

New Jersey Commissioner of Education
Final Decision

Michael Conway,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent State Board of Examiners (SBE), denying his application for teacher and principal certificates based upon Conway's alleged conduct unbecoming a teacher. Petitioner maintains that the SBE's decision was arbitrary, capricious and unreasonable. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no issues of material fact in this case; the petitioner's professional conduct assessment and explanations for his unbecoming conduct which were sent subsequent to the SBE's decision are irrelevant here as that information was not before the SBE to consider at the time of its decision, and there is no evidence that the petitioner availed himself of potential opportunities to present that information via a motion for reconsideration before the SBE; further, there is no impediment to petitioner reapplying for the certificates he seeks, at which time he could present mitigating evidence explaining the conduct at issue and his subsequent job performance; however, based on the present record, the matter is ripe for summary decision; pursuant to *N.J.A.C. 6A:9B-4.1*, the SBE may refuse to issue an applicant's certificate for conduct unbecoming – notwithstanding that a candidate may meet all requirements for certification – if it determines based on the record before it that the candidate is not suitable for employment as a teaching staff member for reasons set forth in *N.J.A.C. 6A:9B-4.4*; it is well settled that teachers are held to a high standard of conduct because of the influence they exercise over students; teachers and principals are professional employees entrusted with the care of school children, and this duty requires a high degree of self-restraint and controlled behavior not always required in other types of employment; in this case, petitioner has not met his burden to prove by a preponderance of credible evidence that the SBE's denial of teaching and principal certificates to him was arbitrary, capricious, or contrary to law; and petitioner's conduct was sufficiently flagrant to warrant the denial of teaching and principal certificates based upon his alleged conduct unbecoming. Accordingly, the ALJ granted summary decision in favor of the SBE, and the petition was dismissed.

The Commissioner concurred with the findings and determination of the ALJ as comprehensively detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

<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>

193-21
OAL Dkt. No. EDU 08054-20
Agency Dkt. No. 184-8/20

New Jersey Commissioner of Education
Final Decision

Michael Conway,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons set forth in detail in the Initial Decision, that petitioner has failed to meet his burden of demonstrating that the Board of Examiners' decision denying petitioner's application for teaching and principal certifications was arbitrary, capricious, or unreasonable.

Accordingly, the Board of Examiners' motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹


ANGELINA ALLEN-McMILLAN, Ed.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 16, 2021
Date of Mailing: September 16, 2021

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 08054-20

AGENCY DKT. NO. 184-8/20

MICHAEL CONWAY,

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION, STATE BOARD OF
EXAMINERS,**

Respondent.

Corinne M. Mullen, Esq., for petitioner (The Mullen Law Firm, attorneys)

Sydney Finkelstein, Deputy Attorney General, for respondent (Andrew J. Bruck,
Acting Attorney General of New Jersey, attorney)

Record Closed: July 20, 2021

Decided: August 5, 2021

BEFORE **SARAH H. SURGENT, ALJ**:

STATEMENT OF THE CASE

Petitioner Michael Conway (Conway) appeals from respondent New Jersey State Department of Education (NJDOE), State Board of Examiners' (Board) denial of his

application for teacher and principal certificates based upon Conway's alleged conduct unbecoming a teacher. He maintains that the Board's decision was arbitrary, capricious, and unlawful, which the Board denies.

PROCEDURAL HISTORY

On or about May 12, 2020, Conway submitted his application for teacher and principal certificates to the NJDOE. By letter dated August 11, 2020, the Board denied Conway's application. On August 26, 2020, Conway timely filed a pro se petition of appeal, and subsequently retained private counsel. On August 28, 2020, the Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23, and resolution of Conway's motion for emergent relief, (R-A).

On September 4, 2020, a telephonic status conference was conducted with the parties, and a briefing schedule was set, with an emergent hearing to be held on September 9, 2020. At the request of both parties, the emergent hearing was adjourned to September 24, 2020. On September 24, 2020, oral arguments on the emergent motion were heard remotely via videoconference due to the COVID-19 pandemic (pandemic), and the record closed. On September 28, 2020, I denied Conway's motion for emergent relief, (R-C), which I incorporate herein by reference. After four telephone conferences concerning protracted discovery production delays, the matter was scheduled for remote oral arguments on the parties' cross-motions for summary decision. Oral arguments were heard via videoconference on July 20, 2021, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

These salient points are not in dispute. I therefore **FIND** the following **FACTS**.

Conway was a teacher for approximately twenty-four years in Arizona, before relocating to New Jersey in 2020 to become a teacher at the Beloved Community Charter

School (Beloved) in Jersey City. (P-B; R-F). He has been employed by Beloved as a teacher's assistant since the fall of 2020. (P-B; R-F). His contract has been renewed for the 2021-2022 school year, (P-A), and he is said to be doing very well, (P-E), teaching eighth-grade students both in person and remotely, due to the pandemic, (P-B; P-C; R-H).

While still residing in Arizona, Conway was instructed by the Board to submit his New Jersey teaching and principal certificate applications electronically due to the pandemic. (P-B; R-G). In his emailed submissions to the Board, Conway included his photographs of a requisite criminal/offense information form dated May 12, 2020, which plainly depict his legs and lap, clothed only in underwear, and containing outlines of his genitalia. (P-B; P-D; R-I).

Conway has poor eyesight, is not "tech-savvy," and did not realize that the photographs he sent contained inappropriate content, as he only checked the "thumbnails" of his photographs before he submitted them. (P-B; P-D; P-G; P-H; R-F; R-G). He was busy preparing and packing for his transition from Arizona to New Jersey, his house was in disarray, and there were boxes "everywhere." (P-B). He and his partner agreed that they would disrobe upon entering their home due to the pandemic and his partner's asthma. Ibid. He chose to take the photographs on his lap because the kitchen table was "filled with boxes." Ibid. He takes full responsibility for his "error." (R-A).

By letter dated August 11, 2020, the Board denied Conway's applications, stating, in relevant part:

The photograph[s] of the criminal history information form you submitted to the Board via email contained inappropriate content. Specifically, the image[s] contained male anatomy in underwear. Upon receipt of the image[s], the Board sent an email permitting you to provide an explanation. Your response to the request was that you were "sorry the emailed version has inappropriate content." There was no explanation for the content or how the image[s] [were] sent with the content.

Pursuant to N.J.A.C. 6A:9B-4.2, “Notwithstanding that a candidate may meet all requirements for certification, the Board of Examiners may refuse to issue a certificate to that candidate if, based on the record before it, the Board of Examiners determines that, for reasons set forth in N.J.A.C. 6A:9B-4.5, the candidate is not suitable for employment as a teaching staff member in the public schools.” One of the reasons stated in N.J.A.C. 6A:9B-4.5 for the revocation of a teaching certificate, or, in this case, the refusal to issue one, is “conduct unbecoming a teacher.”

In reviewing your application, the Board considered, among other factors, your lack of judgment and/or carelessness in submitting an image with such content. Such poor judgment and/or carelessness is conduct unbecoming an educator. Accordingly, the Board finds that the level and nature of your conduct provide sufficient reason to block your application for certification. Thus, at its July 30, 2020 meeting the Board of Examiners voted to block your application for a Teacher of Social Studies and Principal certificate.

[(R-B).]

Conway maintains that when the Board asked him via email about the inappropriate content of his emailed photographs, he did not understand what the Board was referring to, and assumed that it must have been a reference to a 2011 driving under the influence conviction. (P-B; R-A; R-I). He only understood the issue at hand after he received the Board’s denial letter and checked the actual photographs which he had emailed to the Board. (P-B).

LEGAL ANALYSIS AND CONCLUSIONS

The Board argues that its motion for summary decision should be granted because it is undisputed that Conway submitted inappropriate images to the Board with his applications for certifications, that the conduct was unbecoming a teacher or principal, whether intentional or not, and that granting him the certificates would not be in the best interests of students or the public. It also argues that Conway’s subsequent “excuses” and a subsequent recommendation by a teacher at Beloved do not mitigate Conway’s admitted conduct and are not genuine issues of material fact with respect to the Board’s decision at the time it was made.

Conway argues that his cross-motion for summary decision should be granted, and the Board's motion denied, because the Board's decision was arbitrary, capricious, and "prudish[ly] unlawful[]," and because Beloved "strongly [disagrees] with the knee-jerk reaction to deny a competent teacher employment based on an innocent mistake committed during a world-wide pandemic." Conway maintains that the Board's failure to consider the circumstances underlying his conduct, whether his conduct was intentional, and his subsequent successful conduct at Beloved, was "prudish, ill-informed, and completely unexamined." Alternatively, Conway argues that "[a]s a result of the arbitrary, capricious, and unlawful manner in which the Board has chosen to interpret . . . Conway's unintended and entirely accidental actions, the material facts and substantive issues surrounding this case are indeed a matter of great dispute. As such, the motion[s] for summary decision should be denied," and the matter should be set down for a plenary hearing.

I.

A summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

[Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, “[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion.” Judson, 17 N.J. at 75. However, “[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” N.J.A.C. 1:1-12.5(b).

Having reviewed the parties’ submissions and heard their oral arguments, I **CONCLUDE** that no genuine issues of material fact exist which require a plenary hearing to determine whether the photographs which Conway admittedly took and sent were inappropriate and conduct unbecoming, and if so, whether the Board’s July 30, 2020 decision to deny him teaching and principal certificates was arbitrary, capricious, or contrary to law. I further **CONCLUDE** that Conway’s professional conduct assessment and explanations for the photographs which were sent subsequent to the Board’s decision are entirely irrelevant—that information was not before the Board to consider at the time of its decision, and there is no evidence that Conway availed himself of any potential opportunities to present that information by filing a motion for reconsideration before the Board. See, e.g., N.J.A.C. 6A:9B-4.15.

The Board and I are unaware of any impediment to Conway reapplying for the certificates, at which time he might present mitigating evidence explaining his conduct at issue and his subsequent job performance, but on the issues presently before me, I cannot consider it. This matter is therefore ripe for summary decision.

II.

The Board of Examiners is entrusted with the issuance and revocation of certificates to teach pupils and to serve as principals in public schools. N.J.S.A. 18A:6-38. N.J.A.C. 6A:9B-4.1 governs the Board’s authority to refuse to issue certificates, and provides:

Notwithstanding that a candidate may meet all requirements for certification, the Board of Examiners may refuse to issue a certificate to the candidate if it determines based on the record before it that the candidate is not suitable for employment as a teaching staff member in the public schools for reasons set forth in N.J.A.C. 6A:9B-4.4.

[N.J.A.C. 6A:9B-4.1 (emphasis added).]

Thus, the Board may refuse to issue an applicant's certificate for "conduct unbecoming." N.J.A.C. 6A:9B-4.4. Conduct unbecoming includes a broad range of behavior that impacts an applicant's ability to perform their duties or otherwise renders them unfit to have the responsibility for the care of children. See State Bd. of Exam'rs v. Charlton, 96 N.J.A.R.2d (EDE) 18; In re Certificate of Fargo, 91 N.J.A.R.2d (EDE) 1. Although "conduct unbecoming" a teacher, principal, or other public employee is not defined by statute or regulation, it has been described as an "elastic" phrase that includes "conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (internal quotation marks omitted). The touchstone of the charge is an applicant's fitness to discharge the duties and functions of their position. See Laba v. Newark Bd. of Educ., 23 N.J. 364, 385-88 (1957).

"That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." In re Grossman, 127 N.J. Super. 13, 30 (App. Div. 1974) (internal quotation marks omitted). Unfitness to hold a position in a school system may be demonstrated by a series of incidents or a single incident, if sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944).

It is well settled that "teachers are held to a high standard of conduct because of the influence they exercise over the students." Charlton, 96 N.J.A.R.2d (EDE) 18, 21. Teachers "hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils." In re

Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99. They “are professional employees to whom the people have entrusted the care and custody of . . . school children,” and “[t]his heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.” In re Tenure of Sammons, 1972 S.L.D. 302, 321. Those principles apply with as much if not more force to school principals, who are high-ranking administrators entrusted with providing educational leadership, directing and supervising all school operations, and evaluating staff, including teachers. N.J.A.C. 6A:9B-12.3(b).

Pursuant to N.J.A.C. 6A:4-4.1:

- (a) In determining appeals from decisions of the State Board of Examiners . . . , the Commissioner shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law.

[N.J.A.C. 6A:4-4.1(a).]

Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

[Bayshore Sewerage Co. v. Dep’t of Env’tl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973).]

In this case, Conway has not met his burden to prove by a preponderance of credible evidence that the Board’s denial of teaching and principal certificates was arbitrary, capricious, or contrary to law. There is no evidence of any “willful and unreasoning action, without consideration and in disregard of circumstances.” Indeed, the Board gave Conway the opportunity to explain the inappropriate content of his photographs, and without bothering to ascertain what that content was and offer his explanations and the circumstances under which the photographs were taken and submitted, Conway merely replied that he was “sorry the emailed version has inappropriate content.”

Conway's failure to investigate and appropriately respond to the Board's inquiry, in addition to his "poor judgment and/or carelessness" in photographing and submitting the admittedly "inappropriate content," merely bespeaks of further poor judgment and carelessness on Conway's part. Moreover, Conway's choice to point his camera at his scantily clad lap while taking photographs to be submitted to the Board is the epitome of poor judgment and carelessness. Surely, he could have chosen to put on pants, or to photograph his criminal history form on the top of a moving box, or even on the floor, but he chose not to do so. "While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control." In re the Tenure Hearing of Ostergren, 1966 S.L.D. 185, 186 (internal quotation marks omitted). Conway's conduct fell far short of the mark, even in the midst of our global pandemic.

Under these facts and circumstances, I **CONCLUDE** that Conway has not met his burden to prove that the Board's decision was arbitrary, capricious, or contrary to law. I **CONCLUDE** that the totality of Conway's conduct was alarming conduct unbecoming which raised grave doubt about Conway's fitness to discharge the duties and functions of teaching and principal positions. I further **CONCLUDE** that Conway's subsequent explanations to this Tribunal that he was busy, is not "tech-savvy," and has poor eyesight mitigate against him, as he is still teaching remotely, and another episode of such poor judgment and carelessness could have grave social and psychological consequences for the pupils in his virtual classroom, as well as undermine the public's trust and confidence in him and in the school. I therefore **CONCLUDE** that Conway's conduct was sufficiently flagrant to warrant the Board's denial of teaching and principal certificates based upon his conduct unbecoming.

ORDER

It is therefore **ORDERED** that the Board's motion for summary decision is hereby **GRANTED** and its denial of teaching and principal certificates is hereby **AFFIRMED**; and it is further

ORDERED that Conway’s motion for summary decision or a plenary hearing in the alternative is hereby **DENIED**; and it is further

ORDERED that Conway’s petition is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked “Attention: Exceptions.” **A copy of any exceptions must be sent to the Judge and to the other parties.**



August 5, 2021 _____

DATE

SARAH H. SURGENT, ALJ

Date Received at Agency:

August 5, 2021 (emailed) _____

Date Mailed to Parties: _____

SHS/mel

APPENDIX

EXHIBITS

For Petitioner:

- P-A Conway's 2021-2022 employment contract with Beloved dated May 19, 2021
- P-B Conway's responses to Board's first set of interrogatories and request for production of documents dated November 23, 2020
- P-C Conway's responses to Board's supplemental interrogatories and request for production of documents dated May 14, 2021
- P-D Conway's answers to Board's requests for admission dated November 14, 2020
- P-E Undated letter of recommendation by Shanay Walker, teacher at Beloved
- P-F Letter of Recommendation for Conway by Susan O'Brien, Arizona school Principal, dated April 14, 2020
- P-G Thumbnail images of application documents from Conway's cell phone
- P-H Thumbnail images of application documents from Conway's cell phone
- P-I Affidavit of Conway dated July 7, 2021

For Respondent:

- R-A Conway's Pro Se Petition of Appeal and letter of "Specific Allegations" dated August 26, 2020
- R-B Board's letter of denial of teaching and principal certificates dated August 11, 2020
- R-C Order denying emergent relief dated September 28, 2020
- R-D Certification of Rani Singh dated September 21, 2020
- R-E Duplicate of P-B
- R-F Board's first request for admissions and Conway's answers dated November 11, 2020
- R-G Undated unsigned certification of Conway

- R-H Duplicate of P-C
- R-I Two color photographs of Conway's criminal history form depicting his underwear, lap, legs, and outline of male genitalia
- R-J Certification of Sydney Finkelstein, DAG, dated June 11, 2021