

IN THE MATTER OF THE TENURE :
HEARING OF SCOTT POWELL, :
SCHOOL DISTRICT OF THE TOWNSHIP :
OF LOPATCONG, WARREN COUNTY. :
:
AND :
COMMISSIONER OF EDUCATION :
:
SCOTT POWELL, :
DECISION :
:
PETITIONER :
:
V. :
:
BOARD OF EDUCATION OF THE :
TOWNSHIP OF LOPATCONG, :
WARREN COUNTY, :
RESPONDENT. :

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming, incapacity, and other just cause against respondent Scott Powell – a tenured special education teacher – for alleged inappropriate, unprofessional and offensive behavior toward students in his charge, including: directing students to inappropriately touch him in class; engaging in personal work during his class time; and using obscenities and vulgar hand gestures in the presence of his students. The Board sought dismissal of respondent from his tenured employment. Consolidated into this case are the respondent’s increment withholding appeals for the 2006-07, 2007-08, and 2008-09 school years.

The ALJ found that: the Board carried its burden of proving the tenure charges of unbecoming conduct and incapacity against respondent; respondent’s actions were violative of the public trust and his behavior constituted conduct unbecoming a teacher; the Board’s determination to remove respondent was reasonable and necessary in order to insure the safety and well being of students; and the Board properly denied respondent’s increments and/or salary adjustments for the 2006-07, 2007-08, and 2008-09 school years. The ALJ determined that the tenure charges were sustained, and ordered respondent dismissed from his tenured teaching position.

Upon independent review of the record, the Commissioner concurred with the ALJ’s findings as to the seriousness and unacceptability of respondent’s conduct, and found that the Board had sustained its burden of the proving the charge of unbecoming conduct by a preponderance of credible evidence; however, the Commissioner found that the record contains insufficient evidence to sustain the charge of incapacity, and dismissed this charge. Accordingly, the Commissioner adopted, with modification, the Initial Decision of the OAL as the final decision in this matter. A copy of this decision will be transmitted to the State Board of Examiners for action as that body deems appropriate.

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.

OAL DKT. NOS. EDU 7065-07 (1425-06, 7630-06 ON REMAND), 1519-08 AND 9521-08
(CONSOLIDATED)
AGENCY DKT. NOS. 374-12/05, 188-5/06, 391-12/07 AND 192-7/08

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COMMISSIONER OF EDUCATION
DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions on behalf of Mr. Powell and the Board’s reply thereto – filed in accordance with the timelines dictated by *N.J.A.C. 1:1-18.4* – were fully considered by the Commissioner in reaching her decision herein.

Respondent’s extensive exception submission is largely reiterative of arguments advanced before the Administrative Law Judge (ALJ) below.¹ As the Commissioner finds that

¹ As observed by the Board in its reply exceptions – “[t]his is demonstrated by the fact that more than half – approximately forty-eight (48) – of the ninety (90) pages that constitute Mr. Powell’s written exceptions simply repeat verbatim the Proposed Findings of Fact contained in Mr. Powell’s August 29, 2008 Post Hearing Brief. Furthermore, it is also worth noting that, save for a couple of paragraphs here and there, the arguments set forth, and

these were, in relevant part, addressed and resolved in the Initial Decision, they will not be revisited here. Respondent additionally charges that the ALJ failed to make factual findings sufficient to allow the Commissioner to determine whether the conclusions she reached were proper and supported by competent evidence and he, therefore, urges that this matter be remanded to the OAL to cure this significant deficiency. (Respondent's Exceptions at 2-5)

Upon a comprehensive review of the entire record of this matter – which includes transcripts of each of the 11 days of hearing² – and finding respondent's exceptions without merit, the Commissioner concurs with the ALJ that the Board has proven its charge of unbecoming conduct against respondent by a preponderance of the credible evidence and that termination from his employment is warranted.

In reaching her determination herein, the Commissioner fully recognized that the outcome of this matter with regard to the proving of the charge of unbecoming conduct turns almost exclusively on the credibility of witnesses – the administrators, the students themselves and the respondent – and the weighing of evidence. Consideration of the credibility of the students must focus on such matters as the story they tell, the inconsistencies and gaps therein and the possible motives which may have led them, individually or as a group, to prevaricate. As for respondent, his own testimony forms the primary bulwark of his defense and, in addition to his obvious personal motivations for presenting his case as he does, the record must be thoroughly reviewed to see if his defense is secure, or if – when viewed in light of the Board's evidence – it is contaminated with fatal deficiencies. The ALJ having had the opportunity to

even the cases cited, in the remaining forty-two (42) pages of Mr. Powell's written exceptions are verbatim the same that were set forth in Mr. Powell's August 29, 2008 Post Hearing Brief and October 6, 2008 Reply Brief." (Board's Reply Exceptions at 3)

² The hearing was conducted on October 30, November 28, and December 7, 2007, January 4, January 9, January 10, April 30, May 9, May 16, May 27, and June 26, 2008.

assess the credibility of the various witnesses who appeared before her and having made findings of fact based on their testimony, the standard governing the Commissioner's review is clear and unequivocal:

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.
(*N.J.S.A. 52:14B-10(c)*)

The Commissioner observes that the ALJ documents a clear understanding of her responsibility in this regard by her extensive recitation as to the reasons underlying her credibility assessments:

In evaluating the testimony and evidence in this matter, I am very mindful of the gravity of the charges and more importantly the penalty that goes along with it. I have carefully and thoroughly observed the witnesses, considered their testimony along with the documentary evidence presented. I FIND that the school personnel and the students testified credibly. I have largely relied on the testimony of the students and have given their testimony a great deal of weight because they were in Mr. Powell's classroom. The students are the only witnesses with first-hand knowledge of all of the allegations pending against Powell. They were the recipients of Powell's actions and inactions.

All of the students testified consistently and clearly without any hesitation. They testified that they were either asked to rub/push Powell's shoulder and/or back, or that they saw another student rub/push Powell's shoulder and/or back. All of the students were consistent as to what Powell did and said. I find their consistency of particular note because of their ages at the time the incidents occurred and the time that had expired between the incidents and their testifying. Of note, I find that several of the students testified that they were uncomfortable or felt uncomfortable for another student rubbing Mr. Powell's back yet those very same students did not reveal how uncomfortable they felt to anyone prior to June of 2005. This I FIND to be a confirmation that these back rubbing/pushing incidents occurred. These students had no motive to lie, they have nothing to gain or lose, and at the time of their testimony Powell was no longer their teacher nor were they in the same school, for they all had graduated to the middle school.

***Mr. Powell was not as consistent and at times contradicted himself. Mr. Powell at first testified that he did have occasions when he touched a student. He said he had to touch the student to direct his/her attention to the learning task at hand. When Mr. Powell was confronted with discussing his personal family problems and his medical problems with his students he admitted to such behaviors but then rationalized their happening and promising that they would not happen again. Then at times during his testimony he denied that any touching or inappropriate discussion of personal family issues or his medical issues occurred. Mr. Powell admitted to touching R.'s hair (one of the twins). He admitted to asking a student named Joseph to push on his back. Powell testified that he did not recall how many times he asked Joseph to do it. He also testified to asking Joseph during class time and when other students were not around. Powell acknowledged that he had been warned numerous times, verbally and in writing, not to touch students or not to have students touch him. I FIND that these admissions or acknowledgements by Mr. Powell are indicative of the students' and the other school personnel's truthfulness. I FIND that Mr. Powell's testimony actually corroborates the students' and Mr. Purdy. (Initial Decision, at 27-28)

Contrary to respondent's exception contention, the Commissioner determines that the findings issued by the ALJ provide her with a sufficient basis for reviewing the ALJ's conclusions and recommendations. In this connection, the Commissioner is fully aware that "the ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them." *State Dept. of Health v. Tegnazian*, 194 N.J. Super. 435, 442-443. The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." (*Id.* at 443) In this matter, the Commissioner concludes that the ALJ fairly summarized the testimony and evidence on both sides, explained how she weighed the proofs before her and further explained why she credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations.

The Commissioner finds that it is readily ascertainable – as illustrated above – which testimony the ALJ accepted as fact, and she further finds that these facts provide a reasonable basis for her conclusions. The Commissioner’s considered review of the entire record before her provides no basis whatsoever for alteration of the ALJ’s determinations.

However, notwithstanding that the Commissioner finds that the record amply establishes that the Board has sustained its burden of establishing that respondent is guilty of unbecoming conduct, contrary to the conclusion of the ALJ, she does not find that the Board has met its burden of establishing its second charge against respondent – that of incapacity – as it is determined that the instant record contains insufficient medical evidence to sustain this charge and, therefore, the Board’s incapacity charge is hereby dismissed..

With respect to respondent’s petitions in this consolidated matter seeking restoration of his salary increments for the 2006-07, 2007-08 and 2008-09 school years, the Commissioner concurs with the ALJ that these appeals have been subsumed in the factual determinations of the instant tenure case and, therefore, the Board properly denied these salary adjustments for the years at issue for the reasons detailed in the Initial Decision at 30-31.³

Turning to the appropriate penalty to be imposed in this manner, the Commissioner is mindful that “[f]actors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher’s prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring.” *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark,*

³ It is noted, however, that on Page 31 of her decision the ALJ states “Also by virtue of the tenure charges having been sustained herein Powell’s employment was terminated on December 13, 2005.” By way of clarification, any order terminating respondent’s tenured employment must emanate from the Commissioner and would be effective upon the issuance of her decision.

Essex County, decided by the Commissioner October 14, 1997, slip. op. at 32, citing *In re Hearing of Ostergren, Franklin School District*, 1966 S.L.D. 185; *In re Hearing of Kittell, Little Silver School District*, 1972 S.L.D. 535, 541; *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967). She is likewise fully aware that it has long been recognized that – by virtue of the unique position they occupy – educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 S.L.D. 302, 321

[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.*

Moreover, as a teacher of special needs elementary school students, recognition of and strict adherence to this requisite standard of behavior is, of necessity, even more crucial.

It is evident on this record that respondent has been in the Board's employ in excess of 25 years, during which time he has received many positive evaluations. However, these factors – which ordinarily could serve to mitigate against respondent's termination – are outweighed by the fact that his unfitness to teach has been demonstrated by a series of incidents – beginning as early as 1986 and continuing, albeit intermittently, to June of 2005 – where respondent exhibited a pattern of poor impulse control, poor insight and poor judgment in his interactions with students under his charge. (See *Redcay v. State Bd. of Ed.*, 130 N.J.L. 369 (Sup. Ct. 1943), *aff'd* 131 N.J.L. 326 (E. & A. 1944) Despite repeated oral and written admonishments from school administrators, respondent has been unwilling or unable to correct his inappropriate behavior. Such an unacceptable pattern of misconduct provides the

Commissioner with little promise that respondent will in the future achieve comportment to the standard which is reasonably demanded of a teaching staff member in this regard, specifically self-restraint, prudence and controlled behavior in his interactions with students. Consequently, the Commissioner is compelled to terminate respondent from his tenured position.

Accordingly, the recommended Initial Decision of the OAL, as modified above, is adopted for the reasons articulated therein. The Commissioner hereby directs that Scott Powell be dismissed from his tenured employment with the Board of Education of the Township of Lopatcong as of the date of this decision. A copy of this decision shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED⁴

COMMISSIONER OF EDUCATION

Date of Decision: March 18, 2009

Date of Mailing: March 18, 2009

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.