undeniable. That he did so knowing J.F. was already an extremely conflicted and troubled young man makes his actions here all the more outrageous and reprehensible.

Although duly considering respondent's unblemished prior record, his positive performance evaluations and letters from individuals attesting to his many laudable contributions to students, the school and the community, the Commissioner concludes that these factors, which ordinarily might serve to mitigate against respondent's dismissal, are greatly outweighed by the seriousness of his admitted conduct in this matter. In light of the fact that respondent's behavior reflects a clear violation of his obligation to educate, not endanger, and protect, not exploit,

vulnerable children (*Frugis v. Bracigliano*, 177 N.J. 250, 268 (2003)), the Commissioner finds that such behavior is “sufficiently flagrant” to warrant respondent’s dismissal from his tenured position. *In re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967).

Accordingly, the Initial Decision of the ALJ is adopted as the final decision in this matter. Stephen Fox is hereby dismissed from his tenured teaching position in the New Providence School District as of the date of this decision. This matter is being referred to the State Board of Examiners for action against respondent’s certificate as that body deems appropriate.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: February 10, 2005

Date of Mailing: February 10, 2005

² 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.*