

IN THE MATTER OF THE TENURE :
HEARING OF RANDALL N. KAVET, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE : DECISION
CITY OF NEW BRUNSWICK, :
MIDDLESEX COUNTY. :
_____ :

SYNOPSIS

The petitioning Board certified tenure charges of inefficiency, incompetence, and conduct unbecoming against respondent – a tenured special education teacher employed by the district since 1987 – for allegedly failing to: follow lesson plans; substantiate student grades, and meet the goals of multiple sixty-day improvement plans. Respondent denied the charges as alleged.

The ALJ found that: the petitioning Board bears the burden of proving the tenure charges brought against respondent by a preponderance of the competent and credible evidence; the Board failed to comply with the procedural requirements set forth at *N.J.S.A. 18A:6-11* and *N.J.A.C.6A:3-5.1(c)* regarding the tenure charges of inefficiency and further failed to substantiate the charges of incompetency and conduct unbecoming. Accordingly, the ALJ ordered that all tenure charges brought against respondent be dismissed.

Upon a comprehensive and independent review of the record, the Commissioner determined to adopt the decision of the ALJ recommending that the charges against respondent be dismissed. In so doing, he found that the Board failed to sustain its burden of establishing its charges of unbecoming conduct by a preponderance of the credible evidence. With respect to the charges of inefficiency, the Commissioner found that as the petitioning Board failed to comply with the procedural requirements of *N.J.S.A. 18A:6-11* and *N.J.A.C.6A:3-5.1(c)*, the charges of inefficiency are dismissed for failure to satisfy the statutory and regulatory requisites attendant to their certification. Finally, the Commissioner agreed with the ALJ that the Board has failed to sustain its charges of incompetency. The Commissioner ordered that respondent be reinstated to his tenured position and reimbursed for back pay and emoluments.

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.

August 19, 2010

OAL DKT. NOS. EDU 13695-09 AND EDU 1539-10
AGENCY DKT NOS. 339-11/09 AND 14-1/10
(CONSOLIDATED)

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The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The District's exceptions and respondent's reply thereto – submitted in accordance with the requirements of *N.J.A.C. 1:1-18.4* – were fully considered by the Commissioner in reaching his determination herein.¹

The District's exceptions – although acknowledging the technical correctness of the Administrative Law Judge's (ALJ) analysis on the issue of the District's charges of inefficiency – cite extensively to the testimony of its witnesses, which it avers was essentially un rebutted and amply supports its contention of Respondent's incompetency, insubordination and unprofessional conduct. It alleges, *inter alia*, that such testimony establishes that respondent:

- Could not produce student grades when requested by the principal and failed to enter grades in the computer.
- Failed to complete documentation requested by the Department of Youth and Family Services in connection with its investigation involving a specific student.

¹ It is noted that by letter dated July 7, 2010 – filed with the Agency on July 8, 2010 – the District attempted to file a response to Respondent's Reply Exceptions. As there is no regulatory provision for such a submission, it was not considered herein.

- Claimed a writing sample with inappropriate content was authored by a student, while the District Superintendent concluded that such sample couldn't have been done by a student because it was adult in manner, prose and composition.
- Was absent on days of regularly scheduled weekly meetings with the principal.
- Missed a meeting with the Superintendent to discuss the potential seriousness of denial of increments for the 2007-08 and 2009-10 school years and the lack of change in his performance.
- Complied at a very minimum level with code requirements of teacher assessments.
- Performance evaluation from his supervisor evidenced no student writing samples as required; showed that he regularly used videos in place of classroom instruction and he failed to utilize textbooks.
- Was repeatedly unprepared for IEP meetings, notwithstanding repeated directives from his superiors to correct that deficiency.
- Was given seven 60-Day Improvement Plans but did not improve.

It additionally cites to certain of respondent's own testimony which it claims further buttresses the charges asserted against him:

- When asked about his failure to maintain student folders he said he was not a "paperwork guy."
- He admitted he failed to maintain student grades consistent with Board policy and instructions of his supervisors.
- He admitted his classroom environment was disheveled, and further admitted that he is messy by nature.

(District's Exceptions at 1-8)

The District next excepts to the ALJ's Finding of Fact, #5. It maintains that although respondent testified that he posted some grades, the unrebutted testimony of the District's witnesses demonstrate that no such grades were regularly found in the respondent's grade book or on the Real Time Computer System used by the District. Moreover, it proffers this same testimony established that even when grades were posted, no back verification such as student classwork, homework, quizzes or tests could be found, therefore raising a serious concern as to the validity of his grade posting. (District's Exceptions at 6)

In conclusion, the District maintains that the evidence and unrebutted testimony clearly demonstrate that it has met its burden of proving the tenure charges against respondent and urges the Commissioner to reverse the decision of the ALJ. (*Id.* at 8)

In reply, respondent asserts it is important to note that, although evidence on many issues was introduced at the hearing in this matter, the only relevant issues are those relating to the charges advanced in the District's two sets of tenure charges. Although the District claims to have presented witnesses whose testimony was "essentially un rebutted," respondent does not necessarily concur that such is the case but, notwithstanding, cautions that it must be recognized that although evidence may be un rebutted, unless such testimonial evidence is probative of a specific charge against him, the fact that it may be un rebutted is of no consequence. As an example, respondent notes that there is no reference in any of the District's charges against him as to his teaching style or how he conducted himself in the classroom, other than that he had model writings in his classroom that were inappropriate. (Respondent's Reply Exceptions at 1-2)

Respondent proceeds to analyze the actual incompetence and unbecoming conduct charges against him – which he charges the District's exceptions failed to do – and, in great detail, presents testimony and evidence in defense of the appropriateness of the ALJ's dismissal of all of them as unproven. He maintains that it was the District's burden to provide specific fact – rather than mere conclusionary testimony and evidence – to support the charges against him which, he asserts, it failed to do. (Respondent's Reply Exceptions at 1-17)

Upon a comprehensive review of the record in this matter – which included transcripts of the hearing conducted on February 19, March 11, and March 18, 2010 – the Commissioner, finding the District's exceptions unpersuasive, determines to adopt the decision of the ALJ recommending that the charges against respondent be dismissed.

As noted by the ALJ, the within District certified two sets of tenure charges against respondent, alleging inefficiency, incompetence and unbecoming conduct. Initially, the

Commissioner concurs with the ALJ's determination that the inefficiency charges must be dismissed as a consequence of the District's failure to comply with the procedural requirements attendant to the certification of such charges. Specifically, it is well-established that when a board provides an individual with written notice that it is bringing tenure charges of inefficiency against him or her, the district is required to: provide that individual with a 90-day period in which to correct and overcome the inefficiencies (*N.J.S.A. 18A:6-16*); provide the individual with a modified professional improvement plan (PIP) which addresses the specific charges of inefficiency and comports with the timelines established for correction (*N.J.A.C. 6A:3-5.1(c)4*); and render positive assistance to the individual during the 90-day remediation period in an effort to help him or her overcome the inefficiencies. (*In the Matter of the Tenure Hearing of Donald Rowley v. Board of Education of Manalapan-Englishtown*, 205 N.J. Super. 65, 72 (App. Div. 1985)). It is uncontested that such legal prescriptions were not undertaken in the instant matter.

Turning to the District's charge of incompetence which alleges "for several years Mr. Kavet has regularly made up grades for students and placed them in his grade book, as documented by students' work folders in comparison to Mr. Kavet's grade book," (Initial Decision at 9), based on past case law on this particular charge, the Commissioner is in full agreement with the ALJ – for the reasons presented on pages 9-10 of his decision – that the District has failed to sustain this charge.

Finally, after full consideration of the District's tenure charges of unbecoming conduct and the proofs advanced in support of them, the Commissioner agrees – for the reasons presented by the ALJ on pages 10-11 of his decision – that the District has failed to sustain its

burden of establishing these charges by a preponderance of the credible evidence, necessitating their dismissal.

Accordingly, the recommended decision of the OAL dismissing the instant tenure charges is adopted as the final decision in this matter. It is hereby ordered that Randall N. Kavet be reinstated to his tenured position and reimbursed for back pay and emoluments withheld, less mitigation, as a consequence of these charges.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2010

Date of Mailing: August 20, 2010

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)