#362-06 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu03876-05_1.html)

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| IN THE MATTER OF THE TENURE | : | |
| HEARING OF ADELPHIA POSTON, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE CITY OF | : | DECISION |
| ORANGE TOWNSHIP, ESSEX COUNTY. | : | |

## SYNOPSIS

Petitioning school district certified multiple tenure charges of conduct unbecoming and insubordination against respondent – a tenured middle school science teacher – for actions which included, *inter alia*: a physical altercation with another teaching staff member; use of expletives in the classroom and during interactions with other staff at the school; and a physical altercation with a student. A number of tenure charges originally certified were subsequently withdrawn by petitioner for lack of evidence.

The ALJ identified three issues in this matter: 1) whether charges of conduct unbecoming are supported by the evidence; 2) whether there are mitigating circumstances for such conduct; and 3) whether the penalty of permanent removal from a tenured teaching position is warranted. The ALJ found that: the Board failed to sustain most of the charges; mitigating circumstances existed that must be taken into consideration in determining the appropriate penalty; and that all that could ultimately be held against respondent was one incident of poor judgment which did not warrant dismissal from tenured employment. The ALJ imposed a 30-day suspension for respondent's poor judgment "when using expletive words in her classroom on one specific occasion."

The Commissioner adopted the Initial Decision with modification. Because the ALJ's credibility assessments and resultant fact-finding were sufficiently supported by the record, the Commissioner concurred that very few of the Board's charge specifications were actually proven and those that were did not warrant her dismissal from tenured employment. However, the Commissioner also found a 30-day suspension insufficient to impress upon respondent and others that obscene and derogatory outbursts – regardless of how grievously provoked – cannot be tolerated in the school setting, and the ALJ's recommended penalty was increased to forfeiture of the 120 days of salary already withheld from respondent pursuant to *N.J.S.A.* 18A:6-14. Additionally, in light of the numerous indications on record that respondent is experiencing difficulties in resolving conflicts and dealing with disruptive students, the Commissioner directed that respondent be provided with appropriate training and assistance.



October 19, 2006

OAL DKT. NO. EDU 3876-05
AGENCY DKT. NO. 78-3/05

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Board of Education (Board) and Respondent's reply thereto.[1]

In its exceptions, the Board contends that although the Administrative Law Judge (ALJ) correctly recited the legal principles controlling tenure matters, she misapplied them to the facts herein, reaching an erroneous conclusion as to the appropriate penalty to be imposed upon respondent. According to the Board, respondent's admissions *alone* warrant more than a thirty-day unpaid suspension, and when added to the testimony of Board witnesses, they clearly warrant her dismissal from tenured employment. The Board argues that respondent engaged in highly offensive and unprofessional behavior toward staff and students, and that allowing such conduct to pass with nothing more than a thirty-day suspension "sends a terrible message to stakeholders in the Orange School System [who should not] be forced to put up with this behavior, [as well as to other teachers who] may think it is worth thirty days to physically attack a colleague and/or curse out a student in front of their class." The Board opines that respondent "obviously has reached the point in her life and career, where she has become combative,"

[1] Shortly after issuance of the Initial Decision, a Substitution of Attorney was filed with the ALJ, wherein Alfred F. Maurice, Esq. was substituted for Louis P. Bucceri, Esq. as counsel for respondent. However, respondent subsequently elected to proceed *pro se* and submitted reply exceptions on that basis.

having "articulated and acted out an 'I'm not going to take it anymore' attitude***[which] should not be tolerated in the public school setting." (Board's Exceptions at 1-2)[2]

In reply, respondent argues that the Board's exceptions read as though charges were proven at hearing, which they were not. Reviewing her own response to each of the charges and noting the Board's various withdrawals and lack of proofs, respondent states that she has "no history of a hostile and aggressive attitude and demeanor the entire time [she] was at the Middle School," and she urges the Commissioner to adopt the ALJ's decision, with which she "wholeheartedly and gratefully" agrees. (Respondent's Reply, Part I at 1-7, quotation at 2; and Part II at 1-2, quotation at 5[3])

Upon careful and independent review of the record of proceedings at the OAL, and of the parties' arguments on exception, the Commissioner adopts the Initial Decision of the ALJ with modification as set forth below.

Initially, although the ALJ did not make pertinent findings and recommendations as required by *N.J.A.C.* 6A:3-5.6(a) and (c), the Commissioner here approves the Board's withdrawal of Charges 2b and 2h (use of expletives with students) and Charge 4b (use of racial slurs in class), since – although the charges are unquestionably serious – the Board discovered following certification that it either lacked evidence to pursue them or that the charge had been based on error. The Commissioner likewise approves the withdrawal as *de minimis* of Charge 2d (impeding the school nurse's ability to quickly access her emergency cards and pen at a time of urgent need), since it is evident from the record (I.D. Exhibit P-4/D and respondent's Answer

[2] The Board also references its prior argument that respondent's testimony was simply not plausible, attaching a copy of its post-hearing brief.

[3] Because of confusion resulting from the various changes in respondent's representation (see Note 1 above), respondent's reply exceptions were submitted in two parts. See October 6, 2006 letter to respondent from the Director of the Bureau of Controversies and Disputes.

at ¶7) that the most that might have been established for this charge is that respondent should not have gotten in the nurse's way when it was evident that she was busy and dealing with a crisis.

The Commissioner is more reluctant to approve withdrawal as *de minimis* of Charge 2e (not permitting a student in respiratory distress to leave class in a timely manner to see the nurse for asthma medication).[4] However, in view of the principal's representation that when notified of this incident he immediately advised respondent as to proper procedure (Transcript of Hearing, April 12, 2006, at 32), and the fact that the Board alleged neither a past pattern nor any recurrence of incidents of this type, the Commissioner finds it unlikely that this charge – if proven true despite respondent's denial (Answer at ¶8) – would have materially affected the outcome of this matter. Thus, because no purpose would be served by directing litigation of the charge at this point in proceedings, the Commissioner approves its withdrawal. *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions* [*S.L.D.*] 842, 846)

With respect to the remaining charges, the Commissioner first observes – as recognized by the Board – that the ALJ has generally cited and applied appropriate principles of law in deciding this matter.[5] The Commissioner further observes – again, as recognized by the Board (Post-Hearing Submission at 7) – that the outcome of the matter with respect to the proving of charges turns largely on witness credibility.

This being so – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her, and having made findings of fact based upon their testimony – the standard governing the Commissioner's review is clear and unequivocal:

[4] The Initial Decision (at 4) erroneously places the alleged act in 2004; the correct year is 2003 (Exhibit P-4e).

[5] The remarks on criminality included within the ALJ's discussion of unbecoming conduct – as well as her reference to pre-trial intervention – do not pertain to the instant matter and are clearly the result of "cutting and pasting" an otherwise applicable paragraph from a prior OAL decision, *In the Matter of the Tenure Hearing of Thomas Wachendorf, New Jersey State Department of Corrections, Mountainview Correctional Facility*, OAL Dkt. No. EDU 6860-04, decided May 3, 2005, pages 5-6 (Commissioner's Decision July 14, 2005).

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record. (*N.J.S.A.* 52:14B-10(c))[6]

On reviewing the record with this standard in mind,[7] the Commissioner cannot conclude that the ALJ's credibility assessments and resultant fact-finding were without the requisite level of support; thus, the Commissioner must substantially adopt the Initial Decision with respect to the truth of the Board's charges. As a consequence, the Commissioner must also concur with the ALJ that – notwithstanding the Board's characterization of respondent's conduct as "profane, volatile and assaultive" (Post-Hearing Brief at 7) and its belief that it should not be "forced to gamble" on her continued good behavior by keeping her employed as a teacher (*Id.* at 10-11) – very few of the Board's specific allegations were actually proven in this proceeding, and those that were did not generally rise to a level sufficient to support a tenure charge.

To briefly summarize: Charge One, where respondent was alleged to have choked and cursed a colleague during a heated altercation on the day prior to the beginning of school, was essentially reduced to a finding that respondent might have handled the confrontation between herself and Dr. Jones – which she was found to have neither initiated nor pursued as charged, and for which both she and Dr. Jones were chastised by the principal without assignment of blame – in a more professional manner by seeking immediate administrative

[6] Decisional law, too, has long held that an agency head must generally defer to credibility determinations made by the ALJ who had the opportunity to hear the testimony and observe the demeanor of the witnesses. *In the Matter of the Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied,* 121 *N.J.* 615 (1989); *S.D. v. Div. Med. Assistance and Health Services,* 349 *N.J. Super*. 480, 485 (App. Div. 2002); *D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004), citing *State v. Locurto*, 157 *N.J.* 463, 470 (1999). See also *State v. Salimone*, 19 *N.J. Super*. 600, 608 (App. Div. 1952), certif. denied 10 *N.J.* 316 (1952).

[7] Full transcripts of hearing were provided.

assistance to diffuse the situation rather than permitting it to escalate as it did. Her participation in the subsequent physical tussle was found to have been solely in self-defense – with the "choking" of Dr. Jones being, in fact, her attempt to push him away as he pinned her against a cabinet – and her utterance of profanity a culminating outburst of rage and frustration brought on by Jones' goading and persistence.

Charge Two, which originally included eight separate specifications of alleged insubordination and inappropriate behavior during the 2003-04 school year, was eviscerated by the Board's withdrawal – as noted above – of four specifications involving cursing, use of expletives, and interference with the functioning of the school nurse, and by the ALJ's finding that two additional charges involving use of expletives and screaming at a colleague lacked any semblance of evidence and were, additionally, outside the time frame of the charge as stated. All that remained as proven were respondent's departure from a difficult parent conference before the parent was satisfied and without being explicitly excused by the assistant principal in attendance (Charge 2f), and respondent's having independently scheduled a parent meeting involving a sensitive situation (the T.A. incident, Charge Five) after being specifically advised by the principal not to do so (Charge 2g). Even these actions were found to have been mitigated by circumstances, in the first instance because the parent was abusive and the assistant principal was doing nothing to intervene, and in the second because respondent had tried repeatedly without success to arrange the meeting through proper channels. Further, with respect to Charge 2f, respondent's year-end evaluation not only made no reference to the incident, but actually found respondent's performance for that year fully satisfactory in all areas, including

accommodation of parents, professional demeanor, fulfillment of assigned duties, and dealings with students and staff.[8]

Charge Three, where respondent was alleged to have used a racial epithet to describe a colleague in front of students, was dismissed in its entirety due to the complete lack of testimony or competent evidence to corroborate the second-hand account of the Board's sole witness, whom the ALJ additionally deemed less credible than respondent.

Charge Four, respondent's alleged poor judgment and inappropriate conduct in the classroom, was reduced to one incident by the Board's withdrawal – for lack of evidence – of the specification (Charge 4b) alleging inappropriate racial and sexual remarks during a career education class. The remaining incident – respondent's alleged encouragement of a student to make a drawing illustrating his desired career of "porno star" and allowing other students to see it (Charge 4a) – was found to be lacking any supporting testimony or evidence whatsoever, while the corollary allegation regarding incorrect reporting of the incident in question (Charge 4a1) was found to be without basis because respondent did, in fact, follow appropriate procedure.

Charge Five, where respondent was alleged to have punched a student (T.A.) in the stomach after calling his mother a "bitch ass dyke" (Charge 5a), was reduced to a finding that respondent – following relentless needling by the persistently disruptive T.A., who was taunting her repeatedly with the epithet "dyke," reached the bursting point and hurled the same epithet back at him with reference to his mother – whereupon T.A. exploded and punched respondent; respondent never touched the student, as he subsequently admitted in a municipal court proceeding. With respect to the Board's corollary allegation that respondent "spoke in a very loud voice and displayed erratic and uncontrollable behavior" and admitted calling T.A.'s mother a "bitch ass" as well as a "dyke" at a meeting with the administration called to discuss this

[8] Additionally, the incident in question, which occurred on February 6, 2003, fell outside the time frame of the charge (the 2003-04 school year).

incident (Charge 5a1), the ALJ, in disposing of the charge, presents the testimony of the Board's sole witness, Assistant Superintendent Frazier, in a manner suggesting that she was taking such testimony as fact. (Initial Decision at 38) However, with respect to respondent's deportment at the meeting, the ALJ makes no actual findings of fact (*Id*. at 32), and the transcript of hearing reveals that Frazier testified to nothing more than that the "pitch" and "intonation" of respondent's voice indicated that she was becoming "vexed," "agitated" and "annoyed" as the meeting progressed – nowhere even suggesting that her behavior was erratic or uncontrollable as charged by the Board. (Transcript of Hearing, April 11, 2006, at 9-11, 14). Similarly, while the aforementioned recitation of Frazier's testimony in this context (at 38) might suggest that the ALJ was giving credence to Frazier's representation that respondent admitted using the term "bitch ass," she expressly found elsewhere that respondent neither used the term nor admitted using it. (Initial Decision at 31, 32 and 37)

Thus, upon completion of fact-finding as to the truth of the Board's charges, the ALJ concluded that the only "mountable charges" against respondent were those portions of Charge Five involving the use of inappropriate language with student T.A. (Initial Decision at 41) While recognizing that use of profane and derogatory language with a student is inappropriate for a teacher under any circumstances, even where the student in question has been "able to stress respondent to a point of using poor judgment, and incite her to retaliate with unbecoming language" (*Id*. at 44-45), the ALJ concluded that – in light of respondent's seven-year record of successful teaching with satisfactory and outstanding evaluations, the absence of any discipline prior to that associated with the instant charges, and no reported repetition of conduct of the type associated with the T.A. incident – the only penalty warranted is respondent's suspension for a period of 30 days for her "use of 'poor judgment' when using expletive words in her classroom on one specific occasion." (*Id.* at 47)

The Commissioner fully concurs with the ALJ that, notwithstanding the scope and seriousness of the Board's original charges, the conduct actually proven in this proceeding does not warrant the extreme penalty of respondent's dismissal from tenured employment. However, the Commissioner cannot concur with the ALJ that the appropriate penalty for such conduct is a 30-day suspension.

Initially, the Commissioner finds that the recommended suspension[9] is not a sufficient penalty – even in light of mitigating circumstances – to recognize and impress upon respondent the seriousness of the conduct in which she was found to have engaged, nor the extent of her own responsibility for it. The ALJ was correct in implicitly rejecting the Board's comparisons to "similar" tenure matters in which the respondents were dismissed,[10] the respondents in those matters having been found guilty of far more extreme and pervasive misconduct than the respondent herein; however, respondent's analogy to matters where charges were dismissed,[11] or where the charged party was found to have documented mental and physical incapacity at the time of the conduct in question,[12] is equally inapplicable.

What is required instead is a penalty sufficiently heavy to make it clear that obscene and derogatory outbursts of the type displayed by respondent in her confrontation with a colleague, and – most egregiously – in her classroom interaction with a student, are a very

[9] Presumably referring to 30 days of the 120-day period of unpaid suspension served by respondent pursuant to *N.J.S.A.* 18A:6-14.

[10] *In the Matter of the Tenure Hearing of Philip Sheridan, School District of the City of Orange Township, Essex County*, 92 *N.J.A.R.2d* (EDU) 393, and *In the Matter of the Tenure Hearing of Kenneth Van Gilson, Flemington-Raritan Regional School District, Hunterdon County*, 93 *N.J.A.R.2d* (EDU) 378.

[11] *In the Matter of the Tenure Hearing of Peter J. Romanoli, School District of the Township of Willingboro, Burlington County*, 1975 *S.L.D.* 352, *In the Matter of the Tenure Hearing of Thomas L. Harty, School District of the Borough of Wallington, Bergen County*, 1960-61 *S.L.D.* 199, and *In the Matter of the Tenure Hearing of H. Evelyn Cohn, School District of the City of Trenton, Mercer County*, 1983 *S.L.D.* 633.

[12] The Commissioner is not persuaded on this record that the Board filed tenure charges in "retaliation" for respondent's exercise of her right to request reasons for the Board's directive that she undergo a psychiatric exam pursuant to *N.J.S.A.*18A:16-2l, as respondent claims. The Commissioner finds it more likely that the Board, having concerns about respondent, made a strategic decision that the most expedient way in which to proceed was to let respondent's conduct speak for itself rather than attempting to probe her underlying mental state.

serious matter and simply cannot be tolerated in the school setting no matter how grievously a teaching staff member may be provoked (*In the Matter of the Tenure Hearing of Juanita Zielinski, School District of the Town of Guttenberg, Hudson County,* 1977 *S.L.D.* 786, 793), yet at the same time acknowledging that the charges proven against respondent were far fewer than those in matters where the respondent was not dismissed, but suffered a very substantial monetary penalty such as a salary reduction of six months or more and/or withholding of one or more increments in addition to increments already withheld.[13] The Commissioner, therefore, determines that the appropriate monetary penalty for respondent, under all of the circumstances, is forfeiture of the 120 days of salary already withheld from her pursuant to *N.J.S.A.* 18A:6-14.

Additionally, the Commissioner notes that while the record may not have supported the bulk of the Board's tenure charges, it is replete with indications that respondent – however successful she may have been in the past – has become increasingly stressed and is now experiencing difficulty in her interactions with colleagues and superiors, and in dealing with disruptive students and trying situations.[14] The Commissioner, therefore, finds it appropriate to further direct, "as a component of the penalty imposed against the respondent, that the Board arrange for and the respondent attend a program designed to provide training" in anger management, conflict resolution and handling difficult and disruptive students. *In the Matter of*

[13] See, for example, *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County*, decided by the Commissioner October 21, 2002, affirmed by the State Board December 3, 2003, citing *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; *In the Matter of the Tenure Hearing of Henry Allegretti, School District of the City of Trenton*, decided by the Commissioner March 22, 2000; and *In the Matter of the Tenure Hearing of George Mamunes, Pascack Valley Regional School District*, decided by the Commissioner June 26, 2000.

[14] For example, although respondent may not have been the aggressor in the conflict with Dr. Jones, she nonetheless let herself be drawn into a confrontation with him and reacted with language totally inappropriate to the school setting even in the absence of students. Later, although respondent may not have called Dr. Jones by derogatory names as charged, she apparently did speak inappropriately to students about her difficulties with him; her denial of Charge Three (Answer ¶12) is expressly limited to her alleged use of racial epithets. Additionally, in several instances where administrators did not respond to concerns or situations as she thought they should, respondent reacted with a less than optimal degree of professionalism, and, throughout her testimony and written communications, she repeatedly expressed frustration at having to tolerate "disrespect" from staff and students.

*the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County*, decided by the State Board, December 3, 2003, slip opinion at 6-8 (quotation at 8) Such training may be in conjunction with referral of respondent to the district's Employee Assistance Program, which the Board directed in August 2004 but never actually effectuated given its subsequent actions (Initial Decision at 32-33, Exhibits R-36 through R-46), and through inclusion of appropriate strategies in respondent's Individual Professional Development Plan.[15]

Accordingly, the Initial Decision of the OAL, as modified herein, is adopted as the final decision in this matter.[16] Respondent shall not be dismissed from tenured employment but shall forfeit the 120 days' salary already withheld from her, and arrangements shall promptly be made for training and assistance as set forth above.

IT IS SO ORDERED.[17]

COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2006
Date of Mailing: October 19, 2006

[15] Nothing herein is intended to foreclose the Board from subsequently directing that respondent be examined pursuant to *N.J.S.A.*18A:16-2 if, in its judgment, respondent shows evidence of deviation from normal health, *provided*, however, that such directive must be effectuated in accordance with *N.J.A.C.* 6A:32-6.3(e) or such other rule as may be applicable at that time.

[16] The Commissioner notes, for purposes of clarity, that, although the ALJ has correctly summarized respondent's testimony with respect to her worker's compensation claim (Initial Decision at 20), the referenced exhibit (R-35, notice of suspension pending investigation) does not pertain to this testimony; similarly, although respondent testified, as recited, that her increment was withheld, the referenced exhibit (R-46, letter of counsel regarding tenure charges) does not so state, nor does any other document on record. (See Transcript of Hearing, April 12, 2006, at 173, 233.)

[17] 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.*