

#368-06 (No OAL Decision)

IN THE MATTER OF THE TENURE :
HEARING OF UMA SWAMINATHAN, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF PISCATAWAY, : DECISION
MIDDLESEX COUNTY. :

SYNOPSIS

In August 2004, petitioning school district certified tenure charges of incapacity and conduct unbecoming against respondent – a tenured middle school social studies teacher – alleging chronic failure to meet professional expectations, and unprofessional and hostile reactions to supervision by district personnel. Respondent denies the charges and contends that she is a victim of racism based upon her Asian Indian heritage. The matter was transmitted to the OAL on September 7, 2004.

Hearings in this matter were delayed multiple times due to counsels’ schedules, finally commencing in November 2005. Hearing days were used for settlement negotiations during the summer of 2006, but were unsuccessful. Subsequently, petitioner requested leave from the ALJ to withdraw tenure charges, and submitted certification indicating that the continued financial cost and diversion of resources necessary to sever the employment relationship with respondent could no longer be justified. The OAL subsequently transmitted the case file – marked “WITHDRAWAL” – to the Commissioner for review, without benefit of an Initial Decision in this matter.

The Commissioner found that the proposed withdrawal did not meet the standards required pursuant to *N.J.A.C. 6A:3-5.6(a)* for withdrawal of tenure matters, emphasizing that once tenure charges have been certified, financial considerations alone do not justify abandoning same. The Commissioner further noted that petitioner’s certification, submitted with the request for withdrawal, itself suggests that it is not in the public interest to withdraw tenure charges against respondent. Accordingly, this matter is remanded to the OAL for further proceedings or, in the alternative, for a settlement or withdrawal that meets the standards of *N.J.A.C. 6A:3-5.6(a)* and has been evaluated by the ALJ in an Initial Decision. Further, in light of the fact that the petitioner has reported a finding of probable cause from the Division on Civil Rights, the ALJ is directed to consider the possibility of consolidating these two matters.

<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>

October 25, 2006

OAL DKT. NO. EDU 8108-04
AGENCY DKT. NO. 289-8/04

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On August 23, 2004, petitioner filed tenure charges against the respondent, alleging incapacity and conduct unbecoming. More specifically, petitioner stated in pertinent part as follows:

Charge No. 1 (Paragraph 20)

Respondent's chronic failure to meet reasonable professional expectations placed upon her does not constitute mere inefficiency, but is tantamount to incompetence and incapacity such that further opportunities for corrective action or improvement would be futile, and harmful to the students of the district.

Charge No. 2 (Paragraph 22)

Respondent's persistent refusal over six consecutive school years to perform to the expectations reasonably placed upon her, coupled with her unprofessional and often hostile reaction to appropriate supervisory activities by her Building Principal and other supervisory personnel, are tantamount to conduct unbecoming a teaching staff member.

Conclusion (Paragraph 24)

As a result of the facts alleged hereinabove, the undersigned has reluctantly concluded that respondent is professionally unfit to continue as a teacher in the District, and that further attempts to assist her in improving performance would be futile.

Respondent's answer denied the allegations in the petition and contained only one affirmative defense, *i.e.*, that the allegations articulated in the petition, if true, constituted inefficiency, and must be dismissed because petitioner allegedly failed to implement the procedural and corrective actions required by such a charge.

The matter was transmitted to the Office of Administrative Law (OAL) on September 7, 2004. The hearing was initially set to commence in April 2005. It was adjourned multiple times, due to the difficulties of coordinating the calendars of the Administrative Law Judge (ALJ), the parties' counsel, and the respondent. Correspondence in the file identifies November 16, 2005 as the first hearing day. While it is not clear from the record available to the Commissioner whether any additional hearing days were completed in 2005, there is a transcript of proceedings dated February 7, 2006.

The next reference to a hearing date was an OAL notice which directed the parties to appear on March 29, 2006, but the record does not reveal whether proceedings actually took place on that day. Another OAL notice identified three days in June 2006 as hearing dates, but those dates were apparently used for settlement discussions.¹ By letter dated July 6, 2006, petitioner's counsel advised that he had not heard from respondent's counsel concerning a settlement proposal.

On July 27, 2006, petitioner's counsel reported that he had finally heard from respondent that settlement negotiations were failing, and that the parties would like to have a settlement conference before the hearing dates that had been set for the Fall of 2006. Once again, counsel and respondent had difficulty agreeing on a date for the requested settlement conference. Ultimately, settlement negotiations were held on August 31, 2006, but petitioner

¹ Two subsequent OAL notices reserved six days in September and October 2006, and four days in December 2006, respectively.

received word a week later that respondent had rejected petitioner's proposal and had made no counter offer.²

On September 25, 2006 the ALJ received a request from petitioner for leave to withdraw the tenure charges, accompanied by a certification by Robert L. Copeland, Superintendent of the Piscataway School District. In the certification, Copeland states, in pertinent part, as follows:

[A]fter reviewing her record and conferring extensively with her building principal and other supervisors, I was satisfied that she possessed neither the skills nor the professional attitude necessary to be an effective middle school social studies teacher in this District. She had rejected virtually all attempts to assist her in improving her skills, and reacted to any criticism of her performance with unfounded accusations of racism. After having given her every opportunity to rehabilitate her job performance, I was convinced that further attempts would be futile. . . .

[W]e remain convinced that she should not be teaching middle school students in this District Based on her historical unwillingness to take direction from any supervisor with whom she disagrees, we have serious concerns about the prospects for success at another grade level without a substantial change in attitude on her part.

The case file, marked "WITHDRAWAL," was transmitted from the OAL on September 28, 2006, for the Commissioner's review.

Although the regulations governing the OAL give ALJs the option of entering Initial Decisions memorializing on the record the circumstances of withdrawals, *N.J.A.C.* 1:1-19.2, an Initial Decision was not filed in this case. Because the present case is a tenure matter, however, any proposed withdrawal must address the six standards set forth in *N.J.A.C.* 6A:3-5.6(a). Those standards are:

² In the meanwhile, respondent's counsel wrote to petitioner's counsel with a copy to the ALJ stating that his client had received a "finding of Probable Cause" from the New Jersey Division on Civil Rights (which finding does not appear to be part of the record transmitted from the OAL), and that respondent planned to seek a Right to Sue Letter from the EEOC and add civil rights causes of action against petitioner to a lawsuit she had filed in federal court.

1. Accompaniment by documentation as to the nature of the charges;
2. Explication of the circumstances justifying settlement or withdrawal;
3. Consent of both the charged and the charging parties;
4. Indication that the charged party entered into the agreement with a full understanding of his or her rights;
5. A showing that the agreement is in the public interest; and
6. Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

[Emphasis added.]

The Commissioner finds that the above articulated standards 2 – 5 have not been met.

As to standard 2, petitioner's justification for withdrawal appears to be the length of time that has already transpired since the tenure charges were filed and the financial burden that can be expected to result from further prosecution of the charges. The Commissioner is mindful of the serious financial liability consequent to lengthy tenure proceedings. However, the record indicates that the proceedings in this case were protracted primarily due to counsel's schedules and decisions by the parties to preempt hearing dates for settlement talks, instead of holding such talks in tandem with the OAL proceedings.

More importantly, it is well settled that once tenure charges have been certified, financial considerations alone do not justify abandoning same. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner on March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education, November 2, 1983, *aff'd*. Superior Court, January 30, 1986 (once a Board takes up the burden of tenure charges it cannot lay it back down again without

setting forth on the record a reasonably specific explanation of why it is now in the public interest not to pursue them). [Emphasis added]

This principle correlates with standard 5 above, which requires a showing that a withdrawal of tenure charges is in the public interest. Petitioner contends that it is in the financial best interests of the district to withdraw the tenure charges. (Certification of Robert L. Copeland, Paragraph 3) The district's interest, however, is not synonymous with the public interest. In point of fact, petitioner's request for withdrawal of the tenure charges itself states: "we remain convinced that she should not be teaching middle school students in this District," and "[b]ased on her historical unwillingness to take direction from any supervisor with whom she disagrees, we have serious concerns about the prospects for success at another grade level without a substantial change in attitude on her part." Petitioner's words suggest that it is not in the best interest of the district's children, *i.e.* the public interest, to withdraw the tenure charges against respondent. Consequently, the Commissioner cannot conclude that standard 5 is met.

Finally, as regards standards 3 and 4, there is nothing in the record to indicate that respondent would willingly change teaching assignments, revise her outlook or accept supervision. Accordingly, the Commissioner remands this matter to the OAL for further proceedings to be conducted in an expeditious and timely manner as required by *N.J.S.A.* 52:14B-10.1, or, in the alternative, for a settlement or withdrawal that meets the standards of *N.J.A.C.* 6A:3-5.6(a) and has been evaluated by the ALJ in an Initial Decision. Further, in light of the fact that petitioner has reported a finding of probable cause from the Division on Civil Rights, the ALJ is directed to consider the factors set forth in *N.J.A.C.* 1:1-17.3

and 17.5 for the possible consolidation of this proceeding before the Commissioner with the matter pending before the Division on Civil Rights.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: October 25, 2006

Date of Mailing: October 25, 2006

³ 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.*