

#27-10R

OAL DKT. NO. EDU 590-06  
AGENCY DKT NO. 62-2/06  
STATE BOARD NO. 4-08  
APPELLATE DIVISION DKT. NO. A-005128-07

IN THE MATTER OF THE TENURE :  
HEARING OF DR. DAVID L. WITMER, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF THE : DECISION ON REMAND  
TOWNSHIP OF MIDDLETOWN, :  
MONMOUTH COUNTY. :  
\_\_\_\_\_ :

For the Petitioner: Daniel R. Roberts, Esq.,  
Kenney, Gross, Kovats & Parton

For the Respondent: Frank S. Gaudio, Esq.,  
Miller & Gaudio, P.C.

The Commissioner decided this matter on December 27, 2007, adopting the Administrative Law Judge's (ALJ) Initial Decision with modification. In addition to the three tenure charges found by the ALJ, the Commissioner additionally found respondent guilty of charge four – that of abusing the authority of his position as Superintendent by directing his subordinates to take actions regarding the carryover of vacation and the rollover of personal days into sick leave days for respondent's own financial benefit. The Commissioner agreed with the ALJ that the respondent's conduct – although extremely serious and evidencing significantly impaired judgment and lack of professionalism – did not warrant his dismissal from his position. Rather, the Commissioner concurred with the ALJ that respondent be suspended prospectively

from his contractually tenured position – without pay – for six months. The State Board of Education affirmed the Commissioner’s decision on May 21, 2008. On appeal, the Appellate Division, although affirming respondent’s guilt on the three charges found by the ALJ, reversed the Commissioner’s finding as to charge four, adopted by the State Board. The Court found that the Commissioner should not have rejected the ALJ’s conclusion that the Board did not prove this charge since in finding respondent guilty of this charge, the Commissioner impermissibly rejected the ALJ’s findings of fact as to the credibility of lay witnesses which the Court determined was supported by sufficient, credible evidence in the record and, therefore, remanded the matter for reconsideration of the penalty. The Court in its decision stated:

...our concern here is that we have concluded that one of the charges underpinning the Commissioner’s imposition of a six-month suspension has been reversed and is no longer extant. We have indicated that reasonable minds may differ as to the quantum of an appropriate penalty, and while we have significant reservations as to whether these offenses warranted a six-month suspension, especially given the record’s depiction of the hostility between the School Board and appellant, we recognize that our role is constrained by *Hermann* [sic]. [*In re Herrmann*, 192 N.J. 19]. Nevertheless, where a six-month suspension is based on the Commissioner’s finding of guilt on four offenses, and one of the significant offenses has been reversed, the Commissioner should be obligated to revisit the appropriateness of the penalty imposed consistent with the merits’ determination contained in this opinion.

Upon reconsideration of the appropriate penalty in this matter, the Acting Commissioner finds and concludes that – under the particular circumstances in this matter – a six month suspension from duty without pay is the appropriate penalty for respondent’s unbecoming conduct. Notwithstanding that the Commissioner found respondent guilty of an additional charge over and above the three found by the ALJ, the record reflected that respondent’s contractual tenure position in the District was due to expire – by its own terms – on June 30, 2008; as the Commissioner’s decision in this matter was issued on

December 24, 2007, no useful purpose would have been served by increasing the ALJ's recommended penalty, thereby imposing a penalty on respondent exceeding his contractual term in the District.

Accordingly, the Acting Commissioner concludes that the ALJ's recommended penalty of respondent's six-month suspension from his position, to be served prospectively, is the appropriate penalty for the three proven unbecoming conduct charges against him.

IT IS SO ORDERED.\*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 27, 2010

Date of Mailing: January 27, 2010

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\* 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)