

IN THE MATTER OF THE TENURE :
HEARING OF JILL KUBICKI, : COMMISSIONER OF EDUCATION
LAWRENCE TOWNSHIP SCHOOL :
DISTRICT, MERCER COUNTY. : DECISION
_____ :

SYNOPSIS

The petitioning Board certified tenure charges of insubordination, failure to perform required duties, fabrication of records, prevarication, lack of professionalism and other just cause against respondent – a special education teacher employed by the district. Specifically, respondent, *inter alia*: refused to produce required back-up for some or all scores that she submitted after administering the quarterly Developmental Reading Assessment (DRA); resisted or refused utilization of district resources designed to assist teachers; failed to produce backup for final grades submitted for her students; refused to participate in the development of her performance improvement plan (PIP) and corrective action plan (CAP), and ignored the goals and directives incorporated therein; was uncooperative, unprofessional, hostile and disrespectful in her communications with colleagues, substitute teachers and parents; and refused to report to her assigned school at the beginning of the 2007-2008 school year after being informed verbally and in writing the previous Spring that she was being reassigned to a different school. Respondent denies the charges, and alleges that they are false, that her actions were taken out of context, and that her conduct was not reflective of her capability as a teacher.

The ALJ found, *inter alia*, that: the sixteen witnesses for the Board presented credible testimony, corroborative of the other witnesses' testimony; each witness described respondent as hostile, aggressive, demanding and unresponsive to reasonable requests for grades, progress reports, test scores and student information; this testimony was corroborated by the exhibits presented at hearing; respondent's own testimony over five days was repeatedly unresponsive to the questions asked by counsel and the directives of the ALJ; respondent's sudden production – two thirds of the way through the OAL hearing – of files that allegedly proved she had properly completed DRAs during the 2008-2009 school year further contradicted the credibility of her testimony; respondent replied to the charges against her with uniform denials of personal responsibility, insinuation that the behaviors in question were inconsequential, or provoked or caused by the actions of others; and, taken as a whole, the testimony and evidence presented in this matter clearly indicates that respondent's behavior was inappropriate and inconsistent with the decorum and responsibility expected of a professional educator. The ALJ concluded that the Board has met its burden of proof relative to each of the charges filed against respondent. Accordingly, the ALJ ordered that respondent be dismissed from her tenured position.

Upon independent review of the record and the Initial Decision, the Commissioner adopted the ALJ's decision as the final decision in this matter, with modification. Respondent was dismissed from her tenured employment, and a copy of this decision was forwarded to the State Board of Examiners for action against respondent's certificate(s) 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.

May 23, 2011

IN THE MATTER OF THE TENURE : COMMISSIONER OF EDUCATION
HEARING OF JILL KUBICKI,
LAWRENCE TOWNSHIP SCHOOL : DECISION
DISTRICT, MERCER COUNTY.
_____ :

Petitioner brought tenure charges against respondent as a consequence of an alleged constellation of unbecoming behavior and other just cause, including insubordination, unprofessional conduct toward colleagues, students and parents, failure to properly execute job duties, prevarication and fabrication of records. After review of the extensive record – including transcripts of eleven days of hearings, the Initial Decision of the Office of Administrative Law (OAL), respondent’s exceptions and petitioner’s replies thereto – the Commissioner concludes that respondent’s dismissal is warranted.

Petitioner presented sixteen witnesses – all of whom had been sequestered – whose testimony was generally consistent and corroborative. Most of that testimony, and the evidentiary documents offered by petitioner, pertained to the 2008-2009 school year.¹ The conduct described in the testimony and referenced in the documentary evidence revealed troubling themes.

For example, Kristine Deni, Director of Student Services, Pamela Hernandez, petitioner’s learning disabilities teaching consultant, Maureen Hayes, Director of Humanities, Special Education Supervisor Jay Billy, principals Judith McLaughlin and William Buss, and Superintendent Philip Meara all testified that throughout the school year respondent refused to

¹ There was also, however, testimony about an incident at the beginning of the 2007-2008 school year that bore significance.

produce required back-up for some or all scores that she submitted after administering the quarterly Developmental Reading Assessments (DRA). Deni explained that the DRA is an important diagnostic tool used to ascertain students' reading progress and to adjust individual education plans (IEPs), if necessary.

The deadlines for submitting the results of the DRAs were printed on calendars distributed to the teaching staff on September 3, 2008, at the first faculty meeting of the 2008-2009 school year. The ultimate scores for the DRAs must be supported by the teacher's answers to specific questions about what the student was able to read and how the student comprehended the stories/texts used in the DRA. These supportive materials are referred to as "protocols" and "rubrics/grids." According to her supervisors, respondent produced little or no backup for most of the tests she administered; they therefore concluded that many of the DRA scores she submitted were invented.² This precipitated petitioner's charge of record fabrication.³

Second, testimony from several of petitioner's representatives revealed that petitioner resisted or refused utilization of the resources provided by the district to assist teachers. According to petitioner's witnesses, there were instruction kits, DVDs, and in-school trainings for the DRA, staff handbooks, and computer technicians available for staff who needed assistance with the use of the district's computer data programs. In addition, respondent refused offers of assistance from several of her peers and supervisors, either by direct refusal or non-cooperation. This pattern of resistance culminated at the end of the school year with her

² There is evidence in the record that some, but not all, of the back-up materials were submitted in late November, and none of the protocols or rubrics were submitted after the January and April testing cycles. The fact that the November DRA backup was incomplete is corroborated by respondent's own notes from a November 26, 2008 meeting with her supervisors. (Respondent's Exhibit R-18b)

³ Respondent produced documents at the OAL on August 19, 2010 – the seventh day of the hearing and respondent's third day of testimony – which she alleged were her copies of the DRA protocols that her supervisors had been requesting from her since October of 2008. No explanation was offered as to why the documents had not been provided to her supervisors when they were due during the 2008-2009 school year – or even via discovery in the instant proceeding.

failure to produce backup for the final grades that she submitted for her students – even when her supervisors gave her extra time to do so. In the absence of same, and with respondent’s history regarding the DRAs, the school administrators could not be sure how respondent had arrived at the grades that she submitted.

Third, respondent’s supervisors testified that throughout the 2008-2009 school year, respondent would not work with them to formulate such professional development tools as performance improvement plans (PIPs) and a corrective action plan (CAP). When her supervisors crafted the PIPs and CAP without her, respondent ignored the goals and directives incorporated into same. Included in the PIPs and CAP, for example, were directives to improve her professional behavior and develop clearer and more informative substitute lesson plans. Respondent reacted defensively and aggressively to her supervisors’ instructions and also, paradoxically, to their offers of assistance.

Fourth, the testimony of seven of respondent’s peers indicated that during the 2008-2009 school year, respondent was not forthcoming with information that her colleagues needed from her, was hostile to requests for same, and on several occasions behaved disrespectfully both to her peers and to her supervisors. This unprofessional behavior included incidents where respondent declined to open her emails, required multiple days’ notice from colleagues prior to discussing issues of concern to them, and returned – unread – documents placed in her mailbox.

Fifth, the issue of communication arose as well with respect to the substitute plans that respondent was required to provide. Special Education Supervisor Jay Billy testified that as the year progressed, respondent was absent more frequently. The substitutes assigned to her classes – including retired special education teachers – reported that respondent’s plans were

difficult to understand. Learning disabilities teaching consultant Pamela Hernandez testified that she also found the plans to be abstruse. Lesson plan improvement was part of respondent's CAP, see Petitioner's Exhibit P-24, but respondent contended that her plans were adequate and made no discernable effort to conform them as directed.⁴

Sixth, various witnesses testified that respondent overstepped the bounds of professional conduct in front of students and parents. One example was an occasion on which respondent criticized third grade teacher Donna Lawrance in front of the class, causing Lawrance's students to worry about their teacher. In other testimony, teachers reported unprofessional remarks by respondent during parent-teacher conferences. The record also includes testimony about parent complaints concerning respondent's demeanor toward the students. One student was apparently afraid of respondent to a degree that warranted the student's transfer to another teacher.

Finally, the testimony of principals Jonathan Dauber and Andrew Zuckerman, and Director Kristine Deni, indicated that in the Spring and Summer of 2007 petitioner was told verbally and in writing that she would be reassigned from Lawrence Intermediate School (LIS) to Lawrence Middle School (LMS) for the 2007-2008 school year. However, on September 4, 2007 she showed up at LIS and refused to report to LMS until after she had met with Deni and a union representative. Respondent's explanation for this behavior was that she had never been advised of her transfer to LMS. Petitioner's charge of prevarication is based in part upon this incident.

Teachers may be dismissed or have their compensation reduced for inefficiency, incapacity, unbecoming conduct, or other just cause. *N.J.S.A. 18A:6-10*. As an appointing

⁴ Respondent not only maintained that there was nothing wrong with her lesson plans for substitutes, but also ignored a written directive from Director of Student Services Kristine Deni to meet with Jay Billy to work on improving them.

agency, petitioner must establish one or more of these causes by a preponderance of the credible evidence. *In re Polk*, 90 N.J. 550, 560-61 (1982).

Conduct unbecoming a public employee includes a broad range of behavior which adversely affects the morale or efficiency of the public entity or can destroy public respect for public employees and confidence in the operation of public services. *See, e.g. In re Emmons*, 63 N.J. Super. 136, 140 (App. Div. 1960). Insubordination has been defined as the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor. *In the Matter of the Tenure Hearing of Charles Motley, State Operated School District of Newark, Essex County*, Commissioner Decision No. 252-99 (August 4, 1999), at 2-3, adopted State Board (Dec. 1, 1999). As the Administrative Law Judge (ALJ) correctly noted, conduct such as that described by petitioner's representatives has been found in prior Commissioner decisions to be unbecoming and insubordinate. *See, e.g., In the Matter of the Tenure Hearing of Carl A. Hill, Irvington Township School District, Essex County*, Commissioner Decision No. 176-07 (May 15, 2007), adopted, State Board (Oct. 17, 2007); *In the Matter of the Tenure Hearing of Carol Ziznewski, School District of the Township of Edison, Middlesex County*, Commissioner Decision No. 234-10 (August 3, 2010). Thus, if a weighing of the evidence in the instant case supports the substance of petitioner's charges, grounds exist for the dismissal of respondent.

The ALJ's evaluation of the evidence weighed in favor of petitioner. An important component of that evaluation was the ALJ's credibility findings. More specifically, the ALJ found that petitioner's witnesses – especially Kristine Deni, Jay Billy and Principal Judith McLaughlin – were well informed about respondent's conduct, and without motivation to

offer false testimony. Similarly, the ALJ found that the other teachers and supervisors who testified made sincere efforts to be accurate and unbiased.

The ALJ regarded the individual testimony of each of petitioner's witnesses to be corroborative of the other witnesses' testimony, notwithstanding that the witnesses had been sequestered. She noted that each witness described respondent as hostile, aggressive, demanding and unresponsive to reasonable requests for grades, progress reports, test scores, and student information. Further the ALJ found that the hearing exhibits corroborated the testimony about respondent's refusal to follow direct instruction, and her obscure and disjointed style of communication.

In evaluating respondent's credibility, the ALJ had the benefit of observing respondent during eleven hearing days and listening to five days of respondent's testimony. She found the testimony to be rich in *non sequiturs* and repeatedly unresponsive to the questions asked by counsel and the directives that she issued to respondent. The ALJ also viewed as contraindicative to respondent's credibility her sudden production of files – two-thirds of the way through the OAL hearing – that would allegedly have proven that she had in fact properly completed the DRA assessments during the 2008-2009 school year. *See*, Respondent's Exhibits R-78, R-79 and R-80.

The Commissioner will not reject the ALJ's determinations concerning the 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. *S.D. v. Division of Medical Assistance and Health Services and Monmouth County Board of Social Services*, 349 *N.J. Super.* 480, 484 n.1 (App. Div. 2002). The Commissioner's review of the record reveals no such defects.

Further, the Commissioner accepts the ALJ's factual findings as amply supported by the record. Respondent's exceptions notwithstanding, the Commissioner finds that the ALJ's recitation of testimony is accurate and thorough, and that the ALJ measured conflicts, inconsistencies and potential biases in deciding which testimony to credit. In this regard, the Commissioner is unpersuaded by respondent's attempts to discredit witnesses by questioning their character.

As discussed *supra*, there was extensive testimony at the hearing depicting incidents of insubordination and unbecoming conduct that impacted both staff and students. It included 1) respondent's resistance to cooperating with her supervisors in formulating PIPs and her CAP, 2) respondent's refusal to utilize the various district software programs designed to record student information for multiple purposes – including information sharing by staff members and preparation of reports required by the State and other entities;⁵ and 3) respondent's failure to ensure – by her own devices or with the offered assistance of peers and supervisors – that she properly executed all aspects of the DRA and other diagnostic tools that she was required to administer.

Some of the documentary evidence – including respondent's own memoranda and emails – supports the testimonial evidence concerning respondent's resistance to supervisory directives, refusals of assistance, and uncooperativeness with her peers. Other exhibits, such as the copies of the DRA files that were given to respondent's supervisors in 2008 and 2009, support the testimony of petitioner's representatives that respondent was not properly

⁵ In the Commissioner's view, respondent's refusal to record the prior grades of her student, B.H., likely flowed from her failure to avail herself of the available information concerning the functions, procedures and purposes of the district's data-collecting software.

administering the DRA tests and was trying to hide the truth.⁶ In summary, there are no grounds to reject the ALJ's credibility findings or factual findings.

In considering penalties, the adjudicator should take into account the nature and circumstances of the incidents underlying the charges, the respondent's prior record and present attitude, the effect of the identified conduct on students and staff, and the likelihood that the conduct would recur. *See, e.g., IMO Tenure Carl A. Hill, supra*, at 2. Thus, the ALJ addressed the effect of respondent's conduct on students:

Some of the incidents described by respondent's fellow teachers occurred in the presence of the children. One class became afraid their teacher might be fired. Other children needed to be removed from respondent's classroom at the request of their parents. Additionally, it cannot be said with any certainty that the grades the children in respondent's class received for school year 2008–2009 were accurate. Nor can it be said that their DRA reading scores reflected their competence. This is unconscionable, particularly for students with IEP's whose goals and objectives must be met for them to progress with their peers. (Initial Decision at 108-09)

Similarly, the ALJ summarized respondent's effect on her colleagues and the implementation of educational objectives:

[E]ach of the regular classroom teachers, the case managers, the social workers and the administrators reported having difficulty with respondent. Rather than act in a collegial manner with her colleagues, respondent forced them to work harder simply to best serve the needs of the children (Initial Decision at 109)

And the ALJ discussed respondent's attitude as it related to the likelihood that the conduct at issue would recur:

⁶ The ALJ did not – and the Commissioner cannot – accept respondent's exhibits R-78, R-79 and R-80 as support for her contention that she had completed the backup for the DRAs at the times they were due. Petitioner's exhibits, the testimony of petitioner's witnesses, and respondent's own Exhibit R-18b contradict that contention. Nor did respondent adequately explain why she never produced the DRA protocols and rubrics until her third day of testimony.

Despite receiving orders and directives, being counseled and transferred, respondent showed no understanding that her behavior was not compatible with the mission of the public schools. She responded to the charges against her with uniform denials of personal responsibility and the transference of blame to others. (*Ibid.*)

In connection with these latter findings by the ALJ, the Commissioner adds his unease about respondent's dismissal of the concerns manifested in the testimony of the large number of petitioner's witnesses. Her responses included in some instances denials of the alleged behavior or suggestions that the behavior was inconsequential, and in other instances allegations that the behavior at issue was provoked or caused by others. In light of this failure to accept responsibility for any of the problems described herein, it cannot be reasonably predicted that respondent will significantly change her attitude or style. More specifically, the record offers no indication that respondent will improve her interpersonal relationships with fellow staff members, yield to the authority of her supervisors without continued resistance, or adhere to the district procedures and policies applicable to her work.

In view of the foregoing, the commissioner concurs with the ALJ that dismissal is appropriate.

Upon review of respondent's four exceptions, the Commissioner finds that they are without merit. The first exception – alleging that the ALJ did not sufficiently tie her credibility and factual findings to the record, and did not give proper weight to the evidence provided by respondent – is rejected. At the outset, there is no authority requiring that specific citations to transcripts accompany the ALJ's findings. Further, the Commissioner finds, after his own review of the record, that the ALJ's conclusions about credibility and her evaluation of the evidence as a whole are well grounded. Respondent's reiteration of her testimony – in pages 19 through 60 of her exceptions – provides no basis for different findings.

Respondent's second exception also challenges the ALJ's evaluation of the evidence and is rejected for the reasons stated above.

In her third exception, respondent contends that petitioner improperly failed to follow the procedures outlined in *N.J.S.A. 18A:6-11* relating to charges of inefficiency. As the ALJ noted, petitioner did not charge respondent with inefficiency. Nor did the ALJ believe that it was necessary for petitioner to bring or prove inefficiency in this case. The Commissioner concurs.

There is no authority requiring a board of education to bring or prove charges of inefficiency where other grounds exist and are proven. Even assuming, arguendo, petitioner had prosecuted a charge of inefficiency, the Commissioner is free to decide the matter on other grounds. In this regard the Commissioner notes that *N.J.S.A. 18A:6-10* sets forth the grounds for discipline of tenured employees in the disjunctive, i.e., "inefficiency, incapacity, unbecoming conduct or other just cause" (emphasis added).

Further, case law instructs that where tenured employees have been charged with both "inefficiency" and other grounds for discipline, the employees may be terminated or otherwise penalized in consequence of the alternate charges whether or not the inefficiency charge is sustained. See, e.g. *In the Matter of the Tenure Hearing of Carl A. Hill, School District of the Township of Irvington, Essex County*, State Board Decision No. 14-07 (October 17, 2007) ("Even assuming arguendo that some of the allegations relating to the appellant's performance of his duties could be characterized as inefficiency, we find that the Irvington Board has more than amply demonstrated the appellant's unbecoming conduct, and we conclude that such charges warrant the appellant's dismissal from his tenured employment."); *In the Matter of the Tenure Hearing of April Renee Bradley, School District of the City of Newark*,

Essex County, 1990 *S.L.D.* 790, aff'd as modified by the State Board of Education, 1991 *S.L.D.* 2521 (inefficiency charges dismissed but respondent terminated based upon charge of unbecoming conduct).

Here, as elaborated on above, the record amply establishes that respondent engaged in a continuing pattern of professional misconduct which included: ignoring or defying direct orders or suggestions of her supervisors; exhibiting anger, hostility and disrespectfulness in her communications with fellow teaching staff members, at times in the presence of students; and, in a number of instances, categorically refusing to perform the duties required by her position. As such, the Commissioner finds and concludes – as did the ALJ – that the District's charges of unbecoming conduct and other just cause have been amply established. Consequently, that one or more of the District's charges against respondent may be interpreted to sound in inefficiency is of no consequence in this matter. Accordingly, respondent's third exception is rejected.

Finally, respondent contends in her fourth exception that, in the event that the Commissioner upholds one or more of the charges, the doctrine of progressive discipline mitigates against imposition of the most stringent penalty – termination. However, there is no authority requiring the Commissioner to impose penalties based upon an employee's disciplinary record, *vel non*.

The one education decision upon which respondent relies, *In the Matter of the Tenure Hearing of Gilbert Alvarez, School District of the Township of Lakewood, Ocean County*, OAL Dkt. No. EDU 10067-09 (March 5, 2010) is not helpful. First, it acknowledges that the doctrine of progressive discipline can be set aside, even in cases where it would generally be used. Second, the penalty imposed by the ALJ was not adopted by the Commissioner. *In the*

Matter of the Tenure Hearing of Gilbert Alvarez, School District of the Township of Lakewood, Ocean County, Commissioner Decision No. 167-10R (June 3, 2010).

The Commissioner's analysis regarding the appropriate penalty in this case is set forth above, and respondent's fourth exception urging the imposition of a lesser penalty is rejected.

Accordingly, the Initial Decision is adopted as the final decision in this case, for the reasons set forth in the Initial Decision as modified herein. Petitioner's charges are upheld, and respondent is terminated from her employment in petitioner's district.

Further, this decision shall be forwarded to the State Board of Examiners for its consideration and possible action against respondent's teaching certificate.

IT IS SO ORDERED.⁷

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 23, 2011

Date of Mailing: May 23, 2011

⁷ 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)