

IN THE MATTER OF THE TENURE :
HEARING OF CLAUDIA ASHE-GILKES, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
EAST ORANGE, ESSEX COUNTY. :
_____ :

SYNOPSIS

The Board certified tenure charges of inefficiency against respondent – a tenured teacher – for alleged inefficiencies that involved her: interactions with students and other staff members; teaching skills, lesson plans, and classroom management; failure to submit records and reports in a timely manner; and failure to report to school and classroom or duty assignments on time. The Board sought dismissal of respondent from her tenured employment.

The ALJ found that: the Board carried its burden of proving the tenure charges of inefficiency against respondent; and that respondent had failed to resolve her deficiencies despite the district's repeated efforts over several years – including the 90-day period required by law prior to certifying charges of inefficiency – to encourage professional improvement and more efficient performance. The ALJ ordered respondent dismissed from her tenured teaching position as of the date of her suspension.

The Commissioner adopted the Initial Decision as the final decision in this matter, but modified the ALJ's recommended penalty to reflect dismissal from respondent's tenured employment, pursuant to *N.J.S.A. 18A:6-14*, as of the filing date of the Commissioner's decision. The Commissioner additionally forwarded the decision to the State Board of Examiners for action 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>

May 28, 2009

OAL DKT. NO. EDU 7135-08
AGENCY DKT. NO. 127-5/08

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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 respondent’s exceptions and the Board of Education’s reply, both duly filed pursuant to *N.J.A.C. 1:1-18.4*.

In her exceptions, respondent recasts and reiterates the arguments of her post-hearing brief, urging the Commissioner to reject the Initial Decision because it “perpetrates a gross miscarriage of justice, is arbitrary and capricious, and is not based on substantial evidence in the record.” (Petitioner’s Exceptions at 1, 3-38; quotation at 1) Specifically, respondent contends that the Administrative Law Judge (ALJ) erred by: shifting the burden of proof to respondent with respect to the Board’s charge of failure to report to work on time, expecting respondent to prove her timely arrival rather than the Board to prove her lateness;¹ deeming Acting Principal Leslie Shults to be a credible witness, when the record shows her testimony to be inconsistent, biased and characterized by poor recall;² combining certain charges so as to gloss over weaknesses in their individual proofs and fashion from them a directive to “improve attendance” that appears nowhere in respondent’s modified Performance Improvement Plan (PIP);³ finding that the Board rendered positive assistance to respondent and evaluated her progress appropriately during the 90-day

¹ Exception II at 3-7, incorporating arguments of post-hearing brief at 39-43.

² Exception III at 7-11, reiterating arguments of post-hearing brief at 57-61.

³ Exception X at 22-24, incorporating arguments of post-hearing brief at 36 and, by reference to Exception I, 39-43.

improvement period, when the record shows that her assigned evaluator neither performed the required evaluations nor rendered meaningful assistance;⁴ and concluding – in the absence of sufficient credible evidence – that the Board had met its burden of proof with respect to charges of failure to focus students’ attention on task,⁵ failure to demonstrate proficiency in content areas,⁶ failure to teach in accord with approved lesson plans,⁷ failure to implement lessons in accord with required program,⁸ failure to efficiently and effectively manage instructional time,⁹ failure to correct inappropriate student behavior without disturbing educational process,¹⁰ failure to act sufficiently on suggestions for improvement,¹¹ failure to contribute to positive school climate,¹² and failure to provide students with clear explanations of subject matter.¹³ Respondent also asserts that the ALJ – after having (wrongly) concluded that charges were proven so as to warrant loss of tenured employment – incorrectly ordered forfeiture of respondent’s position as of the date of her suspension, despite the provisions of *N.J.S.A.* 18A:6-14 to the contrary and the fact that respondent has not been charged with – let alone convicted of – any crime or offense that would render the forfeiture statute (*N.J.S.A.* 2C:51-2)¹⁴ applicable to this matter. (*Id.* at 2)

In reply – except as to its agreement that the penalty in this matter is controlled by the tenure laws rather than the forfeiture statute¹⁵ – the Board counters each of respondent’s contentions

⁴ Exception XIV at 31-38, reiterating arguments of post-hearing brief at 3-12.

⁵ Exception IV at 12-15, reiterating arguments of post-hearing brief at 20-23.

⁶ Exception V at 15-17, reiterating arguments of post-hearing brief at 25-26.

⁷ Exception VI at 17-18, reiterating arguments of post-hearing brief at 28-29.

⁸ Exception VII at 18-20, reiterating arguments of post-hearing brief at 30-31.

⁹ Exception VIII at 20-21, reiterating arguments of post-hearing brief at 31-32.

¹⁰ Exception IX at 21-22, reiterating arguments of post-hearing brief at 35-36.

¹¹ Exception XI at 24-25, reiterating arguments of post-hearing brief at 36-38.

¹² Exception XII at 26-28, reiterating arguments of post-hearing brief at 45-46.

¹³ Exception XIII at 28-30, incorporating arguments of post-hearing brief at 47-49.

¹⁴ Inadvertently cited by respondent as *N.J.S.A.* 2C:52-1.

¹⁵ Reply Exceptions at 1.

with references to applicable testimony and evidence as set forth by the ALJ or drawn from its own post-hearing brief. (Board's Reply at 1-19) Specifically, the Board rejects any notion that the ALJ shifted the burden of proof with respect to the charge of lateness, asserting that respondent's chronic tardiness and resulting discipline were well documented over the years and that several instances of lateness during the 90-day improvement period were undisputed. (*Id.* at 1-2) It further rejects any suggestion that Acting Principal Shults was not a credible witness, noting the consistency of her testimony with both the documentary evidence and the testimony of Principal Henry Hamilton, and observing that the ALJ had ample opportunity to observe Shults's demeanor over the three days of hearing at which she testified. (*Id.* at 3-5) With respect to the ALJ's having combined certain charges for determination, the Board posits that respondent suffered no prejudice thereby, since the ALJ clearly recognized that the Board had not actually charged respondent with excessive absenteeism and expressly stated that respondent's absenteeism record could not factor into any ultimate conclusions in this matter. (*Id.* at 12-13, referencing Initial Decision at 28, note 3) Finally, with respect to respondent's claims that the Board failed to prove specific charges and properly implement the 90-day improvement period, the Board points to testimony and evidence indicating otherwise and endorses the conclusions reached by the ALJ. (*Id.* at 5-12, 13-16, 16-19)

Upon review, the Commissioner determines to adopt the Initial Decision in all respects save the basis and manner of respondent's dismissal from tenured employment.

Initially, the Commissioner finds the ALJ to have carefully considered the voluminous testimony, evidence and argument in this matter, and based thereon, to have made: 1) findings of fact that are amply supported by the record; and 2) conclusions of fact and law that are both appropriate and fully explained in light of the parties' respective positions – expressed both at the OAL and on exception – as to burden of proof, witness credibility, and weight of evidence. Consequently, the Commissioner concurs with the ALJ that the Board has met its burden of establishing that respondent was provided with an opportunity to improve as required by law, but has

remained an inefficient employee whose dismissal from tenured employment in the district is warranted under all of the circumstances.

The Commissioner cannot, however, adopt the ALJ's recommended order that respondent's tenured position be forfeited as of the date of her suspension upon certification of tenure charges. As recognized by both respondent and the Board, the applicable statute in tenure matters (*N.J.S.A. 18A:6-14*) clearly requires that the charged party's employment will continue through determination of the charges, with no provision for retroactive dismissal if the charges are ultimately sustained.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – sustaining the Board's charge of inefficiency – is adopted as the final decision in this matter, with modification as set forth above. Respondent is hereby dismissed from her tenured employment as a teaching staff member in the East Orange School District as of the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners pursuant to *N.J.A.C. 6A:9-17-6(a)1* for action as it deems appropriate.

IT IS SO ORDERED.¹⁶

COMMISSIONER OF EDUCATION

Date of Decision: May 28, 2009

Date of Mailing: May 28, 2009

¹⁶ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.