#283-08 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu08220-07_1.html)

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MIERZWA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF FRANKLIN, SOMERSET COUNTY.	:	
	:	

SYNOPSIS

The petitioning school district certified three tenure charges of unbecoming conduct and other just cause against respondent – a tenured technology education teacher – for alleged inappropriate behavior toward students and staff, in which he demonstrated poor judgment, an inability to control his temper and demeanor, and insubordination, and on one occasion, used excessive force against a student. The respondent acknowledged that the three incidents had occurred, but denied that his behavior constituted conduct unbecoming and asserted that his failure to control his emotions in response to exceptionally difficult circumstances did not constitute a pattern of conduct unbecoming a teacher.

The ALJ found that the Board has established by a preponderance of the credible evidence that respondent on two different occasions acted in a manner inappropriate for a teacher and inapposite to his function as a role model. Respondent failed to control his temper, displayed poor judgment, and allowed feelings of frustration and anger to overwhelm his professional demeanor in the aftermath of a student fight in February 2004; moreover, he used force against a student, although not excessively under the circumstances. Respondent displayed similarly inappropriate behavior during and following an incident of unruly student conduct in his classroom in May 2006. On the third occasion, the ALJ found respondent's behavior less than exemplary, but concluded that under the circumstances it did not rise to the level of unbecoming conduct. Based on the two charges proven, the ALJ concluded that respondent was incapable of controlling his temper and that his tenure must be revoked.

Upon careful and independent review of the record, the Commissioner found that – while concurring with the ALJ's findings as to the seriousness and unacceptability of respondent's conduct – the penalty of dismissal in this case is too severe in light of prior tenure matters wherein respondents demonstrated similar unprofessional behavior but did not lose their tenured employment. Accordingly, the Commissioner adopted the Initial Decision of the OAL with modification as to the penalty, holding that respondent shall not be dismissed from tenured employment, but shall forfeit the 120 days of salary already withheld from him and shall further be suspended without pay for four months beginning with the opening of the 2008-09 school year while he obtains training and assistance in anger management, conflict resolution and handling difficult and disruptive students – which must successfully completed as a condition of respondent's return to duty, or his tenured employment shall cease at the end of his suspension.

June 23, 2008

OAL DKT. NO. EDU 8220-07
AGENCY DKT. NO. 259-9/07

IN THE MATTER OF THE TENURE HEARING OF ADAM MIERZWA, SCHOOL DISTRICT OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent and the Franklin Township Board of Education (Board), respectively, together with respondent's reply to the Board's exceptions.[1]

In his exceptions, respondent urges adoption of the Initial Decision, but asks that it be modified with respect to the recommended penalty of dismissal. Respondent contends that – although the Administrative Law Judge (ALJ) thoroughly analyzed the facts and circumstances underlying the tenure charges – he nonetheless imposed an "excessive and unwarranted" sanction that neither accurately reflects nor appropriately addresses the actual nature and gravity of respondent's conduct. (Respondent's Exceptions at 1-6)

According to respondent, the facts found by the ALJ constitute neither a pattern of unbecoming conduct nor individual instances of conduct sufficiently flagrant

[1] Although all three days of hearing appear to have been transcribed, the record forwarded to the Commissioner contained transcripts for the March 3, 2008 and March 5, 2008 hearings only.

to demonstrate unfitness to remain in a teaching position.[2] Respondent stresses that: 1) he did not strike, physically threaten or intimidate, curse at or personally insult or slur any student, teacher or administrator; 2) he engaged in none of the behaviors – such as physical or verbal abuse, harassment, harsh and persistent scolding and criticism, or cruel, premeditated or vicious actions – that have cost teachers their positions in prior tenure matters of this type; and 3) his conduct did not exhibit a pattern of gravity or frequency comparable even to those of teachers who did *not* lose their positions. (Respondent's Exceptions at 6-7 and 9, citing *In the Matter of the Tenure Hearing of Juan Cotto, State-Operated School District of the City of Newark, Essex County*, Commissioner's Decision No. 205-00, decided June 26, 2000, affirmed, State Board of Education Decision No. 40-00, decided November 1, 2000; *In the Matter of the Tenure Hearing of M. William Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988); and *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County*, Commissioner's Decision No. 371-02, decided October 21, 2002, affirmed with modification, State Board of Education Decision No. 49-02, decided December 3, 2003)

[2] Respondent characterizes "the sum of [his] conduct at issue" as follows:

> On February 20, 2004, Respondent, then 56 years old, was punched, kicked, and knocked to the ground by a student when he removed her from a fight. When he brought her to the office, he was physically and emotionally compromised; he was lightheaded and breathing heavily, and upset at what he perceived to be a lack of support to deal with a very serious altercation. He yelled that more assistance was necessary, and then left the office instead of heeding an instruction from his Principal which he undisputedly may not have even heard.
>
> On May 4, 2006, Respondent berated students in his class for throwing things at him while he was facing the chalkboard; referring to their behavior as cowardly, and threatening not to pass them, or to contact the police. He then called security to remove one of the students, T.W., who had already tried to shove past Respondent to leave the classroom, and who subjected him to a litany of foul insults when he was removed. Respondent then went to the main office and emotionally expressed his anger and frustrations to his Principal and Vice Principal. Leaving the office, he angrily told T.W. that his obnoxious and assaultive actions might warrant police intervention. (Respondent's Exceptions at 8-9)

Moreover, respondent asserts, his actions on the dates in question were at least to some extent predicated on a lack of assistance from the school administration in dealing with difficult students, so that the district bears a degree of responsibility for creation of the conditions that led to his actions. (Respondent's Exceptions at 7-8 and 9, citing *In the Matter of the Tenure Hearing of George Zofchak, School District of the City of Trenton, Mercer County*, Commissioner's Decision No. 365-02, decided October 15, 2002, affirmed, State Board of Education Decision No. 47-02, decided June 4, 2003)

Respondent, therefore, urges that – although a sanction is warranted because he allowed his emotions and temper, on two occasions more than two years apart, "greater leeway than is appropriate for one charged with exhibiting a great degree of restraint and self-control" – his "displays of emotion" under the circumstances were neither so extreme as to demonstrate "an utter inability to control his temper" nor indicative of a temperament "so chronically fragile that he is unable to handle the rigors of the classroom on a daily basis." (Respondent's Exceptions at 9)

The Board, in turn, urges that the Initial Decision be adopted in all respects save its finding that respondent's use of force in pushing a student into a chair on February 20, 2004 was not "excessive." Pointing to the testimony of respondent's then-principal and the "statements" from witnesses and respondent serving as the basis for the administration's report to the superintendent on its investigation of the underlying incident (Exhibit P-3), the Board asks the Commissioner to find instead that respondent, in anger and frustration, pushed a student – who was no longer offering any physical resistance and had been given no prior direction to sit – into a chair with such

force that her backpack hit the back of the seat and bounced her back up, thereby employing a degree of force unnecessary and excessive under the circumstances, creating some risk of harm to the student, and setting an extremely poor example by reinforcing the very impulses toward irrationality and violence that caused the student to become involved in fighting in the first place. (Board's Exceptions at 1-5)

In reply, respondent counters that: 1) the testimony on which the Board bases its exceptions was fully taken into account by the ALJ, who properly contextualized it in making his findings of fact; and 2) the conclusions of Exhibit P-3 cannot be substituted for the findings resulting from a plenary hearing where testimony was duly weighed and witness credibility appropriately assessed. Respondent also contends that Exhibit P-3 does *not* include a "statement" from him as claimed by the Board, since the document in question was prepared by the Board's chief witness against him and he had no opportunity to review, correct or sign it. As to the Board's proposed findings of fact, the record shows – according to respondent – that: 1) he held onto the student in question as he was bringing her into the office and directing her to the chair so she could not continue assaulting him – as she had just done by punching, kicking and pushing him to the ground, and as he reasonably feared she might again based on her manifest combativeness – so that while he was, indeed, angry and frustrated, his handling of the student was motivated by the desire to avoid further injury; 2) while he undeniably used force to compel the student to sit, there is no basis for characterizing the degree of such force as "great;" 3) he did, in fact, instruct the student to sit as he was directing her into the chair, as found by the ALJ; and 4) any claim that the student – who had just engaged in a violent altercation with a classmate and assaulted

respondent to the point where he required medical attention – was put at "risk of harm" by respondent's placing her into a cushioned chair is "not only objectionable hyperbole, but also dilutes the gravity of that phrase in instances where its application is warranted." (Respondent's Reply at 1-6, quotation at 6)

Upon careful review and consideration, the Commissioner determines to adopt the Initial Decision with modification as set forth below.

Initially, the Commissioner finds the ALJ's fact-finding, analysis and conclusions as to the truth of the Board's allegations and the characterization of respondent's behavior as unbecoming conduct – including the finding that the force used by respondent in compelling student K.H. to sit was "not excessive" – to be fully supported by the record and entirely consistent with applicable law. In regard to the ALJ's finding of "not excessive," as challenged by the Board, the Commissioner notes that the testimony and evidence proffered on exception were, in fact, fully and carefully considered in the Initial Decision, and that the import of the ALJ's assessment – which is by no means an exoneration of respondent – is clear from the corollary finding that respondent pushed K.H. down forcefully enough to get her to sit, but did not throw her down or jam her into the seat so as to place her in danger. (Initial Decision at 20-21)

However, while the Commissioner concurs with the ALJ as to the nature of respondent's conduct, she finds less clear the question of whether dismissal is the appropriate penalty for it.

On the one hand, the ALJ is entirely correct – for all of the reasons well expressed in the Initial Decision (at 29-30) – that respondent's behavior cannot be tolerated and that nothing in his Lesson Observation records and Annual Performance

Reports (Exhibits P-24a through P-24q and R-15 through R-18) serves to mitigate any penalty that would otherwise be imposed against him. Furthermore, as noted by the Board in its Post Hearing Brief (at 26-28), the record is replete with indications that respondent does not comprehend the gravity of – or accept responsibility for – his behavior, instead contending that he does not have an anger management problem and attributing his difficulties entirely to the failings of others – specifically, students and district administrators.[3]

On the other hand, though – while respondent's actions certainly may not be dismissed as lightly, or viewed as sympathetically, as his recitation of "the sum of his conduct" would suggest[4] – respondent is correct that, in prior tenure matters, conduct of the type in which he was found to have engaged has generally resulted in a penalty less severe than dismissal. *In the Matter of Emri, supra,* citing *In the Matter of the Tenure Hearing of Charles Motley, State-operated School District of the City of Newark, Essex County,* Commissioner's Decision No. 252-99, decided August 4, 1999; *In the Matter of the Tenure Hearing of Henry Allegretti, School District of the City of Trenton,* Commissioner's Decision No. 96-00, decided March 22, 2000; and *In the Matter of the*

[3] For example, although he did attend "a couple of counseling sessions" at the suggestion of his attorney (Transcript of March 5, 2008 hearing at 213), respondent dismissed suggestions in 2004 – by both the Division of Youth and Family Services and the district – that he undergo counseling to assist him in dealing with this anger, noting that he already practiced Tai Chi and Qi Gong and that it was K.H. who needed anger management. (Initial Decision at 9; Exhibits P-3 and P-21) On July 23, 2005 – nearly a year prior to the incident of May 4, 2006 – he represented to the district, in seeking restoration of the increment withheld from him as a result of the February 20, 2004 incident, that he had developed sufficient coping strategies so that his behavior would not be repeated. (Exhibit P-22) As late as the March 5, 2008 hearing in this matter, he stated that the problem was not with his level of anger control, but with the behavior of his students. (Transcript at 213)

[4] See Note 2 above. With respect to the February 20, 2004 incident, respondent does not even mention his physical handling of K.H. or pushing her into the chair. With respect to the events of May 4, 2006, respondent ignores the ALJ's findings that respondent publicly stated he *would* file charges against T.W. and that he cast aspersions on his students (not merely on their behavior) and responded to all of them, guilty or not, in an "emotional, agitated and verbally threatening manner" (Initial Decision at 27); moreover, nothing in respondent's description captures the ALJ's specific (and graphic) finding as to respondent's persistent yelling, screaming and venting in his interactions with administrators. (*Id*. at 26-27)

Tenure Hearing of George Mamunes, Pascack Valley Regional School District, Commissioner's Decision No. 208-00, decided June 26, 2000. See also *In the Matter of the Tenure Hearing of Adelphia Poston, School District of the City of Orange Township, Essex County*, Commissioner's Decision No. 362-06, decided October 19, 2006, appeal dismissed, State Board of Education Decision No. 44-06, decided April 4, 2007. Moreover, although the Board withheld respondent's increment after the incident with K.H. and suggested that he obtain counseling (Exhibits P-3 and P-8), there is no indication on the record that the Board compelled him to take specific actions to address his unacceptable behaviors, or that strategies for dealing with disruptive students or administrative conflict were included in his Individual Professional Improvement Plans.

The appropriate balance in this matter, then, would appear to be struck by a penalty that 1) suffices to impress upon respondent the seriousness and unacceptability of his misconduct, yet affords him a reasonable opportunity to address his behavior without losing his tenured employment, and 2) removes him from the school environment while his behavior is being addressed, but in a manner that takes into consideration the need to minimize disruption to his students' education. The Commissioner, therefore, directs that respondent shall forfeit the 120 days' salary already withheld from him pursuant to *N.J.S.A.* 18A:6-14, and that he shall further be suspended without pay for an additional period of four months commencing with the beginning of the 2008-09 school year, during which time the Board shall arrange for – and the respondent shall successfully complete as a condition of his return to duty – a program designed to provide training in anger management, conflict resolution and handling difficult and disruptive students. *In the Matter of Emri, supra,* State Board Decision at 6-8.

Should respondent not successfully complete the program as directed, his tenured employment shall cease at the end of the four-month suspension period.

Accordingly, the Initial Decision of the OAL, as modified herein with respect to penalty, is adopted as the final decision in this matter. Respondent shall not be dismissed from tenured employment at this time, but shall forfeit the 120 days of salary already withheld from him and be further suspended without pay for four months while he obtains training and assistance as set forth above; provided, however, that his tenured employment shall cease at the end of the suspension period if he fails to successfully complete the requisite program. [5]

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2008
Date of Mailing: June 24, 2008

[5] Nothing herein is intended to foreclose the Board from referring respondent to an Employee Assistance Program or directing that he be examined pursuant to *N.J.S.A.*18A:16-2, if, in the Board's judgment, he shows evidence of deviation from normal mental or physical health. Similarly, should respondent complete training as ordered and return to duty, nothing herein precludes the Board from taking action as it deems fit in response to any subsequent instances of inappropriate behavior.

[6] 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.*